

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Jul 06 2023**

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Jean H. Toal, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2020-CP-40-02098  
Appellate Case No. 2022-001722

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

v.

Pennsylvania National Mutual Casualty Insurance Co. is the .....Appellant.

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**PETITION FOR WRIT OF CERTIORARI**

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## **CERTIFICATION OF COUNSEL**

Counsel for Petitioner Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) certifies the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 6, 2023.

### **QUESTIONS PRESENTED FOR REVIEW**

1. Whether the Court of Appeals erred when it dismissed outright Penn National’s appeal of the circuit court’s order denying Penn National’s jury trial demand when this Court has consistently held that such orders are immediately appealable.
2. Whether the Court of Appeals erred when it dismissed Penn National’s appeal of the circuit court’s order denying Penn National’s jury trial demand when such dismissal was not because of lack of jurisdiction or mootness, the only two bases that this Court has recognized as justifying an outright dismissal of an appeal.
3. Whether the Court of Appeals erred when it dismissed Penn National’s appeal of the circuit court’s order denying Penn National’s jury trial demand when such dismissal creates new law that allows one party to nullify another party’s right to a jury trial in declaratory judgment actions.
4. Whether the Court of Appeals erred when it dismissed Penn National’s appeal of the circuit court’s order denying Penn National’s jury trial demand, thus determining that the issue of whether Penn National engaged in spoliation was not a factual issue to be determined by a jury.

### **STATEMENT OF THE CASE**

On April 27, 2020, Covil Corporation, by and through its duly appointed Receiver Peter D. Protopapas (“Covil”), filed a Complaint for Declaratory Judgment and Breach of Contract against Penn National, Sam J. Crain & Co., Inc. and South Carolina Property and Casualty Insurance Guaranty Association. In the Complaint, Covil alleged that “claims and lawsuits,” unidentified by name or case number, have been filed against Covil alleging liability resulting from asbestos exposure caused by Covil’s products. (Appx. pp. A031-A032, ¶7). Covil alleged that Penn National issued policies of general liability insurance to Covil for two policy periods:

(1) March 31, 1986 to March 31, 1987; and (2) March 31, 1987 to March 31, 1988, and that Penn National has breached these policies. (*Id.*, ¶¶ 8-9). Specifically, the Complaint states:

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

(*Id.*).

In the Complaint, Covil asserted three claims against Penn National: (1) declaratory judgment regarding compensation to be paid to the Receiver for Covil in defending unidentified “Covil Asbestos Suits;” (*Id.*, p. A0034, ¶¶ 14-19); (2) declaratory judgment that all policies issued by Penn National are the property of the Receiver of Covil; (*Id.*, p. A0035, ¶¶ 20-22); and (3) declaratory judgment regarding the terms of the Penn National policies, trigger of coverage, allocation, Penn National’s defense and indemnity obligations, number of occurrences, coverage for the Covil Asbestos Suits and the effect of exclusions (*Id.*, pp. A0035-A0037, ¶¶ 23-26).

On June 1, 2020, Penn National filed its Answer. In its Answer, Penn National responded to the allegations contained in the Complaint and raised a number of defenses. (Appx., pp. A045-A054). Significantly, Penn National requested a jury trial consistent with the requirements of Rule 38(b) of the South Carolina Rules of Civil Procedure:

WHEREFORE, Penn National respectfully prays the Court as follows:

\* \* \*

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

(*Id.*, p. A0052).

The parties engaged in discovery. On May 5, 2022, the circuit court entered an order requiring Penn National to incur the considerable expense to digitize its entire historical repository of insurance policies (approximately 18 million pages of documents) and to allow Covil, its

Receiver and their attorneys to have full and unfettered access to the created database. Because of the punitive nature of the order and the fact that the order affected a substantial right of Penn National that would be irrevocably lost absent immediate review, Penn National appealed the order. No other appeal has been filed by Penn National in this case until the present mandatory appeal.

