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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
Appellate Case No. 2024-000674

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

v.

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

Of which Pennsylvania National Mutual Casualty Insurance Company is the Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in finding that it had jurisdiction over the present declaratory judgment action where the Complaint sought coverage determinations without reference to any underlying lawsuit filed against Covil, no actual controversy existed between the parties regarding Penn National's obligations with respect to lawsuits already settled by Covil, and Covil's Receiver testified at trial that he was seeking an advisory opinion.

2. Whether the trial court erred in failing to grant Penn National a new trial where Penn National demanded a jury trial, Penn National did not consent to a bench trial of factual issues, and the trial court made factual determinations in its Final Order.

3. Whether the trial court erred in finding that the ongoing operations coverage in the Penn National Policies was triggered when there was no evidence that a given asbestos claimant was exposed to Covil's ongoing operations during the Penn National Policy periods.

4. Whether the trial court erred in failing to find that Penn National's completed operations hazard exclusion precludes coverage for Covil's asbestos liability where the only evidence of exposure to asbestos fibers resulting from Covil's operations is from work that was completed prior to the start of the Penn National policy periods.

5. Whether the trial court erred in failing to adhere to the Supreme Court's decision in *Crossmann Communities v. Harleysville Mutual Insurance Company,* which mandated the allocation of covered damages resulting from a progressive injury be spread among all triggered policies based on each policy's pro-rata time-on-risk, and instead ordered that Covil's asbestos liability should be allocated on an "all-sums" basis to a single triggered policy period.

6. Whether the trial court erred in finding that no aggregate limit applied under the Penn National policies to Covil's asbestos liability, contrary to the policies' plain language, and finding that Covil was entitled to a full per occurrence limit for each and every lawsuit filed against Covil for its liability arising out of asbestos exposure that occurred prior to or during the Penn National policies.

7. Whether the trial court erred in finding that Penn National engaged in spoliation of evidence with a culpable state of mind, where Covil failed to show that the evidence allegedly destroyed actually existed and Covil failed to show that Penn National's corporate process of implementing its document retention policy would have destroyed any such evidence.

8. Whether the trial court erred in finding that Penn National actually issued a third policy of insurance to Covil for the March 31, 1985 to March 31, 1986 policy period.

9. Whether the trial court abused its discretion in ordering Penn National to digitize its entire repository of historic insurance underwriting policy documents as a discovery sanction where there was no evidence to show such digitization was necessary or relevant or was reasonable and aimed at specific misconduct by Penn National, and where such sanction was clearly disproportionate to the needs of the present case.

10. Whether the trial court abused its discretion when it awarded Covil its attorneys' fees as a discovery sanction.

11. Whether the trial court erred in awarding attorneys' fees to Covil for prosecuting this action, where Covil did not seek a determination of Penn National's defense obligation for any underlying asbestos litigation, and, indeed, where the evidence established that Penn National defended each underlying asbestos case tendered to it.

12. Whether the trial court erred in awarding attorneys' fees to Covil as a sanction for spoliation where the evidence did not show that Penn National actually spoliated any evidence.

STATEMENT OF THE CASE

This is a declaratory judgment action filed by Covil Corporation, by and through its Receiver Peter Protopapas ("Covil") against one of its insurers, Pennsylvania National Mutual Insurance Company ("Penn National"). Because Covil sought coverage determinations in the context of its asbestos liability, this matter was assigned to Retired Chief Justice Jean Hoefer Toal, who thereafter controlled all matters in this case, from discovery orders which mandated that Penn National incur millions of dollars in costs to comprehensively transform the storage system of its repository of historic policy-related underwriting documents, to renunciation of Penn National's right to a jury trial, to determinations of an expansive and almost-limitless coverage obligation by Penn National for Covil's liability, to increasing Penn National's coverage obligation under a phantom policy, and finally to requiring Penn National to pay

millions of dollars to opposing counsel without a basis in law. Penn National seeks this Court's review of ten of the orders entered by the trial court in this case.

I. COVIL CORPORATION

Covil, a South Carolina corporation formed in 1954, was in the business of selling, distributing, and installing insulation products, some of which allegedly contained asbestos. From 1954 through 1991, Covil provided its products and performed insulation work at several locations throughout South Carolina and North Carolina. (Pl. Exhs. 80, 81, 93, 101). In 1991, Covil went out of business and its charter was thereafter administratively revoked.

From 1954 through 1991, Covil purchased insurance policies from various insurers to insure its liability as follows:

Policy Dates	**Insurer**
04/21/1954 – 04/21/1964	United States Fidelity & Guaranty
04/21/1964 – 03/31/1970	Hardware Mutual Casualty (n/k/a Sentry Insurance)
03/31/1970 – 03/31/1976	Maryland Casualty (now Zurich American Ins. Co.)
03/31/1976 – 03/31/1978	United Stated Fidelity & Guaranty
03/31/1978 – 03/31/1986	Hartford Accident & Indemnity Company
03/31/1986 – 03/31/1988	Pennsylvania National Mutual Casualty Ins. Company
02/17/1988 – 03/31/1991	Scottsdale Insurance Company (now Nationwide)
03/31/1991 – 03/31/1992	Pacific Employers Ins. Company/CIGNA (now Chubb)

(Pl. Exh. 12; Def. Exh. 9).[1] As clearly indicated in the chart, there were no coverage gaps from the time of Covil's creation until the cessation of its business.

On November 2, 2018, Ret. Chief Justice Toal appointed Peter Protopapas to serve as a Receiver for Covil. In his position as Receiver, Mr. Protopapas entered into settlements with several insurance companies that had issued liability insurance policies to Covil, specifically

[1] The chart shows all general liability policies issued to Covil. Starting with the March 31, 1980 policy period, Covil purchased separate policies for premises-operations coverage and separate policies for products hazard and completed operations hazard coverage. Covil also purchased excess/umbrella coverage starting in 1967. The chart omits the policies providing separate product-completed operations hazard coverage or excess/umbrella coverage.

Sentry, Hartford, TIG (excess carrier), and Zurich. As part of the settlements, these carriers were released by the Receiver from any obligation to defend or indemnify Covil in any asbestos claims. The settlement amounts paid by these carriers were placed into a Qualified Settlement Fund ("QSF"). The QSF is administered by the Receiver under court supervision. Penn National is not privy to the total held in the QSF. Of note, in Covil's settlement with Hartford, Covil released Hartford's obligations for the 1985-86 policy period, which immediately precedes Penn National's first policy. (Protopapas testimony (11/27/2023 AM session), pp. 168-70; (11/27/2023 PM session), pp. 5-6).

Covil has been sued in numerous lawsuits brought by individuals allegedly injured through their exposure to asbestos, or by the estates of those individuals, claiming that such injuries were caused by Covil's alleged distribution and/or installation of asbestos-containing products. While the Complaint in this action did not identify any specific claimant who was pursuing Covil, fourteen claims that had been previously tendered to Penn National and which Penn National both defended and contributed to their settlements were identified by Covil at trial ("Asbestos Lawsuits"). The evidence as to those fourteen claimants at trial was as follows:

Name	**Dates of Exposure to Covil's Work**	**Other evidence of exposure to Covil's work**	**Reference**
Jerry W. Archer, Sr.	None	Covil worked at facility before Mr. Archer's employment at that facility. Covil's work was performed before the Penn National policy periods.	Pl. Exhs. 15, 86
Robert Ashworth	1980, 1981		Frost test.; Pl. Exh. 16
Robert Aspray	(No dates)	Mr. Aspray worked as an electrician from 1953 to 1997. There was testimony that Covil's work overlapped Mr. Aspray's work at one facility, but no dates were given.	Pl. Exh. 17
Jerry Campbell	1969 to 1973		Pl. Exh. 18

	1973 to 1977		
Julian D'Amico, Jr.	1951 to 1989		Pl. Exh. 19
Galen Garren	Late 1970's or early 1980's 1981 or 1982		Pl. Exh. 20
Beverly D. Jolly	1970's	Also, take-home exposure from father from 1946 to 1984	Pl. Exh. 21
Ronnie Jonas	1981 to 1983		Frost test.; Pl. Exh. 22
Teddy Knight, Jr.	Mid to late 1970's		Pl. Exh. 23
Edward Morgan, Sr.	1963 to 1965		Frost test.; Pl. Exh. 24
Gary Jay Moss	1981 to 1983		Frost. Test.; Pl. Exhs. 25, 83
Nicholas Murphy	None	Covil worked at facility before Mr. Murphy's employment at that facility. Covil's work was performed before the Penn National policy periods.	Pl. Exhs. 26, 87
Waymon Sims, Jr.	1970's, 1980's, 1990's 1973 to 1978		Pl. Exhs. 27, 89
Tommy Wannamaker	1977 to 1979		Frost test.; Pl. Exhs. 28, 88

II. PENN NATIONAL

Penn National is a regional insurance company that has been in existence since 1919. It issues insurance policies to both individuals and companies in the Atlantic and Southern States. The lines of coverage that Penn National issues to businesses include workers compensation, inland marine, property, commercial general liability, automobile liability, and excess policies. (Reifsnyder Aff., 7/9/2021, ¶18).

A. Penn National Policies Issued To Covil

As noted in the chart above, Penn National issued two insurance policies to Named Insured, Covil Corporation, Inc.: (1) Policy No. 515 50 28 53-7, for the policy period of March 31, 1986 through March 31, 1987 ("1986-87 Policy"); and (2) Policy No. 515 50 28 53-8, for the

policy period of March 31, 1986 through March 31, 1988 ("1987-88 Policy"). Both Policies had bodily injury and property damage liability combined single limits of $1 million each occurrence and $1 million aggregate. (Def. Exhs. 5, 6). (The 1986-87 Policy and the 1987-88 Policy will be collectively referred to as the "Penn National Policies.").

The Penn National Policies provided coverage, pursuant to their terms and conditions, for injuries that occurred during the policy period and arose out of Covil's ongoing operations during the same policy period. The Penn National Policies specifically included an exclusion, the completed operations hazard exclusion, for injuries that occurred during the policy period but after Covil's operations were completed. This is consistent with Covil's purchase of separate products-completed operations coverage from Imperial Casualty & Indemnity Company from February 17, 1987 to February 17, 1988. (Pl. Exh. 12).

B. Penn National's Repository Of Historic Insurance Policies

When it began to store its historic policies of insurance, decades before it was involved in any asbestos coverage litigation, Penn National made the decision to store its policy-related documents by policy number. Policy numbers have been used to identify, organize, file and retrieve policies since the first liability policy was issued in the United States in 1886. Policy numbers are an efficient method of identifying policies by line of business and by policyholder, whereas the names of companies often are similar, are easily confused, or can be changed during the policy period. However, a policy number exclusively identifies a particular policy for a specific policyholder, regardless of the similarity of the policyholder's name to any other company or business. (Heinze testimony (11/28/2023 AM session), p. 16; Def. Exh. 17; Exh. 31, pp. 12-20). There is no insurance regulation, industry standard, or jurisprudential rule that indicates Penn National's method of cataloguing its historical insurance policies by policy

number is ineffective or inappropriate. (Heinze testimony (11/28/2023 AM session), pp. 12-19).

Initially, Penn National stored its historic insurance policy-related information on microfiche cards. In 1992, Penn National implemented an electronic storage system, but Penn National stopped using this version of the electronic storage system in 1995. Between 1995 and 2003, Penn National stored paper copies of its insurance policy-related documents. These documents are contained in 5,800 boxes located in an Iron Mountain storage facility. Between 2003 and 2005, Penn National stored its insurance policy-related documents in a hybrid of electronic and paper copies. After 2005, all policy-related documetns issued by Penn National have been stored electronically. (Reifsnyder Aff., 7-9-20201, ¶¶17-18).

Penn National has a thorough Document Retention Policy that has always been in compliance with its regulatory obligations. (Def. Exh. 19). Under this Policy, for all non-workers compensation policies, policy-related and underwriting documents must be retained for twenty-five (25) years from the cancellation or non-renewal date. (Reifsnyder Aff., 7-9-2021, ¶19). Throughout a calendar year, policy-related documents for policies that were cancelled or non-renewed on a date twenty-five years prior would be set aside. Then, after the end of the calendar year, those set-aside microfiche/documents would be marked for destruction. (Def. Exh. 32, pp. 37-42).

In 2018 (when Penn National first received notice that Covil was involved in asbestos litigation), Penn National was routinely implementing its Document Retention Policy by collecting for destruction policy-related documents with respect to policies that had been cancelled or non-renewed solely in calendar year 1993. In 2019, Penn National collected for destruction policy-related documents with respect to policies that had been cancelled or non-renewed solely in calendar year 1994. In 2020, Penn National collected for destruction policy-

related documents with respect to policies that had been cancelled or non-renewed solely in calendar year 1995. As indicated above, Covil ceased operations in 1991. Therefore, no policies on which Covil would have been included as a named insured, additional insured or special insured would have cancelled or non-renewed in 1993, 1994 or 1995, years after Covil ceased its existence. Contrary to the court's Final Order in this case, no Covil-related documents could have been destroyed in 2018, 2019, and 2020. (Def. Exh. 32, pp. 37-42). Thereafter, a litigation hold notice was issued by Penn National on December 17, 2021. Since December 21, 2021, Penn National has not destroyed any policy-related documents. (Def. Exh. 21; Exh. 18).

