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 Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-02098
Appellate Case No. 2023-001079

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

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance Company,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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2. Whether the Court of Appeals properly dismissed Penn National's appeal of the circuit court's order denying Penn National's last-minute motion for "confirming" a jury trial when a non-jury evidentiary hearing has been scheduled for numerous months because it is well-settled in South Carolina that it is within the circuit court's power to conduct an evidentiary hearing on spoliation.

3. Whether the Court of Appeals properly dismissed Penn National's appeal of the circuit court's order denying Penn National's last-minute motion for "confirming" a jury trial when a non-jury trial has been scheduled for numerous months because Penn National waived any argument that it is entitled to a jury trial on the declaratory judgment claims or alleged spoliation.

II. INTRODUCTION AND IMPORTANT BACKGROUND

For the ***seventh*** time since last May, Penn National makes an appellate filing designed only to delay disposition in the circuit court, all of which have been denied:

Date	**Penn National's Frivolous Appeal**	**Result**	**Appellate Case No.**
May 31, 2022	Penn National filed a Notice of Appeal of a discovery order entered on May 5, 2022 ("May 5 Order").	On August 9, 2022, the Court of Appeals dismissed Penn National's appeal, finding the May 5 Order was ***not immediately appealable***.	No. 2022-000761
June 6, 2022	Penn National filed a Petition for Writ of Certiorari in the original jurisdiction of the Supreme Court, seeking contemporaneous appellate review of the May 5 Order.	On August 23, 2022, the Supreme Court ***unanimously denied*** the Petition for Writ of Certiorari.	No. 2022-000785
August 24, 2022	Penn National filed a Petition for Rehearing with the Court of Appeals.	On November 15, 2022, the Court of Appeals ***denied*** the petition.	No. 2022-000761
December 7, 2022	Penn National filed a Notice of Appeal of the December 7, 2022 Order, which is the subject of this Petition.	On February 8, 2023, the Court of Appeals granted Covil's Motion to Dismiss and Expedite and ***dismissed*** the appeal.	No. 2022-001722

December 16, 2022	Penn National filed another Petition for Writ of Certiorari with the Supreme Court requesting appellate review of the same May 5 Order for the second time.	On January 12, 2023, the Supreme Court ***denied*** the second petition.	No. 2022-001764
February 23, 2023	Penn National filed a Petition for Rehearing and Suggestion for Rehearing of the February 8, 2023 dismissal.	On June 6, 2023, the Court of Appeals ***denied*** Penn National's petition.	No. 2022-001722

In doing so, Penn National ignores this Court's warning to Covil's insurers:

> We, in turn, expect the parties and their attorneys in this and any other case to fully cooperate with the trial court in order to ensure the case is tried or otherwise disposed of in a timely manner. Any action taken for the purpose of delaying the disposition of this case will, under appropriate circumstances, merit the imposition of sanctions under Rule 269, SCACR.

See March 9, 2021 Order, Appellate Case No. 2020-001670.[1]

This time, to avoid a trial date, Penn National moved to "confirm" a jury trial just ten days before a *non*-jury trial seeking declarations on narrow issues of insurance coverage law was set to begin. Then, it appealed the circuit court order denying the motion on December 7, 2022, only three business days before the scheduled trial date. After the Court of Appeals dismissed Penn National's interlocutory appeal upon the Receiver's motion, Penn National filed a petition for rehearing, which was also denied.

Undaunted by this Court's admonition against improper dilatory tactics, Penn National filed the instant Petition for Writ of Certiorari on July 6, 2023. Penn National's recycled arguments

[1] In this appeal, an insurer of Covil appealed an order of the circuit court bifurcating issues and setting a non-jury trial on January 11, 2021. The insurer filed a Notice of Appeal on December 21, 2020, and an emergency Petition for Writ of Prohibition in this Court on December 23, 2020. The Court of Appeals dismissed the appeal, finding the order setting the non-jury trial was not immediately appealable, and this Court denied the subsequent Petition for Writ of Certiorari. *See* Appellate Case Nos. 2020-001663 and 2021-000462.

are without merit, and this Court should deny this Petition, ending Penn National's gamesmanship most aptly described by the circuit court as a "foot dragging operation." (Pet. App. A0095.)