While the order mandating digitization of Penn National's historic policies remained on appeal and other discovery matters were unresolved (*see*, Appx., pp. A0059-A0060, listing outstanding discovery issues), Covil filed a Status Report with the circuit court on September 6, 2022 that, for the first time, demanded a trial:

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

(*Id.*, p. A0061). (*See also*, Appx., p. A0094 [Transcript from 9/8/2022 status conference]: Counsel for Penn National: "Your Honor, yesterday was the first time that I had seen a suggestion of a December trial date ...").

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

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

(Appx., p. A0079). The next day, on November 8, 2022, Zitel Poswal, judicial law clerk for Ret.

Chief Justice Toal, sent an email to Penn National's counsel indicating that the court recognized that Penn National had requested a trial by jury and had not waived its right to a jury trial in this case:

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

(Appx., p. A0080).

Despite these representations, no order was placed on the record regarding Penn National's right to a jury trial in this case. Instead, a scheduling order was entered setting the trial date for December 12 or 14, 2022, and establishing other deadlines in advance of trial, including:

- Submission of proposed Findings of Fact/Conclusions of Law: seven (7) days prior to trial;
- Submission of trial exhibits: twenty-one (21) days prior to trial;
- Submission of list of trial witnesses, including expert witnesses: twenty-one (21) days prior to trial;
- Submission of deposition designations: seven (7) days prior to trial; and
- Filing of motions in limine: fourteen (14) days prior to trial.

(Appx., pp. A0023-A0025). The scheduling order was silent on whether the trial would be by jury or non-jury. (*Id.*).

Because the scheduling order did not confirm that the scheduled trial would be by jury, Penn National filed a Motion to Confirm Jury Trial Demand on December 2, 2022. (Appx., pp. A0066-A0081). The parties continued to comply with the Scheduling Order, and on December 5,

2022, the parties filed their respective Findings of Fact and Conclusions of Law. (Appx., pp. A0239-A0310 [Covil's FOF/COL]; pp. A0311-A0332 [Penn National's FOF/COL]).

On December 7, 2022, an Order was entered denying Penn National's right to a jury trial of the issues in this case. (Appx., pp. A0026-A0028). On the same day, Penn National filed a notice of appeal from this order (Appx. pp. A0001-A0009).

Seven (7) days after Penn National filed its notice of appeal of the order affecting its mode of trial, Covil filed a Motion to Dismiss and Expedite (Appx. pp. A0010-A0020). The Court of Appeals granted Covil's motion to dismiss Penn National's appeal in a one sentence order dated February 8, 2023, and signed by Judge Stephanie P. McDonald (Appx. p. A0333). Penn National filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on February 23, 2023, requesting that the Court of Appeals not dismiss its appeal outright but consider the appeal on its merits (Appx. pp. A0334-A0353). Penn National's Petition was denied by order dated June 6, 2023, and signed by Judge Stephanie P. McDonald, Judge Paula H. Thomas, and Judge Blake Hewitt (Appx. pp. A0354-A0357). Penn National now petitions this Court for a writ of certiorari to address its constitutionally guaranteed right to a jury trial in this case.

### **SUMMARY OF ARGUMENT**

It is well-established in South Carolina that orders affecting the mode of trial must be immediately appealed. This rule is based on the principle that trial by jury is a fundamental and substantial right guaranteed by the South Carolina Constitution and the laws and rules of this State. Any order affecting such a substantial right is therefore immediately appealable. In this case, the circuit court entered an order in which it denied Penn National's right to a jury trial. As required by decades of precedent from this Court and from the Court of Appeals, Penn National immediately appealed this order so as to avoid any waiver of its right to a jury trial. Covil moved

straightaway to dismiss this appeal as being somehow “frivolous.” In a one sentence order, a single judge from the Court of Appeals granted Covil’s motion to dismiss without any explanation. On Penn National’s Petition for Rehearing, this same judge, along with two colleagues, denied Penn National’s request that this appeal be heard on its merits.

