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SC Court of Appeals

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.

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STATEMENT OF ISSUES

- I. The trial court made certain conclusions of law regarding Penn National's coverage obligations that correctly interpret Penn National's unambiguous Policy language and correctly apply South Carolina law. While Penn National attempts to muddy the waters with certain purported factual disputes, the issues with respect to these coverage decisions are:
 - a. Did the trial court properly resolve a justiciable controversy where the parties clearly dispute Penn National's coverage obligations relating to over a dozen actual asbestos litigations and going forward?
 - b. Did the trial court properly interpret the unambiguous language of Penn National's policies as a matter of law, and thus no jury trial was warranted?
 - c. Did the trial court correctly apply the continuous trigger theory of coverage to Penn National's policies, including because Penn National waived it at trial?
 - d. Did the trial court properly reject Penn National's invocation of the "completed operations hazard" exclusion?
 - e. Did the trial court properly hold that coverage should be allocated on an "all sums" basis based on the plain terms of Penn National's policies?
 - f. Did the trial court properly hold that Penn National's indemnity payments for operations hazard claims are not subject to the aggregate limit for "completed operations" and "completed operations hazard" claims, as defined in the Penn National policies?
 - g. Did the trial court properly interpret the plain terms of Penn National's 1986-1987 "renewal" policy to hold that it also issued Covil a 1985-1986 policy?
- II. The trial court also made certain discovery holdings and issued sanctions orders based on Penn National's discovery misconduct. All are entitled to abuse of discretion review. The discovery-related issues are:
 - a. Did the trial court properly hold that Penn National was not entitled to a jury to decide the evidentiary issue of spoliation of evidence?
 - b. Did the trial court properly exercise its discretion in finding that Penn National spoliated evidence with the requisite state of mind?
 - c. Did the trial court properly exercise its discretion in ordering Penn National to digitize its insurance records as a sanction for its continued refusal to participate in discovery?
 - d. Did the trial court properly exercise its discretion to award Covil attorneys' fees?

STATEMENT OF THE CASE

The circuit court appointed Peter D. Protopapas (the “Receiver”) as the Receiver for Covil Corporation (“Covil”) on November 2, 2018, and it tasked the Receiver with “the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil’s insurance carriers.”¹ The Receiver filed this action against Covil’s insurer, Pennsylvania National Mutual Insurance Company (“Penn National”), on April 27, 2020, seeking declarations as to the interpretation and meaning of insurance policies Penn National issued to Covil related to underlying asbestos claims.²

Throughout the course of the litigation, Penn National’s recalcitrance to meet its discovery obligations has been well documented.³ Penn National forced the Receiver to file numerous motions to compel and the circuit court to issue multiple discovery and sanction orders for Penn National to comply with its basic discovery obligations.⁴

Two distinct matters were presented in the final proceedings before the circuit court: (1) the non-jury trial to interpret the unambiguous policy language contained in the Penn National insurance policies issued to Covil and to apply that unambiguous policy language to undisputed facts regarding underlying asbestos claims; and (2) an evidentiary hearing on spoliation. The proceedings commenced on November 27, 2023 and concluded on November 28, 2023. The parties made post-trial submissions on January 12, 2023.

The circuit court issued a 102-page Final Order on Findings of Fact and Conclusions of Law (the “Final Order”) on March 1, 2024, holding that (1) “the Receiver is entitled to judgment

¹ See Order Appointing a Receiver for Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Ct. Comm. Pl. Nov. 2, 2018).

² See Compl.

³ Covil Trial Ex. 121, Attorneys’ Fee Sanction Order against Penn National, at 1–7.

⁴ *Id.* at 4; see generally Covil Trial Ex. 71, May 5, 2022 Discovery Order.

on his declaratory relief claims,” (2) that “[t]he evidence in the record also demonstrates that Penn National has, deliberately or with gross negligence, destroyed historic comprehensive general liability insurance policies, and a spoliation order is justified,” and (3) that “the Receiver is entitled to his reasonable attorneys’ fees and costs.”⁵

A. Covil Corporation’s Business and the Covil Asbestos Suits

1. Covil was a Greenville, South Carolina–based insulation contractor between 1948 and 1991.

In 1948, Palmer Covil opened a small insulation contracting business in Greenville, South Carolina.⁶ The company was incorporated in 1954.⁷ Over the next thirty years, Covil grew to become a major regional insulation contractor, installing or removing asbestos-containing insulation in a variety of heavy industrial facilities across South Carolina.⁸ In 1991, Covil was administratively dissolved.⁹

2. Covil was placed into receivership in November 2018.

When Covil failed to respond to two asbestos personal injury claims in South Carolina state court in November 2018, defaults were entered in both cases. *See* Order Granting Default Judgment against Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Ct. Comm. Pl. Nov. 2, 2018); Order Granting Default Judgment against Covil

⁵ Final Order on Findings of Fact and Conclusions of Law, dated Mar. 1, 2024, at 1–2.

⁶ *See* Covil Trial Ex. 79, Deposition of Palmer Covil in *Evelyn White v. Combustion Engineering Company, Inc., et al.*, Nos. 77-1369, 77-1384 (D.S.C.), Volume 1, at 9:10–13; *see also* Volume 1 at 86:21–87:4.

⁷ *See* Covil Trial Ex. 80, Certificate of Incorporation.

⁸ *See* Covil Trial Ex. 81 at COV_005788 (Covil promotional material, noting “Founded in 1947, we have for 32 years furnished the Southeast with insulation products from companies that set industry standards. As contractors our workmanship has proved to be of such high quality that we too, are setting standards throughout the Southeast.”); *id.* at COV_005785 (Resume of Work Performed by Covil Corporation); *id.* at COV_005787 (Resume of Work Performed by Covil Corporation).

⁹ Covil Trial Ex. 101, Certificate of Administrative Dissolution.

Corporation, *Hill v. Advance Auto Parts*, C.A. No. 2018-CP-4004680 (S.C. Ct. Comm. Pl. Nov. 2, 2018). In addition to requesting entry of defaults in both cases, plaintiffs moved to appoint a receiver over Covil Corporation. *See* Order Appointing a Receiver for Covil Corporation, *Taylor v. Air & Liquid Sys. Corp.*, C.A. No. 2018-CP-40-04940 (S.C. Ct. Comm. Pl. Nov. 2, 2018). On November 2, 2018, the circuit court appointed Peter Protopapas as the Receiver of Covil Corporation to administer Covil’s insurance assets and claims related to actions or failures of Covil’s insurance carriers. *See id.*

3. Covil continues to be sued in asbestos personal injury litigation.

Since the Receiver’s appointment, Covil has continued to be sued for asbestos claims arising out of Covil’s historic operations, among other allegations, throughout the southeastern United States (“Covil Asbestos Suits”)—including fourteen Covil Asbestos Cases for which Penn National participated in settlement.¹⁰ Mr. Protopapas has properly administered the insurance assets of Covil to resolve legitimate Covil Asbestos Suits as authorized by the court.¹¹

B. Penn National’s Insurance Policies and the Covil Asbestos Suits

1. Covil purchased insurance policies from Penn National.

During the company’s existence, Covil purchased a range of different insurance policies and policy renewals from Penn National, including but not limited to multiple years of comprehensive general liability, auto, and inland marine coverages.¹² For example, Penn National

¹⁰ Covil Trial Exs. 15–28.

¹¹ As the circuit court stated to Penn National at trial, “The luckiest day you ever had was when someone like Peter Protopapas got involved for your insured. Because there’s a guy who’s not trying to [gouge] you at all. He’s trying to talk fairly as a defendant and as a receiver for a defendant about what makes sense and whether claims have validity and so forth and so on.” Trial Tr., Day 1 Morning Session, at 31:2–9. Penn National agreed, stating: “The record is Mr. Protopapas has done an outstanding job in retaining and defending claims and resolving claims. There’s no dispute about that.” *Id.* at 31:10–14.

¹² *See, e.g.*, Covil Trial Exs. 1, 2, 4, and 5.

admits in this lawsuit that it issued general liability coverage to Covil through Policy Number 515-50-28-53-7 for the period March 31, 1986 to March 31, 1987 (hereinafter “1986–1987 Policy”) and Policy Number 515-50-28-53-8 for the period March 31, 1987 to March 31, 1988 (hereinafter “1987–1988 Policy”) (collectively, the “Penn National Policies”),¹³ and produced what it characterized as “true and accurate” copies of those specific policies.¹⁴ The 1987–1988 Policy is a “renewal” policy, as is the 1986–1987 Policy, (App. Br. 47), meaning there must have been at least one previous general liability policy in 1985–1986, (Final Order at 86–87).

2. The Penn National Policies contain clear and unambiguous policy language.

In the “Insuring Agreement” of the comprehensive general liability insurance coverage portion of the Penn National Policies, Penn National promises:

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

¹³ Penn National Trial Ex. 2, Penn National’s Answer to Complaint, ¶ 8. Penn National failed to produce “true and accurate” copies of any other comprehensive general liability coverage issued to, or otherwise protective of, Covil as a named insured or additional/supplemental insured. As explained in the Final Order, the circuit court also found that Penn National issued a comprehensive general liability policy to Covil for the policy period of March 31, 1985 to March 31, 1986. *See* Covil Trial Ex. 1, at 29 (Change Endorsement establishes 1986–1987 Policy is a renewal policy).

¹⁴ Covil Trial Exs. 1–3. Penn National also issued auto coverage to Covil through Policy Number 130 03 87 00-6 for the period March 31, 1985 to March 31, 1986, Policy Number 130 03 87 00-7 for the period March 31, 1986 to March 31, 1987, and Policy Number 130 03 87 00-8 for the period March 31, 1987 to March 31, 1988 (hereinafter the “Auto Policies”). Covil Trial Ex. 5. Further, Penn National issued inland marine coverage to Covil through Policy Number 900 0521 40-6 for the period March 31, 1985 to March 31, 1986, Policy Number 900 0521 40-7 for the period March 31, 1986 to March 31, 1987, and Policy Number 900 0521 40-8 for the period March 31, 1987 to March 31, 1988 (hereinafter the “Inland Marine Policies”). Covil Trial Ex. 4.

on [account] of such **bodily injury** or **property damage**, even if any of the allegations of [the] 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.¹⁵

The "Limits of Liability" section of the Penn National Policies addresses "Coverage A," which applies to bodily injury—it provides:

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."¹⁶

The "Limits of Liability" further provide:

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**.¹⁷

The applicable "Definitions" section of the Penn National Policies contains these definitions:

- "**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;¹⁸
- "**completed operations hazard**" includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at

¹⁵ Covil Trial Ex. 1, 1986–1987 Policy, at Penn National Policies 000002; Covil Trial Ex. 2, 1987–1988 Policy, at Penn National Policies 000045.

¹⁶ Covil Trial Ex. 1, 1986–1987 Policy, at Penn National Policies 000004; Covil Trial Ex. 2, 1987–1988 Policy, at Penn National Policies 000047.

¹⁷ *Id.*

¹⁸ Covil Trial Ex. 1, 1986–1987 Policy, at Penn National Policies 000036; Covil Trial Ex. 2, 1987–1988 Policy, at Penn National Policies 000081.

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 a 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;¹⁹

- “**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;²⁰ and
- “**products hazard**” includes bodily injury . . . arising out of the named insured’s products . . . , but only if the bodily injury . . . occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others.²¹

There is no definition of the term “aggregate” in the “Definitions” section of the Penn National Policies.²²

Penn National’s proffered insurance expert, Mr. Bernd Heinze, testified that the 1986–1987 Policy and the 1987–1988 Policy are unambiguous.²³

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Trial Tr., Day 2 Morning Session, at 52–53.

3. Penn National contributed to settlements to resolve covered Covil Asbestos Suits.

Penn National has paid more than \$600,000 to participate in the settlement of fourteen covered asbestos bodily injury claims against Covil covered by the Penn National Policies.²⁴

Considering the underlying defense file with regard to each of the fourteen Covil Asbestos Suits in which Penn National participated in settlement, Covil's expert witness, nationally-recognized asbestos trial lawyer Sharla Frost, evaluated each suit to explain the potential verdict risk the cases presented from the perspective of the asbestos-related disease/medical diagnosis with which the plaintiff presented, the job/job duties of each particular plaintiff, the work site(s) where each particular plaintiff performed work during his working life, the time period(s) when the plaintiff worked at each such work site, and the overlap in terms of those time periods with periods when Covil employees performed work operations at the same work site.²⁵

As detailed in Ms. Frost's undisputed testimony, the following asbestos suit settlements for which Penn National participated under its insurance policies—*Ashworth, Campbell, D'Amico, Garren, Jolly, Jonas, Knight, Morgan, Sims, Aspray, Wannamaker, and Moss*—alleged that Covil performed contracting work at the respective plaintiff's worksites at the same time that the plaintiff was working at those jobsites, and that Covil's contracting work allegedly caused the plaintiff to be exposed to asbestos.²⁶ As Ms. Frost explained, these cases presented high verdict risks, and therefore were appropriate for resolution before trial, because the:

worker is working at that same site while the Covil operations are still in progress. When a worker is directly involved in the installation, removal, replacement, repair, or maintenance of asbestos containing thermal insulation there is, of course, a significant risk of exposure to asbestos. Likewise a worker whose job function is nearby on the jobsite where such insulation installation, removal, replacement,

²⁴ See Covil Trial Ex. 14, Letter from B. Wright to P. Protopapas dated September 1, 2022.

²⁵ See Covil Trial Ex. 103, S. Frost Declaration, at 6–23.

²⁶ *Id.*

repair, or maintenance work is taking place, faces a significant risk of a high dose exposure because of the release of asbestos fibers into the air as a result of the insulation work being performed by the insulation contractor's—in this case, Covil's—employees, even if his personal job duties do not require him to manipulate the asbestos containing materials himself.²⁷

C. Penn National Failed to Maintain Covil's Historic Insurance Policies and Policy-Related Documents.

1. Penn National's duty to preserve its historic insurance policies was independently triggered in 2018, 2019, 2020, and 2021.