III. COUNTER-STATEMENT OF THE CASE

The circuit court appointed Peter D. Protopapas as the Receiver for Covil Corporation on November 2, 2018, and it tasked the Receiver with "the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil's insurance carriers." (Pet. App. A0042.) Covil is a now-defunct entity that conducted business in South Carolina until it forfeited its corporate charter in the early 1990s. (Pet. App. A0031, A0042.) Because it was an insulation contractor, Covil has been named as a defendant in many lawsuits that have been filed in state court in South Carolina alleging liability resulting from asbestos bodily injury.

The Receiver filed this action against Penn National on April 27, 2020, seeking declarations as to the interpretation and meaning of insurance policies Penn National issued to Covil.[2] (Pet. App. A0030–41.) Penn National admits it issued these insurance policies. (Pet. App. A0046.) In its Answer, Penn National prayed for "a trial by jury on all issues so triable."[3] (Pet. App. A0052.)

[2] The Receiver also named other defendants in this action (Pet. App. A0092–93.) Neither of these defendants appeared in this action; the Receiver subsequently dismissed them. (Pet. App. A0055–56.) Thus, Penn National remains the only defendant in this action, and the only remaining causes of action are for a declaratory judgment related to the insurance policies.

[3] It appears that Penn National mistakenly believed the Receiver brought a breach of contract action against Penn National because Penn National captioned its responsive pleading as "**ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND BREACH OF CONTRACT.**"(Pet. App. A0045.) However, a simple reading of the Complaint in this case shows the only causes of action brought against Penn National are for declaratory judgment. Further, the Receiver has made it clear to Penn National that it seeks only declaratory relief against Penn National. (Pet. App. A0082.)

On September 6, 2022, the Receiver requested the circuit court schedule a non-jury trial on Covil's declaratory judgment issues against Penn National to take place in December 2022. (Pet. App. A0057–61.) Penn National did not file any written response or objection to the Receiver's request for a non-jury trial on his claims for declaratory relief.

The circuit court held a status conference on September 8, 2022. (Pet. App. A0084.) At the status conference, the Receiver reiterated its request that the circuit court schedule a non-jury trial in December 2022. (Pet. App. A0087, A0093–94.) The circuit court set the non-jury trial on December 12 or 14, 2022. (Pet. App. A0096.) Penn National did not object to a non-jury trial at the status conference. (Pet. App. A0096–97–9.) Its only request was for the Court to incorporate a mediation deadline in the forthcoming scheduling order. (Pet. App. A0099.) The circuit court agreed to do so and then asked the parties if there were any further matters to raise for the court's consideration. (Pet. App. A0099–0100.) Penn National was silent. (Pet. App. A0100.)

The circuit court issued a scheduling order on September 16, 2022, setting the non-jury trial for December 12 or 14, 2022, and a pretrial hearing for November 18, 2022.[4] (Pet. App. A0023–25.) The scheduling order also included deadlines for the parties to attend mediation and to file proposed findings of fact and conclusions of law, trial exhibits, witness lists, deposition designations, and motions in limine. (Pet. App. A0023–25.) Penn National did not raise any objections or file a motion seeking reconsideration of the scheduling order.

Penn National first raised concerns with the non-jury nature of the trial to the circuit court nearly two months after the scheduling order was issued, and just one month before the scheduled trial date, on November 7, 2022. (Pet. App. A0214.)

[4] This pre-trial hearing was subsequently moved to November 14, 2022.

The case came before the circuit court for a pre-trial hearing on November 14, 2022. (Pet. App. A0102.) At the hearing, the circuit court reiterated that it scheduled a non-jury hearing to begin the week of December 12, 2022. (Pet. App. A0193.) Penn National requested "a jury trial to the extent there are factual issues as to the spoliation component for this case." (Pet. App. A0205.) The circuit court indicated it was unsure, based on the record before it, what factual issues Penn National believed entitled it to a jury trial and reiterated that the non-jury trial in the declaratory judgment action would start on December 12, 2022. (Pet. App. A0207–08.) The parties subsequently conducted a number of remaining depositions and filed and exchanged motions in limine, deposition designations, witness lists, and trial exhibits in accordance with the scheduling order.