Penn National petitions this Court for a writ of certiorari on four grounds: (1) the Court of Appeals’ dismissal of Penn National’s appeal of the circuit court’s order affecting the mode of trial directly involves substantial constitutional issues and conflicts with clear precedent from this Court requiring such appeals; (2) the Court of Appeals’ dismissal was improper because there is no statutory authority or precedent from the appellate courts of this State that allows dismissal of an appeal in a civil case based on its alleged “frivolousness;” (3) the dismissal affects substantial constitutional issues by essentially creating new law that allows one party to nullify the other party’s right to a jury trial by simply demanding a non-jury trial in declaratory judgment actions where factual issues are in dispute; and (4) the issue of whether a party is entitled to have a jury decide factual issues regarding spoliation is a novel question of law previously not addressed by any appellate court in South Carolina. The dismissal of Penn National’s appeal by the Court of Appeals was premature and wholly unfounded. Penn National respectfully requests that this Court accept its petition, issue a writ of certiorari to have these issues addressed, vacate the Court of Appeals’ dismissal, and require the Court of Appeals to address Penn National’s appeal on its merits.

### **ARGUMENT IN SUPPORT OF PETITION**

- 1. The Court Of Appeals’ Dismissal Of The Present Appeal Conflicts With The Supreme Court’s Declaration That Orders Affecting The Mode Of Trial Must Be Immediately Appealed.**

This Court has clearly and unequivocally established that orders affecting the mode of trial must be appealed immediately and a party's failure to do so results in a waiver of that party's right to a jury trial.

This Court has held that orders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately. Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue. Here, Client's failure to immediately appeal the order designating this case as a non-jury matter bars his current appeal of that issue.

*Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (internal citations omitted). *See also, Fulmer v. Cain*, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008); *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993); *Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 352 (1985); *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389-90 (Ct. App. 2004). *See also, Jean Hoefler Toal, et al., Appellate Practice in South Carolina*, 156 (3<sup>rd</sup> ed. 2016) ("The purpose of permitting immediate appeal in these cases is to preserve a party's constitutional right to a trial by jury which would otherwise be lost.").

In the present case, Penn National demanded a jury trial in its Answer consistent with the requirements of Rule 38(b) of the South Carolina Rules of Civil Procedure. (Appx., p. A0052). During a status conference, Covil requested a non-jury trial on its claims against Penn National. (Appx., p. A0061). In response to this request for a non-jury trial, Penn National sent a letter to the circuit court requesting that its right to a jury trial be honored and preserved (Appx., p. A0079), which the circuit court agreed to do (Appx. p. A0080). When the circuit court subsequently refused to set this case for a jury trial, Penn National filed a Motion to Confirm Jury Trial Demand on December 2, 2022. (Appx., pp. A0066-A0081). The circuit court then entered an order on December 7, 2022, denying Penn National's right to a jury trial on the issues in this case and instead ordered that these issues be "scheduled for a non-jury trial." (Appx., pp. A0026-A0028).

In accordance with this State's jurisprudence, Penn National was required to, and did, immediately appeal the order entered by the circuit court that denied Penn National's right to a jury trial of the factual issues in this case. The purpose behind requiring an immediate appeal of the denial of the right to a jury trial is to ensure that such a significant right is preserved. *See*, S.C. Const. art. I, § 14 ("The right of trial by jury shall be preserved inviolate."). *See also*, Rule 38(a), SCRCP ("The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate.").

The Court of Appeals' dismissal of this mandatory appeal, without any explanation, violates Penn National's constitutional right to a jury trial and is directly in conflict with this Court's mandate and decades of precedent. Therefore, Penn National respectfully requests that this Court grant its petition for certiorari to review whether the Court of Appeals erred in dismissing Penn National's appeal of an order denying its right to a jury trial without any review of the merits of the appeal.

