

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**Aug 07 2023**

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

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S.C. SUPREME COURT

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

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

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance Company,

Petitioner.

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**REPLY IN SUPPORT OF PENN NATIONAL'S PETITION  
FOR WRIT OF CERTIORARI**

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## INTRODUCTION

The request presented to this Court by Appellant Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) is straightforward: to review the decision by the Court of Appeals where it summarily dismissed Penn National’s appeal of an order that disregarded Penn National’s demand for a jury trial contained in its Answer and mandated that all issues in the case be tried non-jury. Penn National’s right to a jury trial, once properly invoked, “shall be preserved inviolate.” S.C. Const. art. I, § 14. When a circuit court fails to do so, this Court, in decades of precedent, has mandated that the circuit court’s decision be immediately reviewed on its merits. In this case, however, the Court of Appeals refused to adhere to this Court’s directives and, without discussion, reasoning or any discernable review, summarily dismissed Penn National’s appeal in a one sentence order. Penn National respectfully requests this Court to issue a writ of certiorari to review the Court of Appeals’ decision because its decision clearly conflicts with prior decisions of this Court and involves the substantial constitutional issue of Penn National’s right to a jury trial in this case. As indicated by Penn National in its Petition for Writ of Certiorari, this case also presents a novel question of law, specifically whether a party is entitled to a jury trial of disputed factual issues regarding the other party’s claim of spoliation.

In its Return, Covil Corporation, by and through its duly appointed Receiver (“Covil”), failed to address the special and important reasons raised by Penn National as to why its Petition should be granted by this Court. Instead, Covil sought to distract this Court by attempting to denigrate Penn National for previously appealing a single discovery order which commanded Penn National to incur the extraordinary expense of digitizing its entire historic repository of policies and to provide unfettered access to this newly created database to Covil and other

Receiverships.<sup>1</sup> Then, Covil makes the incredible statement that in appealing the order affecting the mode of trial in this case, Penn National somehow contravened an order entered in an entirely different appellate case, that was not directed to Penn National, and where Penn National was not even a party. But these are not the issues in this case and this Court should not be distracted by Covil's attempted smear campaign. Instead, Penn National requests this Court to issue a writ of certiorari to review the final decision made by the Court of Appeals in this case: its summary dismissal of an order that denied Penn National its right to a trial by jury on the factual issues in this case, an issue that is as significant to the jurisprudence of this State as it is to Penn National.

**I. Covil Cannot Justify The Court Of Appeals' Summary Dismissal Of Penn National's Appeal Because Covil Has Not Shown That The Order At Issue Is Somehow Not Immediately Appealable.**

In this appeal, Penn National sought review of an order entered by the circuit court which denied Penn National the right to a jury trial of the issues in the present case and directed that the issues would be tried "nonjury." Because this order affected the mode of trial, it was immediately appealable. *See, e.g., Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) ("This Court has held that orders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1997) and must, therefore, be appealed immediately."); *Creed v. Stokes*, 285 S.C. 542, 543, 331 S.E.2d 351, 352 (1985) ("The order [of reference to a master] was not interlocutory, and should have been appealed immediately because it affected the mode

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<sup>1</sup> In a blatant attempt to prejudice this Court against Penn National, Covil complains that Penn National's petition for writ of certiorari is the seventh appellate filing made in this case. In making this statement, Covil is being disingenuous with this Court. There have been only two orders entered by the circuit court for which Penn National has sought appellate review: (1) this order that affects a mode of trial (which this Court has consistently decreed is immediately appealable); and (2) the discovery order which Penn National contended affected a substantial right that would be lost if not immediately reviewed.

of trial, a substantial right.”).<sup>2</sup> The Court of Appeals’ summary dismissal of Penn National’s appeal of this order is contrary to decades of this Court’s precedent. In its Return, Covil was not able to dispute this fact.

Instead, Covil argued that this case does not present any issues of fact, and therefore, does not require a jury trial. Covil’s argument, however, goes to the merits of the appeal. A decision on the merits of the appeal should have been made by the Court of Appeals after a thorough review of the case. It failed to do so. The Court of Appeals simply and without any consideration of the parties’ positions, dismissed Penn National’s appeal. The one sentence dismissal was rendered before a complete appendix was even filed by the appellant, let alone any briefs by the parties that addressed the merits. To now attempt to justify the Court of Appeal’s action in this case by arguing the merits of the appeal is improper and disingenuous.