On December 2, 2022, only ten days before the non-jury trial would begin, Penn National filed a Motion to Confirm Jury Trial Demand.[5] (Pet. App. A0066.) Penn National asserted "the case must proceed on the jury trial roster at this time" and alleged its jury trial demand was proper given "the existence of factual questions in this case."[6] (Pet. App. A0069.) The Receiver filed a Notice on December 6, 2022, reconfirming that he only seeks declarations against Penn National related to the insurance policies. (Pet. App. A0082.) The circuit court issued an order on December 7, 2022, reiterating that the non-jury trial was previously scheduled to begin on December 12, 2022, and would proceed on that date. (Pet. App. A0026.) The circuit court noted "[n]one of the matters" pending against Penn National "are triable to a jury." (Pet. App. A0026.)

[5] Although the Motion was drafted on November 28, 2022, Penn National waited until December 2, 2022 to file it. (Pet. App. A0070.)

[6] Penn National again stated its mistaken belief that the "Complaint alleges claims for breach of contract and declaratory judgment against Penn National." (Pet. App. A0068.) As discussed above, this case only involves declaratory judgment actions against Penn National.

As the trial date loomed, just three business days before trial was set to begin, Penn National filed the instant appeal from the December 7, 2022 Order. Subsequently, the circuit court postponed the non-jury trial due to the appeal until such a time that this case is remitted. (Pet. App. A0213.)

On December 14, 2022, the Receiver filed a Motion to Dismiss and Expedite. (Pet. App. A0010–20.) The Court of Appeals granted Covil's motion on February 8, 2023. (Pet. App. A0333.) Penn National filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* on February 23, 2023. (Pet. App. A0334–53.) The Court of Appeals denied Penn National's petition on June 6, 2023. (Pet.App. A0354–57.) Penn National then petitioned this Court for a writ of certiorari on July 6, 2023. The Receiver now files this Return to oppose Penn National's Petition.

IV. SUMMARY OF ARGUMENT

Penn National raises several arguments in its Petition, but they all boil down to one question: does the declaratory judgment action raise any factual issue? Penn National answered this question itself when it failed to specify a single factual issue before the circuit court—there are none. Instead, the only issue before the circuit court is the interpretation of unambiguous terms of policies that Penn National admits it issued to Covil.

It is true that Covil also requested a *separate* evidentiary hearing on the issue of Penn National's spoliation of insurance policies, to take place during the same week as the declaratory judgment trial. Importantly, however, South Carolina does not recognize spoliation as a separate tort for which damages may be awarded at trial. Instead, spoliation is a discovery issue with a sanctions remedy, left to the discretion of the trial court.

Further, Penn National waived any argument related to the right to a jury trial, failing to raise the issue until several months after the non-jury trial had been scheduled, and failing to preserve many of the points it asserts at the circuit court level.

Rule 1 of the South Carolina Rules of Civil Procedure sets out the purpose of the rules by stating they "shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 1 SCRCP. Penn National's "foot-dragging operation" and its seven frivolous appellate filings stand in stark contrast to this rule. Penn National's writ must be denied to ensure a just, speedy, and inexpensive determination of this declaratory judgment issue without further unnecessary delay.

V. ARGUMENT

A. The Court of Appeals properly dismissed Penn National's frivolous appeal because there are no factual issues within the declaratory judgment action.

The circuit court's order is not appealable because Penn National is not entitled to a jury trial in this declaratory judgment action that does not involve any factual issues. *See C & S Real Estate Servs. v. Massengale,* 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) (granting a motion to dismiss an appeal where the appellant did not have a right to a jury trial); *Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees,* 344 S.C. 522, 524–25, 544 S.E.2d 642, 643 (Ct. App. 2001) (dismissing an appeal from an order transferring a case to a non-jury roster because there was no right to a jury trial).

"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." *Lester v. Dawson,* 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). "The character of an action as legal or equitable depends on the relief sought." *Bank of New York Mellon v. Lindsay,* No. 2015-UP-208, 2015 WL 1880195, at *1 (S.C. Ct. App. Apr. 22, 2015). "A declaratory judgment action is neither legal nor equitable, but is determined by the nature of the underlying issue." *State Farm Fire & Cas. Co. v. Barrett,* 240 S.C. 1, 5, 530 S.E.2d 132, 134 (Ct. App. 2000) (quoting *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)).