**2. The Court Of Appeals' Dismissal Of Penn National's Appeal Based Solely On Respondent's Unfounded Argument That The Appeal Is Frivolous Is In Conflict With Prior Decisions Of This Court.**

This Court has consistently enforced a party's right to appeal, oftentimes liberally construing statutory provisions to ensure that the right to appeal is preserved. *See, Haughton v. Order of United Commercial Travelers*, 108 S.C. 73, 74-75, 93 S.E. 393, 393-94 (1917) ("Our decisions show that this Court is very reluctant to dismiss appeals on technical grounds. Therefore, we have construed the statutes and rules of Court liberally in favor of the right to appeal."); *O'Rourke v. Atlantic Paint Co.*, 91 S.C. 399, 403, 74 S.E. 930, 931 (1912) ("The Court should give a liberal construction to the Constitution and statutes, in favor of the right to appeal.").

Dismissal of an appeal in a civil case has generally only been allowed in two instances: (1) when the appellate court does not have jurisdiction over the appeal because of the appellant's failure to adhere to appellate rules regarding timely filing of an appeal or because the appeal is interlocutory; and (2) when the appeal is moot. *See, e.g., S.C. Coastal Conservation League v. Dominion Energy S.C., Inc.*, 432 S.C. 217, 223-24, 851 S.E.2d 699, 702 (2020) (affirming dismissal of appeal on mootness grounds); *Wachesaw Plantation E. Cmty. Servs. Ass'n v. Alexander*, 414 S.C. 355, 360, 778 S.E.2d 898, 901 (2015) (finding that the issuance of a deed did not moot the appeal of a foreclosure sale and remanding case to Court of Appeals for decision on merits); *Fields v. Regional Med. Ctr.*, 363 S.C. 19, 26-29, 609 S.E.2d 506, 509-11 (2005) (considering and ultimately denying respondent's motion to dismiss appeal on jurisdictional grounds); *Byrd v. Irmo High School*, 321 S.C. 426, 430-32, 468 S.E.2d 861, 863-64 (1996) (denying motion to dismiss appeal on mootness grounds based on exception to doctrine for cases evading review); *Wallace v. Interamerican Trust Co.*, 264 S.C. 563, 569, 144 S.E.2d 813, 816 (1965) (granting motion to dismiss appeal of discovery order as being interlocutory); *Deal v. Deal*, 85 S.C. 262, 264, 67 S.E. 241, 242 (1910) (granting motion to dismiss appeal because order was interlocutory); *Atkins v. Wilson*, 417 S.C. 3, 18, 788 S.E.2d 228, 236 (Ct. App. 2016) (denying motion to dismiss appeal on jurisdictional grounds because appellant timely filed notice of appeal); *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 413 S.C. 642, 646, 776 S.E.2d 575, 577 (Ct. App. 2015) (granting motion to dismiss appeal because court did not have jurisdiction based on untimely filing of notice of appeal).

Neither basis for the dismissal of an appeal exists in the present case. The Court of Appeals clearly has jurisdiction to consider the issues on appeal. Penn National timely filed its Notice of Appeal. In fact, Penn National filed its Notice of Appeal on the same day that the circuit court

entered its order denying Penn National's right to a jury trial in this case. (Appx. pp. A0026-A0028; Appx. pp. A0005-A0007; Appx. pp. A001-A009). Additionally, the order on appeal is one affecting the mode of trial and is therefore immediately appealable. *Lester*, 327 S.C. at 266, 491 S.E.2d at 241. The issue on appeal, whether Penn National has a right to a jury trial of the factual issues in this case, has also not been rendered moot by any subsequent actions. Indeed, Covil did not cite either of these reasons in its motion to dismiss Penn National's appeal. The Court of Appeals' summary dismissal of Penn National's appeal is contrary to this Court's previous articulation of the circumstances justifying immediate dismissal of an appeal.