Penn National was on notice in May 2018 that it should preserve its historic Covil insurance policies from automatic destruction or deletion when asbestos claimants in *Ann Finch v. Covil Corporation*, 1:16-cv-1077 (M.D.N.C.), served Penn National with a subpoena requesting “all liability insurance policies and endorsements issued to Covil between 1969 and 1995.”²⁸ At that time, Covil faced significant potential liability in the *Finch* asbestos personal injury case, which ultimately resulted in a \$32 million verdict against Covil.²⁹ Although Penn National was not involved in the *Finch* defense, the underlying asbestos personal injury plaintiff's counsel, Dean Omar Branham & Shirley, LLP, served the subpoena on Penn National seeking policies for two known policy years (1986–87 and 1987–88) and documents related to any other policies protective of Covil. Penn National responded on June 15, 2018, but only searched for Covil policies by the exact policy numbers provided to it.³⁰ Penn National did not perform a search for any other policies potentially covering Covil for any other years despite the clear subpoena request. Additionally, Penn National did not institute any form of internal litigation hold for Covil policies at this time.

Then, in October 2019, Penn National was named as a defendant in the Covil coverage

²⁷ *Id.* at 4.

²⁸ Covil Trial Ex. 12, Finch Subpoena to Penn National, at 5.

²⁹ See Covil Trial Ex. 71, May 5, 2022 Order, at 3.

³⁰ Covil Trial Ex. 13, Penn National Subpoena Response, dated June 15, 2018.

litigation in the Middle District of North Carolina.³¹ Specific and identifiable litigation was filed against the company and all evidence of Penn National’s historic insurance policies covering Covil as a named or additional/supplemental insured should have been preserved. Specifically, the Receiver served discovery on Penn National, demanding that it identify “all insurance policies [Penn National] issued to Covil or which otherwise include Covil as an insured.”³² Penn National responded, clearly understanding the Receiver’s request to include “*policies under which Covil is named as an additional insured or qualifies as an additional insured.*”³³ Therefore, no later than October 2019, Penn National was on notice that the Receiver sought documents and information about named insured *and* additional insured coverage for Covil in ongoing litigation.

At the same time, the Receiver requested that Penn National “describe [its] document retention policies, oral or written, that relate to insurance policies, underwriting information related to such policies, and/or form language used in such policies issued by [Penn National] during the 1950-1986 time period.”³⁴ Penn National did not produce or describe those policies, nor did it assert that they were confidential or proprietary.³⁵ And, once again, Penn National failed to issue any form of internal litigation hold at this time to prevent the destruction of any Covil-related documents.

In February 2020, the Receiver filed suit against Penn National in the South Carolina circuit

³¹ On October 2, 2019, another of Covil’s historical insurers, Hartford, named Penn National as a third-party defendant in the first Covil insurance coverage action, filed in the Middle District of North Carolina. *See Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-cv-932 (M.D.N.C. Oct. 2, 2019), ECF 104. On November 20, 2019, Covil amended its Answer to include a third-party action against Penn National. *See id.*, ECF 131 at ¶¶ 118, 169, 174–176. Penn National moved to dismiss Covil’s third-party complaint, but the motion was denied on February 24, 2020. *See id.*, ECF 227.

³² Covil Trial Ex. 42, Dec. 18, 2019 Penn National Discovery Responses, at Interrogatory No. 1.

³³ *Id.*

³⁴ *Id.* at Interrogatory No. 9.

³⁵ *Id.*

court.³⁶ The Receiver again served Penn National with discovery requesting any policy issued by Penn National that included Covil as an insured.³⁷ The Receiver also requested Penn National’s document retention policies from 1950 through 2018.³⁸ Penn National repeated its responses from the North Carolina case,³⁹ and again it did not institute a litigation hold in response to this litigation.

In April 2020, the Receiver filed this case against Penn National. In his Complaint, the Receiver made clear that he was seeking “an order requiring that Penn National . . . provide to plaintiff complete and authentic copies of any general liability and excess liability insurance policies it issued to Covil together with all other documents and things relating to these policies, including (but not limited to) certificates of insurance, underwriting manuals and documents, and claims files.”⁴⁰ Subsequent discovery revealed that Penn National had not conducted a reasonably diligent search of its records for policies covering Covil as a named insured or an additional insured. The Receiver continued to serve requests for coverage, and Penn National continued to stonewall.⁴¹ Once again, Penn National did not institute a litigation hold in response to this litigation.

2. Penn National destroyed historic occurrence-based general liability insurance policies and policy-related documents as part of its annual document purges in 2018, 2019, 2020, and 2021 without issuing a litigation hold related to the Covil litigation.

On a November 19, 2021 call with the Receiver’s counsel and Ellis & Winters (Covil’s insurer-appointed asbestos defense counsel), Penn National disclosed for the first time that it

³⁶ *Covil Corp. v. Pa. Nat’l Mut. Cas. Ins. Co.*, C.A. No. 2020-CP-40-01226 (S.C. Ct. Comm. Pl. Feb. 28, 2020).

³⁷ Covil Trial Ex. 52, May 15, 2020 Penn National Discovery Responses, at RFP No. 2.

³⁸ *Id.* at RFP No. 11.

³⁹ *See id.* at RFP Nos. 2 and 11.

⁴⁰ Penn National Trial Ex. 1, Covil Complaint, at 11 ¶ B.

⁴¹ Covil Trial Ex. 57, May 10, 2021 Penn National Responses to Receiver’s Interrogatories, at Interrogatory No. 1.

conducts an annual purge of archived general liability insurance policies as they age out of its retention period without any litigation hold in place related to the Covil litigation. This disclosure was confirmed a month later in Penn National’s written discovery responses.⁴² Based on Penn National’s admission, it is clear that Penn National conducted annual document purges near the end of 2018, 2019, and 2020, all of which were performed *after* it was on notice—by May 2018 with the *Finch* subpoena—of the need to preserve documents that potentially identify insurance coverage for Covil.⁴³

Penn National has admitted the following:

- It identified policy-related documents by policy number that were beyond the scope of its retention timeframe for possible disposal in 2018, 2019, 2020, and 2021.⁴⁴
- It disposed of policy-related documents pursuant to its standard record purge policy and practice in 2018, 2019, and 2020.⁴⁵
- It disposed of liability insurance policies in 2018, 2019, and 2020.⁴⁶
- It did not issue a litigation hold for any Covil litigation until December 2021.⁴⁷
- It did not review the policy-related documents for references to Covil before it disposed of the purged documents pursuant to its standard record purge policy and practice in 2018, 2019, and 2020.⁴⁸

⁴² Covil Trial Ex. 64, Dec. 20, 2021 Penn National Responses to Receiver’s Second Requests for Production, at RFP No. 1 (“Penn National has not issued any formal litigation hold notice at this time. . . . Pursuant to [Penn National’s] retention policy, certain policy-related documents may be identified for purging throughout the course of the year.”). Penn National finally issued a litigation hold on December 17, 2021. *See* Covil Trial Ex. 10, Dec. 17, 2021 email litigation hold from S. Maier to B. Reifsnyder.

⁴³ *See* Covil Trial Ex. 84, B. Reifsnyder Dep. Transcript, dated Nov. 11, 2022, at 41:23–42:8, 53:14–22.

⁴⁴ *See, e.g.*, Covil Trial Ex. 68, Feb. 17, 2022 Penn National Responses to Requests for Admission, at Request for Admission No. 2.

⁴⁵ *See id.* at RFA Nos. 3, 5, 7.

⁴⁶ *See id.* at RFA Nos. 4, 6, 8.

⁴⁷ *See id.* at RFA Nos. 21.

⁴⁸ *See id.* at RFA Nos. 11, 13, 15.

- It did not review the liability insurance policies for any reference to Covil before it disposed of them in 2018, 2019, and 2020.⁴⁹
- It cannot identify each and every named insured, additional insured, or supplemental insured listed in the paper and microfiche-policy-related documents it destroyed, purged, or otherwise disposed of since 2018.⁵⁰

Out of concern that the December 17, 2021 litigation hold was insufficient, Covil filed a Motion for Protection, requesting that the trial court order Penn National to preserve all its historic insurance policy documents. On February 11, 2022, the circuit court entered an order requiring Penn National to:

preserve all historic insurance policies and policy-related information unless and until this Court orders otherwise. This order includes not only historic insurance policies, but also policy-related information existing in electronic form, hard copy, handwritten notes, or any other format. As examples only, this order includes insurance policies, certificates of insurance, underwriting files, claims files, and any other documentation, regardless of format, evidencing the terms and conditions of historic insurance coverage. Because some of this relevant material is likely stored in electronic forms, all auto-delete or other routine destruction policies for historic insurance policies and policy-related information must be suspended until further notice.⁵¹

The trial court found: “Penn National only put a litigation hold in place on December 17, 2021, in response to the Receiver’s legitimate concerns regarding document preservation. Moreover, the Court is not persuaded that the current litigation hold, that was recently distributed to a single Penn National employee, is sufficient to preserve all relevant documents.”⁵² The court’s concern over the efficacy of the litigation hold was well founded: not even Penn National was aware of its litigation hold procedure, and confusion remains as to who received a litigation hold from whom, and when. Scott Maier, an in-house lawyer for Penn National, testified that he issued the litigation hold to Brent Reifsnnyder, Penn National’s Director of Administrative Services, in

⁴⁹ See *id.* at RFA Nos. 12, 14, 16.

⁵⁰ See *id.* at RFA No. 23.

⁵¹ See Covil Trial Ex. 66, Order on Motion for Protection dated Feb. 11, 2022, at 3.

⁵² *Id.* at 2–3.

December 2021 pursuant to the Penn National Legal Department’s litigation hold policy.⁵³ At no time—not when he issued the December 2021 litigation hold to Mr. Reifsnyder and not when he was preparing to testify as a corporate representative—has Mr. Maier ever confirmed with the Claims Department whether it ever issued a litigation hold notice related to Covil documents.⁵⁴

3. Discovery revealed Penn National’s history of document destruction.

After the Receiver’s persistent discovery efforts and the circuit court’s order, it was revealed that (a) Penn National purposefully downgraded its ability to perform policy searches in 2010, despite knowing about potential claims from policyholders with long-tail liability in asbestos litigation; and (b) Penn National routinely purged its policy documents, including microfiche.

a. In 2010, Penn National downgraded its ability to search for insurance policies by policyholder name.

It is notable that Penn National’s corporate representative testified in a 1991 deposition that *it was possible* at that time to search its policy index by *policyholder name*.⁵⁵ In this case, however, Mr. Reifsnyder testified that the only way to search for historic policies is by *policy number* using the system he created in 2010.⁵⁶ In fact, Mr. Reifsnyder admitted that Penn National

⁵³ Covil Trial Ex. 10, Dec. 17, 2021 Litigation Hold Email.

⁵⁴ *Id.* at 56:15–57:1 (“Q. Did Mr. Parson confirm to you that a Litigation Hold Notice had been issued by the Claims Department in connection with any of the Covil litigation? A. He did not confirm a notice went out, no. Q. As the corporate representative for Penn National, can you tell me whether the Claims Department ever issued a litigation hold notice under its policies or procedures related to any of the Covil litigation as that term is defined in the 30(b)(6) notice? A. I cannot.”).

⁵⁵ *See* Covil Trial Ex. 83, E. Rice Dep., at 16:16–22 (“In order to find if there were policies issued to General Gasket, we went back and went through our indexing system by name as well as by the policy number that was – or the alleged policy number that was provided on the documents that you furnished.”); *see also* Covil Trial Ex. 99, November 30 2022 B. Wright Dep., at 57:4-58:8 (confirming that he had seen the deposition previously, and “Q. But you have no reason to believe that this was not his 30(b)(6) deposition testimony on behalf of Penn National; correct? A. The document is what it is, and I accept it at face value.”).

⁵⁶ *See* Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep., at 112: 10–17.

designed the 2010 electronic system of organizing its records by policy number only.⁵⁷ He designed the “2k10 System” to provide only three pieces of information about Penn National’s policies: (1) the policy number, (2) the date of policy cancellation or nonrenewal, and (3) the date the policy should be destroyed under Penn National’s 25-year document retention policy.⁵⁸ The retention policy does not provide details for *how* document destruction should take place.⁵⁹

Mr. Reifsnyder explained that in 2010, Penn National hired clerks to perform the task of inputting policy numbers into the computer system, and the company paid the clerks so little that they did not want the low-paid employees to perform a complex analysis that a policyholder name entry would require.⁶⁰ Mr. Reifsnyder described the policyholder name as “extraneous information.”⁶¹

b. Penn National purges policy documents on an annual basis, with no quality control mechanism in place.

Since the 2k10 System has been in place, on an annual basis, Mr. Reifsnyder prints out a list of all Penn National policies subject to destruction within the calendar year, which he places outside his office door.⁶² His team of five document clerks locates all copies of the policy

⁵⁷ Covil Trial Ex. 77, Aug. 3, 2021 B. Reifsnyder Dep., at 43:11–16.

⁵⁸ Covil Trial Ex. 84, November 10, 2022 B. Reifsnyder Dep., at 91:1–24.

⁵⁹ *Id.* at 68:5–12 (“Q. The process that you have described here today for identifying policies in a calendar year and destroying them in January of the next year, is that policy written anywhere? A. Not that I’m aware of. Our – our records retention policy offers that once they hit that destruction date, then they’re eligible to be purged.”).

⁶⁰ *Id.* at 92:24–93:25 (“Q. When you were going through this 2k10 database exercise and pulling the policyholder number, at that period, you could have pulled the policyholder name as well, correct? A. We could have, however – however, the people doing that job would have no idea to know whether that was the policyholder name without looking at each form. They were not underwriting people. They were clerks. No experience in underwriting, no experience in dealing with policies. They were just basic clerks. . . . It was a manual [] task. We assigned the appropriate level staff from a dollar perspective to that task.”).

⁶¹ *Id.* at 91:25–92:23.