A declaratory judgment action that does not involve any factual dispute is to be resolved by the trial court. *See Zurich Am. Ins. Co. of Illinois v. Palmetto Cont. Servs., Inc.*, 434 S.C. 104, 112, 862 S.E.2d 714, 717 (Ct. App. 2021) ("Given the jury's role as the finder of fact, it is logical 'that the jury trial right extends only to disputed factual conclusions.'"). South Carolina courts recognize that construction of an unambiguous insurance policy is a question of law not triable to a jury. *United Dominion Realty Tr., Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992) ("[W]here an action of law presents a question as to the construction of a written contract and the language of the contract is clear and unambiguous, the question is not one of fact but one of law.").

This is an insurance-coverage declaratory judgment action in which both parties agree on the existence of the at-issue insurance policies, and the parties further agree that the policies are unambiguous. (Pet. App. A0046, A0051, A0062–65, A0315–20, A0326.) Both the Receiver and Penn National rely on the plain language of the policies in this case. (Pet. App. A0046, A0051, A0062–65, A0315–20, A0326.) The Receiver and Penn National only disagree on the interpretation of the policy language.

Penn National's chief argument emphasizes that the circuit court order is an order affecting the *mode* of trial, which would render it immediately appealable. (Pet. at 7–9.) This, however, is misleading. This Court has recognized, "An order denying a party a jury trial is not immediately appealable unless it deprives him of a mode of trial ***to which he is entitled as a matter of right***." *C & S Real Est. Servs., Inc. v. Massengale*, 290 S.C. 299, 300, 350 S.E.2d 191, 192 (1986) (emphasis added); *see also Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees*, 344 S.C. 522, 523, 544 S.E.2d 642, 642 (Ct. App. 2001). In other words, an order denying a party a jury trial is ***not*** immediately appealable if the party is not entitled to a jury trial to begin with.

Both *Massengale* and *Brown* involved requested appellate review of orders related to the trial mode of equitable issues. In *Massengale*, this Court considered an order denying a jury trial where the appellant sought a jury trial on five counterclaims she asserted in a mortgage foreclosure action. 290 S.C. at 300, 350 S.E.2d at 192. This Court found that two were equitable in nature, and appellant "clearly had no right to a jury trial on these claims." *Id.* The remaining three were permissive counterclaims, and under South Carolina law, "[w]hen a defendant asserts these permissive counterclaims which are legal in nature, he waives the right to a jury trial on these issues." *Id.* at 301, 350 S.E.2d at 193. Because "[t]he order under appeal did not deprive appellant of a mode of trial to which she was entitled as a matter of right," this Court granted the respondent's motion to dismiss, and found "the order is not immediately appealable." *Id.* at 300, 301, 350 S.E.2d at 192, 193. In *Brown*, the Court of Appeals similarly found that an appellant was not entitled to a jury trial in a case involving a contract dispute in which the appellant sought rescission and restitution as remedies. 344 S.C. 522 at 525, 544 S.E.2d at 643. While the respondent had not filed a motion to dismiss, the court found that "issues relating to subject matter jurisdiction may be raised at any time," and when "an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction" to the appellate court. *Id.* at 524–25, 544 S.E.2d at 643 (citations omitted). Because the case involved only equitable remedies, the Court of Appeals found "the court properly granted the motion to transfer the case to the non-jury roster," and dismissed the appeal of the interlocutory order. *Id.* at 525, 544 S.E.2d at 643.

The cases Penn National cites do not help its position that the dismissal creates new law because those cases are consistent with the well-settled law discussed above—all of those cases involved disputed factual issues. The *Government Employees Insurance Company v. Mackey* case involved issues of fact related to whether an insurance policy was properly cancelled. 260 S.C.

306, 313, 195 S.E.2d 830, 833 (1973). The *St. Paul Fire and Marine Insurance Company* case involved issues of fact related to whether a car was being driven with the express or implied consent of its owner. 251 S.C. 56, 57, 159 S.E.2d 921, 922 (1968). The *Anders v. South Carolina Farm Bureau Mutual Insurance Company* case involved issues of fact related to whether an insurer properly offered underinsured motorist coverage to an insured and whether the insured declined the coverage. 307 S.C. 371, 373, 415 S.E.2d 406, 407 (Ct. App. 1992). The *State Farm Mutual Automobile Insurance Company v. Turner* case involved issues of fact related to whether a release was valid and whether it could be set aside due to a unilateral mistake. 303 S.C. 99, 101–02, 399 S.E.2d 22, 23 (Ct. App. 1990).