In truth, there are factual issues involved in the present case that are required to be tried to a jury. Covil makes no argument that Penn National neglected to invoke its right to a jury trial. Consistent with the requirements of Rule 38(b) of the South Carolina Rules of Civil Procedure, Penn National demanded a jury trial in its Answer. (A0052). Therefore, undisputedly, Penn National is entitled to a jury trial of the issues in the present case. *See, Zurich Am. Ins. Co. v. Palmetto Contract Servs.*, 434 S.C. 104, 110, 862 S.E.2d 714, 716-17 (2021) (a party must serve a demand for a jury trial with its pleadings or the demand is waived).

Second, Covil did NOT file a motion for summary judgment, which is the appropriate mechanism for a party to request that the circuit court enter judgment in its favor if there were no genuine issues of material fact (even in cases where a jury trial is demanded). Instead, Covil requested a TRIAL of the issues in this case. In preparation for trial, Covil requested that

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<sup>2</sup> A case cited by Covil in its Return.

the parties identify both fact and expert witnesses and exhibits, and file statements of “Findings of Fact/Conclusions of Law.” (A0061: “The Receiver further requests that the Court combine the evidentiary hearing regarding spoliation with the trial on declaratory issues into a single trial ... The Receiver also requests that the Parties be allowed to submit proposed findings of fact and conclusions of law in advance of trial. The Receiver anticipates calling three expert witnesses live at trial ... and entering the testimony of three fact witnesses via deposition testimony. The Receiver also anticipates offering between 25 to 30 exhibits at trial.”); A0023 (establishing a schedule for submission of witness list, exhibit list, and findings of fact and conclusions of law prior to trial).

Consistent with the circuit court’s scheduling order and prior to the circuit court’s entry of the order denying Penn National’s right to a jury trial, the parties actually submitted to the court their respective proposed findings of fact. Covil’s Proposed Findings of Fact consisted of twenty-nine (29) pages of factual findings that it wanted the circuit court to make. (A0239-A0273). Penn National also submitted fifteen (15) pages of its proposed findings of fact. (A0311-A0325). These factual issues included: whether Penn National issued policies of insurance in addition to the two policies which were stipulated to by Penn National; what endorsements are contained on these two policies; whether Covil has presented evidence of other policies issued by Penn National that are potentially applicable to Covil’s asbestos liability; whether and when injuries occurred in fourteen asbestos liability cases asserted against Covil; whether the fourteen asbestos liability cases asserted against Covil sought damages as a result of Covil’s products or Covil’s operations; whether any duty to preserve historic policies was triggered, and if so, when the duty 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. (A0229-A0325; *see also*, A0063-A0064, Defendant Penn National's Response to the Receiver's Pre-trial Status Report: "Here, there are factual issues that will need to be resolved by a factfinder."). Clearly, there are factual issues to be tried in this case. And, significantly, Covil previously represented to the circuit court that there were such factual issues for its determination.

At a very basic level, the appellate courts of South Carolina have held that the fact that a defendant denies allegations contained in a complaint shows that there are issues of fact for a jury to determine. *See, Zurich Am. Ins. Co. v. Palmetto Contract Servs.*, 434 S.C. 104, 112, 862 S.E.2d 714, 717 (2021) ("Given the jury's role as the finder of fact, it is logical that the jury trial extends only to disputed factual conclusions. Once a party denies an allegation, both parties are then made aware that an issue of fact exists.") (internal citations and quotations omitted).<sup>3</sup> Here, Penn National denied in whole or in part eighteen (18) allegations directed toward it in the Complaint filed by Covil in this case. (A0045-A0054: ¶¶ 1, 2, 5, 6, 7, 8, 9, 13, 14, 15, 18, 19, 21, 22, 23, 24, 25, 26).

It is clear that the present case involves factual issues that are to be determined by the fact-finder. Penn National timely and appropriately demanded a jury trial of these issues. The circuit court wrongfully denied Penn National's right to a jury trial of the factual issues. Penn National timely and appropriately appealed this order. Without any consideration of the merits of the appeal, the Court of Appeals summarily dismissed this appeal in a one-sentence order. Covil's attempt to now justify this dismissal by arguing the merits is improper simply

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<sup>3</sup> Case cited by Covil in its Return.

because there has never been a review of the merits by the Court of Appeals. Penn National respectfully requests that this Court grant its petition for writ of certiorari, reverse the dismissal of Penn National's appeal, and require the Court of Appeals to appropriately review the appeal after allowing the parties a full and fair opportunity to argue the merits of the appeal.