⁶² *Id.* at 103:9–22.

documents, in both paper and microfiche form, writing “done” next to each policy number on the printed list as the policies are collected.⁶³ No copies of those lists are maintained.⁶⁴ In January of the calendar year after the documents are collected, the full set of policies to be destroyed, both in paper form and in microfiche form, are collected and sent to Iron Mountain, a third-party vendor, for destruction.⁶⁵

Penn National is unable to recreate or identify who the policyholders were for the policies that were destroyed in previous years.⁶⁶ As Mr. Reifsnyder explained: “I would have no idea out of all the records [of destroyed policies] who was Covil, who was not.”⁶⁷ Mr. Reifsnyder also acknowledged that the document destruction process is not without errors. He explained that one of the most problematic pieces of the destruction process is that sometimes *the microfiche stick together*, which means that a document clerk may pull more sheets of microfilm than should be destroyed.⁶⁸ No one performs an independent quality control or spot check of the documents to be

⁶³ *Id.* at 104:2–17 (“Q. Would they return that part of the list to you to QC or verify that they have done that section of the list? A. They would write done on it. That way we knew that that section . . . Done, D-O-N-E, on the sheet. As they worked through the sheet, they would check off each file so that they weren’t looking for something that they had already found. At the end of doing the list, they would just – we would know when they – the whole series was done because everything was marked off.”).

⁶⁴ *Id.* at 104:19–105:2 (“Q. And this was all done by hand? A. Yes, sir. Q. Do you have a copy of that list from 2018? A. No. Do you have the list from 2019? A. No. Do you have that list from 2020? A. Not that I’m aware of.”).

⁶⁵ *Id.* at 46:6–47:5; *see also id.* at 53:6–8 (explaining “what was purged for 2019 would have been pulled 2018, 2019 in preparation for their eventual purge early the following year”).

⁶⁶ *Id.* at 44:2–17.

⁶⁷ *Id.*; *see also id.* at 67:4–22 (“I understand what you’re saying. There’s nothing that’s additional to say we destroyed them.”).

⁶⁸ *Id.* at 78:6–9.

destroyed.⁶⁹ Further, there is no list of destroyed policies for anyone to review over the course of the project of pulling the policies.⁷⁰

4. Because of its own actions, Penn National can no longer locate all of its historic liability insurance policies and policy-related documents protective of Covil.

Penn National has asserted it is unable to locate any additional policies or policy-related documents indicating coverage protective of Covil, but Penn National has not produced “complete and authentic copies” of each of the Covil policies and policy renewals issued to Covil, including general liability policies that pre-date the 1986–1987 Policy.⁷¹

As Penn National admitted in its first set of discovery responses on December 18, 2019, and has consistently stated in discovery thereafter, it now has no reliable way to search its own records for this information:

Penn National does not maintain its records in a way that would provide a reasonable method of searching for policies under which Covil is named as an additional insured or qualifies as an additional insured. Thus, Penn National has no reasonable method of identifying all documents *that may be responsive* to this interrogatory.⁷²

D. Penn National repeatedly failed to meet its basic discovery obligations.

Penn National’s delayed revelation of its policy document purge is directly related to its failure to meet its basic obligations to fully respond to written discovery and to produce witnesses prepared to testify on key issues in this case. Penn National’s stonewalling required Covil to file

⁶⁹ *Id.* at 81:4–8 (“I do not look at a quality control at all. They pull the files. They prep them, meaning pull them out and – and date them, and we go to – they’re sorted and put in boxes. I do not go through the files.”).

⁷⁰ *Id.* at 77:25–78:5.

⁷¹ See Covil Trial Ex. 1, at 29 (Change Endorsement establishes 1986-1987 Policy is a *renewal*).

⁷² Covil Trial Ex. 50, Penn National’s Answers to Covil’s First Set of Interrogatories and Responses to Covil’s First Set of Requests for Admission, *Zurich Am. Ins. Co. v. Covil Corp. et al.*, No. 1:18-cv-000932 (Dec. 18, 2019 M.D.N.C.), at Interrogatory No. 1 (emphasis added).

six motions to compel between January 15, 2021 and April 11, 2022, and the trial court entered six separate orders over the course of two years to require the production of basic information related to Penn National's insurance coverage protective of Covil and Penn National's maintenance of historical policy documents.

1. Penn National refused to conduct an adequate search of its records for Covil policy documents when required to do so.

Penn National's prolonged discovery intransigence was based on the premise that it could not access any possible historic occurrence-based liability coverage from its archives for Covil (or for any other policyholder) unless provided with a policy number.⁷³ As more fully detailed below, this was despite the fact that Penn National itself, Covil, and later Covil's insurer-appointed asbestos defense lawyers, Ellis & Winters, acknowledged that it was possible to engage a vendor to scan the historical policy documents in Penn National's remaining collection of paper and microfiche records to create a more searchable set of information. A solution clearly existed, but Penn National consciously elected to waste the resources of the trial court and the Receiver in prolonged (and futile) discovery fights.

To compel Penn National to fulfil its discovery obligations, the circuit court was forced to issue the Order on Discovery Motions on May 5, 2022,⁷⁴ summarizing Penn National's misconduct related to its inadequate search of policy-related documents as follows:

This Court has now lost all confidence in Penn National's willingness and ability to independently participate in discovery. The Court finds that Penn National's conduct with respect to its searches for historic Covil insurance 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

⁷³ Covil Trial Ex. 71, May 5, 2022 Order, at 4.

⁷⁴ For the same reason, the circuit court also denied Penn National's motion to reconsider the May 5, 2022 Order on Discovery Motions. *See* Order, dated May 26, 2022.

that it could not search for historic policies on its microfiche cards without being provided a policy number. That position turns out not to be so. This Court is left with no choice but to allow the Receiver to examine the records.⁷⁵

The circuit court therefore ordered Penn National to (1) digitize certain microfiche records, (2) produce code keys for its policy prefixes, (3) produce all information disclosed to Ellis & Winters and used as a basis for identifying the policy numbers for the newly discovered Covil insurance policies, and (4) produce all underwriting documentation in its possession, custody, or control for various receiverships.⁷⁶

On May 31, 2022, Penn National filed a Notice of Appeal of the May 5 discovery order.⁷⁷ Oddly, Penn National also filed a Petition for Writ of Certiorari in the original jurisdiction of the South Carolina Supreme Court on June 6, 2022, seeking contemporaneous appellate review of the same order.⁷⁸ The Court of Appeals dismissed Penn National's appeal on August 9, 2022, finding the order was not immediately appealable.⁷⁹ The Supreme Court unanimously denied the Petition for Writ of Certiorari on August 23, 2022.⁸⁰ Penn National filed a Petition for Rehearing with the Court of Appeals on August 24, 2022, and the Court of Appeals denied the petition on November 15, 2022.⁸¹ Then, Penn National filed *another* Petition for Writ of Certiorari with the Supreme Court requesting appellate review of the May 5 discovery order, which was denied.⁸²

⁷⁵ *Id.* at 8.

⁷⁶ See Covil Trial Ex. 71, May 5, 2022 Order, at 9–10. The trial court denied Penn National's motion for reconsideration. Order, dated May 26, 2022.

⁷⁷ See Notice of Appeal, dated May 31, 2022.

⁷⁸ See Petition for Writ of Certiorari, Appellate Case No. 2022-000785, dated June 6, 2022.

⁷⁹ See Order, Appellate Case No. 2022-000761, dated Aug. 9, 2022.

⁸⁰ See Order, Appellate Case No. 2022-000785, dated Aug. 23, 2022.

⁸¹ Petition for Rehearing, Appellate Case No. 2022-000761, dated Aug. 24, 2022; Order, Appellate Case No. 2022-000761, dated Nov. 15, 2022.

⁸² See Petition for Writ of Certiorari, Appellate Case No. 2022-001764, dated Dec. 16, 2022; Order, Appellate Case No. 2022-001764, dated Jan. 12, 2023.

Subsequently, due to problems with the digitization and searchability of the scanned policy information, the Receiver and the circuit court were forced to spend additional efforts in ensuring Penn National's compliance with the May 5 discovery order.⁸³

2. Penn National's discovery misconduct extended beyond policy documents to nearly every aspect of the litigation.

a. Penn National produced a corporate representative who had no information regarding policy searches Penn National performed.

More than a year after first filing a case against Penn National, on January 7, 2021, Covil had its first opportunity to depose a Penn National corporate representative, Penn National's Senior Home Office Claims Examiner, Boyd Wright. In his deposition, Mr. Wright testified that he spent a few "minutes" in preparation for the deposition asking the Penn National clerical staff what they had done to perform a search for Covil policies—he could not specify the actual searches Penn National performed.⁸⁴ He also confirmed that the clerical employees did not search for—and Penn National does not maintain—an index of insurance policies that include information identifying "additional insureds" covered by Penn National policies.⁸⁵ Finally, Mr. Wright confirmed that he was "not aware that a search . . . through the entire company records occurred."⁸⁶

b. Next, Penn National failed to comply with a subpoena, despite explicit instructions from the circuit court.

In a hearing on January 25, 2021, related to the policy search deficiencies that Mr. Wright's deposition uncovered, the trial court ordered Covil to "develop a more complete list of job sites and possible agents that might have been involved in procuring this coverage from Penn National,"

⁸³ See Order, dated June 16, 2023; Order, dated Sept. 7, 2023.

⁸⁴ See Covil Trial Ex. 76, B. Wright Dep., dated Jan. 7, 2021, at 9:5–12, 43:14–44:18.

⁸⁵ *Id.* at 45:14–25.

⁸⁶ *Id.* at 67:4–6.

and “[gave] Penn National 15 days to respond to it.”⁸⁷ The trial court warned Penn National against asking Covil “for something that’s just as ridiculous as what you say they asked for from you. They are not going to know policyholder’s numbers, or policyholders.”⁸⁸

Fifteen days after the hearing, on February 8, 2021, Covil re-issued its subpoena to Penn National, this time listing relevant contractors and job sites as the circuit court requested.⁸⁹ Despite the circuit court’s warning against doing so, Penn National’s first reaction to the subpoena included requesting the Receiver to provide “a policy number for any policy that may relate to Covil or the Contractors listed.”⁹⁰ Penn National objected to the subpoena on many grounds over the course of two pages, including that the subpoena did not provide “any policy number.”⁹¹ Following its objections, Penn National asserted that it spent an “immense amount of time” conducting a search and exercised reasonable diligence in searching its files.”⁹² However, the actual substance of the subpoena response was limited to a single two-page e-mail chain in which Penn National had identified several policies issued to contractors from Covil’s list, but Penn National determined they were “not relevant to this action because such policies do not provide coverage to Covil Corporation.”⁹³

Given Penn National’s incomplete responses and improper objections to the Receiver’s subpoena, Covil filed a supplemental motion to compel on April 22, 2021, which the circuit court heard on June 25, 2021. Just two weeks before the hearing, Penn National produced three policies

⁸⁷ Covil Trial Ex. 100, Hearing Tr., at 141:14–24.

⁸⁸ *Id.* at 143:17–21.

⁸⁹ Covil Trial Ex. 53, Letter and Subpoena to Penn National, dated Feb. 8, 2021.

⁹⁰ Covil Trial Ex. 54, Letter from D. Harris to M. Shisko, dated Feb. 12, 2021.

⁹¹ Covil Trial Ex. 55, Penn National’s Subpoena Response, dated Feb. 22, 2021.

⁹² Covil Trial Ex. 56, Penn National’s Supplemental Subpoena Response, dated Mar. 9, 2021, at 5.

⁹³ *Id.* at 7.

protective of Covil in its discovery responses in another case.⁹⁴ In its July 1 order following the hearing, the circuit court found:

The Court is unconvinced that Penn National has used the information provided by the Receiver to fully search its records, particularly given the fact that Penn National claimed in its March 9, 2021 subpoena responses to have ‘performed the necessary due diligence’ and ‘exercised reasonable diligence in searching its files,’ *yet Penn National did not identify or produce the newly produced policies until June 11, 2021, in its supplemental discovery responses in a separate case.* The Receiver’s efforts to locate Penn National policies providing coverage to Covil has been a matter of protracted litigation for quite some time, and the Court is troubled that Penn National asserted it conducted a reasonable, thorough search in response to the Receiver’s subpoena in this matter but, three months later, uncovered and produced additional policies protective of Covil.

...

[T]he Court is not satisfied that Penn National has fully complied with its instructions at the January 25 hearing. Additionally, the Court is not satisfied that Penn National is only able to search its paper records by policy number. In any event, without more detailed information from Penn National, the Receiver and this Court are unable to evaluate Penn National’s efforts to search for coverage.⁹⁵

The trial court therefore ordered Penn National to “provide the Receiver with a detailed description of how Penn National maintains its paper records” by July 9, 2021, and to thoroughly search its paper records by July 23, 2021.⁹⁶

c. Penn National ignored another set of instructions from the court to perform a physical search of paper documents.

Penn National relied on Brent Reifsnyder to provide the court-ordered detailed description of how it maintains its paper records.⁹⁷ In his July 9 Affidavit, Mr. Reifsnyder explained that non-electronic archives were stored on microfilm and in paper form.⁹⁸ Reifsnyder attested, “Policy

⁹⁴ Covil Trial Ex. 62, Order granting Covil’s motions to compel, dated July 1, 2021 (*Finch and Covil v. USF&G*, No. 2019-CP-40-03003 (S.C. Ct. Comm. Pl.), at 4.

⁹⁵ *Id.* at 5–6 (emphasis added).

⁹⁶ *Id.* at 6.

⁹⁷ See Covil Trial Ex. 73., Aff. of B. Reifsnyder, dated July 9, 2021.

⁹⁸ *Id.* at ¶ 6.

documents that are stored on microfilm or paper are only searchable by policy number given that Penn National has historically organized such documents by using the terminal digit system” that marks each file with the last two digits of a policy number.⁹⁹

In a second Affidavit dated July 23—the date by which Penn National was to thoroughly search its paper records—Mr. Reifsnyder did not attest to having performed a thorough search.¹⁰⁰ Instead, he stated he “considered other alternative means of searching Penn National’s non-electronically-stored paper documents.”¹⁰¹ He asserted, “the only alternative means of searching such [non-electronic] documents is by way of a manual search of each of the policy documents contained on microfilm at Penn National and in paper form This would entail a manual search of all non-electronically stored paper policy documents for policies that Penn National may have issued to any of the 240 contractors and 650 facilities listed by the Receiver that may or may not identify Covil Corporation as an additional insured.”¹⁰²

When deposed regarding his Affidavits, Mr. Reifsnyder admitted the following:

- he spent *less than five minutes* trying to locate documents responsive to the circuit court’s order.¹⁰³
- he did not take any steps to search for policy-related documents based on the contractor or job site lists provided by Covil.¹⁰⁴
- he did not consult with anyone at Penn National or outside Penn National about how he might be able to search for documents other than by policy number.¹⁰⁵
- until preparing for his deposition, he had never reviewed the list of job sites the Receiver provided to Penn National to facilitate Penn National’s searches.¹⁰⁶

⁹⁹ *Id.* at ¶¶ 8, 16.