Because its repository of historic policy-related documents are stored by policy number, Penn National can readily search for and obtain a copy of an insurance policy once Penn National is provided with a policy number. With respect to Covil, on May 29, 2018, the plaintiff in an asbestos bodily injury lawsuit in which Covil was a defendant[2] issued a subpoena to Penn National requesting copies of insurance policies issued to Covil between 1969 and 1995. Attached to that subpoena was a list of all the policies of insurance issued to Covil from March 31, 1969 through March 31, 1992 by policy number, including the 1986-87 Policy and the 1987-88 Policy. (Def. Exh. 3). In response to that subpoena, Penn National located and produced copies of the 1986-87 Policy and the 1987-88 Policy. Penn National also checked to see if there were any commercial general liability policies that were issued either before the 1986-87 Policy or after the 1987-88 Policy (as both policies had the same policy number, with the exception of the final issue number (representing the year the policy ended), and were stored together). There were none. (Wright Dep., 8-26-2021, p. 17). Covil has had complete copies of these two policies since at least 2018.

[2] *Finch v. BASF Catalysts, LLC, et al.*, Civil Action No. 1:16-cv-1077, United States District Court for the Middle District of North Carolina.

Covil has not, indeed cannot, produce any evidence showing that it purchased a commercial general liability policy from Penn National for any policy period other than from March 31, 1986 to March 31, 1987, and March 31, 1987 to March 31, 1988. (Heinze testimony (11/28/2023 AM session), p. 21). Covil has not produced any business records, board meeting minutes, ledgers, premium invoices, receipts for paid premium, or cancelled checks for paid premium indicating that it purchased other commercial general liability policies from Penn National. (*Id.*). Covil has not produced or identified any excess or umbrella insurance policies on which there was a schedule of underlying insurance indicating that Penn National issued policies other than the 1986-87 Policy and the 1987-88 Policy. (*Id.*). Nor did Covil provide any records from its insurance broker(s), such as quotes, binders, declaration pages, premium invoices, or certificates of insurance, indicating that any other commercial general liability policies were procured from Penn National. Furthermore, no witnesses were identified who had personal knowledge of any other commercial general liability policies that were purchased by Covil from Penn National. In short, there was no evidence at all to support Covil's contention that Penn National issued any other general liability policies to it, other than the previously identified Penn National Policies. And, again, there was no gap in Covil's insurance program that a "missing" Penn National policy would have allegedly filled.

C. Covil's Tender of the Asbestos Lawsuits to Penn National

Covil tendered the above-referenced Asbestos Lawsuits to Penn National for defense under the Penn National Policies. (Wright testimony (11/27/2023 AM session), p.116; Protopapas testimony (11/27/2023 AM session), pp. 171-75). In response, Penn National agreed to and has defended each of the Asbestos Lawsuits, has paid defense counsel chosen by Covil to defend these Lawsuits, and paid defense costs on an equal basis with other insurers who agreed

to defend the Asbestos Lawsuits. For most of the Asbestos Lawsuits, Penn National paid one-half of the defense costs, and another insurance carrier, Travelers, has paid the other half. The QSF, funded by the insurers with which Covil has settled, has not paid any defense costs for the Asbestos Lawsuits. (Wright testimony (11/27/2023 AM session), pp. 116-18; Protopapas testimony (11/27/2023 AM session), pp. 171-75).

All of the Asbestos Lawsuits (identified at trial) were settled prior to the trial of this matter. (Protopapas testimony (11/27/2023 AM session), pp. 149-52; Def. Exh. 24). Prior to the settlement of each Asbestos Lawsuit, defense counsel for Covil, Mr. Protopapas, and representatives from the insurance carriers, including Penn National, discussed the value of each Asbestos Lawsuit and the amount to be paid to settle the Asbestos Lawsuit. In each Asbestos Lawsuit, Penn National agreed to and did pay the amount requested by Mr. Protopapas to settle the Lawsuit. (Wright testimony (11/27/2023 AM session), pp. 120-21).

Penn National is not seeking recoupment of any amount it paid to settle each of the Asbestos Lawsuits or the attorneys' fees and costs it paid to defend these cases. (Wright testimony (11/27/2023 AM session), p. 122; Protopapas testimony (11/27/2023 PM session), p. 23). At trial, Covil confirmed that it is not seeking any additional money from Penn National for the settlement of each of the Asbestos Lawsuits. (Protopapas testimony (11/27/2023 AM session), pp. 149-52).

III. THE PRESENT CASE

On April 27, 2020, 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. (Complaint, ¶ 7). Covil further alleged that Penn National issued two policies of general liability insurance to Covil: (1) the 1986-87 Policy; and (2) the 1987-88 Policy, and that Penn National has breached these policies. (*Id.*, ¶¶ 8-9).

In the Complaint, Covil asserted three claims against Penn National: (1) declaratory judgment regarding compensation to be paid to the Receiver in defending unidentified "Covil Asbestos Suits;" (*Id.*, ¶¶ 14-19); (2) declaratory judgment that the Penn National Policies are the property of the Receiver; (*Id.*, ¶¶ 20-22); and (3) declaratory judgment regarding the terms of the Penn National Policies, trigger of coverage, allocation, Penn National's indemnity obligations, number of occurrences, coverage for the Covil Asbestos Suits and the effect of exclusions (*Id.*, ¶¶ 23-26). Again, no specific claims asserted against Covil were identified in the Complaint. Further, the only Penn National Policies identified in the Complaint, and for which declarations were sought, were the 1986-87 Policy and the 1987-88 Policy. (*Id.*, ¶ 8).

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, including that the action was inappropriate because it only sought an advisory opinion. (Answer, p. 7). Of importance, Penn National expressly requested a jury trial consistent with the requirements of Rule 38(b) of the South Carolina Rules of Civil Procedure. (*Id.*, p. 8).

A. The Extensive Discovery Engaged In By The Parties

The parties engaged in extensive discovery. Covil served Penn National with multiple sets of discovery requests containing forty-eight (48) interrogatories, seventy-eight (78) requests for production of documents, and twenty-six (26) requests for admission. In its discovery requests, Covil sought comprehensive information and documents regarding all insurance

policies issued to Covil or on which Covil was insured, all underwriting files, all claims submitted by Covil for insurance coverage, a detailed description of Penn National's policy searches, reinsurance information, Penn National corporate policies and procedures, and all policies of insurance issued to 240 listed contractors, and certificates of insurance or other coverage issued to 650 facilities. (Plaintiff's 1st Set of Discovery). Covil sought documents regarding litigation holds placed by Penn National in this case. (Plaintiff's 2nd Requests for Documents).

Covil also requested information regarding Penn National's document retention policy and its implementation, all training relating to Penn National's retention policy, Penn National's litigation hold policy, all litigation holds placed after June 2018. (Covil's 2nd Set of Interrogatories, 3rd Requests for Documents, and 1st Requests for Admissions). Finally, Covil requested documents regarding reviews by Penn National of documents destroyed after 2010 pursuant to its retention policy, all self-audits, additional Penn National policies and procedures, and other information regarding Penn National's storage of its historic policies. (Covil's 4th Requests for Documents).

Penn National responded to each discovery request and produced over 54,000 pages of documents. Covil has taken multiple depositions of Brent Reifsnyder, Penn National Director of Administrative Services, Boyd Wright, Penn National's Senior Home Office Claims Examiner, and Scott Maier, Associate General Counsel.

Although it had not produced any secondary evidence of any additional general liability policies issued by Penn National to Covil (other than the 1986-87 Policy and the 1987-88 Policy), Covil demanded that Penn National manually search its entire repository of historic policy-related and underwriting documents to determine if any additional policies of insurance

issued to Covil exist. Penn National objected to performing a manual search on the grounds that it is unduly burdensome. Specifically, Penn National's historic policy-related and underwriting documents are stored on microfiche contained in 148 boxes and in paper documents contained in 5,800 boxes located at an Iron Mountain facility. A manual search of these millions of documents would be all-consuming, take an inordinate amount of time, and would overwhelm Penn National staff. (Reifsnyder Aff., 7-23-2021, ¶¶ 8-11).

In response to Penn National's objections, the trial court requested that Covil produce a list of relevant job sites, owners and agents for Penn National to search. In response, Covil provided a list of 240 contractors and 650 facilities to Penn National. Penn National searched its electronic system for any information on any of these 890 entities and obtained copies of any policies it discovered. Upon reviewing the policies, Penn National did not find that Covil was insured under any of those policies as either a named insured or an additional insured. Penn National spent over one hundred hours researching the list of 890 names provided to it by Covil. (Wright Aff., 6-3-2021, ¶¶ 11-19).

Still not satisfied with the results of Penn National's search for policies, Covil again moved to compel Penn National to perform a manual search of its historic files. (9-8-2021 Covil's 2nd Supp. Motion; 10-5-2021 Covil's 3rd Motion). The trial court directed that the law firm of Ellis & Winters, which served as defense counsel in the asbestos litigation cases in which Covil was a defendant, perform a representative manual search of Penn National's repository of historic policy-related documents. (11-5-2021 Discovery Order). Three Ellis & Winters employees spent two days and 32 hours sampling approximately 100 boxes of paper documents. Subsequently, two Ellis & Winters employees spent another two days and 21.7 hours reviewing microfiche cards. The Ellis & Winters employees confirmed that Penn National actually stored

its historic policy-related documents as it had represented in this litigation. (3-22-2022 Ellis & Winters Letter). Having access to Penn National historic policy-related and underwriting documents, the Ellis & Winters employees were unable to find any additional applicable general liability policies issued to Covil or on which Covil was an additional insured.[3] (*Id*.).

B. The May 5, 2022 Discovery Order

Nonetheless, Ret. Chief Justice Toal issued a discovery order on May 5, 2022. In that order, she commanded that Penn National: (1) image and digitalize its entire microfiche repository of historic commercial lines insurance policies and underwriting documents, and (2) allow Covil and its attorneys to have unfettered access to this repository:

> The Receiver will be entitled to review the policy records uploaded to the database to identify potentially responsive documents. The Receiver will be entitled to examine each and every policy to understand whether it is a policy that in any way, shape, or form covers Covil's asbestos responsibilities and liabilities. Because of Penn National's intransigence, the Court will not limit the Receiver's access to any of the information in the microfiche database. …

(Order, 5/5/2022, p. 10).

The "intransigence" to which the court referred is Penn National's decision, made decades before its involvement in any asbestos coverage litigation, to store its historic insurance policy-related and underwriting documents by policy number and Penn National's failure to independently image and digitize its historic repository of such documents:

> This Court fully expects than an insurance company served with discovery requests from a receiver in this state, seeking the identification and production of insurance policies issued to the company as a named insured or which otherwise includes the company as a supplemental or additional insured, will search its entire repository of insurance policies and policy-

[3] The Ellis & Winters employees, working off a list of policy numbers provided to them (but not to Penn National) by Covil, were able to locate three additional policies of insurance. However, it is undisputed that these policies of insurance (an inland marine (property insurance) policy, a boiler machine policy, and a commercial automobile policy) are not applicable to Covil's asbestos liability because they provided no general liability coverage to Covil. (*Id*.).

> related information for documents identifying the defunct company at issue. The Receiver need only provide the insurance company with the name of the defunct company for which it is seeking to marshal insurance assets. For the avoidance of doubt, this Court flatly rejects any assertion that an insurance company may refuse to search its repositories of insurance policies for responsive documents unless and until it is provided with a specific policy number.
>
> * * *
>
> … The Court finds that Penn National's conduct with respect to its searches for historic Covil insurance policies (as well as non-Covil Receivership policies) amounts to a total and complete refusal to comply with its discovery obligations. It could well have done exactly what Ellis & Winters has proposed here. Penn National could have selected a vendor, processed the information on its microfiche cards, and conducted a review. It did not. Instead, Penn National took the defiant stance that it could not search for historic policies on its microfiche cards without being provided with a policy number. …

(5-5-2022 Order, pp. 4-5, 8).

Penn National moved the court to reconsider this Order, which was denied on May 26, 2022. (5-26-2022 Order). Penn National appealed these orders to the Court of Appeals on May 31, 2022, and simultaneously petitioned the Supreme Court, pursuant to Rule 245 of the South Carolina Rules of Appellate Procedure, for a writ of certiorari in its original jurisdiction and for supersedeas. (Petitions, filed 6-6-2022). Covil filed a motion to dismiss the appeal at the Court of Appeals, which motion was granted on August 9, 2022. (8-9-2022 Ct. App. Order). The Supreme Court denied Penn National's Petitions for writ of certiorari in its original jurisdiction and for supersedeas on August 23, 2022. (8-23-2022 SC Order). Penn National petitioned the Supreme Court for writ of certiorari to review the dismissal of its appeal to the Court of Appeals. This second petition was also denied by the Supreme Court on January 12, 2023. (1-12-2023 SC Order).

Upon remand, Ret. Chief Justice Toal ordered Penn National to pay $671,693 to Covil's

counsel as a discovery sanction. (5-11-2023 Order).

C. The Digitization Of Penn National's Repository Of Historic Policies

After remand, Ret. Chief Justice Toal ordered Penn National to immediately begin the digitization of its repository of historic policies. Penn National could not select its own vendor for this project. Instead, Penn National was ordered to cooperate with BMI, the vendor selected by Ellis & Winters. By July 31, 2023, when BMI completed the digitization of Penn National historic policies, BMI had successfully scanned 356,944 microfiche cards. Penn National was ordered to pay $1,389,540.80 to BMI for this project, and Penn National did so.

On August 21, 2023, after Covil submitted a report to Ret. Justice Toal that was critical of the digitized policy information provided by BMI, including Covil's lament that the policy information was not easily searchable on the digital platform chosen by the Ellis & Winters firm, Ret. Chief Justice Toal ordered Penn National to address the searchability issues. Penn National agreed to allow its database to be uploaded onto Ellis & Winters' discovery platform. To effectuate this process, Penn National paid $48,078.42 to Ellis & Winters. Covil, however, was still not satisfied with the discovery platform utilized by Ellis & Winters, reporting that it was experiencing a high rate of errors in its searches.