Contrary to Penn National's assertion, then, the circuit court's order was not immediately appealable solely by virtue of its reference to whether the trial would be tried to a jury. As established, here, the parties agree that the insurance policies at issue exist and that they are unambiguous. No facts are at issue. Under these circumstances, Penn National is ***not*** entitled to a jury trial as a matter of right and, therefore, the circuit court order was not immediately appealable.

Further, Penn National fails to show that lack of jurisdiction and mootness are the only two bases allowed for dismissal of an appeal. Penn National only listed cases where a court dismissed an appeal on mootness grounds and lack of jurisdiction grounds. (Pet. at 10.) Penn National did not cite any case to show these two instances are the *only* two bases for dismissal of an appeal. *Massengale* and *Brown* establish the contrary is true. Our appellate courts regularly dismiss appeals from interlocutory orders, as the Court of Appeals did here. *See, e.g.*, *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 331, 426 S.E.2d 777, 778 (1993) ("We DISMISS the appeal as interlocutory."); *Brown v. Cnty. Of Berkeley*, 366 S.C. 354, 362, 622

S.E.2d 533, 538 (2005) (dismissing an appeal of an interlocutory order); *Edwards v. SunCom*, 369 S.C. 91, 93, 631 S.E.2d 529, 530 (2006) ("We dismiss the appeal as interlocutory.").

Similarly, Penn National's assertion that the Court of Appeals' dismissal creates new law has no merit. (Pet. at 12–16.) As discussed above, it is well-settled in South Carolina that Penn National is not entitled to a jury trial in the declaratory judgment action that does not involve any factual issue. *See, e.g., Zurich Am. Ins. Co. of Illinois v. Palmetto Cont. Servs., Inc.*, 434 S.C. 104, 112, 862 S.E.2d 714, 717 (Ct. App. 2021) ("Given the jury's role as the finder of fact, it is logical 'that the jury trial right extends only to disputed factual conclusions.'"). Indeed, Penn National agrees that it is entitled to a jury trial for only factual issues. (Pet. at 14.) Penn National's dispute as to whether there are factual issues in the declaratory judgment claims cannot support its position that the Court of Appeals' dismissal created new law.

Finally, contrary to Penn National's characterization (Pet. at 9), the Receiver did not base his motion to dismiss "solely on" frivolousness. The Receiver's motion to dismiss has argued that the circuit court's order is not immediately appealable and that Penn National waived its arguments that it was entitled to a jury trial. The Court of Appeals' dismissal could rely on either or both grounds. Thus, the dismissal could be based on the lack of jurisdiction ground because, as discussed above, Penn National is not entitled to a jury trial and the circuit court's order is interlocutory.

Because the Receiver seeks declarations as to the interpretation of unambiguous insurance policies, the circuit court properly found Penn National is not entitled to a jury trial, and the Court of Appeals properly dismissed the Penn National interlocutory appeal.

B. The Court of Appeals properly dismissed Penn National's frivolous appeal because it is within the circuit court's power to conduct an evidentiary hearing on spoliation.

Penn National's appeal rests almost entirely on the premise that a jury trial is necessary to resolve purported, yet unidentified, factual issues. But as discussed above, no factual dispute remains as to the Receiver's declaratory judgment claims: the parties agree that the Penn National policies at issue exist, and that they are unambiguous. Penn National attempts to manufacture a factual dispute by relying on the Receiver's request for a hearing on spoliation, claiming that "a right to a jury trial exists on issues regarding whether a party engaged in spoliation of evidence." (*See* Pet. at 19.) For the following reasons, Penn National's position is unavailing.

Penn National is not entitled to a jury trial on the issue of spoliation, as spoliation of evidence is a discovery issue, left to the discretion of the court. *See Kershaw Cty. Bd. Of Educ. V. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990) (acknowledging that spoliation of evidence is a discovery violation potentially warranting sanctions and is at the discretion of the trial court). Indeed, South Carolina law "does not recognize an independent tort for the negligent spoliation of evidence," *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 154, 714 S.E.2d 537, 542 (2011), and therefore, does not involve anything to be tried at all.