¹⁰⁰ *See* Covil Trial Ex. 74, Aff. of B. Reifsnyder, dated July 23, 2021.

¹⁰¹ *Id.* at ¶ 6.

¹⁰² *Id.* at ¶ 7.

¹⁰³ Covil Trial Ex. 77, August 3, 2021 B. Reifsnyder Dep., at 65:3–11.

¹⁰⁴ *Id.* at 49:20–50:1.

¹⁰⁵ *Id.* at 50:2–9.

¹⁰⁶ *Id.* at 47:10–24.

- Penn National itself designed the system of organizing its records by policy number.¹⁰⁷
- he only considered, but did not pursue, one alternative means of searching: “[S]omebody would need to coordinate having somebody physically pull up and look through every conceivable record from microfilm and paper storage.”¹⁰⁸
- he never consulted with anyone regarding how a manual search could be conducted, never determined how long such a search would take, never determined how many individuals it would take to conduct such a search, never discussed procuring additional staff or resources for a search, and never determined how much the search would cost, whether conducted internally or by an outside vendor.¹⁰⁹

Shortly thereafter, Covil deposed Penn National’s 30(b)(6) deponent, Boyd Wright, who was in charge of Penn National’s electronic document search. Like Mr. Reifsnyder’s complete refusal to search Penn National’s paper or microfiche files, Mr. Wright doubled down on Penn National’s assertion that “[y]ou’d have to have a policy number” to search electronically for an “additional insured” such as Covil.¹¹⁰ Without a policy number, Mr. Wright admitted that Penn National would “have to look in the policy documents to see if there was any supplemental insureds.”¹¹¹ But Mr. Wright testified that he did not even speak with Mr. Reifsnyder about the process or logistics for manually searching the paper archives for responsive documents.¹¹²

¹⁰⁷ *Id.* at 43:11–16.

¹⁰⁸ *Id.* at 50:20–51:3.

¹⁰⁹ *Id.* at 52:7–24, 55:23–56:5, 57:2–12, 59:8–13, 59:14–60:10, 62:17–63:3.

¹¹⁰ Covil Trial Ex. 78, August 26, 2021 B. Wright Dep., at 23:22–24.

¹¹¹ *Id.* at 23:22–24:1.

¹¹² *Id.* at 36:6–11. The circuit court noted that to the extent Penn National’s expert, Mr. Heinze, was presented in an effort to vouch for the propriety of Penn National’s document retention system or the adequacy of its policy search efforts related to Covil, his testimony was rejected. While Mr. Heinze made a visit to Penn National’s headquarters in November 2022 during which time he observed boxes containing microfiche and reviewed a few randomly selected microfiche slides, he acknowledged that he (i) never spoke with Mr. Reifsnyder or Mr. Wright about their search efforts, (ii) is unaware of who at Penn National was involved in any document searches related to Covil or how much time was spent conducting those searches, (iii) does not know what documents were reviewed during any such search, and (iv) is not aware of and never asked if any index exists linking policy numbers to insured name or policy issue date. Trial Tr., Day 2 Morning Session, at

d. The trial court ordered Penn National to permit Ellis & Winters to search Penn National’s policy documents—leading to the revelation of more discovery malfeasance.

Given this background, on November 5, 2021, the trial court entered an order requiring Penn National “to open its repository of insurance policies and to facilitate a review supervised and performed by Covil’s insurer-appointed defense counsel, Ellis & Winters, LLP.”¹¹³ The order required interim reports, with the first to be made on December 7, 2021.¹¹⁴ The trial court explained: “This Court has ordered Penn National to meaningfully participate in discovery on multiple occasions. Penn National claims that it cannot search its documents unless Covil provides the policy numbers where Covil was designated as an additional insured. Despite this Court’s orders, Penn National has yet to perform a manual search or to scan the documents so that they can be searched electronically.”¹¹⁵

3. Because of Penn National’s discovery misconduct, the court issued the order granting the Receiver’s Motion for Attorneys’ Fees and Costs on May 12, 2023.

At each turn in discovery, Penn National was required to pull back a small portion of the curtain, revealing just enough information about the existence of historical records and its document maintenance system to raise more questions to which it would not respond, and forcing Covil to return to the trial court with additional requests for discovery intervention.

The Receiver ultimately was forced to file six different motions to compel on this issue of search for policy-related documents. After each of the circuit court’s many discovery orders, Penn

43–49, 57–58.

¹¹³ Covil Trial Ex. 63, November 5, 2021 Order, at 1.

¹¹⁴ *Id.* at 2.

¹¹⁵ *Id.* at 1.

National and its representatives consistently failed to engage in a search for the policies in question.

As the circuit court properly observed:

It is clear that this is not a case of an insurance company lacking any records. Instead, it is a case in which the insurer decided to store voluminous records in such a way that it would be expensive to search them to locate a policyholder's insurance policies in any way other than by policy number, and now the insurer seeks to avoid evaluating its own records.¹¹⁶

Penn National also refused to produce its claim files related to fourteen asbestos claims and documents responsive to the Receiver's Fourth Request for Production. The Receiver was forced to file another motion to compel, which was granted on November 16, 2022.¹¹⁷

On May 12, 2023, the trial court granted the Receiver's motion for costs associated with the above-mentioned various unnecessary discovery, motions to compel, hearings, and appeals filed by Penn National in its many years spent trying to thwart the Receiver's court-appointed responsibilities in this matter.¹¹⁸ Penn National paid the ordered amount, and the Receiver filed a satisfaction of judgment.¹¹⁹

E. Penn National delayed the trial before the circuit court for a year by filing its motion to "confirm" a jury trial and subsequent appellate filings.

On September 6, 2022, the Receiver requested that the trial court schedule a non-jury trial on Covil's declaratory judgment issues against Penn National to take place in December 2022.¹²⁰ Penn National did not file *any* written response or objection to the Receiver's request for a non-jury trial on his claims for declaratory relief.

The trial court held a status conference on September 8, 2022.¹²¹ At the status conference,

¹¹⁶ Order, dated May 12, 2023, at 4–5.

¹¹⁷ Motion to Compel, dated Nov. 4, 2022; Order, dated Nov. 16, 2022.

¹¹⁸ Order, dated May 12, 2023.

¹¹⁹ July 20, 2023 Satisfaction of Judgment.

¹²⁰ See Receiver's Status Report, dated Sept. 6, 2022, at 5.

¹²¹ See Hr'g Tr., dated Sept. 8, 2022.

the Receiver reiterated its request that the trial court schedule a non-jury trial in December 2022.¹²² The trial court set the non-jury trial on December 12 or 14, 2022.¹²³ Penn National did not object to a non-jury trial at the status conference.¹²⁴ Its only request was for the Court to incorporate a mediation deadline in the forthcoming scheduling order.¹²⁵ The court agreed and then asked the parties if there were any further matters to raise.¹²⁶ Penn National was silent.¹²⁷

After the status conference, the trial court issued a scheduling order on September 16, 2022, setting the non-jury trial for December 12 or 14, 2022, and a pretrial hearing for November 18, 2022.¹²⁸ The scheduling order included deadlines for the parties to attend mediation and to file proposed findings of fact and conclusions of law, trial exhibits, witness lists, deposition designations, and motions in limine.¹²⁹ Penn National again did not raise any objections.

Penn National first raised concerns with the non-jury nature of the trial to the circuit court nearly two months after the scheduling order was issued, and just one month before the scheduled trial date, on November 7, 2022.¹³⁰ At the pre-trial hearing on November 14, 2022, the trial court reiterated that it scheduled a non-jury hearing to begin the week of December 12, 2022.¹³¹ Penn National requested “a jury trial *to the extent there are factual issues as to the spoliation component* for this case.”¹³² The circuit court indicated it was unsure, based on the record before it, what

¹²² See *id.* at 4, 10–11.

¹²³ See *id.* at 13.

¹²⁴ See *id.* at 13–16.

¹²⁵ See *id.* at 16.

¹²⁶ See *id.* at 16–17.

¹²⁷ See *id.* at 17.

¹²⁸ See Scheduling Order, dated Sept. 16, 2022. This pre-trial hearing was subsequently moved to November 14, 2022.

¹²⁹ See *id.*

¹³⁰ See Letter from B. Yntema to the circuit court, dated Nov. 7, 2022.

¹³¹ See Hr’g Tr., dated Nov. 14, 2022, at 92.

¹³² See *id.* at 104 (emphasis added).

factual issues Penn National believed entitled it to a jury trial and reiterated that the non-jury trial in the declaratory judgment action would start on December 12, 2022.¹³³

On December 2, 2022, only ten days before the non-jury trial would begin, Penn National filed a “Motion to Confirm Jury Trial Demand.”¹³⁴ Penn National asserted “the case must proceed on the jury trial roster at this time” and alleged its jury trial demand was proper given “the existence of factual questions in this case.”¹³⁵ The Receiver filed a Notice on December 6, 2022, reconfirming that he only sought declarations against Penn National related to the insurance policies.¹³⁶ The circuit court issued an order on December 7, 2022, reiterating that the non-jury trial was previously scheduled to begin on December 12, 2022, and would proceed on that date.¹³⁷ The court noted: “None of the matters” pending against Penn National “are triable to a jury.”¹³⁸

As the trial date loomed, just three business days before trial was set to begin, Penn National filed an appeal from the December 7, 2022 Order.¹³⁹ Subsequently, the trial court postponed the non-jury trial due to the appeal.¹⁴⁰ After the Court of Appeals dismissed Penn National’s interlocutory appeal upon the Receiver’s motion, Penn National filed a petition for rehearing, which was also denied.¹⁴¹ Penn National then filed a petition for a writ of certiorari on

¹³³ See *id.* at 106–07.

¹³⁴ See Penn National’s Motion to Confirm Jury Trial Demand, dated Dec. 2, 2022. Although the Motion was drafted on November 28, 2022, Penn National waited until December 2, 2022 to file it. See *id.* at 5.

¹³⁵ See *id.* at 4. Penn National again stated its mistaken belief that the “Complaint alleges claims for breach of contract and declaratory judgment against Penn National.” *Id.* at 3. As discussed above, this case only involves declaratory judgment actions against Penn National.

¹³⁶ Receiver’s Notice, dated Dec. 6, 2022.

¹³⁷ Order, dated Dec. 7, 2022.

¹³⁸ *Id.* at 1.

¹³⁹ See Penn National’s Notice of Appeal, dated Dec. 7, 2022.

¹⁴⁰ Letter from the circuit court to counsel, dated Dec. 8, 2022.

¹⁴¹ See Court of Appeals Order, dated Feb. 8, 2023; Penn National’s Petition for Rehearing and Suggestion for Rehearing, dated Feb. 23, 2023; Court of Appeals Order, dated June 6, 2023.

July 6, 2023, which was again denied.¹⁴²

F. The trial court's order.

The trial and evidentiary hearing proceedings eventually commenced on November 27, 2023 and concluded on November 28, 2023, almost a year later than the originally scheduled trial date.

As noted above, the trial court issued the Final Order on March 1, 2024, holding that (1) “the Receiver is entitled to judgment on his declaratory relief claims,” (2) “[t]he evidence in the record also demonstrates that Penn National has, deliberately or with gross negligence, destroyed historic comprehensive general liability insurance policies, and a spoliation order is justified,” and (3) “the Receiver is entitled to his reasonable attorneys’ fees and costs.”¹⁴³ This appeal followed.

¹⁴² See Penn National’s Petition for Writ of Certiorari, dated July 6, 2023; Supreme Court Order, dated Nov. 7, 2023.

¹⁴³ Final Order, at 1–2.

STANDARD OF REVIEW

This Court reviews the trial court's construction of the unambiguous insurance policies using "general rules of contract construction." *Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013). This construction involves a question of law. *See id.* ("Whether a contract is ambiguous is a question of law, and the interpretation of an unambiguous contract is a question of law."); *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009) ("When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law."). As a result, this construction is "reviewed de novo." *Bennett & Bennett*, 405 S.C. at 4, 747 S.E.2d at 427.

Here, the trial court's factual findings relevant to insurance coverage were based on undisputed facts about asbestos claims brought against Covil and, "in an action at law tried without a jury, the appellate court will not disturb the trial court's findings of fact unless there is no evidence to reasonably support them." *Auto Owners Ins.*, 385 S.C. at 191, 684 S.E.2d at 543.

This Court reviews the trial court's resolution of "discovery matters" and whether to impose "discovery sanctions" for an abuse of discretion. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011); *see Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) ("A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion."). Likewise, a trial court's "award of attorney fees . . . will not be disturbed on appeal absent an abuse of discretion." *Jenkins v. Jenkins*, 357 S.C. 354, 358, 592 S.E.2d 637, 639 (Ct. App. 2004).

ARGUMENT

I. This Court Should Affirm the Trial Court’s Coverage Determinations, Which Correctly Interpret Penn National’s Unambiguous Policy Language and Correctly Apply South Carolina Law.

A. Penn National’s threshold attacks on the trial court’s decision fail.

1. *The trial court resolved an actual, justiciable controversy and did not issue an advisory opinion.*

Penn National’s attacks on the trial court begin with a throw-away assertion (less than two pages long) that Chief Justice Toal’s final order is an “advisory opinion.” (App. Br. 22-23.) It clearly is not advisory, but instead resolved consequential, live disputes between the parties regarding the interpretation of unambiguous insurance policy language and their application to undisputed material facts related to underlying asbestos cases.