On November 8, 2023, Ret. Chief Justice Toal then ordered Penn National to pay Covil's chosen vendor, Dan Regard with iDiscovery Solutions, Inc., to enhance the searchability of the database. Mr. Regard completed his work on the database on March 8, 2024. Penn National was ordered to pay Mr. Regard's invoices, which totaled an additional $769,092.09.

The compulsory digitization of Penn National's repository of historic policy-related and underwriting documents took over thirteen months and cost Penn National over $2.2 million. Covil was then able to search digitally for anything and everything that it chose. In the end, this

exercise all came to nothing. No general liability policies either issued to Covil or on which Covil was an additional or special insured were discovered. (Def. Exh. 58).

D. Trial

While the order mandating digitization of Penn National's historic policy-related documents remained on appeal, Covil requested a non-jury trial of all issues. (9-6-2022 Status Report, p. 5). Because Covil's request was inconsistent with the jury demand included in its Answer, Penn National sent a letter to Ret. Chief Justice Toal confirming that Penn National demanded a jury trial in this case and requesting that its right to such a trial be preserved. (11-7-2022 Yntema Letter). 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. (11-8-2022 Poswal Email).

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 the submission of proposed Findings of Fact/Conclusions of Law. (9-16-2022 Proposed Scheduling Order).

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. (12-2-2022 Motion). On December 7, 2022, an Order was entered denying Penn National's right to a jury trial of the issues in this case. (12-7-2022 Order).

On the same day, Penn National filed a notice of appeal from this order. (Notice of Appeal). Covil immediately filed a Motion to Dismiss the appeal. (12-14-2022 Mot. to Dismiss

& Expedite). The Court of Appeals granted Covil's motion to dismiss Penn National's appeal on February 8, 2023. (2-8-2023 Ct. App. Order). 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. (2-23-2023 Petition). Penn National's Petition was denied by order dated June 6, 2023. (6-6-2023 Ct. App. Order). Penn National filed a petition for a writ of certiorari with the Supreme Court to address its constitutionally guaranteed right to a jury trial in this case. (7-3-2023 Petition). Penn National's Petition was denied on November 7, 2023. (11-7-2023 SC Order).

The matter was then tried before Ret. Chief Justice Toal without a jury on November 27 and 28, 2023. Prior to the start of the trial, the court heard Penn National's Motion for Summary Judgment. (11-17-2023 Motion). In its motion, Penn National requested the Court to dismiss the present case because there was no justiciable controversy and Covil simply sought an advisory opinion regarding whether and how Penn National was to respond to future claims tendered to Penn National by Covil. After hearing arguments, Ret. Chief Justice Toal orally denied Penn National's motion. (Arguments (11/27/2023 AM session), pp. 17-45). Penn National moved for involuntary non-suit pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure at the close of Plaintiff's evidence, which was denied. (Arguments (11/28/2023), pp. 5-6). Penn National renewed its motion at the close of all evidence. Ret. Chief Justice Toal denied that motion. (Arguments (11/28/2023), pp. 116-17).

After the trial concluded, the parties made post-trial submissions on January 12, 2024. (Pl. FOF/COL; Def. FOF/COL). Thereafter, Ret. Chief Justice Toal entered a 102-page "Final Order on Findings of Fact and Conclusions of Law as to Covil Corporation against Pennsylvania National Mutual Casualty Insurance Company," adopting wholesale the proposed Findings of

Fact and Conclusions of Law previously submitted by Covil. (3-1-2024 Final Order). Penn National filed post-trial motions on March 11, 2024. (3-11-2024 Mot.). Ret. Chief Justice Toal denied Penn National's post-trial motions by order dated April 5, 2024. (4-5-2024 Order). Thereafter, Ret. Chief Justice Toal entered an Order awarding Covil its attorneys' fees in the amount of $2,457,108.50 and $306,092.97 in costs. (4-5-2024 Order).

E. Final Order Entered Against Penn National

In her 102-page Final Order, Ret. Chief Justice Toal made findings of fact and conclusions of law regarding the application of the Penn National Policies to Covil's potential exposure for asbestos liability, and Covil's allegation that Penn National engaged in spoliation when it removed insurance policy-related documents during its regularly scheduled implementation of its document retention policy in 2018, 2019 and 2020.

Addressing Penn National's coverage obligations and relying heavily on case law from outside South Carolina, Ret. Chief Justice Toal held that regardless of the evidence that Penn National only issued two years' worth of limited coverage, Penn National was liable up to its limits of $1 million (without regard to its aggregate limits) for limitless lawsuits asserted against Covil where there was any evidence that the plaintiff was exposed to Covil's operations at any time. (3-1-2024 Final Order, pp. 39-77, 99-100). In so holding, Ret. Chief Justice Toal disregarded policy language restricting coverage to only those bodily injuries that occurred during the policy period and policy language excluding coverage if those injuries occurred after Covil completed its operations. (*Id.*, pp. 44-52). Contrary to the Supreme Court's holding in *Crossmann Cmtys. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), Ret. Chief Justice Toal found that as long as there was some evidence that the plaintiff was exposed to Covil's operations, Covil could select Penn National to pay all of its liability exposure in these

asbestos lawsuits, rebuffing *Crossmann*'s adoption of a pro-rata time-on-the-risk allocation among triggered policies. (*Id.*, pp. 54-76). Of note, Ret. Chief Justice Toal did not confine her rulings to the fourteen Asbestos Lawsuits listed above. Instead, she more broadly found when and how the Penn National Policies should respond to future theoretical claims asserted against Covil for its asbestos liability.

Ret. Chief Justice Toal further found that Penn National issued a third policy to Covil, for the 1985-86 policy period, that predated the actual Penn National Policies previously identified and produced to Covil. (*Id.*, pp. 86-89, 100). Despite there being no evidence that could potentially support the idea that policies insuring Covil would have been subject to any such removals during calendar years 2018, 2019 and 2020, or indeed any secondary evidence that such a policy actually existed, Ret. Chief Justice Toal found that a 1985-86 Policy actually existed and that Penn National, with culpable intent, destroyed this policy sometime between 2018 and 2020. (*Id*., pp. 86-94). Ret. Chief Justice Toal's finding is based on nothing more than bald speculation.

After ruling against Penn National on all claims, Ret. Chief Justice Toal found that Covil was entitled to its attorneys' fees because it was the prevailing party in its own declaratory judgment action and as an additional sanction for Penn National's purported spoilation. (*Id*., pp. 96-99).

Penn National now appeals the Orders that have been entered in this case, specifically:

1. May 5, 2022 Order on Discovery Motions, requiring Penn National to digitize its entire repository of historical insurance policies;

2. May 26, 2022 Order, denying Penn National's motion to reconsider the May 5, 2022 Order on Discovery Motions;

3. December 6, 2022 Order, denying Penn National's motion to confirm jury trial demand;

4. May 11, 2023 Order, granting Covil's Motion for Attorneys' Fees and Costs and ordering Penn National to pay $671,693 to Covil;

5. June 8, 2023 Form 4 Judgment, denying Penn National's motion to reconsider the May 11, 2023 Order granting Covil's Motion for Attorneys' Fees;

6. June 16, 2023 Order, mandating that the digitization of Penn National's historic policies be completed by July 31, 2023;

7. September 6, 2023 Order, requiring Penn National to confirm that digitization of all historic policies have been completed;

8. March 1, 2024 Final Order on Findings of Fact and Conclusions of Law as to Covil Corporation against Pennsylvania National Mutual Casualty Insurance Company;

9. April 5, 2024 Order Denying Pennsylvania National Mutual Casualty Insurance Company's Post-Trial Motions; and

10. April 5, 2024 Order Approving Covil Corporation's Report on Attorneys' Fees and Costs.

STANDARD OF REVIEW

This appeal concerns the ten orders issued by Ret. Chief Justice Toal referenced above and therefore presents different standards of review. Principally, Ret. Chief Justice Toal issued decisions regarding the coverage provided under the Penn National Policies for Covil's asbestos liability. Determinations regarding the construction of an insurance policy are questions of law. *Bennett & Bennett Constr. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013). In reviewing coverage determinations, this Court's review is *de novo*. This Court may make its own determinations and need not defer to the trial court's rulings. *Williams v. Gov't Employees Ins. Co.*, 409 S.C. 586, 593, 762 S.E.2d 705, 709 (2014).

Usually, in an action at law tried without a jury, findings of fact made by the trial judge are not disturbed by an appellate court unless there is no evidence to reasonably support such findings. *Crossmann*, 395 S.C. at 46-47, 717 S.E.2d at 592. However, in this case, Penn

National did not consent to a bench trial. Instead, it at all times steadfastly maintained its right to a jury trial of all factual issues. Ret. Chief Justice Toal found that there were no issues of fact in the present case and therefore decreed that Penn National was not entitled to a jury trial. Consequently, no deference is to be given to any of the trial court's rulings, since Ret. Chief Justice Toal specifically ruled that she would not make any factual findings. If, however, this Court finds that factual determinations were made, this Court should reverse Ret. Chief Justice Toal's denial of Penn National's right to a jury trial and remand this matter so that all factual determinations can be made by a jury.

Penn National also requests this Court's review of the trial court's discovery orders. Rulings on discovery matters may be reversed where, as here, the trial court abused its discretion. *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990); *Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (Ct. App. 1990).

ARGUMENT AND ANALYSIS

I. THE COVERAGE DETERMINATIONS MADE BY THE TRIAL COURT CONSTITUTE AN ADVISORY OPINION AND SHOULD BE VACATED.

Covil asked the trial court to make determinations regarding Penn National's coverage with regards to its asbestos liability. However, Covil did not reference any underlying lawsuits in its Complaint, did not indicate that Penn National had denied its duty to defend or indemnify with regard to any underlying lawsuits, or otherwise present an actual or justiciable controversy for the court's determination. (Complaint, ¶¶ 7-9, 23-26). At trial, fourteen Asbestos Lawsuits that were previously settled were generally discussed. In each of these suits, Penn National paid some, but not all, of the settlement amounts. However, both parties agreed that in this case, they were not seeking reimbursement of any amounts paid in any of those Lawsuits. (Wright

testimony (11/27/2023 AM session), p. 122; Protopapas testimony (11/27/2023 AM Session), pp. 149-52 & (11/27/2023 PM session), p. 23).

Tellingly, the Receiver testified at trial that he was seeking direction from the court on how to handle future asbestos claims:

> Q. What relief are you seeking in this lawsuit?
>
> A. I'm seeking declarations so we both know going forward how we're going to operate. Is there an aggregate limit? Am I managing $1.2 million[4] remaining on those two policies? Maybe its's 600 on one, 600 on the other. … And so it's – this will give us that clarity. …
>
> So, I'm asking for those declarations to bring predictability to the Qualified Settlement Fund, predictability to plaintiffs because the first question they ask is going to be how much money is available? …

(Protopapas testimony (11/27/2023 AM Session), pp. 143-45).

It is beyond cavil that courts can only consider cases that present a justiciable controversy. "A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical or abstract." *Sloan v. Friends of the Hunley*, 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006). *See also*, *Colleton County Taxpayers Ass'n v. School Dist.*, 371 S.C. 224, 638 S.E.2d 685 (2006) (finding that courts should not engage in academic or premature exercises).

The present action is nothing more than Covil's attempt to obtain judicial advice regarding how to handle future asbestos claims. Because there was no actual or justiciable controversy, the trial court erred in failing to grant Penn National's motion for summary judgment.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT PENN NATIONAL A NEW TRIAL SO THAT FACTUAL ISSUES COULD BE DETERMINED BY A JURY.

[4] The amount of limits left on the two Penn National policies after Penn National paid amounts to settle the fourteen Asbestos Lawsuits. (Def. Exh. 24).

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. (Answer, p.8). Prior to the trial in this case, the trial court entered an order denying Penn National's right to a jury trial on the issues in this case.[5] (12-7-2022 Order).

While there is no right to a jury trial for claims in equity, *see*, *Fountain v. Fred's, Inc.*, 436 S.C. 40, 47, 871 S.E.2d 166, 170 (2022), declaratory judgment actions are neither legal nor equitable. The nature of a declaratory judgment action is determined by the underlying issue. *See*, *Coakley v. Horace Mann Ins. Co.*, 376 S.C. 2, 5, 656 S.E.2d 17, 18 (2007). An action at law is not converted to an equitable action because it is brought pursuant to the Uniform Declaratory Judgment Act. *Jacobs v. Service Merchandise Co.*, 297 S.C. 123, 127, 375 S.E.2d 1, 3 (Ct. App. 1988).

Indeed, the Uniform Declaratory Judgment Act expressly provides that a party has a right to a jury trial in declaratory judgment actions:

> 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.

S.C. Code Ann. § 15-53-90. *See also*, *Leggette v. Smith*, 226 S.C. 403, 416, 85 S.E.2d 576, 582 (1955) (quoting with approval *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.2d 321, 325 (4th Cir. 1937) ("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.").

[5] Penn National's immediate appeal of this Order was dismissed by this Court, and the Supreme Court denied Penn National's Petition for Writ of Certiorari.

It has long been established that a declaratory judgment action which requests declarations regarding coverage under an insurance policy is an action at law. *See, e.g., Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013); *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 543, 677 S.E.2d 574, 578 (2009); *Cook v. State Farm Auto. Ins. Co.*, 376 S.C. 426, 429, 656 S.E.2d 784, 786 (Ct. App. 2008).

