

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

---

Case No. 2020-CP-40-02098

---

**RECEIVED**

APR 23 2024

SC Court of Appeals

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

Respondent,

v.

Pennsylvania National Mutual  
Casualty Insurance Company,

---

Appellant.

(2) Order Denying Pennsylvania National Mutual Casualty Insurance Company's Post-Trial  
Motions, dated April 5, 2024, and received by Appellant on April 5, 2024

---

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

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

C.A. No. 2020-CP-40-02098

Plaintiff,

v.

**ORDER DENYING PENNSYLVANIA  
NATIONAL MUTUAL CASUALTY  
INSURANCE COMPANY'S POST-  
TRIAL MOTIONS**

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

Defendants.

**RECEIVED**

APR 23 2024

SC Court of Appeals

Before the Court is Defendant Pennsylvania National Mutual Casualty Insurance Company (“Penn National”), Post-Trial Motions, pursuant to Rule 52(b) SCRPC for a new trial, or in the alternative, for an amendment of the Court’s findings of fact and conclusions of law pursuant to Rule 59(e), and/or for judgment notwithstanding the verdict pursuant to Rule 50(b) SCRPC (“Post-Trial Motion”).

The non-jury trial of Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas (“Covil”), against Penn National resolved two matters: (1) the ongoing disputes regarding the interpretation, meaning, and application of insurance policies issued by Penn National related to underlying asbestos claim; and (2) an evidentiary hearing on spoliation. The non-jury trial commenced on November 27, 2023, and concluded on November 28, 2023. The Court entered its Final Order on Findings of Fact and Conclusions of Law as to Covil Corporation against Pennsylvania National Mutual Casualty Insurance Company (“Final Order”) after taking into considerations all exhibits, trial testimony, depositions, submissions by the parties, and

proposed orders. As explained in the Final Order, the Receiver is entitled to judgment on his declaratory relief claims and the evidence before the Court demonstrates Penn National has, among other things, deliberately or with gross negligence, destroyed historic comprehensive general liability insurance policies.

As explained below, the Court denies Penn National's Post-Trial Motion for a new trial, or in alternative, for an amendment of the Court's findings of fact and conclusions of law, and/or for judgment notwithstanding the verdict.

*First*, Penn National seeks a new trial based on a timely demand for a trial by jury. A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issues. *Felts v. Richland County*, 303 S.C. 354, 400 S.E.2d 781 (1991). If an action is at law, it retains this character, and the appellate courts must affirm where there is any evidence to support the judge's findings. *Id.* Further, a declaratory judgment action to interpret an insurance contract is an action at law. *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct.App.1997).

In this matter, the Receiver on behalf of Covil, asked this Court to declare the rights of the parties under two Penn National general liability insurance policies issued to Covil by Penn National. The nature of these declaratory judgments was to determine any question of construction or validity arising under the insurance contracts, an action at law, and as ultimately found and held in the Final Order. Additionally, Covil's Notice That it Seeks Only Declarations Concerning its Policies with Penn National,<sup>1</sup> made it clear to this Court the only causes of actions were declaratory judgments. For the reasons set forth in its December 6, 2022 Order on Penn National's Motion to Confirm Jury Trial Demand, the Court denies Penn National's request for a new trial before a jury, as these matters were properly before the Court to make factual determinations on complex issues.

---

<sup>1</sup> Covil's Notice was filed December 6, 2022.

*Second*, Penn National seeks amendments to the Final Order. Penn National contends the Court failed to address the uncontradicted evidence that Penn National's Document Retention Policy would not have led to the destruction of any Covil-related policies from May 2018 to December 2021. *See* Post-Trial Mot. at 4. Further, Penn National incorrectly states "the uncontradicted evidence in the record shows that, during the period from 2018 to 2021, Penn National would have only destroyed policies that canceled or non-renewed in the years 1993 to 1996, and nothing earlier than that." *Id.* at 5. Yet, the testimony provided to the Court proved Penn National did in fact destroy microfiche containing commercial line insurance policies issued prior to 1992, per Penn National's employee Brent Reifsnyder's testimony. *See* Final Order, at 82-86. Additionally, there was no quality control by Penn National in overseeing their process of destruction of records, as this was simply tasked to an unsupervised administrative staff employee. *Id.* at 86.