Pursuant to South Carolina’s Uniform Declaratory Judgment Act, “[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.” S.C. Code Ann. § 15-53-20.

Under the Declaratory Judgment Act, a party whose rights, status, or other legal relations are affected by a contract may seek a court’s determination of any question of construction or validity of the contract and obtain a declaration of the party’s rights, status, or other legal relations thereunder. The Declaratory Judgment Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships.

Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (citations omitted). “A justiciable controversy exists [for a declaratory judgment action] when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.” *Id.* (citation omitted). Under the Act, “an insurance contract may be construed either before or after a breach occurs” if there is “a real or actual controversy between

the litigants at the time of the institution of the DJ action.” *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595–96, 748 S.E.2d 781, 787 (2013) (citing H. A. Wood, Annotation, *Application of Declaratory Judgment Acts to Questions in Respect of Insurance Policies*, 142 A.L.R. 8, § 3(c) (1943 & Supp. 2012)).¹⁴⁴

That standard is plainly satisfied here. Through this litigation, Covil is seeking to enforce its rights and define Penn National’s duties under the insurance policies Penn National issued to it (“a definite assertion of legal rights”), and Penn National has “denied” Covil’s assertion by advancing a far more restrictive interpretation of the policies. *Graham*, 319 S.C. at 71, 459 S.E.2d at 845. Nothing more is needed.

But there is more. Penn National has defended several asbestos claims that have been brought against Covil already, and Penn National defended those lawsuits *under a reservation of rights*. See Final Order, at 97 (noting “Penn National did not deny that it defended the underlying cases under a reservation of rights”). Under South Carolina law, “[t]here is no material difference in the legal effect between an outright refusal to defend and in undertaking the defense under a reservation of rights until a declaratory judgment is prosecuted to resolve the question of coverage.” *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 550, 243 S.E.2d 443, 444 (1978). So, there is currently a dispute between the parties as to whether Penn National’s policy required coverage for those fourteen asbestos suits—setting aside any current or future suits.

Moreover, Penn National expressly denied coverage of a claim brought against Covil on behalf of Wayne E. Howe in part due to its interpretation of the “Completed Operations Hazard” and “Products Hazard” liability exclusion in its policies, which the trial court ultimately

¹⁴⁴ See also *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (“The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy.”).

determined was incorrect. *See* Covil Trial Ex. 37; Final Order, at 44–52. That denial likewise creates a justiciable controversy between the parties.

What is more, Penn National has participated in the settlement of more than a dozen asbestos claims against Covil again under a reservation of rights *and* under its own interpretation of its policy language—including arguing that those settlements apply to its aggregate limits going forward. *See* Covil Trial Ex. 14. Specifically, Penn National contends the settlement payments it made impaired the aggregate limit under the policies, which would cause Penn National to refuse to participate in similar future settlements once it believed the limit was reached. *See id.* Penn National is wrong. These settlement payments were made for operations claims, not “completed operations hazard” or “products hazard” claims, and therefore do not impair the aggregate limit.

As a result, there is a real, ongoing disagreement between the parties over how Penn National’s indemnity payments in connection with these settlements impact any limits of liability in the Penn National Policies, or which future claims Penn National may pay. Rather than litigate over this claim in every case going forward, the Declaratory Judgment Act provides ample authority to resolve the dispute now—and to hold that the aggregate liability limit does not apply to these specific types of asbestos-related cases. *See Final Order*, at 54.

Indeed, it is hard to image a declaratory judgment action with a more concrete, ongoing dispute between the parties. Covil and Penn National plainly disagree as to the correct interpretation of the Penn National Policies and the applicability of those policies to past, present, and future asbestos claims brought against Covil. And Penn National’s argument that there is no justiciable controversy because “Covil did not reference any underlying lawsuits in its Complaint” or “indicate that Penn National had denied its duty to defend or indemnify with regard to any underlying lawsuits” is specious. (App. Br. 22.) Penn National does not dispute that there have

been over a dozen underlying asbestos lawsuits against Covil and that there will be more, nor does it dispute that it has denied its duty to defend and indemnify by doing so only under a reservation of rights. *See, e.g., Graham*, 319 S.C. at 72, 459 S.E.2d at 846 (“Where, as here, the insurance carrier denies coverage, a declaratory judgment action is necessary to establish whether coverage, in fact, exists Accordingly, this renders the current controversy justiciable.”).

2. *Penn National’s jury trial argument (which is inherently flawed) does not even allegedly apply to the court’s legal interpretation of the policies.*

Penn National argues that it was entitled to a jury trial, but then concedes that it was *not* entitled to a jury to resolve legal issues—like the interpretation of unambiguous contract terms. (*See* App. Br. 25 (arguing only that it should have received “a jury trial on all factual issues”).) While that assertion is wrong in the context of this case, *see infra* Section II.A, it obviously does not apply to the trial court’s declarations regarding coverage under the unambiguous terms of Penn National’s policies.

South Carolina law is clear that the interpretation of an unambiguous contract is a question of law that does not warrant a jury trial, as is the question of whether a contract is ambiguous. *See Williams v. Gov’t Emps. Ins. Co.*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014) (“The construction of a clear and unambiguous contract is a question of law *for the court to determine*.” (emphasis added)); *id.* (“It is a question of law for the court whether the language of a contract is ambiguous.” (quoting *S.C. Dep’t of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302–03 (2001))); *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (stating the interpretation of an unambiguous contract, including an insurance policy, is a question of law for the court to determine). It is only when “the court decides the [contract] language is ambiguous . . . [that] the determination of the parties’ intent becomes a question of fact for the fact-finder.” *Id.* Here, the language in Penn National’s insurance policies

was unambiguous, and as a result, Penn National was not entitled to a jury trial. *See Thalia S. v. Progressive Select Ins. Co.*, 401 S.C. 395, 400, 736 S.E.2d 863, 865 (Ct. App. 2012) (“If the language of a contract is unambiguous and not subject to conflicting inferences, its construction is for the court, not the jury.” (citation omitted)).

Indeed, Penn National argued to the court below that its insurance policies were unambiguous. Penn Nat’l Nov. 21, 2023 Mem., at 6, 9, 10–11, 17.¹⁴⁵ And it moved for summary judgment, (*see* Penn Nat’l Nov. 17, 2023 Mot. for Summ. J, at 1), which is available only if “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRPC. The court’s interpretation of the policies was a matter of law—and indisputably did not require a jury.

B. The trial court’s coverage determinations should be affirmed.

“[T]he terms of an insurance policy must be construed most liberally in favor of the insured and where the words of the policy are ambiguous, or where they are capable of two reasonable interpretations[,] that construction will be adopted which is most favorable to the insured.” *Portrait Homes- S.C., LLC v. Pa. Nat’l Mut. Cas. Ins. Co.*, 442 S.C. 515, 588, 900 S.E.2d 245, 284–85 (Ct. App. 2023) (alterations in original) (quoting *Kingman v. Nationwide Mut. Ins. Co.*, 243 S.C. 405, 411, 134 S.E.2d 217, 220 (1964)). “[T]he provisions of an insurance policy are to be liberally construed in favor of the insured and strictly construed against the company which prepared the policy.” *Id.* at 588, 900 S.E.2d at 285 (alteration in original) (quoting *Whittington v. Ranger Ins. Co.*, 261 S.C. 582, 587, 201 S.E.2d 620, 622 (1973)).

Penn National’s attacks on Chief Justice Toal’s interpretation of its policies misrepresent the decision below and ignore key case law, including South Carolina Supreme Court decisions

¹⁴⁵ *See also* Trial Testimony, Day 2 at 52–53 (Penn National’s proffered insurance expert, Mr. Bernd Heinze, testifying at trial that the Penn National Policies are unambiguous).

interpreting the very language at issue here. The Order should be affirmed on each of its interpretations of Penn National's policies, which were based on the policies' plain language and controlling law.

1. *The trial court properly applied the continuous trigger theory of coverage to Penn National's policies protective of Covil.*

Remarkably, Penn National begins its attack on Chief Justice Toal's coverage determination by making an argument that it expressly disclaimed at trial. Penn National argues the policies it issued to Covil only provide liability coverage for bodily injury claims if the injured person's initial exposure to asbestos occurred during the Penn National policy periods. (App. Br. 27–36.) This is known as the “exposure theory” for trigger of coverage. The trial court properly rejected this argument and ruled that the “continuous trigger theory” applied based on the plain language of the policies.

Penn National's challenge should be rejected for the simple reason that its counsel *conceded during closing arguments at trial* that the continuous trigger theory applies. *See* Trial Tr., Day 2 Afternoon Session, at 45:14–18 (“We don’t for example, I don’t believe, have disagreement or at least not a significant disagreement about the continuous trigger issue, that is how policies are triggered. *I don’t think there’s any question about that under the law of South Carolina.*” (emphasis added)); *id.* at 56:13–18 (“So just to be clear, when I talk about allocation, and I think when the cases talk about allocation, what we’re talking about is you’ve got policies that have been triggered on a continuous trigger basis. You know, we don’t dispute that.”); *see also id.* at 60:17–21; *id.* at 61:2–6. Those concessions are binding on Penn National, and it cannot now reverse course and argue against the position it did not dispute below. *See Thomas v. Dootson*, 377 S.C. 293, 296, 659 S.E.2d 253, 254 (Ct. App. 2008) (observing that a party is bound by concessions by counsel made at trial); *Collins v. Bisson Moving & Storage*, 332 S.C. 290, 303, 504

S.E.2d 347, 354 (Ct. App. 1998) (stating issues conceded at trial may not be argued on appeal, and acts by an attorney are binding on clients through principles of agency law); *Hall v. Benefit Ass’n of R. Emps.*, 164 S.C. 80, 83, 161 S.E. 867, 868 (1932) (“The parties to a suit are bound by admissions, made by their attorneys of record, in open Court, or elsewhere, touching matters looking to the progress of the trial. . . . [T]his statement is so elementary and understood so thoroughly by the profession as to need no citation of authority.”). “In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court. In other words, the trial court must be given an opportunity to resolve the issue before it is presented to the appellate court.” *Winkler v. State*, 418 S.C. 643, 662, 795 S.E.2d 686, 697 (2016) (quoting *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004)).

Even without this clear waiver, Penn National’s argument still fails. The plain terms of the policies—and cases applying those terms—confirm the reason for Penn National’s concession at trial: the policies plainly operate on a “continuous trigger theory.”

As Penn National correctly notes in its appellate brief, its policies issued to Covil cover claims arising out of an “occurrence” that results in “bodily injury.” (App. Br. 28.) An “occurrence” includes, in relevant part, any “accident, including continuous or repeated exposure to conditions, which results in bodily injury . . . neither expected nor intended from the standpoint of the insured.” (*Id.*) Additionally, “bodily injury” includes “bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.” (*Id.*) Critically, this language does not require that the injury-causing *event*—in this context, exposure to asbestos—occur during the policy period, as Penn National now

wrongly argues on appeal. Instead, the policy language only requires that the *injury*, including sickness or disease, occur during the policy period.¹⁴⁶

It is well understood, in both the medical and legal communities, that bodily injury from exposure to asbestos begins almost immediately and continues until manifestation of the ultimate diagnosis of disease. *See R.T. Vanderbilt Co. v. Hartford Accident & Indem. Co.*, 156 A.3d 539, 567 (Conn. App. Ct. 2017) (“[T]o the extent that a background understanding of the nature of asbestos related diseases is helpful in selecting among trigger of coverage theories, both courts and commentators have recognized that expert testimony is not required in this context because the relevant medical facts . . . are now so widely understood and incontrovertible that many courts simply assume their truth when resolving the trigger of coverage question.”).¹⁴⁷

¹⁴⁶ While Penn National suggests that Chief Justice Toal relied on “scholarly articles” for her interpretation rather than the language of the insurance policies, (App. Br. 26-27), that accusation is demonstrably false. Throughout the Final Order, the trial court made clear that its rulings were grounded on the policy language, as interpreted and applied according to South Carolina law. (*See* Final Order, at 41–78.) *In addition to that plain language*, the trial court also found support for its holding in judicial opinions from numerous jurisdictions and cited a single article, Roger C. Henderson, *Insurance Protection For Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 Neb. L. Rev. 415 (1971). Of course, referencing an oft-cited and well-regarded law review article does not suggest that the trial court primarily relied on the article to reach its conclusions, and support from the legal academy strengthens, not weakens, the court’s rulings. Notably, the trial court cited *the same* article in a prior opinion interpreting the language of insurance policies Penn National issued to Covil, and the court’s rulings were upheld on appeal. *See Covil Corp. v. Pa. Nat’l Mut. Cas. Ins. Co.*, 436 S.C. 85, 95–98, 870 S.E.2d 191, 197–98 (Ct. App. 2022), *aff’d as modified*, Op. No. 28221 (S.C. Sup. Ct. filed July 24, 2024) (Howard Adv. Sh. No. 28 at 20).