Because declaratory judgment actions seeking declarations regarding insurance coverage are actions at law, the parties are entitled to a jury trial on all factual issues. *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).

In this case, the trial court made numerous factual findings, which should have been submitted to a jury to determine, including the following:

- Insurers, such as Penn National, have known about the need to preserve their legacy occurrence-based general liability policies once long-tail claims are asserted against their policyholder since at least 1986. (Final Order pp. 22-22).

- Penn National failed to maintain its historic insurance policies and policy-related documents. (Final Order, pp. 15-37).

- Penn National issued a primary general liability insurance policy for the period March 31, 1985 to March 31, 1986. (Final Order, p. 3).

- All of Penn National's expert witnesses were not credible or persuasive in any respect; whereas, all of the Receiver's expert witnesses were credible, and their

testimony was compelling. (Final Order, pp. 7-10; 14; 42-43; 52; fns. 12, 65, 129, 143, 161, 197, 199, and 201).

- The testimony of Penn National's fact witnesses was not credible. (Final Order, pp. 82, 86; fns. 5, 127).

- Asbestos injuries occur at all times between exposure to diagnosis. (Final Order, pp. 67-70).

- The evidence in twelve of the fourteen Asbestos Lawsuits showed that the plaintiffs sought damages for bodily injuries that occurred during the Penn National Policy periods. (Final Order, p.54).

- Penn National had a duty to preserve Covil-related policy documents and that duty arose even before this lawsuit was filed. (Final Order, pp. 80-82).

- Penn National destroyed Covil-related policy documents in 2018, 2019 and 2020. (Final Order, pp. 82-90).

- Penn National destroyed Covil-related policy documents with a culpable state of mind. (Final Order, pp. 90-94).

The trial court obviously undertook the role of trier of fact in this case, despite Penn National's clear and unequivocal request for a jury trial. Therefore, Penn National is clearly entitled to a new jury trial of all factual issues.

III. THE COVERAGE DETERMINATIONS MADE BY THE TRIAL COURT ARE CONTRARY TO THE PLAIN LANGUAGE OF THE PENN NATIONAL POLICIES AND SOUTH CAROLINA PRECEDENT AND SHOULD BE REVERSED.

A. The Trial Court Improperly Found That Coverage Existed Under The Penn National Policies For Asbestos Lawsuits Where Exposure To Covil's Operations Only Occurred Prior To The Penn National Policy Periods.

In deciding whether coverage is afforded under policies of insurance for an insured's liabilities, courts are tasked with first determining whether the policies at issue were triggered by the alleged liability. This analysis begins with the language of the policies themselves. *Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 434 S.C. 18, 23, 862 S.E.2d 248, 250 (2021). However, the trial court in this case did not begin its analysis by reviewing the language in the Penn National

Policies. Instead, it started its analysis by referring to scholarly articles regarding the differing types of coverage available under general liability policies, i.e. premises-operations coverage, completed operations coverage, and products hazard coverage. The trial court then outlined the coverage available under the Penn National Policies based on the types of coverage it provided, premises-operations coverage, as opposed to determining what coverage was provided based on the actual language contained in the Penn National Policies. This was error. As the Supreme Court has made clear, the starting point of any coverage analysis is the language of the policies themselves. *Id*. *See also*, *Nationwide Ins. Co. v. Knight*, 433 S.C. 371, 375, 858 S.E.2d 633, 635 (2021) ("We begin our analysis of coverage under any insurance policy by considering the language of the policy.").

Insurance policies are to be construed in accordance with general rules of contract construction. "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Williams*, 409 S.C. at 594, 762 S.E.2d at 709 (quoting *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009)). Because an insurance policy is to be interpreted according to the language contained therein, "[t]he court's duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their interests carefully." *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999).

The grant of coverage under the Penn National Policies is found in the insuring agreement, which states:

INSURING AGREEMENT

I. COVERAGE A – BODILY INJURY LIABILITY
COVERAGE B – PROPERTY DAMAGE LIABILITY

The company will pay on behalf of the **insured** all sums which the

> **insured** shall become legally obligated to pay as damages because of
>
> Coverage A. **bodily injury** or
> Coverage B. **property damage**
>
> to which this insurance applies, caused by an **occurrence**, and the company shall have the right and duty to defend any suit against the insured seeking damages on behalf of such **bodily injury** or **property damage**, even if any of the allegations of such suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

(Def. Exh. 5, p. 2; Exh. 6, p.2). The Penn National Policies specifically define the pertinent bolded terms as follows:

> "**bodily injury**" means *bodily injury*, sickness or disease sustained by any person *which occurs during the policy period,* including death at any time resulting therefrom;
>
> "**occurrence**" means an accident, including continuous or repeated exposure to conditions, which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **insured**;

(Def. Exh. 5, p. 36; Exh. 6, p. 38). Therefore, under the plain terms of the Penn National Policies, coverage is only provided for bodily injury, sickness or disease sustained by a person, which occurs during the policy period, and which is caused by an accident, including continuous or repeated exposure to conditions. In other words, to trigger coverage under the Penn National Policies, the bodily injury at issue must have occurred during the policy period.

In construing similar language, the Supreme Court has held that in a progressive injury case, "coverage is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage." *Joe Harden Builders v. Aetna Cas. & Sur. Co.*, 326 S.C. 231, 236, 486 S.E.2d 89, 91 (1997). In so finding, the *Joe Harden* Court distinguished between the "injury-causing event"

and the "injury-in-fact," finding that only the latter was "consistent with the policy's requirement that damage occur during the policy period." *Id.* Therefore, the Penn National Policies are triggered if the injuries alleged in an underlying asbestos lawsuit in fact occurred during the Penn National Policies.

Although no medical evidence was presented during trial to show when bodily injury caused by asbestos actually occurs, the trial court found that "subclinical" injury or disease occurred from the time of exposure through manifestation of the disease, and this subclinical injury was sufficient for bodily injury to occur during all policies providing coverage from first exposure to diagnosis. Assuming that asbestos bodily injuries start upon inhalation of asbestos fibers and progress until manifestation of the disease, then if the plaintiffs in the Asbestos Lawsuits were exposed to asbestos fibers from Covil's work on or before the inception of the Penn National Policies, bodily injury most likely occurred during the Penn National Policies.

The trial court's task of reviewing whether Covil's asbestos liability falls within the coverage afforded by the Penn National Policies does not end with determining whether underlying lawsuits alleged that bodily injury from Covil's work occurred during the Penn National Policy periods. The second step in determining coverage is to consider whether the coverage for Covil's asbestos liability under the Penn National Policies is precluded through the operation of an exclusion. See, *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 657, 661 S.E.2d 791, 798 (2008) (issue is not confined to whether coverage falls within insuring agreement, but "must be applied to the policy in its entirety, which necessarily includes the exclusions section."). However, the trial court did not take into account the exclusions contained in the Penn National Policies when it analyzed coverage for the Covil's asbestos liability. It erred in failing to do so.

The Penn National Policies exclude from coverage injuries that fall within the "completed operations hazard." Specifically, the Penn National Policies contain the following endorsement:

EXCLUSIONS
(Completed Operations Hazard and Products Hazard)

> It is agreed that such insurance as is afforded by the Bodily Injury Liability Coverage and the Property Damage Liability Coverage does not apply to **bodily injury** or **property damage** included within the **Completed Operations Hazard** or the **Products Hazard**.

(Def. Exh. 5, p.30; Exh. 6, p.25). The Penn National Policies specifically define "completed operations hazard" as:

> "**completed operations hazard**" includes **bodily injury** and **property damage** arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:
>
> (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
> (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
> (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.
>
> Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.
>
> The completed operations hazard does not include **bodily injury** or **property damage** arising out of:
>
> (a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or

on a vehicle created by the loading or unloading thereof,

(b) the existence of tools, uninstalled equipment or abandoned or unused materials, or

(c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations";

(Def. Exh. 5, p.36; Exh. 6, p.38). Under the plain language of this exclusion, the Penn National Policies do not provide coverage for claims of bodily injury that arise out of the insured's operations if the bodily injury occurs **after such operations have been completed**.

To determine if Covil's asbestos liability triggers coverage under the Penn National Policies, the Penn National Policies must be read as a whole. *See*, *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976) ("As a rule of construction, the Court must consider the entire contract between the parties to determine the meaning of its provisions."). If the bodily injury that is occurring during the policy period arises out of Covil's operations during the policy period, then there is coverage under the Penn National Policies for those injuries. If, however, the bodily injury that is occurring during the policy period arises after the operations that caused those injuries has already been completed, then there is no coverage under the Penn National Policies for those injuries. Put simply, if a given claimant was exposed to asbestos fibers from Covil's ongoing operations from 1986 – 1988, then the Penn National Policies afford coverage. But, if the claimant was exposed to asbestos fibers from Covil's ongoing operations only during the 1970's, then the Penn National Policies do not provide coverage. There may well be an ongoing disease process from 1986 – 1988, but the claimant was not exposed to Covil's ongoing operations from 1986 – 1988. In the words of the completed operations hazard exclusion, there is no coverage under the Penn National Policies for bodily injury occurring between 1986-1998 if the bodily injury during that time period is after Covil's operations have been completed.

James Robertson, Defendant's expert in insurance industry standards, customs, and practices, explained the difference between claims that were covered under the Penn National Policies and those that were excluded as falling with the completed operations hazard coverage:

> A. Operations is generally understood to be triggered when there is either bodily injury or property damage directly resulting from the work that is being performed by the named insured at the time that the policy is in effect.
>
> Q. Okay.
>
> A. If the injury or damage occurs after the work is completed and the policyholder has left the job site, then that's considered to be a completed operations risk.
>
> … in order to be covered under the Penn National policies, there would need to be an occurrence of injury during the Penn National's policy period arising out of its operations during the policy period.
>
> * * *
>
> A. The key thing that has to be present for a Penn National policy to be triggered in 1986 is that there must be injury because of work they were doing and exposure to the claimant in 1986.
>
> Q. Okay.
>
> A. If the injury arose out of work, even though it was performed by Covil, but it was performed and the injury was performed – I'm sorry, the work was performed at an earlier time, let's say 1970, the policy that's in effect in 1970 is the one that would provide operations coverage.
>
> But later policies, regardless of the insurer that issued the policy, would also trigger as a result of bodily injury during the policy periods, they would treat those same claims as completed operations because the policy that they issued was not in effect at the time the original injury occurred and there was no work being performed during the policy period.

(Robertson testimony (11/28/2023 AM Session), pp. 78-80).

Illustrating this point, Covil's expert, Sharla Jo Frost, described one of the Asbestos Lawsuits filed by Edward Morgan, Sr. In her testimony, Ms. Frost stated that Mr. Morgan was exposed to asbestos during Covil's operations in 1964 through 1967. (Frost testimony (11-27-

2023 PM Session), p.75). Assuming that Mr. Morgan's asbestos injury started in 1964 and progressed until his later diagnosis of lung cancer, decades later, some part of Mr. Morgan's bodily injury occurred between 1986-1988. However, any injury that occurred in 1986-1988 occurred after Covil completed its operations in 1964-1967. Therefore, because the injuries in 1986-1988 occurred during the completed operations hazard, there is no coverage under the Penn National Policies for the Morgan Lawsuit.

In contrast is the Asbestos Lawsuit filed by Julian D'Amico. Mr. D'Amico worked for the Duke Energy Corporation at its facilities from 1951 to 1989, and while working in those facilities, he worked in close proximity to the work performed by Covil at those same facilities. (Pl. Exh. 19). If Covil was performing operations around Mr. D'Amico between 1986-1988, Mr. D'Amico's asbestos bodily injury occurred in 1986-1988. Because the injuries that occurred in 1986-1988 were caused by Covil's operations that were ongoing in 1986-1988 (and not completed prior to 1986), the D'Amico Lawsuit would be covered under the Penn National Policies.

In determining whether any asbestos lawsuit filed against Covil triggers coverage under the Penn National Policies, and pursuant to the plain language of the terms of the Penn National Policies, the determinative questions are:

1. When did the plaintiff's bodily injury occur?

   If the bodily injury did not occur during the Penn National policy periods, there is no coverage.

   If the bodily injury occurred during the Penn National policy periods, then proceed to question 2.

2. For bodily injury occurring during the Penn National policy periods, were the Covil operations that caused that injury completed before the Penn National policy period?

> If the Covil operations that caused injuries in 1986-1988 had already been completed prior to 1986-1988, the loss falls within the completed operations hazard. No coverage is afforded under the Penn National Policies due to the completed operations hazard exclusion.
>
> If the Covil operations that caused injuries in 1986-1988 were on-going at the time of the injuries in 1986-1988, the loss falls within the coverage provided by the Penn National Policies, and coverage is not excluded.

The trial court did not undergo this analysis. Instead, the trial court found that if the bodily injury was caused during Covil's operations, that bodily injury is **always** an "operations loss" even under policies with effective dates many years after those operations were completed. The trial court's ruling is contrary to the plain and unambiguous language contained in the Penn National Policies.