Covil based its motion to dismiss solely on its characterization of Penn National's appeal of the order denying its right to a jury trial as being somehow "frivolous." However, frivolousness is clearly not a basis upon which to dismiss an appeal in a civil case, particularly one affecting a constitutional right. *See, e.g., Fishburne v. Minott*, 72 S.C. 567, 569, 52 S.E. 648, 648 (1905) (refusing to "entertain such a motion" which sought to strike case "on the ground that the same is frivolous and vexatious"). Indeed, neither this Court nor the Court of Appeals has ever granted a motion to dismiss an appeal in a civil matter on the grounds of frivolousness.<sup>1</sup>

The Order from the Court of Appeals granting Covil's motion to dismiss is contrary to and directly conflicts with this Court's decision in *Sumter Hardwood Co. v. Fitchette*, 133 S.C. 149, 130 S.E. 881 (1925). In *Sumter*, upon motion by the plaintiff, the circuit court referred the action to a master for determination of all issues. The defendant immediately appealed this decision and the plaintiff moved to dismiss the appeal. This Court began its analysis by reference to the "well-

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<sup>1</sup> Indeed, the case law from South Carolina appellate courts is clear: assertions of frivolousness can only be considered in dismissals of appeals in criminal cases and only after counsel has filed an *Anders* brief and the court has made a full examination of the record on its own. *See, e.g., State v. McKennedy*, 348 S.C. 270, 279, 559 S.E.2d 850, 855 (2002).

settled” canon that “if an order deprives a party of the mode of trial which the law allows him, it is appealable.” *Id.* at 151, 130 S.E. at 882. This Court then found that the circuit court improperly referred the case to a master, as the defendant was allowed to have the factual issues in the case decided by a jury. Therefore, this Court concluded:

The judgment of this Court is that the motion of the plaintiff to dismiss the appeal of the defendant be refused, that the order of reference be reversed, and that the case be remanded to the Circuit Court without prejudice to a motion by the plaintiff to amend its complaint if so advised.

*Id.* at 155-56, 130 S.E. at 884.

Similarly, in the present case, this appeal was appropriately before the Court of Appeals. It is clear and without question that the Court of Appeals has jurisdiction over the appeal of the circuit court’s denial of Penn National’s jury trial demand. It is similarly beyond doubt that the issue on appeal has not been rendered moot due to any subsequent actions. Therefore, the Court of Appeals should have denied Covil’s motion to dismiss this appeal, as directed by the *Sumter Hardwood* Court. Instead, the Court of Appeals should have enforced Penn National’s right to have its appeal decided on the merits, after a full review of the record and consideration of the arguments of counsel. The Court of Appeals’ summary dismissal of Penn National’s appeal was both unjustified and contrary to years of precedent from this Court.

**3. The Court Of Appeals’ Dismissal Of Penn National’s Appeal Creates New Law That Would Allow One Party To Nullify Another’s Party’s Right To A Jury Trial By Merely Demanding A Non-Jury Trial In A Declaratory Judgment Action.**

Covil’s motion to dismiss Penn National’s appeal was based solely on Covil’s assertion that there is no right to a jury trial of a declaratory judgment action addressing coverage under a policy of insurance. This is not, and never has been, the law in South Carolina. However, by summarily dismissing Penn National’s appeal, without any review of the merits of the appeal, the

Court of Appeals has now ratified the circuit court's actions in stripping Penn National of its right to a jury trial solely because the opposing party requested a bench trial of the factual issues.

It is axiomatic that a party is entitled to a jury trial even as to claims asserted under the Uniform Declaratory Judgment Act. S.C. Code Ann. § 15-53-90 (“When a proceeding under this chapter involves the determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. All existing rights to jury trials are hereby preserved.”). *See also, Leggette v. Smith*, 226 S.C. 403, 416, 85 S.E.2d 576, 582 (1955) (“And, irrespective of this provision of the statute, it is clear that the right of jury trial in what is essentially an action at law may not be denied a litigant merely because his adversary has asked that the controversy be determined under the declaratory procedure.”) (internal quotations and citations omitted).