¹⁴⁷ *See also id.* at 572 (“Our current knowledge about asbestos related disease, then, is most consistent with the theory that the body is continuously injured by the presence of asbestos and the ongoing progression of disease, from exposure through manifestation.”); *Nat’l Union Fire Ins. Co. v. Porter Hayden Co.*, 331 B.R. 652, 664 (D. Md. 2005) (“[E]xposure to and inhalation of asbestos fibers begins a cumulative process in which the body suffers virtually continuous injuries.”); *J.H. Fr. Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993) (“[I]njuries occur during the development of asbestosis immediately upon exposure, and that the injuries continue to occur even after exposure ends during the progression of the disease right up until the time that increasing incapacitation results in manifestation as a recognizable disease. If any of these phases of the pathogenesis occurs during the policy period, the insurer is obligated to indemnify [the insured]

Despite Penn National's suggestion to the contrary, the trial court's application of the continuous trigger theory is consistent with *Joe Harden Builders v. Aetna Casualty & Surety Co.*, 326 S.C. 231, 233, 486 S.E.2d 89, 89 (1997), and that opinion does not mandate a different conclusion. To start, *Joe Harden* specifically rejected the exposure theory Penn National now advances because it "conflicts with the plain language of the policy." *Id.* at 234, 486 S.E.2d at 90. That case hurts (not helps) Penn National. In any event, *Joe Harden* discussed the appropriate theory of coverage in the context of a construction defect claim, wherein a brick wall was defective when it was constructed but the defect did not manifest, and the property owner was unaware of the defect for some time. *Id.* at 233, 486 S.E.2d at 90. The court explained that a continuous trigger theory "triggers coverage from the time of the injury-causing event even if no damage has yet occurred," but held that, in that case, "coverage [was] triggered whenever the damage can be shown in fact to have first occurred, even if it is before the damage became apparent." *Id.* at 236, 486 S.E.2d at 91. The court referred to this modified theory as an "injury-in-fact trigger," and it adopted it "*in conjunction with* a continuous trigger of coverage." *Id.*

In the asbestos context, as discussed above, it cannot be disputed that "damage" (bodily injury) occurs immediately after the "injury-causing event" (exposure to asbestos) and continues thereafter. Accordingly, there is no need to modify the continuous trigger theory in this context. *Cf. Crossmann Cmtys. of N.C. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 55, 717 S.E.2d 589, 597 (2011) (explaining that "[t]he [*Joe Harden*] modification was that, rather than defining the damage period as beginning with the injury-causing event and ending with manifestation, we defined the damage period as the term during which actual injuries occurred"). Actual injuries occur at the time of exposure to asbestos. *See id.* (noting the "injury-in-fact trigger and continuous trigger are

under the terms of the policy.").

on the same continuum and are complementary” (citing *U.S. Gypsum Co. v. Admiral Ins. Co.*, 643 N.E.2d 1226, 1255 (1994) (“The adoption of an injury in fact trigger . . . is not inconsistent with a finding that an injury occurred in more than one policy period or that such an injury occurred in each policy period. Conceptually, the injury in fact trigger and the continuous trigger are on the same continuum and are complimentary, rather than mutually exclusive.”)); *U.S. Gypsum Co.*, 643 N.E.2d at 1256 (observing “courts have frequently utilized a continuous trigger in asbestos cases”). Because an “injury-in-fact” occurs continuously from the time of first exposure until the time of manifestation of the disease and during the policy period, Penn National’s policies provide coverage to individuals who were exposed to asbestos prior to the policy period under *Joe Harden*.

Thus, Penn National offers no reason for this Court to follow its “exposure theory,” least of all given that it conceded a “continuous trigger” theory applied to this case at trial.¹⁴⁸

2. *The trial court properly rejected Penn National’s argument that the “completed operations hazard” exclusion applies.*

Penn National next argues the trial court erred by failing to “take into account the exclusions contained in the Penn National Policies when it analyzed coverage for . . . Covil’s asbestos liability.” (App. Br. 29.) That is false. Penn National contends that the claims of individuals exposed to asbestos *during* Covil’s operations are excluded from coverage by the “completed operations hazard” exclusion if those operations preceded the Penn National policy periods. (*Id.* at 29–36.) The trial court correctly considered and rejected this argument, (*see* Final Order, at 44–46), including because “[i]nsurance policy exclusions are construed most strongly

¹⁴⁸ As Covil argued in its Opposition to Penn National’s Motion for Summary Judgment, and as the trial court found, applying the continuous trigger theory to Penn National’s policies is also supported by the drafting history of the Penn National policies, equitable considerations, and Penn National’s own course of conduct in approving settlements of claims brought under the policies. (Nov. 22, 2023 Covil Opp’n to Penn Nat’l Mot. for Summ. J., at 45–48; Final Order, at 74–78.)

against the insurance company, which also bears the burden of establishing the exclusion’s applicability.” *Covil Corp. by & through Protopapas v. Pennsylvania Nat’l Mut. Cas. Ins. Co.*, No. 2022-000366, 2024 WL 3515523, at *7 (S.C. July 24, 2024) (quoting *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005)).

As an initial matter, the South Carolina Supreme Court just rejected Penn National’s contrary argument less than two months ago—in a different case between Covil and Penn National, interpreting the same policy language. *See id.* at *9. As a matter of South Carolina law, the “Completed Operations Hazard exclusion” applies only to “claims (1) arising out of the insured’s operations, (2) when the alleged bodily injury occurs after the insured’s operations are completed, and (3) where the alleged bodily injury occurs away from the premises owned by or rented by the named insured.” *Id.* Whether the operations preceded the policy periods is irrelevant. Indeed, in its recent decision, the Supreme Court held that the exclusion did not apply to an asbestos plaintiff who suffered “take-home exposure [to asbestos] during the period in which Covil” was operating at a facility—because “the exposure occurred (1) before all performance under Covil’s contract was complete, (2) before operations at the Bowater facility were complete, and (3) before Covil’s work at the Bowater facility was put to its intended use.” *Id.* (“Thus, the Completed Operations Hazard exclusion *does not apply*[.]” (emphasis added)).

Under the Supreme Court’s reasoning, whether the exposure took place before the policy period is irrelevant. Instead, the exclusion applies only where the exposure took place before the operations were completed, whether or not the exposure was during the policy period.

That binding holding flows directly from the policies’ plain terms. The exclusion defines “completed operations hazard” as including, in relevant part, “bodily injury . . . arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but

only if the bodily injury . . . occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured.” (App. Br. 30.) Two aspects of this plain language preclude Penn National’s argument.

First, the question is whether the injury occurs *after such operations have been completed*. Where asbestos exposure takes place during operations—*i.e.*, before they have been completed—the exclusion does not apply on its own terms. The focus is on the operations, not on the policy period. *See Covil*, No. 2022-000366, 2024 WL 3515523, at *9.

Second, whether bodily injury is excluded from coverage depends on whether “the” injury occurs after operations are completed. In other words, because Penn National refers to the bodily injury using the definite article “the,” there is only one continuous injury for purposes of this provision, and the entire injury must occur “after . . . operations have been completed” in order for this exclusion to apply. *See, e.g., Holman v. Bulldog Trucking Co.*, 311 S.C. 341, 346, 428 S.E.2d 889, 892 (Ct. App. 1993) (“The use of the definite article ‘the’ and the singular noun ‘state’ shows that the Legislature intended the word ‘located’ to refer to one state, not many.”).¹⁴⁹ Penn National’s argument to the trial court and on appeal ignores this language and attempts to separate one continuous asbestos-related injury (beginning at exposure and continuing in the plaintiff’s body) into two distinct injuries—one not encompassed by the completed operations hazard exclusion so long as operations are ongoing, and one encompassed by the exclusion as soon as operations are completed. Penn National’s argument ignores its own policy language and must be rejected. The Supreme Court just recognized this point by focusing on the time of asbestos “exposure,” *Covil*, No. 2022-000366, 2024 WL 3515523, at *9, and Penn National has no

¹⁴⁹ Or, as the trial court stated, “if *any* bodily injury occurs *before* the operations are completed, then “*the*” bodily injury could not have occurred *after* the operations were completed. Final Order, at 45.

response. Instead, it spends multiple pages of its appellate brief advancing its untenable, contrary position but fails to address this critical point.

Penn National also argues the trial court’s interpretation of the completed operations hazard exclusion “would essentially eliminate the completed operations hazard from the policy.” (App. Br. 35.) Not so. Under the trial court’s interpretation, the completed operations hazard exclusion in Penn National’s policies still applies to any bodily injury that occurs after Covil’s operations. This is the exclusion that Penn National drafted and contracted for, and this is the exclusion the courts must enforce. *See S.C. Dep’t of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) (“A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.”).

Finally, Penn National’s reliance on *General Insurance Company of America v. United States Fire Insurance Company*, 886 F.3d 346 (4th Cir. 2018), and the *In re Wallace & Gale Company* line of cases, is misplaced. (App. Br. 35.) *General Insurance* relies entirely on the *Wallace & Gale* cases to reach its conclusion regarding the completed operations hazard exclusion, and these cases each apply an *Erie* guess as to **Maryland law** and therefore do not control this South Carolina case. *See Gen. Ins.*, 886 F.3d at 354-55; *id.* at 349 (declining to certify question to Maryland Court of Appeals). Their reasoning that the exclusion focuses on whether the *policy* was after operations were completed—rather than whether the *injury* happened after operations were completed—are also incompatible with the plain terms of the exclusion and the South Carolina Supreme Court’s recent decision. *See Covil*, No. 2022-000366, 2024 WL 3515523, at *9.

The reasoning in these *Erie*-guess cases also is inconsistent with the basic definition of the relevant hazard. The “hazard” is the “source of a risk,” *Serv. Welding & Mach. Co. v. Mich. Mut.*

Liab. Co., 311 F.2d 612, 617 (6th Cir. 1962), or the “source from which an accident may arise,” *Ketona Chem. Corp. v. Globe Indem. Co.*, 404 F.2d 181, 185 (5th Cir. 1968). In these asbestos cases, the source from which the injury arose was an ongoing operation, not a completed one. Whether the operation was completed “prior to the start of [the] policy” is simply irrelevant to that question. *Gen. Ins.*, 886 F.3d at 355.

Also of note: the insured in *General Insurance* waived its argument that the Insurers bear the burden of proving that a bodily injury claim falls within an exclusion. *Id.* Thus, that court did not hold the insurers to their heavy burden, which Penn National must meet in this case.

For all these reasons, the trial court properly rejected Penn National’s interpretation of the completed operations hazard exclusion and found it is only applicable to bodily injury that occurred entirely after Covil’s operations were completed.¹⁵⁰

3. *The trial court properly ruled that coverage should be allocated on an “all sums” basis, not pro rata.*

Penn National argues the trial court erred by ruling coverage should be allocated on an “all sums” basis instead of a “pro rata / time on the risk” basis, and it relies entirely on *Crossmann Communities of North Carolina v. Harleysville Mutual Insurance Company*, 395 S.C. 40, 717 S.E.2d 589 (2011), to support its position. However, *Crossmann* makes clear that the words in the policy must be given effect—so Penn National’s *different* policy should apply differently given its materially distinct terms. *Id.* at 52–53, 717 S.E.2d at 595 (“[I]nsurance policies are contracts to be interpreted in accord with contract law. Accordingly, our discussion begins with the language of

¹⁵⁰ As Covil argued in its Opposition to Penn National’s Motion for Summary Judgment, and as the trial court found, this interpretation also “is consistent with long-understood underwriting intent, as expressed in historical writings, insurance textbooks, insurance industry interpretive materials, and in legal and academic commentary.” (Nov. 22, 2023 Covil Opp’n to Penn Nat’l Mot. for Summ. J., at 45–48; Final Order, at 46–52.)

the policies themselves.”); *see also* *Standard Fire Co. v. Marine Cont. & Towing Co.*, 301 S.C. 418, 421, 392 S.E.2d 460, 461 (1990) (noting the fundamental precept of South Carolina insurance law that courts “must give policy language its plain, ordinary and popular meaning”). Indeed, Penn National argues throughout its appellate brief that the plain language of the policy (and no case law interpreting different language in different policies) controls.

The *Crossmann* decision, which Chief Justice Toal joined when she was on the Supreme Court, followed this principle and made clear that its pro-rata holding depended on the terms of the property coverage policy in that case. *See Crossmann*, 395 S.C. at 50, 62 717 S.E.2d at 594, 600 (holding that the “time on risk” approach “conforms to the terms” of the policy before it, because that policy stated that insurance applies “**only if**” the injury or property damage “occur[red] during the policy period.” (emphasis in original)); *id.* at 60, 717 S.E.2d at 599 (referring to this as the “critical language limiting the insurer’s obligation to pay to sums that are attributable to property damage that occurred during the policy period”). Here, there is no policy language stating that insurance applies “only if” the injury occurs during the policy period, so there is no indication under *Crossmann* that a pro rata allocation should apply.

To the contrary, the terms of Penn National’s policies here “insure Covil for bodily injury in broad terms that encompass all consequences of bodily injury, without regard to when they occur.” Final Order, at 56.

- First, in the “Insuring Agreement,” Penn National commits to “pay on behalf of the **insured** *all sums* which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . [to] which this insurance applies, caused by an **occurrence**[.]”¹⁵¹ “All sums” is not limited by a temporal or proportionate limit,

¹⁵¹ Covil Trial Ex. 1, 1986–1987 Policy, at Penn National Policies 000036; Covil Trial Ex. 2,

supporting applying an “all sums” allocation here. This language plainly protects Covil from its entire legal liability (all sums) so long as the “insurance applies” to a bodily injury that was “caused by an occurrence.”

- Second, while the “Policy Territory Provision” addresses the “bodily injury” to which this insurance applies and provides that “[t]his insurance applies only to **bodily injury** or **property damage** which occurs within the policy territory,” the “Definitions” section of the policy defines “bodily injury” to mean “bodily injury, sickness, or disease sustained by any person which occurs during the policy period, *including death at any time* resulting therefrom.”¹⁵² This “death at any time” language makes clear there is no temporal limit to Penn National’s obligation and thus no reason to apply a pro rata allocation.

As Chief Justice Toal correctly held here, this policy is materially different from the policy examined in *Crossmann*. See Final Order, at 54–63. The policy here “imposes an open-ended obligation on Penn National that extends to include the overall legal liability borne by the insured ‘because of’ bodily injury to which the insurance applies.” *Id.* at 57. The first policy provision discussed above does not place a temporal limitation on the scope of the bodily injury covered by the policies—distinguishing this case from *Crossmann*.

Moreover, Penn National’s policy language indisputably does not state that an injury is covered “only if” it occurs “during the policy period.” The policy uses the word “only” in a different context—noting that insurance “applies only to bodily injury . . . which occurs within the policy territory”—but that context plainly involves only a geographic limitation (the policy

1987–1988 Policy, at Penn National Policies 000081 (*italics added*).

¹⁵² *Id.* (*emphasis added*).

territory) and not a temporal limitation like in *Crossmann*. Penn National knew how to limit its coverage through use of the word only, and it simply chose not to do so in the context of a temporal limitation. Thus, it is liable not only for its “pro rata” share of bodily injuries, but for any bodily injury.