The rules of insurance policy construction require this court to interpret terms contained in a policy according to the definition given to those terms by the policy. *See, Reeves v. S.C. Mun. Ins. & Risk Fund*, 434 S.C. 18, 24, 862 S.E.2d 248, 251 (2020) ("However, we are not permitted to use our intuitive definition of a term defined in an insurance policy."). The Penn National Policies define "completed operations hazard" as "bodily injury … ***arising out of operations*** … but only if the bodily injury … occurs after such operations have been completed …" (Def. Exh. 5, p.36; Exh. 6, p.38). Therefore, the mere fact that a plaintiff inhaled asbestos fibers during the course of Covil's operations does not take the injury out of the "completed operations hazard." Instead, the key factor is whether the "bodily injury … occurs after such operations have been completed." (*Id*.) If the injury that occurred during the Penn National policy periods occurred after the Covil operations that produced the exposure were completed, that bodily injury falls within the completed operations hazard and coverage is excluded.

Furthermore, the trial court's interpretation that "once an operations loss always an

operations loss" would essentially eliminate the completed operations hazard from the policy. Such a construction cannot be countenanced by this Court. *See, Yarborough,* 266 S.C. at 592, 225 S.E.2d at 349 ("That construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so.").

The Fourth Circuit Court of Appeals has addressed this very issue in *General Insurance Company of America v. United States Fire Insurance Company*, 886 F.3d 346 (4th Cir. 2018). In that case, the Court was tasked with determining whether coverage for an installer of asbestos-containing insulation material fell within the operations or completed operations hazard. The insured argued, as here, that if a claimant was initially injured by asbestos exposure arising out of the insured's operations, the claim should be classified as an operations claim, regardless of whether the operation was ongoing or completed at the time of the policy's inception. *Id.* at 354. The Fourth Circuit disagreed and found that insurers who issued policies to the insured for time periods after the insured completed its operations were only liable for completed operations coverage:

> Accordingly, we conclude that the district court correctly declared that any bodily injury claim based on an injury that occurred during a WECCO operation that completed prior to the start of a policy falls within the completed-operations hazard of that policy.

Id. at 355. *See also, In re Wallace & Gale Co.*, 275 B.R. 223, 241, (D. Md. 2002), *vacated in part on other grounds,* 284 B.R. 557 (D. Md. 2002), *aff'd,* 385 F.3d 820 (4th Cir. 2004) (injuries that continue to occur after operations were completed fall within the aggregate limit for completed operations hazard).

Similarly here, if the injuries that occurred during the Penn National Policy periods (from 1986 to 1988) were the result of Covil's operations that occurred and were completed prior to the start of the Penn National Policy periods, then those injuries fall within the completed operations

hazard. Because Penn National excludes from coverage injuries that fall within the completed operations hazard, there is no coverage for claims that assert such damages. The trial court erred in finding that Penn National Policies were triggered for injuries occurring during the Penn National Policies from Covil's operations that were completed prior to the Policies.

B. The Trial Court Improperly Held That Allocation Among Triggered Insurance Policies Should Be "All Sums."

The diseases caused by exposure to asbestos fibers are progressive injuries which trigger coverage under multiple policies during their progression. *See, Joe Harden*, 326 S.C. at 236, 486 S.E.2d at 91 (holding that in a progressive injury case, "coverage is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage."). After determining whether the Penn National Policies are triggered for a claim for asbestos liability, the next step is determining how much of any indemnity paid on any covered claims should be allocated to the Penn National policy periods. The trial court found that an "all sums" allocation was appropriate, specifically that Covil was able to select one triggered policy period and require that insurer to pay all of the settlement. The allocation method adopted by the trial court, however, has been considered and expressly rejected by the Supreme Court.

In *Crossmann*, the Supreme Court specifically addressed the issues of trigger of coverage and allocation among triggered policies for progressive injury claims. Although arising in the context of a progressive property damage claim, the Supreme Court did not limit its holding to only property damage cases. Instead, the Court found that its determination applied to all progressive injury claims, noting:

> A progressive injury is an injury that results from an event or set of conditions that occurs repeatedly or continuously over time, **such as long-term exposure to asbestos fibers** or the continual intrusion of water into

a building.

395 S.C. at 51 n.8, 717 S.E.2d at 595 n.8 (emphasis added).

The *Crossmann* decision began the analysis by affirming the holding in *Joe Harden* that a modified continuous trigger applied to trigger coverage under all policies where an injury-in-fact occurred during the progression of the injury or damage. *Id.* at 55, 717 S.E.2d at 597. The *Crossmann* Court then turned to the issue of allocation among triggered policies. The Court first considered its previous holding in *Century Indemnity Co. v. Golden Hills Builders*, 348 S.C. 359, 561 S.E.2d 355 (2002), which found that each triggered insurer was liable to pay for all damages, even those damages occurring outside of its policy period. The *Century Indemnity* Court interpreted the policy definition of "property damage" that included "[a]ll such loss of use shall be deemed to occur at the time of the physical injury that caused it" to mean that "property damage relates back in time to the time of the occurrence, that is, when the first injury occurred to the property." *Id*. at 563, 561 S.E.2d at 357. Accordingly, *Century Indemnity* held that the triggered policy "provides coverage for property damage that occurred during the policy period *and* for any continuing damage." *Id.* at 564, 561 S.E.2d at 357 (emphasis in original). *Crossmann* expressly overruled *Century Indemnity*. 395 S.C. at 59, 717 S.E.2d at 599.

Having rejected the *Century Indemnity* method of allocation, the Court in *Crossmann* considered both the "joint and several" approach which is identical to the "all sums" allocation method adopted by the trial court in this case, and the "pro-rata/time-on-risk" theory of allocation. It described the joint and several/all-sums approach as follows: "Advocates of a 'joint and several' approach typically contend that the plain language of the insuring agreement requires an insurer to pay 'all sums' or 'those sums' the insured becomes legally obligated to pay, as long as *some* property damage occurs during the policy period." *Id.* at 60, 717 S.E.2d at

599 (emphasis in original). This is the exact allocation method adopted by the trial court in this case.

However, *Crossmann* expressly rejected this method of allocation, instead adopting the pro-rata time-on-risk allocation method. In so doing, the Court found that pro-rata allocation adhered to the plain language contained in the policy and best comported with the objectively reasonable expectations of the contracting parties as well as promoted sound public policy:

> Not only does the *Boston Gas* interpretation [i.e., pro-rata time-on-risk] interpretation give effect to each part of the insuring agreement (rather than focusing solely on the terms "all sums" or "those sums"), it is consistent with the objectively reasonable expectations of the contracting parties. … Further, this interpretation forwards important policy goals.

Id. at 62-63, 717 S.E.2d at 600-01.

Ultimately, *Crossmann* reversed the trial court's allocation to Harleysville of the entirety of the judgment for covered damages and remanded the case for application the pro-rata time-on-risk allocation:

> For these reasons, we reverse the trial court's order allocating the entire $7.2 million in stipulated damage to Harleysville and hold that the proper method for allocating damages in a progressive property damage case is to assign each triggered insurer a pro rata portion of the loss based on that insurer's time on the risk.

Id. at 63, 717 S.E.2d at 601.

South Carolina's adoption of pro-rata/time-on-risk allocation is consistent with the modern trend which has moved decisively in favor of the pro-rata allocation over the all-sums approach. *See, e.g., Radiator Specialty Co. v. Arrowood Indem. Co.*, 383 N.C. 387, 413, 881 S.E.2d 597, 615 (2022); *Rossello v. Zurich Am. Ins. Co.*, 226 A.3d 444 (Md. 2020); *Arceneaux v. Amstar Corp.*, 200 So.3d 277 (La. 2016); *Dutton-Lainson Co. v. Cont'l Ins. Co.*, 778 N.W.2d 433 (Neb. 2010).

The trial court refused to follow *Crossmann* by finding that the policy language in the Penn National Policies is somehow different from the language at issue in *Crossmann*. That is actually not true. The policy provisions construed in *Crossmann* are the same in all material respects to the policy provisions contained in the Penn National Policies. Like the Harleysville policies at issue in *Crossmann*, the Penn National Policies limit the promise of payment to "damages because of bodily injury." The Penn National Policies then define "bodily injury" as "bodily injury … which occurs during the policy period," a temporal limitation also found in the policies at issue in *Crossman*. *See*, 395 S.C. at 62, 717 S.E.2d at 600.

The trial court found that the definition of "bodily injury" in the Penn National Policies included "death at any time resulting therefrom." However, the definition of "property damage" interpreted by the *Crossmann* Court similarly included "all resulting loss of use of that property." Indeed, *Crossmann* overruled *Century Indemnity*'s focus on such language to find that one policy was responsible for paying for injuries that occurred both within and outside of the policy period. 395 S.C. at 59, 717 S.E.2d at 599. *See also, Joe Harden*, 326 S.C. at 236, 486 S.E.2d at 91 (rejecting injury-in-fact only trigger because it requires "the policy in effect at the time of the injury-in-fact to cover all the ensuing damages" even though the definition of "property damage" included "the loss of use thereof at any time resulting therefrom").

In adopting the pro-rata/time-on-risk method of allocation, *Crossmann* cited with approval the Massachusetts Supreme Court's decision in *Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d at 290 (Mass. 2009), a coverage case arising out of an environmental contamination claim. Subsequently, in *New England Insulation Co. v. Liberty Mut. Ins. Co.*, 988 N.E.2d 450 (Mass. Ct. App. 2013), the Massachusetts appellate court was tasked with determining whether pro-rata/time-on-risk allocation method adopted in *Boston Gas* applied to claims for asbestos

injury. In *New England*, the insured argued, as here, that the policy definition of "bodily injury" included "death at any time" and therefore required a joint and several/all-sums allocation method. *Id*. at 636-37. The court disagreed.

> We disagree that this formulation of the definition of "bodily injury" mandates the use of the joint and several method of allocation. The bodily injury definition simply sets forth the unremarkable proposition, recognized in *Boston Gas*, that in the typical case where the time of injury is easily determined, the policy in place when the injury occurs will cover all consequential damages, even those taking place after the policy period. However, in cases involving injury that develops insidiously over time, it is not readily apparent how to allocate the loss to a particular policy. In asbestos cases, no less than cases of progressive environmental damage, it is both scientifically and administratively impossible to allocate to each policy the liability for injuries occurring only within its policy period.
>
> As a result, courts have been required to choose an allocation method, taking into account not only the terms of the insurance contract, but also public policy considerations. In *Boston Gas*, the Supreme Judicial Court elected to follow the growing plurality of States that apply pro rata allocation in such circumstances, because it "promotes judicial efficiency, engenders stability and predictability in the insurance market, provides incentive for responsible commercial behavior, and produces an equitable result."

Id. at 454 (internal citations omitted).

Similarly, *Crossmann* has determined the allocation method to be used in all progressive injury cases in South Carolina. There is nothing unique or different about the Penn National Policies that would require a different result. The trial court erred in finding that it did. The indemnity obligation from the Asbestos Lawsuits that triggered coverage under the Penn National Policies should have been allocated to Penn National based on its pro-rata/time-on-risk.

C. The Trial Court Erred In Finding That Payment Of Settlements For Covil's Asbestos Liability Did Not Impair The Aggregate Limits Under the Penn National Policies.

On the declarations pages of the Penn National Policies, the Policies state:

	COVERAGES	LIMITS OF LIABILITY

Section II Liability Coverage	Bodily Injury and Property Damage Liability Combined Single Limit	$1,000,000 each occurrence	$1,000,000 aggregate

The Penn National Policies further defined its Limits of Liability as follows:

> **III. LIMITS OF LIABILITY**
>
> Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain **bodily injury** or **property damage**, or (3) claims made or suits brought on account of **bodily injury** or **property damage**, the company's liability is limited as follows:
>
> **Coverage A** – The total liability of the company for all damages, including damages for care and loss of services, because of **bodily injury** sustained by one or more persons as the result of any one **occurrence** shall not exceed the limit of **bodily injury** liability stated in the declarations as applicable to "each occurrence."
>
> Subject to the above provision respecting "each occurrence", the total liability of the company for all damages because of (1) all **bodily injury** included within the **completed operations hazard** and (2) all **bodily injury** included within the **products hazard** shall not exceed the limit of **bodily injury** liability stated in the declarations as "aggregate".
>
> * * *
>
> **Coverages A and B** – for the purpose of determining the limit of the company's liability, all **bodily injury** and **property damage** arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one **occurrence**.

According to the plain language contained in the Limits of Liability section of the Penn National Policies, Penn National has limited its total liability under each Penn National policy in two ways. First, with regard to damages because of bodily injury that is the result of "one occurrence," the "each occurrence" limit of $1 million applies to that one occurrence. Second, with regard to "all" bodily injury arising out of "continuous or repeated exposure to substantially the same general conditions," Penn National's liability is limited to the "each occurrence" limit

of $1 million dollars. *See, B.L.G. Enter.*, 334 S.C. at 535-36, 514 S.E.2d at 330 ("[I]nsurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition.").

The second way is applicable to Covil's asbestos liabilities under the Penn National Policies. It is important to note that in the last section quoted above, the plain language of the Policies does not apply to all occurrences for which coverage is afforded under the Penn National Policies. As indicated above, the Penn National Policies define "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage …" The second way only applies to Penn National's liability for bodily injury caused by "continuous or repeated exposure to conditions." Therefore, for these liabilities, such as progressive injuries caused by exposure to asbestos, **"all"** bodily injury caused by continuous or repeated exposure to substantially the same general conditions, the "per occurrence" limits of $1 million apply. The asbestos bodily injury claims contained in the Asbestos Lawsuits arise out of the plaintiff's continuous or repeated exposure to substantially the same general conditions, specifically, the exposure to asbestos fibers that occurred during Covil's insulation work.