As with other evidentiary rulings the circuit court makes, it has the power to hold an evidentiary hearing to determine whether spoliation occurred and then it can decide an appropriate sanction for the spoliation. As the Supreme Court of Texas has aptly explained:

> [S]poliation is an evidentiary concept, not a separate cause of action. It is well-established that evidentiary matters are resolved by the trial court. Further, spoliation is essentially a particularized form of discovery abuse, in that it ultimately results in the failure to produce discoverable evidence, and discovery matters are also within the sole province of the trial court. Finally, presenting spoliation issues to the jury for resolution magnifies the concern that the focus of the trial will shift from the merits to a party's spoliating conduct. For these reasons, we agree . . . that the trial court, rather than the jury, must determine whether a party spoliated evidence and, if so, impose the appropriate remedy. The trial court may

> hold an evidentiary hearing to assist the court in making spoliation findings, but not in the presence of the jury. Placing the responsibility on the trial court to make spoliation findings and to determine the proper remedy is a key mechanism in ensuring the jury's focus stays where it belongs—on the merits.

Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 19–20 (Tex. 2014) (internal citations omitted); *see also Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449-50 (4th Cir. 2004) (noting that the "imposition of a sanction . . . for spoliation of evidence is an inherent power of federal courts" and that spoliation is "a 'rule of evidence,' and thus is 'administered at the discretion of the trial court'"). Allowing Penn National a jury trial on an evidentiary matter that is properly left to the discretion of the circuit court would effectively reverse Supreme Court precedent and create a new cause of action for spoliation in South Carolina.

Penn National confuses the fact that circuit courts often give adverse inference instructions to a jury as a sanction for spoliation with an unassailable right to a jury trial on any issues involving spoliation. The selection of a proper sanction for spoliation is within the discretion of the circuit court. *See Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999); *Kershaw Cnty. Bd. of Educ. V. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). In order to determine a proper sanction, the circuit court must first hold an evidentiary hearing to determine whether spoliation has occurred.

None of the cases cited by Penn National support its claim that the spoliation issue entitles it to a jury trial. For instance, Penn National relies heavily on the *Kershaw County Board of Education* opinion, which Penn National claims demonstrates "the issue of spoliation necessarily presents factual issues that are disputed between the parties." (*See* Pet. at 18.) To the contrary, however, in *Kershaw County Board of Education, the trial court* made a ruling on the spoliation issue and determined, *in its discretion*, that the spoliation of evidence in that case did not warrant judgment in defendant's favor, but merely warranted "a jury instruction on the destruction of

evidence." 302 S.C. at 394, 396 S.E.2d at 372. Thus, the trial court—not the jury—determined whether spoliation occurred. *Id.* The trial court subsequently exercised its discretion and "permitted Kershaw to explain the circumstances surrounding its [spoliation] and instructed the jury" that the jury could make an adverse inference based on the spoliation. *Id.* Indeed, this Court emphasized that "the trial court is allowed to make such orders as it deems just under the circumstances, and the selection of a sanction is within the court's discretion." *Id.* at 395, 396 S.E.2d at 372.

Penn National's reliance on *Evans v. Quintiles Transnational Corporation* is also misplaced. In *Evans*, the issue before the court was whether to permit the jury to draw negative inferences against the defendant due to missing evidence. *Evans v. Quintiles Transnat'l Corp.*, No. 4:13-CV-00987-RBH, 2015 WL 9455580, at *2 (D.S.C. Dec. 23, 2015). The South Carolina District Court considered evidence submitted by the parties to determine whether there was spoliation and whether the spoliation warranted an adverse inference jury instruction. *Id.* After consideration of that evidence, the District Court ruled on whether the evidence was lost or destroyed and whether an adverse inference instruction was warranted. *Id.* at *3–*4. The District Court found there was insufficient evidence to find spoliation as to the alleged documents and, therefore, no adverse inference was warranted. *Id.* at *4. As to the missing computer file, the District Court found there was enough evidence to allow the jury to consider whether the file existed and whether it was destroyed. *Id.* *4–*5. Thus, in order to determine whether to allow the jury to consider the spoliation, the District Court first had to consider the evidence submitted by the parties. The District Court, in its discretion, found that enough evidence existed to warrant consideration by the jury after the plaintiff moved for an adverse inference instruction.