This Court and the Court of Appeals have previously held that parties are entitled to jury trials in declaratory judgment actions concerning insurance coverage. *See, State Farm Mut. Auto. Ins. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 263 S.C. 391, 394-95, 210 S.E.2d 613, 615 (1974) (upholding on appeal jury responses to special interrogatories in declaratory judgment action regarding coverage under a motor vehicle policy); *Government Employees Ins. Co. v. Mackey*, 260 S.C. 306, 316, 195 S.E.2d 830, 834 (1973) (“The issues of fact in this [declaratory judgment action brought by insurer] were properly submitted to the jury with a full and correct charge by the trial judge.”); *St. Paul Fire & Marine Ins. Co. v. American Ins. Co.*, 251 S.C. 56, 61, 159 S.E.2d 921, 923 (1968) (holding that issues of fact in insurance coverage action were properly determined by a jury); *Anders v. S.C. Farm Bureau Mut. Ins. Co.*, 307 S.C. 371, 375, 415 S.E.2d 406, 409 (Ct. App. 1992) (reversing the grant of summary judgment for plaintiff because there existed genuine issues of material fact to be determined by a jury); *State Farm Mut. Auto. Ins. Co.*

*v. Turner*, 303 S.C. 99, 100, 399 S.E.2d 22, 22 (Ct. App. 1990) (affirming submission of issues to a jury in declaratory judgment action brought by insurer).

Similarly, in this case, Penn National is entitled to have the factual issues decided by a jury. In its motion to dismiss, Covil argued for the first time that no factual issues actually exist in this case because this case is a declaratory judgment action regarding coverage under Penn National's policies of insurance, and therefore a jury trial is not necessary. This is simply not true. Covil's actions, prior to its filing of its motion to dismiss in this case, belie its arguments to the Court of Appeals.

First, if Covil believed that there were no genuine issues of material fact, Covil should have moved for summary judgment. *See*, Rule 56(c), SCRCP. Covil did not do so. Instead, Covil specifically requested a trial, acknowledging that there are genuine issues of material fact that need to be determined at a trial. (Appx., p. A0023).

Second, in requesting a non-jury trial, Covil proposed a pretrial order (which was subsequently adopted by the circuit court without alteration) that required the parties to submit proposed findings of fact and conclusions of law, lists of trial exhibits, lists of witnesses to include expert witnesses, and motions in limine. (Appx., pp. A0023-A0025). Again, if Covil indeed believed that there were no factual issues to be tried, Covil would not have requested a trial on the issues in the case with witnesses and exhibits.

Finally, and most significantly, Covil actually filed with the circuit court "Receiver for Covil Corporation's Proposed Findings of Fact and Conclusions of Law." This document contained thirty-one (31) pages of what Covil requested as "PROPOSED FINDINGS OF FACT." (Appx., pp. A0239-A0273). These proposed factual findings include: whether Penn National issued policies of insurance in addition to the two policies which were stipulated to by Penn

National; whether and when injuries occurred in fourteen asbestos liability cases asserted against Covil; whether any duty to preserve historic policies was triggered; whether Penn National “destroyed” policies potentially applicable to Covil’s asbestos liability with culpable intent; the propriety of Penn National’s business decision to store its historic policies by policy number; the underwriting intent in issuing policies to Covil; and the adequacy of Penn National’s search for additional policies. (*Id.*).

In its litigation of this case, Covil has taken the position that there are disputed factual issues that must be decided in a trial, albeit a bench trial dictated by Covil. However, when Penn National appealed the denial of its right to a jury trial in this case, Covil pivoted and has now argued to the Court of Appeals that these issues are not subject to a jury trial at all, even though Covil never moved, at any time, to have the circuit court make rulings as a matter of law. Covil should have been judicially estopped from taking this position in its motion to dismiss appeal because it is inconsistent with the position Covil has taken in requesting a non-jury trial and filing its proposed findings of fact. *See, Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (“Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. The purpose of the doctrine is to ensure the integrity of the judicial process ...”) (internal citations omitted).