Comparison of the policy language used in describing the first way that Penn National limited its liability to the second way supports the interpretation that a $1 million limit applies to all asbestos bodily injury claims. In the first limitation, the language specifically refers to "all damages … because of bodily injury sustained by one or more persons as a result of any one occurrence." This language is missing from the second limitation. The second limitation is not confined to bodily injury "sustained by one or more persons as the result of any one occurrence." Instead, the Policies clearly and without qualification state that the limitation applies to "all

bodily injury" as long as the bodily injury arises out of exposure.

Interpreting the plain language of the Limits of Liability section of the Penn National Policies, the limits under those Policies for "all bodily injury" arising out of exposure to Covil's operations is the "each occurrence" limit of $1 million. *See, Id.* at 535, 514 S.E.2d at 330 ("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used."). *See also, First Fed. Sav. Bank v. Stewart Title Guar. Co.*, 317 S.C. 131, 138, 451 S.E.2d 916, 919 (Ct. App. 1994) ("The express terms of the policies govern [the insurer's] obligations to the insureds.").

However, the trial court found that claims where the plaintiff was exposed to asbestos during Covil's operations were not subject to the aggregate limit noted in the declarations pages of the Penn National Policies. In reaching this conclusion, the court started, not with the actual language contained in the Penn National Policies, but with an academic discussion of the types of coverages provided by insurance policies, referring exclusively to a 1971 article from the Nebraska Law Review. When the court finally turned to the policy language, it omitted from its consideration the policy language describing the second way that Penn National limited its liability. South Carolina courts have consistently strived to give force and effect to all of the language contained in insurance policies. The trial court erred in failing to consider all language contained in the Penn National Policies. *See, Yarborough*, 266 S.C. at 592, 255 S.E.2d at 349 ("That construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so.").

A straightforward reading of the language contained in the Penn National Policies leads to the conclusion that there is one occurrence limit applicable to "all" bodily injury claims arising out of the continuous or repeated exposure to asbestos resulting from Covil's operations.

Penn National respectfully requests that the trial court's ruling to the contrary be reversed.

IV. THE TRIAL COURT ERRED IN FINDING THAT COVIL MET ITS BURDEN OF PROOF TO SHOW PENN NATIONAL ACTUALLY SPOLIATED EVIDENCE.

In the Final Order, the trial court found that Penn National engaged in spoliation and sanctioned Penn National by declaring that Penn National issued a third policy for the period from March 31, 1985 through March 31, 1986, and by awarding Covil its attorneys' fees for the entirety of this case. The trial court's order was based on mere speculation as Covil failed to present sufficient evidence of spoliation to justify either sanction.

South Carolina appellate courts have not set forth what must be proven before sanctions for spoliation can be imposed. In the cases that have addressed spoliation, courts have generally held that when a party is found to spoliate evidence, a jury is allowed to draw an adverse inference from such spoliation. However, even in those cases, the party accused of spoliation is able to present evidence to the jury of the reason that the evidence is no longer available. *See, e.g.*, *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990) (holding that where there was evidence of spoliation, it was proper for the court to provide an adverse inference jury instruction as well as allow the spoliating party to offer an explanation for the lost evidence); *Welsh v. Gibbons*, 211 S.C. 516, 526, 46 S.E.2d 147, 151-52 (1948) (holding that it was proper for a jury to hear evidence regarding the unavailability of evidence as well as explanation regarding why the evidence was unavailable); *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006) (finding that it was error not to allow adverse jury instruction to be provided where medical records were missing).

Here, the issue of spoliation was tried before the court without a jury (despite Penn National's jury trial demand). Penn National contends that this was improper. *See, id.* The

issue of whether Penn National spoliated evidence should have been presented to a jury, which would have been able to accept such evidence or not and assign any weight to such evidence that it deemed appropriate. Here, the trial court denied Penn National's request for a jury trial on these issues. Instead, the trial court tried the factual issues regarding any alleged spoliation as an "evidentiary hearing." (Final Order, p.1). No court in South Carolina has found that issues of spoliation are to be determined by the court at an evidentiary hearing and outside of a jury trial. It was error for the trial court to do so here.

Furthermore, there is simply no evidence to reasonably support a finding that Penn National spoliated evidence. First, there is no evidence that Penn National actually issued other policies to Covil, specifically including a 1985-86 policy. In all spoliation cases, the party seeking a spoliation sanction was able to specifically identify documents or evidence that previously existed and were thereafter lost or destroyed. *See*, *Kershaw*, 302 S.C. at 394, 396 S.E.2d at 372 (evidence that defendant removed asbestos prior to plaintiff's inspection); *Stokes*, 368 S.C. at 521, 629 S.E.2d at 678-79 (evidence that two medical reports were missing from plaintiff's hospital records); *Gathers v. South Carolina Elec. & Gas Co.*, 311 S.C. 81, 427 S.E.2d 687, 689 (1993) (service line and meter were discarded after electrocution). *See also*, *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 107 (2nd Cir. 2001) (destruction of notes, rankings, and other application material in failure to hire case); *Hawkins v. College of Charleston*, 2013 U.S. Dist. LEXIS 162714 (D.S.C. 2013) (deletion of Facebook content in discrimination case).[6] Here, there is no such evidence.

Moreover, there is no evidence to reasonably support that Penn National actually destroyed any 1985-86 policy or that Penn National destroyed any 1985-86 policy with an intent to prevent Covil from obtaining the earlier policy to be used in this case. Because no such

[6] These federal cases were cited in the trial court's Final Order now on appeal.

evidence exists, the trial court's findings of spoliation were based on speculation and should not be upheld. Accordingly, Penn National requests that this Court reverse the sanctions imposed on Penn National.

A. The Trial Court Erred In Finding that Covil Met Its Burden Of Proving That Other Penn National Policies Actually Existed.

There is simply no evidence that Penn National actually issued a general liability policy to Covil for any other policy period than the 1986-87 Policy and the 1987-88 Policy, including the preceding policy period, the alleged 1985-1986 policy period. Covil did not produce any business records, board meeting minutes, ledgers, premium invoices, receipts for paid premium, or cancelled checks for paid premiums indicating that it purchased this alleged earlier policy. Covil did not produce any records from its insurance broker, such as quotes, binders, declaration pages, premium invoices, or certificates of insurance indicating that any other general liability policy was issued by Penn National to Covil. No witnesses testified on behalf of Covil that they possessed knowledge of this earlier Penn National policy.

Evidence was presented at trial regarding policies of general liability insurance purchased by Covil. Covil prepared a chart showing coverages provided by its insurance program. (Def. Exh. 9). In that chart, coverage for the 1985-1986 policy period is identified as being provided by Hartford. The subpoena issued to Penn National in the *Finch* case was also submitted into evidence at trial. Attached to the subpoena was a list of policies issued to Covil, identifying each policy by policy number and bate-stamp. (Pl. Exh. 12). This list indicates that for the March 31, 1985 to March 31, 1986 policy period, Hartford issued Policy No. 22C943927. In fact, Hartford admitted that it issued a general liability policy to Covil for the 1985-1986 policy period in a Third-Party Complaint that it filed in *Zurich American Ins. Co. v. Covil Corp.*, Case. No. 1:18-cv-932 (M.D.N.C.). (Pl. Exh. 38, p. 3, ¶ 9: "Hartford has located policy documents for policy

periods March 31, 1980 to March 31, 1986 …). Additionally, the Receiver for Covil testified at trial that he had settled claims against Hartford arising out of the 1985-1986 policy. (Protopapas testimony (11/27/2023 AM session), pp.168-170). None of this evidence was addressed in the trial court's Final Order.

Instead, the trial court based its finding of the existence of a 1985-86 Policy on a lone statement contained in the 1986-87 Policy. Specifically, a "Change Endorsement" was included in the 1986-87 Policy. (Def. Exh. 5, p. 29). On that endorsement, in the block titled, "POLICY CHANGES," the following is typed "Amending policy to delete products form GL0031(4/84), and Add GL2104(7/66) Products hazard exclusion as it was left off at renewal. No change in rates or premiums." Immediately under this block, it instructs, "SPECIFY FORM NOS. AND EDITION DATES AFFECTED BY POLICY CHANGES." Indeed, the next page in the 1986-87 Policy following this Change Endorsement is Form GL 2104, as referenced in the "Policy Changes" block. (*Id.*, p.30).

However, the "Change Endorsement" did not change anything else in the 1986-87 Policy. It did not change anything on the Declarations page. Significantly, the language manually typed into the "policy changes" box did not specify that the Declarations page form (Form 70-1570 (Rev. 10-84)) was being affected as was required by the form.[7] The Declarations page clearly and unambiguously states that it is a "NEW" policy. In the box in the upper right corner of the Declarations page, underneath the current policy number, is a box for Penn National to identify the preceding policy number. On the declarations form, that box states "in lieu of" and allows the insurer, Penn National, to put in the previous policy number of a policy issued by Penn National. In the second Penn National Policy, the 1987-88 Policy, in that box is typed "515 50 28 53-7," or the policy number of the 1986-87 Policy. In the first Penn National Policy, in the

[7] Also, no "revised" declarations form followed the Change Endorsement.

"in lieu of" box, the word, "NEW," appears and no other policy number is identified. It is clear from these notations that the 1986-87 Policy is the first general liability policy issued to Covil. Any language contained in the "Change Endorsement" did not change that fact. The language indicating "left off at renewal" was clearly a scrivener's error.

Further evidence supporting the fact that no additional general liability policies were issued by Penn National to Covil is contained in the underwriting documents produced by Penn National. (Def. Exh. 7). The only worksheets and audit information contained in the underwriting documents pertain to either the 1986-87 Policy or the 1987-88 Policy. (*Id.*, pp. 22-38, 41-49, 71-81, 87-89). No other policies are referenced. No worksheets or audit information is provided for any other policy.

Finally, Penn National saved its historical policy-related and underwriting documents according to a terminal digit system. Under this system, policies were saved according to the last two numbers of the policy. With regard to Covil, it is important to note that both the 1986-87 Policy and the 1987-88 Policy contain the same policy number. The policy number for the 1986-87 Policy is: 515 50 28 53-7. The policy number for the 1987-88 Policy is: 515 50 28 53-8. As Penn National representative Boyd Wright testified at trial, the last number, "-7" or "-8," depicts the last digit of the year on which the policy expired. These policies were both saved under "53." (Wright testimony (11/28/2023 AM Session), pp. 109-10). Since all general liability policies issued to Covil contained the same policy number, all general liability policies issued to Covil were saved together under the terminal digit system. However, no other general liability policies, other than the 1986-87 Policy and the 1987-88 Policy, were filed together with the Penn National Policies. Indeed, even after Penn National was ordered to have its entire repository of historic policy-related and underwriting documents digitized, no additional general liability

policies issued to Covil have been found.

The trial court ignored the vast and uncontradicted evidence that Penn National never issued a third policy to Covil for the policy period of 1985-86. Instead, it made a factual finding based on three words, typewritten into a change endorsement seemingly in passing, that did not even meet the criteria to change anything in the policy. The trial court's ruling that a 1985-86 policy existed cannot stand as there is simply no reasonable evidence to support it.

B. The Trial Court Erred In Finding that Covil Met Its Burden Of Proving That Penn National Destroyed Covil-Related Policy Documents After 2018.

The trial court found that Penn National had a duty to preserve Covil-related policy documents as soon as it received the subpoena in the *Finch* litigation in 2018, even before the present lawsuit was filed on April 27, 2020. It is undisputed that Penn National issued a litigation hold in 2021, stopping the removal of historic Penn National policies thereafter. However, Covil did not meet its burden of proving that Penn National destroyed Covil-related policy documents in 2018, 2019 or 2020.

Penn National has a document retention policy that allows the removal of historical policies twenty-five (25) years after the policies have been cancelled or non-renewed. (Def. Exh. 19). This document retention policy has been reviewed by the Pennsylvania[8] Commissioner of Insurance and found to be appropriate. (Heinze testimony (11/28/2023 AM Session), p.18). Penn National's Document Retention Policy greatly exceeds the period required by the South Carolina Insurance Code (5 years) for insurers to retain policy-related documents. *See*, S.C. Code Ann. §38-13-120.

Brent Reifsnyder implements Penn National's document retention policy. He testified that at the beginning of each calendar year, he obtains a list of all policies that were cancelled or

[8] Where Penn National is domiciled.

non-renewed twenty-five years previously. Then, throughout the year, his staff collects policies that have cancelled or terminated solely during that annual period. After the end of the calendar year, usually in January of the next year, those documents are destroyed. (Reifsnyder dep., 11-10-2022, pp. 37-42). Therefore, according to this procedure, in 2018, only policies that were cancelled or non-renewed in 1993 were removed. In 2019, only policies that were cancelled or non-renewed in 1994 were removed. Finally, in 2020, if any policies were removed, only those policies that were cancelled or non-renewed in 1995 were affected.[9] It is undisputed that Covil ceased operations in 1991. Between 2018 and 2020, the only policies that were removed were those policies which were cancelled or non-renewed in 1993 or later, years after Covil was no longer in existence. Therefore, there is no evidence that any Covil-related policy documents were actually collected and destroyed by Penn National in 2018, 2019 or 2020. Covil failed to meet its burden of providing that any such documents were actually destroyed.