While that difference plainly requires a different result than in *Crossmann*, Penn National’s definition of bodily injury (also absent from *Crossmann*) confirms the trial court’s interpretation. Penn National agreed to cover bodily injuries including “injury, sickness or disease,” “including death at any time resulting therefrom.” That definition “expressly rejects the idea that bodily injury covered by the policy is confined to bodily injury occurring during a limited temporal period,” but explicitly includes later “consequences that flow therefrom.” Final Order, at 59. Indeed, Penn National ignores other courts holding such “death at any time” language includes protection beyond the policy period. *See Am. Precision Indus., Inc. v. Fed. Ins. Co.*, No. 14 -1050, 2021 WL 8263499, at *11 (W.D.N.Y. Aug. 4, 2021) (“The ‘death at any time’ provision necessarily extends the protection of each Primary Policy beyond the policy period.”); *Polar-Mohr Maschinenvertriebsgesellschaft GMBH, Co. KG v. Zurich Am. Ins. Co.*, No. 17 -01804, 2018 WL 1335880, at *4 (N.D. Cal. Mar. 15, 2018) (“The definition of ‘bodily injury’ in the Zurich policy contemplates and promises indemnification to damages that arise outside of the policy period.”); *Canon Elec., Inc. v. Ace Prop. and Cas. Co.*, No. BC 290354, 2017 WL 10992340, at *26 (Cal. Super. Ct. Aug. 17, 2017) (“These policies define bodily injury and damage to contemplate not simply a single injury, but also bodily injury resulting in death thereafter, even if the policy term has expired. These policies expressly provide a transfer of the liability risk from the insured to the insurer for all consequential harms—past, present and future—flowing from that injury.”). The

phrase “at any time” plainly precludes any interpretation that would truncate the bodily injury on a temporal basis.

Penn National’s arguments to the contrary are unavailing. (App. Br. 39.) It tries to analogize “at any time” in its policy to the “resulting loss” language in the policy at *Crossmann*, but the former language relates to temporal limits (or the lack thereof) and the latter does not. Resulting loss simply provides additional compensation to an insured for the loss of use of damaged property (without specifying what time applies). *See, e.g., Harleysville Grp. Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 350–51, 803 S.E.2d 288, 304 (2017) (evaluating the insured’s damages due to loss of use of damaged property). *Crossmann* did not include “at any time” language, but instead said that any resulting loss was covered “only if” the injury occurred during the policy period—*i.e.*, in no other circumstances.¹⁵³

Penn National also emphasizes that the phrase “during the policy period” appears in its definition of bodily injury (before also expressly covering “death at any time”). (App. Br. 39.) But Penn National ignores the rule that courts must interpret contracts to give meaning to all the terms. *See Crossmann*, 395 S.C. at 62, 717 S.E.2d at 600–01; *Ex parte Felder*, 61 S.C. 523, 532, 39 S.E. 737, 740 (1901) (stating “the Court should endeavor if possible to harmonize all parts of the agreement and give effect to the whole, rather than to utterly ignore some parts of the agreement”). The correct way to interpret “during the policy period” so as not to eviscerate the “at any time” language is how Chief Justice Toal did: the definition requires some part of the bodily injury to occur during the policy period to trigger the policy, and once the policy is triggered, the policy covers the entire bodily injury and any consequences flowing from it, at any time. *See* Final Order,

¹⁵³ Penn National also puzzlingly suggests that *Joe Harden* warrants reversal of the trial court’s ruling, (*see* App. Br. 39), but that case only dealt with trigger of coverage and did not discuss allocation at all.

at 60. And nothing in the policy excludes continuous injuries occurring in part during the policy period. To the contrary, the policies’ “occurrence” definition anticipates that a bodily injury may result from “continuous or repeated exposure to conditions,” showing that the policy covers conditions resulting in bodily injury without a temporal limit. (Covil Trial Ex. 1, 1986–1987 Policy, at Penn National Policies 000036; Covil Trial Ex. 2, 1987–1988 Policy, at Penn National Policies 000081.)¹⁵⁴

Once again, Penn National ignores a case from this Court involving its very own policy language. Conspicuously missing from Penn National’s appellate brief is any mention of this Court’s recent opinion in *Portrait Homes- S.C., LLC v. Pennsylvania National Mutual Casualty Insurance Co.*, in which this Court held *Crossmann* did not apply “because the Penn National policies contained different language than the policies in *Crossmann*.” 442 S.C. at 590, 900 S.E.2d at 285 (emphasis added). This Court explained that damage “which occurs during the period of a Penn National policy ‘includes any continuation, change or resumption . . . after the end of the policy period,’” so “the progressive property damage caused by continuous or repeated exposure to water intrusion occurring *after* the end of a policy period is deemed to be included in what is covered by the policy.” *Id.* at 590, 900 S.E.2d at 285-86. Such “continuous” bodily injury is likewise covered here.

Here, like in *Portrait Homes*, the Penn National policies contain less restrictive language that does not limit Penn National’s liability to damage occurring during the policy period. *See id.* An “all sums” allocation gives effect to this language and is true to the Penn National policies at

¹⁵⁴ Even if the relationship between these phrases was ambiguous, and it is not, “the terms of an insurance policy must be construed most liberally in favor of the insured and where the words of the policy are ambiguous, or where they are capable of two reasonable interpretations[,] that construction will be adopted which is most favorable to the insured.” *Portrait Homes*, 442 S.C. at 588, 900 S.E.2d at 284–85 (quoting *Kingman*, 243 S.C. at 411, 134 S.E.2d at 220).

issue in this case. *See Georgetown Mfg. & Warehouse Co. v. S.C. Dep’t of Agric.*, 301 S.C. 514, 517, 392 S.E.2d 801, 803 (Ct. App. 1990) (“Basic to the law of construction of contracts is the principle that the intention of the parties must be gathered from the instrument itself, giving effect to all words if possible.”).

The trial court correctly determined that the Penn National policy language is materially distinct from *Crossmann* and, instead of limiting the temporal context for coverage, requires an “all sums” allocation given that the

insuring provisions expressly provide that the policyholder will be indemnified for “all sums” for which it is liable for damages arising from an occurrence, which may be continuous. These policies define bodily injury and damage to contemplate not simply a single injury, but also bodily injury resulting in death thereafter, even if the policy term has expired. . . . To give meaning to the policies’ provisions that extended protection beyond the policy period for continuing injuries means that “all sums” allocation must be applied.

Final Order, at 61 (quoting *Cannon Elec.*, 2017 WL 10992340, at *26).¹⁵⁵

4. *The trial court was correct to rule that Penn National’s indemnity payments for “operations” claims were not subject to an aggregate limit in the Penn National policies.*

At trial, Penn National attempted to manufacture a **general** aggregate limit (to which previous asbestos-related settlements would apply) for all asbestos-related claims against Covil despite the policy including no **general** aggregate limit at all. The trial court correctly rejected that argument. The unambiguous policy language applies the “aggregate” to “completed operations

¹⁵⁵ As Covil argued in its Opposition to Penn National’s Motion for Summary Judgment, and as the trial court found, an “all sums” allocation is also most consistent with the purpose of comprehensive general liability insurance coverage for progressive bodily injury claims. (Nov. 22, 2023 Covil Opp’n to Penn Nat’l Mot. for Summ. J., at 35; Final Order, at 62–63.); *see Newman*, 385 S.C. at 197, 684 S.E.2d at 546 (“The standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions.”); *Bennett & Bennett*, 405 S.C. at 8–9, 747 S.E.2d at 430 (these policies insure against “consequential risk” flowing from the policyholder’s tort liability for damage to persons or property).

hazard” and “products hazard” claims only. Final Order, at 63–64. On appeal, Penn National identifies no reason to reverse.

Instead, Penn National points to the policies’ \$1 million limit for “each occurrence.” (App. Br. 43.) And Penn National attempts to define its total potential liability for *all* bodily injury claims arising out of exposure to asbestos during Covil’s operations as a single occurrence subject to that \$1 million limit. Essentially, Penn National argues that regardless of how many people were exposed to asbestos during Covil’s operations, or where, or when, or under what conditions the exposure took place, *all* those exposures amount to a single “occurrence” under the Penn National Policies. That interpretation is like trying to fit over a dozen square pegs into a single round hole. And the trial court properly rejected it as incompatible with the policies’ language and unsupported by any case law. Final Order, at 39–57.

Penn National also focuses on the following policy language: “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.”¹⁵⁶ (App. Br. 41.) The policies define an “occurrence” as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury

¹⁵⁶ Interestingly, Penn National did not raise this argument until closing arguments at trial. Penn National previously argued that the Covil asbestos claims were subject to a \$1 million “aggregate” limit applicable to the completed operations hazard. *See, e.g.*, Trial Tr., Day 1 Morning Session, at 19:18–20:2, 31:20–32:4. During closing arguments, counsel for Covil remarked that the argument was raised “[f]or the first time, I think, in this case, . . . during the direct examination of” a Penn National witness. Trial Tr., Day 2 Afternoon Session, at 6:23–25. Counsel for Penn National then presented the argument to the trial court for the first time during his closing argument. *See id.* at 65:7–12. Moreover, Penn National does not argue on appeal that the limit of liability applicable to the completed operations hazard applies to the Covil asbestos claims. (*See* App. Br. 40–44.) Accordingly, the argument is abandoned. *See Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 557, 684 S.E.2d 779, 783 (Ct. App. 2009).

or property damage neither expected nor intended from the standpoint of the insured.”¹⁵⁷ No fair reading of this language would decide that multiple people being injured by asbestos exposure in different locations at different times all suffered the same “injury” and thus were part of the same “occurrence.” As the trial court explained: “Covil faces allegations in numerous lawsuits that multiple asbestos injury and wrongful death ‘occurrences’ have resulted from its asbestos ‘operations.’ Covil is therefore entitled to multiple ‘per occurrence’ limits of liability to resolve each of the asbestos suits.” Final Order, at 63.

Although South Carolina appellate courts have not had the opportunity to interpret this policy language in the asbestos context yet, other jurisdictions that have considered this issue have consistently rejected Penn National’s position. For example, in *Plastics Engineering Co. v. Liberty Mutual Insurance Co.*, 759 N.W.2d 613 (Wis. 2009), Liberty Mutual argued that this language applied generally to “the manufacture and sale of asbestos-containing products without warning.” *Id.* at 621. The Supreme Court of Wisconsin disagreed, reasoning that the language “functions to limit an individual claimant’s repeated and continuous exposure to asbestos-containing products as being just one occurrence. In other words, this provision precludes a claimant from asserting that each time he or she was exposed to an asbestos-containing product, a new occurrence arose.” *Id.* at 622. The Supreme Court of Connecticut likewise rejected Metropolitan Life Insurance Company’s argument that its failure to warn of the dangers of asbestos exposure constituted a single “occurrence” under this language. *See Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 765 A.2d 891, 898 (Conn. 2001) (“Under Metropolitan’s reasoning, we would have to conclude that the claimants’ injuries arose from a ‘continuous or repeated exposure to’ an alleged failure to warn. This is contrary to the ordinary meaning of the policy.”). The court reasoned:

¹⁵⁷ Covil Trial Ex. 1, at 36.

the claimants' injuries in this case arose from exposures to asbestos at several locations, at different times, and for varying lengths of time. These circumstances clearly do not constitute "the same general conditions" Thus, as a plain reading of the policies shows, the continuous exposure clause does not combine hundreds of thousands of exposures to asbestos into one occurrence.

Id. at 899. The court also recognized that "the proper interpretation of the continuous exposure clause is that it combines exposures to asbestos that occurred at the same place, at approximately the same time." *Id.* at 900. Many other courts evaluating this language in similar contexts have reached the same conclusion.¹⁵⁸ And Penn National cites no contrary cases in support of this argument.

As these cases recognize, the numerous asbestos bodily injury claims asserted against Covil by different plaintiffs, which resulted from alleged asbestos exposure over multiple years, at

¹⁵⁸ See, e.g., *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 886 N.E.2d 876, 887 (Ohio Ct. App. 2007) (holding "a multitude of physically and temporally distinct injuries [due to asbestos exposure] under a multitude of differing factual scenarios . . . did not constitute the 'same general conditions' contemplated under the plain language of the" policy); *id.* ("For example, exposure occurred in myriad circumstances: exposure to differing levels and in differing times, in many locations, and from many sources."); *Cole v. Celotex Corp.*, 588 So. 2d 376, 390 (La. Ct. App. 1991) (affirming the trial court's ruling "that the claims of [the three plaintiffs] constituted separate occurrences because the plaintiffs were exposed to different levels of asbestos at different times, under a variety of conditions, and at diverse job sites"); *Exxon Corp. v. St. Paul Fire & Marine Co.*, No. CIV. A 94-2111, 1996 WL 665751 (E.D. La. Nov. 15, 1996) (separate encounters with hazardous material by different men working around oil field constitutes separate occurrences); *Travelers Cas. & Sur. Co. v. Gerling Glob. Reinsurance Corp. of Am.*, 419 F.3d 181, 184 (2d Cir. 2005) ("[I]f claims arising from multiple occurrences triggered [operations] coverage, then [the insurer] was exposed to unlimited liability; each occurrence was subject to a \$1 million limit on liability, but there was no cap on total liability. Regardless of how much [the insurer] had paid for previous non-products occurrences under a single policy, each additional non-products occurrence under that policy subjected [the insurer] to liability anew."); *Com. Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167, 1211 (Md. Ct. Spec. App. 1997) ("The event causing damage in the asbestos-related bodily injury cases is exposure to asbestos fibers Since each individual claimant has a unique work history, each claimant's exposure must be viewed as a separate occurrence."); *In re Prudential Lines Inc.*, 158 F.3d 65, 83 (2d Cir. 1998) (holding that each asbestos claim arose from a separate occurrence); *Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co.*, 53 F.3d 762, 767-68 (6th Cir. 1995) (same).

multiple locations, and under a multitude of circumstances, do not constitute “continuous or repeated exposure to substantially the same general conditions,” and certainly are not all a single “occurrence.” Instead, this language is properly read to limit exposure to the *same* source of asbestos, at the *same* location, at generally the *same* time, and under generally the *same* circumstances to a single “occurrence.” There is no reason to interpret “all bodily injury . . . arising out of continuous or repeated exposure” as all bodily *injuries* to any number of people arising out of all *exposures* everywhere. Penn National can only make that argument by twisting the plain language of its own policies and ignoring all the above cases. And, as already noted, any ambiguity must be “construed liberally in favor of” Covil. *Portrait Homes*, 442 S.C. at 588, 900 S.E.2d at 284–85. Accordingly, the trial court’s ruling on this issue should be affirmed.