## **II. Covil Was Unable To Show That The Court Of Appeals Had Any Basis To Dismiss Penn National's Appeal.**

As argued in Penn National's Petition for Writ of Certiorari, this Court has consistently upheld a party's right to have orders entered by the circuit court reviewed on their merits. *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.").

In fact, the only bases that justify an appellate court's outright dismissal of an appeal (without any review of the merits) are: (1) when the appellate court does not have jurisdiction over the appeal, such as when the order is an interlocutory order; 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); *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); *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).

Even Covil was unable to find any appellate cases where the appellate courts summarily dismissed an appeal without review of the merits on grounds other than lack of appellate jurisdiction or mootness. In every case cited by Covil, the appeal was dismissed because the appellate court did not have jurisdiction over the appeal because the requirements of the appealability statute, S.C. Code Ann. § 14-3-330, had not been met. *See, Edwards v. SunCom*, 369 S.C. 91, 93-94, 631 S.E.2d 529, 530 (2006) (dismissing appeal of order granting a motion to stay because the order was not immediately appealable under S.C. Code Ann. § 14-3-330, and therefore, the court did not have jurisdiction to review order); *Brown v. County of Berkeley*, 366 S.C. 354, 361-62, 622 S.E.2d 533, 537-38 (2005) (dismissing appeal of order denying defendant's motion to dismiss because the order was not yet reviewable under S.C. Code Ann. § 14-3-330); *Mid-State Distribs. v. Century Importers*, 310 S.C. 330, 334-35, 426 S.E.2d 777, 780-81 (1993) (dismissing appeal of denial of motion to dismiss because the order did not fall within the ambit of the appealability statute).

Covil points to two cases in which the South Carolina appellate courts "dismissed" appeals of orders that transferred cases to the non-jury roster. However, in both cases, the appellate court reviewed the merits of the appeal, determined that the claims asserted were equitable in nature, and concluded that the transfer of the case to the non-jury roster was appropriate. *See, C & S Real Estate Servs. v. Massengale*, 290 S.C. 299, 301, 350 S.E.2d 191, 193 (1986) (reviewing the merits of case and finding that the circuit court appropriately denied a jury trial for permissive counterclaims asserted in equitable action); *Brown v. Greenwood Sch. Dist. 50 Bd. of Trustees*, 344 S.C. 522, 525, 544 S.E.2d 642, 643 (2001) (reviewing the merits of case to determine that case was equitable in nature and therefore properly transferred to non-jury roster).

In the present case, however, there was no review of the merits to determine if a jury trial was appropriate or not. The Court of Appeals did not analyze whether there were factual issues for trial. Nor was the Court of Appeals able to do so, as Covil's motion to dismiss was filed before any briefs were submitted by the parties or a full and complete appendix of relevant material submitted to the Court of Appeals. Indeed, it is difficult to discern on what basis the Court of Appeals dismissed the present appeal, as the order dismissing the appeal consisted of a single sentence without explanation or elaboration.

Finally, in its Petition for Writ of Certiorari, Penn National argued that the Court of Appeals' dismissal of its appeal conflicts directly with decades-old precedent from this Court in *Sumter Hardwood Co. v. Fitchette*, 133 S.C. 149, 130 S.E. 881 (1925). In *Sumter*, this Court rejected a party's motion to dismiss an appeal of an order referring a case to a master for determination. In so doing, this Court held that such orders are in fact immediately appealable and should be reviewed on their merits. Ultimately, the Court held that the order referring the case to a master was improper because the defendant was entitled to have the factual issues in the case decided by a jury. *Id.* at 155-56, 130 S.E. at 884. In its Return, Covil did not mention or otherwise attempt to differentiate or distinguish the holding in *Sumter*.

The Court of Appeals' summary dismissal of Penn National's appeal was clearly not based on its lack of jurisdiction over the appeal or that the order was somehow now moot – the only bases upon which the appellate courts have been able to dismiss an appeal without review of its merits. Furthermore, the Court of Appeals' summary dismissal of Penn National's appeal directly conflicts with this Court's precedent in *Sumter*, a fact not disputed by Covil. Accordingly, this Court should grant Penn National's petition for writ of certiorari, reverse the Court of Appeals' dismissal of this appeal, and require the Court of Appeals to review

the merits of Penn National's appeal after a full and fair opportunity for the parties to argue their respective positions.