In the Final Order, the trial court placed great emphasis on the fact that microfiche cards may have been destroyed during the regularly scheduled removal of policy-related documents between 2018 and 2020, seemingly implying that policies issued by Penn National prior to 1993 could have been destroyed. As Mr. Reifsnyder described in his deposition testimony, the twenty-five year hold is applied to the termination date of the policy, by either cancellation or non-renewal. (*Id.*, pp. 37-38). The determinative date for implementation of the Penn National document retention policy is not the date on which a policy incepted, or even the date on which that policy renewed. It is the date that the policy no longer was renewed or was otherwise terminated. For example, if an insured purchased a policy in 2010, and renewed that policy for

[9] Mr. Reifsnyder testified that no policy-related documents were removed in 2020. (*Id.*, pp. 54, 97). At trial, Mr. Wright testified that policy-related documents were not destroyed in 2020 because the Penn National offices were closed due to the COVID pandemic. (Wright testimony (11/28/2023 AM Session), pp. 113-14). No evidence was presented to contradict this testimony.

ten years, all ten policies would not be removed from Penn National's repository of stored policies until twenty-five years after the last policy expired, i.e., 2020 (date on which last policy expired and was not renewed) + 25 years = 2045. (*See, id.*, pp. 63-65). At that time, all policies would be removed.

Penn National stored its historic policy-related documents on microfiche cards until 1992. Therefore, it is likely that policies that incepted prior to 1992 and continued to renew until 1993 or later were involved in Penn National's regularly scheduled removal of historic policies pursuant to its document retention policy in 2018 through 2020. However, because it is undisputed that Covil would not have renewed any policies after 1991, when it went out of business, the mere fact that Penn National's implementation of its document retention policy in 2018 or later may have involved microfiche cards does not show that Covil-related policy documents were destroyed in 2018 or later. To the contrary, there is no evidence that Penn National removed policies that cancelled or non-renewed prior to 1993 at any time in 2018 or later. (*Id*.) There is simply no evidence that Penn National actually destroyed any Covil-related policy documents at any time from 2018 until the litigation hold was implemented.

C. The Trial Court Erred In Finding That Covil Met Its Burden Of Proving that Penn National Intentionally Destroyed Covil-Related Policy Documents.

The trial court found that Penn National destroyed Covil-related policy documents between 2018 and 2020 with a culpable state of mind. There is simply no evidence that supports the court's finding.

From the subpoena and documents attached thereto served on Penn National in the *Finch* case in 2018, Penn National knew the following information: (1) a carrier was identified for each policy period from 1967 to 1992; (2) each policy period had the same starting and ending month and day, specifically March 31 (i.e., in 25 years, Covil never purchased overlapping

general liability coverage); and (3) the policy numbers for the two policy periods attributable to Penn National. (Pl. Exh. 12). Using the policy numbers provided in the subpoena and its terminal digit filing system, Penn National was able to locate the two policies at issue and the underwriting documents associated with those two policies. These documents showed that the 1986-87 Policy was a "NEW" policy and that the 1987-88 Policy was a renewal of the prior year's policy. The documents filed with these policies did not indicate that any other general liability policies were issued to Covil. (Def. Exh. 7). The documents attached to the subpoena did not indicate that any other general liability policies were issued by Penn National to Covil. When it received the subpoena in 2018, Penn National did not have a duty to stop the regularly scheduled removal of policy-related documents pursuant to its document retention policy.

In April 2020, when the present action was filed, there were no allegations pled that should have put Penn National on notice that it had a duty to suspend its document retention policy. The Complaint did not indicate that this was a missing policies case. To the contrary, the Complaint identified only two Penn National policies by policy number and policy period and sought declarations regarding only those two policies. (Complaint, ¶¶ 8, 23, 25). Neither the *Finch* subpoena nor the Complaint in the present action put Penn National on notice that it had a duty to preserve policy-related documents. Penn National's ongoing execution of its document retention policy after it was served with the *Finch* subpoena and the present lawsuit does not show that Penn National destroyed any Covil-related policy documents with a culpable state of mind. *Hawkins*, 2013 U.S. Dist. LEXIS 162714, *7 (finding that a party's duty to preserve evidence arises when that party reasonably should know that the evidence may be relevant to litigation). After Penn National was put on notice that Covil sought historic policy information, a litigation hold was put in place that prevented further implementation of the document

retention policy. (Def. Exh. 21). It should be emphasized that after Penn National was forced to digitize its entire repository of historic policy-related and underwriting documents, no additional Covil-related policy documents were found. (Def. Exh. 58).

Covil did not show that Penn National intentionally destroyed documents in the face of reasonably knowing that it had a duty to preserve such evidence. Even if a duty arose after Penn National's receipt of the 2018 *Finch* Subpoena, there is no evidence to support that Penn National allowed the regularly scheduled implementation of the document retention policy to continue knowing that it would destroy any Covil-related policy documents. Indeed, there is no evidence that the regularly scheduled removal of policy-related documents in 2018 and afterwards destroyed Covil-related policy documents at all.

Furthermore, even if this third phantom policy existed, which Penn National disputes, Penn National had no motivation to have destroyed just this one policy. Penn National had already identified and produced the two Penn National Policies that it issued to Covil by 2018. It makes no sense whatsoever that Penn National would have identified a third general liability policy and then, contrary to its conduct with respect to the first two policies, proceeded to destroy just that one policy. The idea that Penn National would have destroyed one policy while leaving behind evidence of the existence of the two other policies is absurd and inconsistent with destroying any policy-related material with a culpable state of mind. Without any such evidence, Covil failed to meet its burden of proof in showing that Penn National destroyed any documents with any degree of culpability. The trial court erred in finding that it did so.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING PENN NATIONAL TO DIGITIZE ITS ENTIRE REPOSITORY OF HISTORIC INSURANCE POLICIES AND ALLOW THE OPPOSING PARTY TO HAVE UNFETTERED ACCESS TO THE DATABASE.

In this case, the trial court took the extraordinary and unprecedented step of mandating,

as a discovery sanction, that Penn National digitize its entire historic microfiche repository of commercial lines insurance policy-related documents and allow full and unrestricted access to this created database to opposing counsel. The trial court abused its discretion by entering such a draconian, overly broad and punitive order. Accordingly, Penn National respectfully requests that this Court find that the trial court abused its discretion in entering the May 5, 2022 Order, eliminate Covil's access to the database of Penn National's historic policy-related documents, and vacate the May 11, 2023 award of attorneys' fees to Covil, requiring Covil to repay such fees.

The imposition of discovery sanctions under Rule 37 of the Rules of Civil Procedure is generally entrusted to the sound discretion of the trial court:

> The sanction should be aimed at the specific misconduct of the party sanctioned and should not be used improvidently to prevent a decision on the merits. The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case.

QZO, Inc. v. Moyer, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004) (internal citations omitted). Discovery sanction orders may be reversed on appeal if it is shown that the trial court abused its discretion. *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). "An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law." *Kershaw*, 302 S.C. at 395, 396 S.E.2d at 372 (citing *Farden v. Witham*, 263 S.C. 183, 209 S.E.2d 42 (1974)).

In the present case, it is clear that the trial court abused its discretion when it entered the May 5, 2022 Order. There was simply no justification for such an onerous, burdensome, and expensive mandate tantamount to a fishing expedition – one that has violated and continues to

violate the rights and privacy of thousands of insureds to whom Penn National issued insurance policies and who are not involved in the present litigation.

The trial court attempted to justify its extraordinary actions in this case by characterizing Penn National as "intransigen[t]." However, Penn National's "intransigence" in this case consisted of: (1) it has always stored its historic insurance policy-related documents by policy number; (2) it did not manually search its millions of pages of documents or microfiche films for general liability coverage that may have been issued to Covil; and (3) it previously did not voluntarily image and digitize its repository of historic policy-related documents. (5-5-2022 Order, pp. 4-8). Ultimately, by entering the May 5, 2022 Order, the trial court punished Penn National for making a decision to store its policies of insurance by policy number.[10] In so doing, the trial court abused its discretion and prejudiced the rights of Penn National.

A. There Is No Legal Requirement That Penn National Store Its Insurance Policies In A Certain Way.

In entering the May 5, 2022 order, the trial court sought to punish Penn National for the method by which it chose to store its historic insurance policy-related documents. However, there has never been any law or regulation promulgated by any federal or state agency that mandates how an insurance company should file and store its policies of insurance. In South Carolina, the legislature has enacted The Insurance Law, S.C. Code Ann. § 38-1-10, *et seq.*, which governs many aspects of the insurance industry. For example, this law addresses the

[10] Ret. Chief Justice Toal erroneously speculated (without any evidence) during the hearing out of which the May 5, 2022 Order was issued that Penn National's intent in storing policy documents by policy number was to make it difficult to find policies. (4-11-2022 Transcript, p. 30). However, the employee with Ellis & Winters charged with reviewing Penn National's archived policy documents stated that he could not speak to Penn National's intent, but that the terminal digit system used by Penn National to store its policies is commonly used by businesses to store or inventory their historical documents. (*Id.*, p. 31). Also, Mr. Reifsnyder testified that there were four basic methods of storing documents and that the method previously chosen by Penn National was highly recommended when storing a large amount of documents. (Reifsnyder dep., 11-10-2022, pp. 16-17).

capital and surplus required of insurance companies (S.C. Code Ann. § 38-9-10, *et seq.*), the investment practices of property and casualty companies (S.C. Code. Ann. § 38-12-410, *et seq.*), the length of time – five years – that losses and claims are to be kept by insurers (S.C. Code Ann. § 38-13-130), and what constitutes improper claims practices (S.C. Code Ann. § 38-59-20). However, The Insurance Law does not mandate, or even address, a method by which insurance companies are to store their historic insurance underwriting records or policies.

Penn National chose to store its historic insurance policies by policy number. As explained by Penn National employees, policy numbers are important to an insurance company because they are a distinct identifier that is specifically associated with a particular insured. Insurance companies do not duplicate their policy numbers. An insured's name, address, or location may be similar or identical to another insured's name, address, or location. However, the policy number assigned to a certain policy issued to a certain insured is unique. Because policy numbers are distinctive, they provide certainty regarding the issuance of insurance coverage. Mr. Wright testified in his deposition:

> Insurance companies, and Penn National is no exception, issue policy numbers for a very specific reason. Name similarity, locations, and other things vary. Policy number is like a Social Security number. It's the identifier for that particular insured.

(Wright dep., 8-26-2021, p.24). During trial, defense expert Bernd G. Heinze testified that storing insurance policies by policy number complies with insurance industry standards:

> Q. Now, there's been a lot of discussion in this case about the fact that the documents were listed and stored by policy number. Could you share with us what your – do you have an opinion satisfactory to yourself to a reasonable degree of professional certainty about whether that is a process that complies with industry standards?
>
> A. I do and it does. And primarily it is a process that is employed by insurance carriers because during the course of any given policy year, the name of an insured may change due to acquisitions, name change

> particularly, different reasons or another. And, if the policy number is given at the inception of the policy, that will never change regardless of what the name of that insured is. So that gives additional ways to make sure that once that policy number is in hand, that we can search for any policies in place for that particular insured regardless of what its name was at the inception, during the course of the policy period, or the date of expiration.

(Heinze testimony (11/28/2023 AM Session), p.16). Because Penn National stored its historic policy-related and underwriting documents by policy number, Penn National can only reasonably search its microfiche or paper documents by policy number.

It is clear that the trial court disagreed with how Penn National stored its historic insurance policy-related documents. In its order, the circuit court stated: "For avoidance of doubt, this Court flatly rejects any assertion that an insurance company may refuse to search its repositories of insurance policies for responsive documents unless and until it is provided with a specific policy number." (5-5-2022 Order, p.5). Regardless of whether Penn National's decision to store its historic insurance policy-related documents by policy number is seen as inappropriate, unwieldy, or even ridiculous; absent a statute, rule or regulation requiring otherwise, a court cannot substitute its judgment on how such insurance policy-related documents should be stored and should not be allowed to punish an insurance company for failing to store its historic policy-related documents in a certain way. But that is exactly what the trial court did in this case. *See, Oppenheimer Fund v. Sanders*, 437 U.S. 340, 362-63 (1978) ("Finally, the suggestion that petitioners should have used 'different systems' to keep their records borders on the frivolous … we do not think a defendant should be penalized for not maintaining his records in the form most convenient to some potential future litigants whose identity and perceived needs could not have been anticipated.").

B. The Conclusion Reached By The Trial Court To Justify Compulsory Digitization Of Penn National Policies Was Without Reasonable Factual Support Because There Was No Evidence That Penn National Issued Any Additional Policies Of Insurance

That Provided Coverage To Covil.

It is significant to note that *no evidence* was ever presented to show that Penn National issued any general liability policy to Covil other than the 1986-87 Policy and the 1987-88 Policy. As indicated above, this was never a lost policy case. In fact, the undisputed information possessed by all parties to this case and the trial court was that Covil was completely insured from March 31, 1969 through March 31, 1992, with consecutively issued policies of general liability insurance issued by insurance companies. There were no gaps in coverage. There were no periods where Covil was not insured or even self-insured. Coverage for each policy period was provided by a certain insurance carrier and the policy numbers for each such period were known and identified. (Pl. Exh. 12; Def. Exh. 9).

Additionally, Covil did not produce then, and has not produced at any time, any information or secondary evidence that there may be other general liability insurance policies that may have been issued to it by Penn National. *See*, *Gamble v. Travelers Ins. Co.*, 251 S.C. 98, 103, 160 S.E.2d 523, 525 (1968) (burden of proof on person seeking insurance benefits to prove coverage). There was no evidence that Covil used any reasonable means to search for any such secondary evidence. Indeed, the order did not reference any such evidence.

The simple truth is that at the time the trial court entered the May 5, 2022 Order, it was highly unlikely and improbable that a manual search of Penn National's repository of historic insurance policies would result in the discovery of any general liability policies that provided coverage to Covil. The facts in this case plainly did not justify the extraordinary remedy of requiring Penn National to digitize its microfiche repository of commercial lines insurance policy-related documents at a cost of millions of dollars to allow Covil to engage in a vain search for policies that it had no good faith basis to believe exist, and to then provide unrestricted access to such database to Covil and its counsel.