By summarily dismissing Penn National’s appeal of the circuit court’s order referring this case for a non-jury trial and not addressing the merits of this appeal, the Court of Appeals has now effectively created new law<sup>2</sup> which sanctions the ability of one party to nullify another party’s right

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<sup>2</sup> Only this Court can create new law. The Court of Appeals is bound to follow existing precedent. S.C. Const. art. V, § 9; *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) (“[I]t is incumbent upon the court of appeals to apply [the Supreme Court’s] precedent.”).

to a jury trial in declaratory judgment actions, even where factual issues are in dispute. In effect, the Court of Appeals has declared that there is no right to a jury trial in declaratory judgment actions. That is not the law in South Carolina and is contrary to this Court's precedent. Therefore, this Court should grant Penn National's petition for writ of certiorari, vacate the dismissal of Penn National's appeal of the order requiring the factual issues in this case to be determined by a judge instead of a jury, and allow the merits of the appeal to be considered by the Court of Appeals after full briefing of the issues and a careful analysis of the full record in this case.

**4. The Court Of Appeals Implicitly Decided A Novel Question Of Law When It Dismissed An Appeal Of An Order Denying A Jury Trial On Issues Of Spoliation.**

In the order on appeal, the circuit court ruled that both the factual issues regarding coverage and the factual issues regarding whether or not Penn National engaged in spoliation of evidence in this case were to be tried without a jury. Covil has taken the position in its motion to dismiss appeal that the factual issues of whether Penn National actually engaged in spoliation of evidence should be decided by the judge and not a jury. Covil did not cite to any case law from South Carolina for this proposition.

Neither this Court nor the Court of Appeals have determined what a party must prove in order to show that another party spoliated evidence, necessitating a sanction. Federal courts, however, have held that a party seeking sanctions regarding spoliation must establish three elements:

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

*Hawkins v. College of Charleston*, 2013 U.S. Dist. LEXIS 162714, \*5 (4<sup>th</sup> Cir. 2013). This standard has actually been adopted by the circuit courts in this State. *See, Hopper v. Air & Liquid Sys. Corp.*, 2019 S.C. C.P. LEXIS 5488, Case No. 2019-CP-00076 (S.C. Com. Pl. Order dated Oct. 31, 2019).

Under the standard adopted by South Carolina federal courts, in order for a party to meet its burden of showing spoliation of evidence, that party has to show whether the evidence actually existed, the opposing party's duty to preserve such evidence, and the opposing party's culpable state of mind. These are all factual findings that are within the purview of a jury. *See, Harleysville Group Ins. v. Heritage Cmty, Inc.*, 420 S.C. 321, 346, 803 S.E.2d 288, 302 (2017) ("These questions of the insured's intent are factual in nature."); *Shenandoah Life Ins. Co. v. Smallwood*, 402 S.C. 29, 32, 737 S.E.2d 857, 858 (Ct. App. 2013) (reversing directed verdict and finding that insured's intent was a factual issue that should have been decided by a jury). *See also, Evans v. Quintiles Transnational Corp.*, 2015 U.S. Dist. LEXIS 171750, \*13-14 (D.S.C. 2015) (holding that on the issue of spoliation, a jury was to resolve "any credibility questions and make a determination, first, as to whether the alleged computer file even existed on Plaintiff's computer, whether and when Quintiles should have reasonably known that the evidence may be relevant to anticipated litigations, and, if so, whether Quintiles willfully lost or destroyed the file.").

Although South Carolina appellate courts have not addressed the federal standard regarding spoliation of evidence, this Court and the Court of Appeals have allowed evidence regarding spoliation to go to the jury. *See, e.g., Welsh v. Gibbons*, 211 S.C. 516, 46 S.E.2d 147 (1948) (holding that it was proper for a jury to hear evidence regarding the unavailability of evidence and whether to draw an adverse inference); *Gathers v. South Carolina Elec. & Gas Co.*, 427 S.E.2d

687, 689 (Ct. App. 1993) (affirming the trial court's decision to submit evidence of the loss or destruction of evidence to the jury).