These cases are entirely inapplicable to the facts of the instant case. Here, the Receiver has not requested an adverse inference jury instruction. Instead, the Receiver has noted his intent to present evidence to the circuit court of Penn National's spoliation and request a sanction from the circuit court. It is necessary and appropriate for the circuit court to have an evidentiary hearing to determine whether spoliation occurred and award any sanction that is warranted. Penn National has not cited any South Carolina case finding a party has a right to a jury trial when another party requests a spoliation sanction.

C. The Court of Appeals properly dismissed Penn National's frivolous appeal because Penn National waived any argument that it is entitled to a jury trial.

The circuit court's order also is not appealable because Penn National waived any arguments regarding its right to a jury trial. While its appellate brief raises certain arguments, Penn National failed to timely raise these issues to the circuit court and failed to appeal the September rulings of the circuit court scheduling the non-jury trial. *See Creed v. Stokes*, 285 S.C. 542, 542–43, 331 S.E.2d 351, 352 (1985) (finding a party waived any arguments that he was entitled to jury trial by failing to immediately appeal order referring the case to a master).

The Receiver requested a non-jury trial in its status report filed with the court on September 6, 2022. (Pet. App. A0057–61.) Penn National did not file any response to this status report or object to the Receiver's request for a non-jury trial. At the September status conference, the Receiver reiterated its request that the circuit court schedule a non-jury trial in December 2022. (Pet. App. A0087, A0093–94.) The circuit court set the trial and stated it "would be nonjury." (Pet. App. A0096.) Penn National did not object to the non-jury trial at the status conference. (Pet. App. A0096–97.)

Penn National waited until ten days before the start of the non-jury trial—which had been already scheduled for three months—to move for clarification from the circuit court about the non-

jury trial. However, even then, Penn National did not provide any specificity as to any existing factual issues it alleged entitled it to a non-jury trial. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (noting an issue is not preserved for appellate review unless it is "raised to the trial court with sufficient specificity" (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))). Instead, Penn National argued "there [was] nothing in the record" showing it was "not entitled to a jury trial." (Pet. App. A0068.) As noted by the circuit court, Penn National has never sufficiently articulated its arguments as to why it is entitled to a jury trial in this declaratory judgment matter.

Penn National's argument relying on the fact the Receiver requested a non-jury trial and did not file a motion for summary judgment is equally inapposite. (Pet. at 14.) Penn National did not raise this issue before the circuit court.

Penn National otherwise only broadly asserted there are factual issues before the circuit court, while failing to enumerate any factual issues related to the declaratory judgment claims, which would entitle it to a jury trial. Penn National has continuously couched its request for a jury trial as a request for a jury trial "to the extent that there are factual issues" in the case without ever attempting to specify the factual issues it alleges exist. (Pet. App. A0205.) As noted by the circuit court, Penn National's vague assertions that it wanted a jury trial on factual issues were not enough to inform the circuit court of why Penn National contended it was entitled to a jury trial. (Pet. App. A0205–08.) Even in its late-filed motion, Penn National did not identify any specific factual issues in this case as to the requested declaratory judgment. (Pet. App. A0066–70.)

Finally, Penn National's reliance on the parties' proposed findings of fact and conclusions of law ("the proposed findings") is inappropriate (Pet. at 14–15.) Penn National filed its Motion to Confirm Jury Trial Demand on December 2, 2022. (Pet. App. A0066–70.) Penn National did not

submit or rely on the proposed findings in the Motion to Confirm Jury Trial. In fact, the parties did not even file the proposed findings until December 5, 2022. The circuit court did not consider or rely on the proposed findings in the December 7, 2022 order. (Pet. App. A0026–27.) Penn National did not file any subsequent motion requesting the circuit court take the proposed findings into consideration. These arguments were never raised to or ruled upon by the circuit court. Therefore, any arguments Penn National raises to this Court related to the proposed findings are not preserved. *See In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court.").

Having failed at every opportunity to raise the issue, Penn National has waived its arguments that it is entitled to a jury trial.

VI. CONCLUSION

For the foregoing reasons, this Court should deny Penn National's Petition for Writ of Certiorari.

(Signature page follows)

RESPECTFULLY SUBMITTED

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