Next, Penn National argues this Court's reliance upon the phrase "left off at renewal" on the Change Endorsement to the 1986-87 Policy in the absence of other secondary evidence that Penn National issued a policy to Covil for 1985-86, is unwarranted. *See* Post-Trial Mot. at 5. However, the Court disagrees as the record contains reasonable factual support to demonstrate the 1986-87 Policy was a renewal and not the initial policy of insurance issued by Penn National to Covil. It is undisputed the 1986-87 Policy included language to indicate it was a "renewal." Specifically, Covil's Trial Exhibit 1, at page 29 stated: "Amending policy to delete products from GL0031 (4-84), and Add GI2104 (7/66) Product hazard exclusion as it was left off at renewal." This alone was sufficient for the Court to make a reasonable reliance of the term "left off at renewal" and make a factual finding the 1986-87 Policy was a renewal. Further, the Court also considered

the meaning of “renewal” in the context of insurance contracts and subsequent renewal policies to make the factual determination the 1986-87 Policy was a renewal policy. *See* Final Order, at 86.

Penn National also asserts the case by Covil presented nonjusticiable issues and this Court’s Final Order is an advisory opinion. *See* Post-Trial Mot. at 7. The Court disagrees. The Court made factual determinations pursuant to S.C. Code Ann. § 15-53-30, the Uniform Declaratory Judgment Act, which allows “[a]ny person interested under a ...written contract or other writings constituting a contract whose rights, status or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status or other legal relations thereunder.” Further, as this Court stated in footnote 7 of the Final Order, an insurance contract may be construed before a breach occurs. *See Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595-96, 748 S.E.2d 781, 787 (2013). This Court did not provide an advisory opinion but rather under the Uniform Declaratory Judgment Act, this Court made determinations of the rights of Covil based on insurance policies issued by Penn National for settled asbestos lawsuits, including pending and future claims.

Additionally, Penn National argues the award of attorney’s fees and cost has no legal basis and as a sanction for discovery violations, it is unconscionable. *See* Post-Trial Mot. at 8. First, the Court disagrees with Penn National’s assertion that both *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 28 (1980) and *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978), do not support the Court’s decision to award attorney’s fees and costs. In *Hegler*, “attorney’s fees are not recoverable unless authorized by contract or statute,” yet a party may recover, “if at all, upon some contractual right” such as an insurance policy. *Hegler*, 270 S.C. at 549, 243 S.E.2d at 444. The respondent in *Hegler* defended the underlying action, but a declaratory judgment was brought by the respondent “to avoid any obligation to continue to

defend.” *Id.* at 550, 243 S.E.2d at 445. Therefore, it became necessary “for [the] appellant to employ counsel to resist the contention by respondent of lack of coverage.” Further, as *Hegler* explains, “[t]here is no material difference in the legal effect between an outright refusal to defend and in undertaking the defense under a reservation of rights until a declaratory judgment is prosecuted to resolve the question of coverage.” *Id.* at 550, 243 S.E.2d 444.

Similarly, Penn National has not denied a duty to defend, but has taken certain positions on the existence of certain insurance policies issued to Covil which directly impacts Penn National’s continuous obligation to defend. Therefore, the Receiver on behalf of Covil has been forced to employ counsel to contend the existence of insurance policies and the terms of those policies pursuant to a declaratory judgment action. The award of attorney’s fees and costs in the Final Order does have a legal basis.

Additionally, the amount is not unconscionable as this Court has discretion in the imposition of sanctions, but of course is not without bounds or limits. *See Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). Further, this Court may award reasonable expenses, including attorney’s fees, for a party’s failure to cooperate in discovery. *See* Rule 37(b), SCRCP. In the Final Order, this Court made findings regarding the spoliation charge. *See* Final Order, at 100-02. Among the findings is Penn National’s destruction of material evidence of at least one primary general liability insurance policy responsive to asbestos bodily injury lawsuits. Based on this Court’s findings, the imposition of attorney’s fees and costs are warranted in light of the finding Penn National spoliated relevant and material evidence. This Court will not eliminate from the Final Order the award of attorney’s fees and costs.

*Last*, Penn National seeks a judgment notwithstanding the verdict and/or further amendment of the Final Order. *See* Post-Trial Mot. at 11. The Court denies adopting the proposed conclusions as offered by Penn National.

For the foregoing reasons, the Court DENIES Penn National's Post-Trial Motions.

**AND IT IS SO ORDERED.**

***[JUDGE'S SIGNATURE PAGE FOLLOWS]***



Richland Common Pleas

**Case Caption:** Covil Corporation By And Through Its Receiver , plaintiff, et al vs  
Pennsylvania National Mutual Casualty Insurance Co , defendant, et al  
**Case Number:** 2020CP4002098  
**Type:** Order/Other

So Ordered

Jean H. Toal