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

Gypsum moved for judgment in its favor on the claims related to Camden High School because Kershaw had violated Judge Smith's order by removing asbestos prior to Gypsum's inspection. The trial judge refused this motion, but did include a jury instruction on the destruction of evidence. The trial court permitted Kershaw to explain the circumstances surrounding its failure to notify Gypsum and instructed the jury that when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party.

We believe the trial court's decision was proper under the fact of this case. *Id.* at 394, 396 S.E.2d at 372. This Court agreed that the jury should be allowed to hear the evidence regarding spoliation and make a determination regarding what effect such evidence had in the case. *Id.* at 395, 396 S.E.2d at 372.

As this Court recognized in *Kershaw*, the issue of spoliation necessarily presents factual issues that are disputed between the parties: one party presents evidence that the other party knew

that it had a duty to preserve evidence and with such knowledge, deliberately destroyed such evidence; and the other party presents evidence that it had no knowledge of its duty to preserve evidence or that its destruction of such evidence was inadvertent or negligent. The resolution of these disputed issues should be within the purview of a jury, and not decided by a trial judge. Similarly, in the present case, the parties should be allowed to present their respective evidence regarding spoliation to a jury for its determination regarding whether spoliation actually occurred and what effect any such spoliation should have.

Covil acknowledged that there are factual disputes regarding the issue of spoliation because Covil requested that its evidence be presented and determined at the trial. Penn National requested a jury trial on factual findings, including any factual findings of spoliation. The circuit court denied Penn National's right to a jury trial of these issues. Penn National's appeal of this order is proper and should have been considered on its merits by the Court of Appeals.

This issue, whether a right to a jury trial exists on issues regarding whether a party engaged in spoliation of evidence, is an issue of first impression and should be appropriately reviewed and decided by the appellate courts of this State. Instead, the Court of Appeals dismissed Penn National's appeal without any consideration of this significant issue. This Court should grant Penn National's petition and allow certiorari to allow the appellate courts the opportunity to provide clear guidance regarding how issues of spoliation of evidence are to be determined in this jurisdiction.

### **CONCLUSION**

Penn National demanded a jury trial in this case appropriately and within the dictates of South Carolina law and the rights guaranteed it by the South Carolina Constitution. When the circuit court denied its constitutional right to a jury trial by ordering that the issues in this case

would be tried non-jury, Penn National had the absolute and unequivocal right to appeal this order. Despite the clear law from this Court that Penn National is required to appeal this order immediately or be deemed to have waived its right to a jury trial, Covil moved to dismiss this appeal, which motion was summarily granted by the Court of Appeals. However, the merits of this appeal should not be decided summarily and on an expedited basis on a motion to dismiss. Instead, the Court of Appeals should have taken a full and fair opportunity to consider the merits and make its determinations after considering the briefing and fully developed arguments of the parties. This is especially true where, as here, Penn National's constitutional right to a jury trial is at stake.

Penn National respectfully petitions this Court for a writ of certiorari because the Court of Appeals' dismissal of its appeal is contrary to the well-established precedent mandating that a party immediately appeal the denial of a jury trial or risk waiving its constitutional right to a jury trial. Furthermore, this dismissal by the Court of Appeals was not based on the Court's lack of jurisdiction over the appeal or because the factual predicate of the appeal was somehow moot. Instead, the Court of Appeals' dismissal appeared to be based on Covil's bald assertion that the appeal was somehow "frivolous." Frivolousness has never before been used by the appellate courts in this State as a justification to dismiss an appeal outright without consideration of its merits. Allowing a swift dismissal of Penn National's appeal of the order denying its right to a jury trial to stand is contrary to South Carolina law and will create a new rule that parties in declaratory judgment actions are no longer entitled to a jury trial of factual issues. Clearly, such a cavalier quashing of a party's fundamental and substantial right to a jury trial should not be affirmed or ratified by this Court. Finally, a party's right to have factual issues of spoliation be decided by a jury is an issue of first impression that should not be summarily dismissed.

Accordingly, Penn National respectfully requests that this Court grant its Petition for Writ of Certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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