Indeed, after the May 5, 2022 Order, Penn National was forced to digitize 356,944 microfiche cards. The process took over 13 months and cost Penn National over $2.2 million. The result is that ***no additional general liability policies issued by Penn National and under which Covil was insured were discovered***. This result was expected and should have been prevented.

C. The Trial Court Failed To Undertake A Proportionality Analysis Prior To Entering the May 5, 2022.

Generally, parties are allowed wide latitude in pursing discovery in civil cases. However, the Supreme Court has previously limited discovery that has been found to be abusive and impose an undue burden by expense. *Oncology & Hematology Assocs. of S.C., LLC v. South Carolina Dep't of Health & Envtl. Control*, 387 S.C. 380, 388-89, 692 S.E.2d 920, 924-25 (2010). The May 5, 2022 Order was oppressive and beyond the pale. By its order, the trial court imposed a sanction on Penn National by requiring it to digitize its microfiche repository of historic commercial lines insurance policies at great expense and to allow Covil and its attorneys' unrestricted access to the created database. The trial court imposed this sanction based on nothing more than Covil's unfounded and wholly unsupported "hope" that Penn National may have issued more policies under which Covil may be insured for general liability purposes, and the trial court's irritation with Penn National's storage method. The trial court's order in this case is a clear abuse of discretion.

In *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009), the Supreme Court established the framework by which a court should review discovery requests for proportionality, abusiveness and undue burden by expense. Specifically, this Court held that if the party from whom discovery is being sought shows a particularized harm which will be caused by allowing the discovery, the person seeking the discovery has the burden of proving that the discovery

sought is both relevant and necessary. *Id.* at 578, 683 S.E.2d at 498.

In this case, Penn National had clearly shown that requiring it to perform a manual review of its historic insurance policy-related and underwriting documents would cause an undue burden by expense. (Reifsnyder Aff., 7-23-2021, ¶¶ 11-12; Reifsnyder Dep., 8-3-2021, pp. 60-63). Prior to the entry of the May 5, 2022 Order, Ellis & Winters advised the trial court that Penn National's archived microfiche records contained more than 300,000[11] microfiche cards corresponding to commercial line policies, with each card containing up to 60 images, meaning that there are roughly 18 million pages of commercial lines policy-related and underwriting documents stored on microfiche cards. (3-22-2022 Ellis & Winter Letter., pp. 2, 5 pp. 653, 656).

The cost to digitize Penn National's microfiche repository fared no better. Ellis & Winters estimated that the cost to image and digitize Penn National's microfiche repository of historic commercial lines policy-related and underwriting documents would be between $240,000 to $960,000;[12] a cost ordered by the trial court to be paid solely by Penn National. (*Id.*, at p.5; 5-5-2022 Order, p.12). The trial court's May 5, 2022 Order went so far as to prohibit Penn National from even participating in the choice of vendor to digitize the microfiche repository. Therefore, Penn National had no control over the vendor selected, the cost incurred, the electronic system used, or whether such system is compatible with and can be supported by Penn National's existing computer system.

Once Penn National made a showing of undue burden and expense, Covil was required to come forward with evidence showing that the digitizing of these historic policy-related documents was both relevant and necessary to the present case. It failed to do so. As indicated more fully above, Covil never demonstrated by the production of policy numbers or by other

[11] The number was actually 356,944 microfiche cards.
[12] The actual cost was over $2.2 million.

secondary evidence that Penn National actually issued policies of general liability insurance to Covil other than the previously produced 1986-87 Policy and the 1987-88 Policy. There was no evidence that Covil even conducted a reasonable search to locate any such secondary evidence. Furthermore, Covil had not shown that there was actually a chance that a manual search of Penn National's historic insurance policy-related documents would have uncovered additional policies of insurance under which Covil would be insured. We now know, after the digitization of Penn National's records, that there are, in fact, no other general liability policies under which Covil is insured. Clearly, a manual search would have been a fool's errand.

The trial court failed to undertake the proportionality analysis required by the Supreme Court in *Hollman*. Instead, the trial court imposed on Penn National the extreme expense of digitizing its microfiche records and provided Covil with unfettered access to this database, including private information about Penn National's insureds with no connection to Covil whatsoever. Clearly, the trial court abused its discretion in issuing such an order. *See, Hollman,* 384 S.C. at 581, 683 S.E.2d at 500 (finding an abuse of discretion where the ordered discovery was not necessary to establish any element of plaintiffs' causes of action).

In addition to providing Covil's Receiver and his counsel unfettered access to Penn National's repository of historical policies, the May 5, 2022 Order did not confine the Receiver's access to just this case. Instead, the trial court granted the Receiver broad access to be used on any and all receiverships for which the Receiver has been appointed:

> RULINGS AND ORDERS
>
> * * *
>
> Once the universe of records to image is determined by Ellis & Winters, images are scanned by the selected vendor, and information is available in a searchable database, the Court DIRECTS Ellis & Winters to provide Penn National and the Receiver with full access, on a rolling basis, to the database to conduct document reviews in order to

> search for responsive information for the Covil Receivership as well as the other Receiverships for which Peter D. Protopapas has been appointed Receiver.

(5-5-2022 Order, p.9).

The trial court clearly abused its discretion in ordering such a broad and all-encompassing sanction where no evidence was produced to show that such a draconian order was necessary or even relevant. The May 5, 2022 order was neither reasonable nor aimed at any specific misconduct by Penn National and clearly disproportionate to the needs of the present case. Penn National respectfully requests that the May 5, 2022 order be vacated, that the Receiver and his attorneys be prohibited from further accessing the database already created, and that the attorneys' fees of $671,693 awarded to Covil on May 11, 2023 be ordered to be reimbursed to Penn National.

VI. THE TRIAL COURT IMPROPERLY AWARDED COVIL ITS ATTORNEYS' FEES FOR PROSECUTING THIS ACTION.

A victorious party in a civil action may not collect his attorneys' fees unless authorized to do so by statute or contract. *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). The Supreme Court has held that in a limited situation, an insurer in breach of its defense obligations to an insured may be liable to pay the insured's reasonable attorneys' fees in establishing the duty to defend. *Hegler v. Gulf Ins. Co*., 270 S.C. 548, 550-51, 243 S.E.2d 443, 444-45 (1978). In *Hegler*, the insurer agreed to defend the insured pursuant to a reservation of rights and immediately filed a declaratory judgment action seeking a finding that it did not have coverage for the underlying lawsuit. The Court ultimately held that because the insured was forced to defend the declaratory judgment action, and was ultimately successful, it was appropriate to award the insured's attorneys' fees incurred in defending the declaratory judgment action, and such an award was justified by the insurance policy's contractual duty to defend

language. *Id.* at 550, 243 S.E.2d at 444.

Since *Hegler*, courts have allowed the award of attorneys' fees only when an insured successfully litigates the issue of the insurer's defense obligation. *See, First Fin. Ins. Co. v. Sea Island Sport Fishing, Soc'y, Inc.*, 327 S.C. 12, 15-17, 490 S.E.2d 257, 258-59 (1997) (the insurer had a duty to defend the insured and award of attorneys' fees was appropriate); *Gordon-Gallup Realtors v. Cincinnati Ins. Co.*, 274 S.C. 468, 472, 265 S.E.2d 38, 40 (1980) (affirming award of attorneys' fees where insurer unreasonably refused to defend the underlying lawsuit); *State Auto Prop. & Cas. Ins. Co. v. Raynolds*, 350 S.C. 108, 564 S.E.2d 677 (Ct. App. 2002) (insureds were entitled to attorneys' fees in successfully litigating the insurer's duty to defend underlying lawsuit). *See also, Crossmann Cmtys. v. Harleysville Mut. Ins. Co.*, 2013 U.S. Dist. LEXIS 138941, *86 (D.S.C. 2013) ("Under well-settled South Carolina law, Beazer is entitled to recover its attorneys' fees and related costs incurred in this action because those attorneys' fees and related costs were incurred to force Harleysville to honor its duty to defend.").

Here, however, Covil never sought a determination regarding Penn National's obligation to defend the Asbestos Lawsuits. Nor should it have. The undisputed evidence was that Penn National defended each of the Asbestos Lawsuits, has paid defense counsel chosen by Covil to defend these lawsuits, and has paid defense costs on an equal basis with other insurers who agreed to defend the Lawsuits. (Wright testimony (11/27/2023 AM session), pp. 116-18; Protopapas testimony (11/27/2023 AM session), pp. 171-75). Because Covil did not seek any such determinations, the trial court did not make any findings specific to Penn National's defense obligations regarding the Asbestos Lawsuits in its "Ordering Paragraphs." (3-1-2024 Final Order, pp. 99-100).

Because the parties did not litigate Penn National's defense obligation in the present case,

the limited exception recognized in *Hegler* does not support an award of attorneys' fees. Instead, the general rule applies and Covil is not entitled to its fees and costs in this case. *See, Jackson,* 326 S.C. at 307, 486 S.E.2d at 759. The order awarding such fees and costs to Covil should be reversed.[13]

Furthermore, after the Final Order was entered awarding Covil its attorneys' fees and costs, Covil filed its "Report on Attorneys' Fees and Costs" on March 29, 2024. In support of its "Report," Covil filed affidavits with charts showing the work performed on this case. However, the charts were heavily redacted and all information regarding hourly rates, work actually performed, and amount billed for such work were removed. (3-29-2024 Receiver's Report on Attorneys' Fees & Costs). Therefore, Penn National could not analyze whether the work actually performed and the time devoted to each task were reasonable and whether any tasks were unnecessarily duplicative or redundant. Also, Penn National could not determine whether the hourly rates charged are customary legal fees for similar services. Finally, to the extent that Covil now argues that it sought declarations regarding Penn National's duty to defend in this case, which it did not, Penn National cannot determine how much of the fees were dedicated to the defense obligation issue. Without such information, Penn National cannot determine whether the attorneys' fees and costs requested and now awarded in this case are reasonable.[14] *See, Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). *See also, First Fed.*, 317 S.C. at 144, 451 S.E.2d at 923 (reversing award of attorneys' fees awarded for work on other

[13] The trial court justified the imposition of $2,763,201.47 in attorneys' fees and costs based on Covil's status as the prevailing party in a declaratory judgment action against its insured as well as sanctions for spoliation. Penn National has addressed more fully above the reasons that this Court should overturn the spoliation award, including the imposition of attorneys' fees and costs on that basis.

[14] Penn National was unable to respond to Covil's Report as the trial court immediately entered the Order Approving Covil Corporation's Report on Attorneys' Fees and Costs on April 4, 2024, four business days after Covil filed its "Report."

actions not associated with establishing coverage and corresponding defense obligation). To the extent that this Court affirms the award of attorneys' fees in this case, Penn National respectfully requests that this issue be remanded for a determination of whether Covil's attorneys' fees and costs were reasonable.

CONCLUSION

The orders on appeal make it clear that the trial court universally accepted Covil's wholly unfounded demands in this case. In the absence of any evidence at all and despite all evidence to the contrary, Covil embarked on a mission to show that Penn National actually issued more insurance policies to Covil than the two policies identified. As a result, the trial court entered a heretofore unprecedented order mandating that Penn National comprehensively alter the way it stored its repository of historical policy-related and underwriting documents, denied Penn National a right to a jury trial to determine factual disputes – including issues regarding whether Penn National spoliated evidence of any additional insurance policies – and ultimately declared that Penn National did issue one more policy to Covil than had previously been admitted. When Penn National complied with the trial court's order and digitized its historical policy-related documents, it was conclusively shown that no additional general liability policies were actually issued by Penn National to Covil, a result that was entirely consistent with all of the evidence in this case, evidence that the trial court refused to consider prior to entering its orders.

The trial court also found that all cases filed or to be filed against Covil for asbestos liability resulting from exposure to Covil's operations at any time before or during the Penn National Policy periods are covered up to the per occurrence limit with no cap on Penn National's liability. These orders cannot stand, because they are contrary not only to the undisputed facts in this case and plain policy language, but also to well-established precedent

from this and the Supreme Court.

Penn National respectfully requests that this Court vacate all orders and dismiss this case because, from its very inception, this case did not present a justiciable controversy and only requested an advisory opinion. If this Court should find that the court has jurisdiction to enter an advisory opinion in this case, then Penn National respectfully requests that this Court vacate the determinations made by the trial court and find that the undisputed evidence shows: (1) the Penn National Policies only provide coverage for asbestos bodily injury claims that occurred as a result of a claimant's exposure to Covil's ongoing operations during the Penn National policy periods; (2) if the Penn National Policies provide coverage, than any covered damages be allocated to Penn National based on its pro-rata time-on-risk; and (3) each Penn National Policy has total limits for all bodily injury claims caused by exposure to asbestos of $1 million.

If this Court finds that this case is not an improper suit seeking an advisory opinion, then Penn National further requests that this Court declare that Penn National is entitled to a jury trial of all disputed factual evidence, including: (1) whether Penn National issued any additional general liability policies under which Covil was insured and the terms and conditions of any such policies; (2) whether the facts of each underlying Asbestos Lawsuit fall within the coverage provided by the Penn National Policies; and (3) whether Penn National destroyed evidence with a culpable state of mind.

Finally, Penn National respectfully requests that this Court prohibit Covil from accessing Penn National's digitized repository of historic policies, vacate the award of attorneys' fees granted as a discovery sanction, and vacate the additional award of attorneys' fees for Covil's prosecution of this case.

Respectfully submitted,

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