**III. Covil's Desperate Attempt To Justify The Court Of Appeals' Summary Dismissal Of Penn National's Appeal By Arguing That Penn National Somehow Waived Its Right To A Jury Trial Of The Factual Issues In This Case Is Both Disingenuous And Wholly Without Merit.**

After consistently characterizing Penn National's appeal of the order denying its right to a jury trial as "frivolous" and therefore justifying the Court of Appeals' summary dismissal of the appeal, Covil then makes the incongruous argument that Penn National actually had the right to appeal the designation of this case as non-jury but waived its right to a jury trial by not appealing sooner. Covil's argument is without merit.

First, the law is clear that a party must appeal from an *order* that abridges that party's constitutional right to a jury trial. *See, Lester*, 327 S.C. at 266, 491 S.E.2d at 241 (even though party made its right to a jury trial an issue throughout the litigation, its failure to immediately appeal the order actually designating the case as a non-jury matter waived its later appeal of issue); *see also, Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) (stating that appeal must be from "order of the trial judge"); *Creed*, 285 S.C. at 542-43, 331 S.E.2d at 352 (because party failed to immediately appeal from the "order of reference," he waived his objection); *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 390 (Ct. App. 2004) ("The failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal.").

Covil's oral references to its request for a non-jury trial is insufficient to trigger any duty by Penn National to appeal. Only when an order is entered that affects the mode of trial is a party required to appeal or risk waiving its right to a jury trial. Here, there was no *order* entered by the circuit court until December 7, 2022, when the order was entered indicating that

the trial in this case would be non-jury. (A0005-A0007). Penn National filed its Notice of Appeal on the very same day. (A0001). Penn National's actions in filing this appeal are entirely proper and consistent with the requirements of South Carolina law. Penn National did not waive its right to a jury trial.

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

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

Rule 39(a), SCRPC. Here, Penn National never filed a written stipulation with the court indicating that it was waiving its right to a jury trial, nor entered into an oral stipulation in open court that it was doing so. Indeed, Covil does not and cannot point to any such stipulation. Therefore, under the Rules of Civil Procedure, Penn National has not waived its right to a jury trial in this case. To the contrary, Penn National is seeking to preserve its constitutional right to a jury trial by filing the present appeal.

Again, however, Covil's argument regarding a potential waiver of the right to a jury trial addresses the merits of Penn National's appeal of circuit court's order. The Court of Appeals' decision did not address the merits of the circuit court's order. Covil cannot now attempt to justify the Court of Appeals' actions by supplying a reason that was not, and indeed could not have been, a basis upon which the Court of Appeals dismissed Penn National's appeal. The Court of Appeals simply did not have the full and complete record before it to determine whether and if Penn National waived its right to a jury trial.

**IV. The Issue Of Whether Penn National Is Entitled To A Jury Trial Of Factual Issues Regarding Spoliation Is A Novel Question Of Law That Should Be Affirmatively Addressed By The Appellate Courts.**

No South Carolina appellate court has directly addressed the issue of whether the factual issues regarding spoliation should be determined by a jury. Covil certainly did not cite to any in its Return. Instead, to support its position that the factual issues regarding spoliation should not be determined by a jury, Covil cited a Texas case (*Brookshire Bros. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014)) and a decision issued by the United States Court of Appeals for the Fourth Circuit applying Virginia law (*Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446 (4<sup>th</sup> Cir. 2004)). This case, however, presents the opportunity for the appellate courts of this State to determine what the standard should be for litigants in its courts.

Covil argued in its Return that the court is the sole judge of whether a party spoliated evidence and the sanction to be administered for such spoliation. The South Carolina appellate courts have never definitively held that the determination of whether a party spoliated evidence and the appropriate sanction was solely within the province of the judge. In fact, in the sole South Carolina case cited by Covil, *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (1999), the court never addressed spoliation at all. The issue in *Griffin* was the appropriate sanction to be given under Rule 37 of the South Carolina Rules of Civil Procedure for a party's pattern and practice of failing to respond to discovery and to comply with orders compelling discovery and contempt orders. The appropriate sanction to be given in a case where a party has failed to engage in discovery is a very different issue than what should be done when there is evidence suggesting a party spoliated evidence.

In previously addressing spoliation, South Carolina appellate courts have generally found that the appropriate sanction to be imposed is an adverse inference instruction, which allows

a jury to determine (1) whether evidence was actually spoliated with culpable intent and if so, (2) what weight to place on the spoliated evidence. For example, in *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990), this Court agreed that the circuit court properly submitted an adverse inference instruction to the jury regarding the plaintiff's spoliation of asbestos evidence and allowed the plaintiff to explain its actions that resulted in the lost or destroyed 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 facts of this case.

*Id.* at 394-95, 396 S.E.2d at 372 (citation omitted and spacing consolidated).

In *Welsh v. Gibbons*, 211 S.C. 516, 46 S.E.2d 147 (1948), this Court found that the circuit court improperly took the decision regarding spoliation and any inference to be made from the actions constituting spoliation from the jury's province:

It does not follow from what has been said that the jury is bound to draw an admission or an inference against plaintiff because of his failure to permit an inspection. That is a matter for the jury to decide from all of the evidence. We merely hold that the evidence excluded was a circumstance which the jury should have been permitted to consider. Of course, it is open to the plaintiff to explain his refusal to allow a chemical analysis to be made of the contents of this bottle and on another trial he is at liberty to do so.

*Id.* at 525-26, 46 S.E.2d at 151-52.

The Court of Appeals, in *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006), approved the following jury instruction allowing a jury to decide whether spoliation of evidence occurred and the weight to be provided to the lost or destroyed evidence, holding that the instruction "reflects the law of South Carolina:"

I charge you that when a party fails to preserve material evidence for trial, it is for you to determine whether the party has offered a satisfactory explanation for that failure. If you find that explanation unsatisfactory, you are permitted – but not required – to draw the inference that the evidence would have been unfavorable to the party’s claim.

*Id.* at 522, 629 S.E.2d at 679.

As these cases hold, evidence of spoliation, including a party’s explanation for the loss or destruction of the evidence at issue, should be submitted to a jury for its determination and the weight to be placed on the lost or destroyed evidence. The decision to give an adverse inference instruction may be within the discretion of the court, but the jury still retains the ability to determine the facts and the weight to be given to those facts.

In the present case, the order requiring all issues to be tried non-jury not only eliminated Penn National’s right to have a jury determine the factual issues regarding Covil’s claims and Penn National’s defenses but also prevented Penn National from having a jury determine the issues of its alleged spoliation. By dismissing its appeal without any consideration of the merits, the Court of Appeals has left Penn National without any redress regarding this issue.

The preferred practice in South Carolina when courts are presented with allegations of spoliation is to submit the issue to a jury with an adverse inference instruction. *See, Hopper v. Air & Liquid Sys. Corp.*, 2019 S.C. C. P. LEXIS 5488, \*16 (Oct. 30, 2019, Judge Jean Hofer Toal) (“Among these tools that judges may use to combat spoliation is the adverse inference jury instruction/presumption. Giving the finder of fact the ability to decide what weight to place on the spoliation is the preferred practice in South Carolina.”). Here, even though Penn National properly and timely invoked its right to a jury trial of all factual issues, it was deprived of the ability to have the evidence of spoliation submitted to a jury for its consideration and determination coextensive with all the other evidence submitted by the parties regarding

the claims and defenses asserted in their pleadings. Penn National requests this Court to issue a writ of certiorari to reverse the summary dismissal of Penn National's appeal so that the issue of whether a jury should decide the factual issues regarding spoliation can be fully and fairly considered by the Court of Appeals after a thorough review of the record and the law.

### **CONCLUSION**

Penn National's appeal of the order denying its right to a jury trial of the factual issues in this case was summarily dismissed by the Court of Appeals without any apparent review of the merits of the appeal. Covil's attempts to justify the dismissal – by arguing that the case presents no factual issues for determination by a jury, that Penn National waived its right to a jury trial, and that the issues of spoliation should not be determined by a jury – all fail for the simple reason that the Court of Appeals never considered Penn National's appeal on the merits. The appeal was dismissed even before any briefs or a full appendix with all the relevant documents were filed by the parties. Indeed, the Court of Appeals gave no reason or justification in its one sentence dismissal of Penn National's appeal.

The Court of Appeals' hasty dismissal of Penn National's appeal was inappropriate. Its failure to review the circuit court's order denying Penn National the mode of trial to which it was entitled is clearly in conflict with decades of precedent from this Court and deprives Penn National of its substantial constitutional right to have the issues in this case decided by a jury. Finally, the dismissal ignores a novel question of law, previously not directly addressed by the appellate courts of South Carolina, i.e. what is the appropriate role of a jury and court in determining issues of spoliation. For all of these special and important reasons, Penn National respectfully requests that this Court issue a writ of certiorari, review the final decision of

the Court of Appeals in summarily dismissing Penn National's appeal, reverse the dismissal, and require the Court of Appeals to decide this matter on the merits.

Respectfully submitted,

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