5. *The trial court correctly interpreted the plain terms of the 1986-1987 policy to hold Penn National also issued a 1985-1986 policy to Covil.*

The trial court held that Penn National issued a 1985–1986 Policy to Covil, and it did so based on the “plain language” of the 1986–1987 Policy. *See* Final Order at 86–89. Indeed, the 1986–1987 Policy contains a Change Endorsement establishing that that policy was a “renewal” policy and not the original general liability policy issued to Covil. The endorsement says: “Amending policy to delete products from GL0031(4/84), and Add GL2104(7/66) Products hazard exclusion as it was left off at renewal. No change in rates or premiums.” (App. Br. 47.) As the trial court noted, the Change Endorsement is “clear and unambiguous” that the completed operations hazard exclusion was inadvertently left off *at renewal*. Final Order, at 86–87. Based on the plain terms of the policy, it was a renewal—*i.e.*, not the first policy.

Renewal has a particular meaning in an insurance contract, as demonstrated by the 1987–1988 Policy that was a “renewal” policy, containing the same terms, conditions, and limits as the prior 1986–1987 policy. The same is necessarily true for the 1985–1986 Policy. Indeed, where a

missing policy has been renewed, case law consistently holds that the subsequent renewal policy can be used to prove the terms of the lost preceding policy.¹⁵⁹ Penn National is bound by the terms of the policy it drafted (in this case, by the term “renewal”), and it has not offered any plausible reason for the change endorsement to refer to a “renewal” unless it was, in fact, a renewal.

Instead, Penn National argues “[t]here is simply no evidence that [it] actually issued a general liability policy to Covil” during the 1985–1986 policy period. (App. Br. 46.) This is patently untrue. As the trial court properly found, the Penn National Policy for the 1986–1987 period included a “Change Endorsement” that stated it was amending the policy “to delete products form GL0031(4/84), and Add GI2104(7/66) Products hazard exclusion as it was left off *at renewal*.” Covil Trial Ex. 1, at 29 (emphasis added). For there to have been a renewal of the policy, there necessarily must have been a previous policy, which would have covered the 1985–1986 period.

Penn National attempts to shift the focus away from its policy’s plain language by arguing that Covil should have produced business records and other secondary evidence that the 1985–1986 policy existed, but producing such additional evidence was unnecessary and is irrelevant to this issue on appeal given the direct evidence of the policy’s existence. Penn National’s reference to Covil’s draft insurance coverage chart from 2019 and a potential Hartford insurance policy for

¹⁵⁹ See, e.g., *Century Indem. Co. v. Aero-Motive Co.*, 254 F. Supp. 2d 670, 692–93 (W.D. Mich. 2003); *Ne. Utilities v. Century Indem. Co.*, No. X03CV 980495496S, 1999 WL 476274, at *7 (Conn. Super. Ct. June 21, 1999) (citing cases from various jurisdictions); *Aero-Motive*, 254 F. Supp. 2d at 695 (“giving effect to the presumption that a renewal policy is on the same terms, conditions, and amounts as the original policy, Aero has established the material terms of coverage under [the missing policy]”); *Patel v. Northfield Ins. Co.*, 940 F. Supp. 995, 1000 (N.D. Tex. 1996) (“In the absence of an agreement to the contrary, the presumption is that renewals are on the same terms, conditions, and amounts as provided in the original policy.”); 2 Couch on Ins. § 29:40 (“Except where there is a special agreement for different terms, the renewal of a policy continues the original stipulations, and the only change is in the time of its expiration.”).

the 1985–1986 period also misses the point, as the chart is attorney work product and not evidence of insurance coverage. Additionally, even assuming *arguendo* that Covil procured coverage from Hartford during this period, that does not preclude Covil from also having procured coverage from Penn National for the same period. Evidence of one policy, simply put, is not evidence that another policy does not exist, even covering the same policy period. *See* Final Order, at 88 & n.201. Penn National also argues the fact that no 1985–1986 Policy was ever found alongside the 1986–1987 and 1987–1988 policies is proof that no such policy existed. (App. Br. 48–49.) That ignores that Penn National *admittedly* destroyed policies from this period as a matter of practice and made it impossible for such evidence to be found or produced in this action. *See infra* Section II.B.

Finally, Penn National argues there could not have been a 1985–1986 Policy because the declarations page for the 1986–1987 Policy states that it is a “NEW” policy. (App. Br. 47.) But that argument is entirely inconsistent with the plain terms of the *Change Endorsement*. A Change Endorsement (by definition) changes the terms of the previously agreed-to policy. For example, the declarations page in the 1986–1987 Policy did not include a completed operations hazard exclusion, but that was a mistake—and the Change Endorsement fixed it. As Justice Toal recognized, “Penn National not only acknowledges that was a mistake but also actively informed both underlying asbestos plaintiffs’ counsel and the Receiver and his counsel of this mistake in numerous instances of written correspondence.” Final Order, at 88. Just the same, the “renewal” language fixed a mistake in the 1986–1987 Policy. Penn National offers no reason—nor could there be one—for the Court to accept the exclusion change and “ignore the language in the Change Endorsement indicating that the error occurred at ‘renewal.’” *Id.*¹⁶⁰

¹⁶⁰ Moreover, even if “renewal” conflicts with “new”—which it does not, because “renewal” was part of a *change* to the “new” contract—that conflict simply creates an ambiguity in the policy, which must be construed in Covil’s favor. *See Portrait Homes*, 442 S.C. at 588, 900 S.E.2d at 284–

Remarkably, Penn National asserts (without evidence) that the “language indicating ‘left off at renewal’ was clearly a scrivener’s error.” (App. Br. 48.) As an initial matter, insurers are bound by the contracts they write and cannot avoid obligations by later saying that they were written in “error.” But more fundamentally, Penn National offers no reason—nor could it—for the trial court to enforce the exclusion that was included in the *same sentence* in the *same Change Endorsement* and to refuse to enforce the “renewal” language. This brazen attempt to have its cake and eat it too should be easily rejected by this Court, just like it was rejected by Chief Justice Toal.¹⁶¹

III. Penn National’s Other Attacks on the Trial Court’s Opinion Fail.

Penn National also appeals the trial court’s other, secondary rulings—namely, the finding that Penn National spoliated evidence, the trial court’s order for Penn National to digitize its remaining insurance records, and the trial court’s award of attorneys’ fees. It also claims it was entitled to a jury trial for factual findings. These challenges by Penn National—which have no potential impact on Chief Justice Toal’s coverage determinations—are meritless and should be rejected.

A. Penn National’s was not entitled to a jury trial.

As noted above, Penn National claims it had a right to a jury trial for resolution of factual disputes between the parties. Penn National is wrong.

As an initial matter, Penn National’s purported right to a jury trial in this action has already been before this Court and rejected. Penn National appealed the trial court’s December 7, 2022

85.

¹⁶¹ Penn National also fails to explain why, if that was a scrivener’s error, it did not enter into another change endorsement indicating as much. The only reasonable explanation is that it was not, in fact, an error but revealed the truth: there was at least one general liability policy before the 1986–1987 policy.

Order setting a nonjury trial in Appellate Case No. 2022-001722. On December 14, 2022, Covil filed a Motion to Dismiss and Expedite,¹⁶² arguing that the trial court’s Order was not immediately appealable because (1) Penn National was not entitled to a jury trial on Covil’s declaratory judgment claims, (2) any issues regarding spoliation of evidence did not entitle it to a jury trial, and (3) Penn National waived any argument that it was entitled to a jury trial because it failed to object to Covil’s September 6, 2022 request for a nonjury trial or the trial court’s initial ruling on September 8, 2022, which Penn National did not appeal, that the trial would be nonjury. This Court granted Covil’s Motion to Dismiss the appeal on February 8, 2023, and denied rehearing on June 6, 2023; and the Supreme Court denied Penn National’s petition for a writ of certiorari on November 7, 2023. This Court’s dismissal order necessarily concluded that Penn National was not entitled to a jury trial on Covil’s declaratory judgment claims or waived its right to challenge the trial court’s ruling that the trial would be nonjury (or both), Covil respectfully requests that this Court adhere to its prior determination and reject Penn National’s arguments once again.

As it informed this Court in the prior appeal, Covil submitted a status report to the trial court in this action on September 6, 2022, wherein it requested a nonjury trial on its declaratory judgment claims against Penn National. *See* Covil Sept. 6, 2022 Status Report, at 5. At a September 8, 2022 status conference, the trial court twice stated that the upcoming trial of the declaratory judgment claims would be nonjury. *See* Sept. 8, 2022 Tr., at 12:9, 13:13. Penn National did not object either to Covil’s request for a nonjury trial or the trial court’s determination that the trial would be nonjury. It was not until December 2, 2022—ten days before the trial was scheduled to

¹⁶² Although Covil’s Motion to Dismiss and Expedite was not presented to the trial court, this Court can take judicial notice of it. *See Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) (“A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records.”). Covil incorporates the arguments from its Motion here.

begin—that Penn National filed a “Motion to Confirm Jury Trial Demand,” seeking a jury trial. *See* Penn Nat’l Mot. to Confirm Jury Trial Demand. And, even then, Penn National did not provide any specificity as to any existing factual issues it alleged entitled it to a jury trial. *See S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (noting an issue is not preserved for appellate review unless it is “raised to the trial court with sufficient specificity” (quoting Jean Hoefer Toal, *Appellate Practice in South Carolina* 57 (2d ed. 2002))).

Because Penn National did not object to the trial court’s initial ruling that the trial would be nonjury or seek appellate relief from that ruling, Penn National waived its right to later object to the ruling and failed to preserve this issue for appellate review. *See Creed v. Stokes*, 285 S.C. 542, 542–43, 331 S.E.2d 351, 352 (1985) (finding party waived any argument he was entitled to jury trial by failing to immediately appeal order referring case to a master); *Rummage v. BGF Indus.*, 434 S.C. 441, 455–56, 865 S.E.2d 380, 388 (Ct. App. 2021) (“To successfully preserve an issue for appellate review, the issue must be: ‘(1) raised and ruled upon by the trial court; (2) raised by the appellant; (3) *raised in a timely manner*; and (4) raised to the trial court with sufficient specificity.’” (emphasis added) (quoting *S.C. Dep’t of Transp.*, 372 S.C. at 301–02, 641 S.E.2d at 907)).

On the merits, Penn National argues it was “entitled to a jury trial on all factual issues.” (App. Br. 25.) What Penn National fails to inform the Court, though, is that it did not identify any factual issues that warranted a jury trial. To be clear, it is undisputed that the insurance policies contain unambiguous language. And there were no factual disputes regarding the asbestos claims entered into evidence. Accordingly, Justice Toal correctly applied the unambiguous policy language to the undisputed facts related to certain asbestos claims.

Even in its Motion to Confirm Jury Trial Demand, Penn National failed to identify any material factual disputes related to the declaratory relief claims. *See* Penn Nat'l Mot. to Confirm Jury Trial Demand. Instead, Penn National merely claimed “there is nothing in the record at this time that would demonstrate Penn National is not entitled to a jury trial on all factual issues.” *Id.* at 3. Penn National’s current, post-hoc attempt to manufacture purported factual issues should not be endorsed by the Court. The fact that Chief Justice Toal applied undisputed factual findings to unambiguous policy language in the Final Order is consistent with binding South Carolina law. Even in cases where claims present pure questions of law, such as this one, any order or opinion will contain similar statements and findings. The fact remains that no material facts were in dispute prior to or during trial (which explains Penn National’s failure to identify any, as well as its filing of a motion for summary judgment), and Penn National was not entitled to a jury trial.

Nor does Penn National provide any support for the idea that a jury was needed to decide facts relevant to spoliation, the court’s discovery sanction, or attorneys’ fees. Penn National never even argues that the court’s discovery sanction or attorneys’ fees should have been decided by a jury, so any such argument is abandoned. *See S.C. Farm Bureau Mut. Ins. Co. v. Oates*, 356 S.C. 378, 382 n.1, 588 S.E.2d 643, 645 n.1 (Ct. App. 2003). And Penn National provides no support for its “conten[tion]” that a jury should have decided whether it spoliated evidence. (App. Br. 44–45.) Instead, it cites three cases where a court issued a jury instruction that one party had spoliated evidence (*i.e.*, the court decided the issue of spoliation and instructed the jury because it was already a jury trial). (*See id.*) Indisputably, spoliation is not a cause of action that could potentially entitle Penn National to a jury trial. *See Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 154, 714 S.E.2d 537, 541 (2011) (South Carolina “does not recognize an independent tort for the negligent spoliation of evidence.”). Instead, spoliation of evidence is a discovery violation potentially

warranting sanctions, including adverse inference, which are left to the trial court’s discretion. *See Kershaw County Bd. Of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990). As discussed by the Fourth Circuit, the decision of whether to impose a sanction for spoliation of evidence is “an inherent power of . . . courts” to facilitate the orderly administration of the judicial process and litigation. *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449–50 (4th Cir. 2004); *see also Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). It is widely recognized that spoliation of evidence is treated just like other evidentiary rulings trial courts make—clearly not subject to a jury trial. *See, e.g., Brookshire Bros. v. Aldridge*, 438 S.W.3d 9, 19–20 (Tex. 2014) (because “spoliation is an evidentiary concept,” *i.e.*, “a particularized form of discovery abuse,” “the trial court, rather than the jury, must determine whether a party spoliated evidence and, if so, impose the appropriate remedy”).

This Court should reaffirm its prior holding that Penn National either waived its request for a jury trial or it had no right to a jury trial in this case.

B. The trial court’s spoliation ruling should be affirmed.

This Court reviews the trial court’s factual findings in support of evidentiary decisions for abuse of discretion. *See Newman*, 385 S.C. at 191, 684 S.E.2d at 543 (2009) (“In an action at law tried without a jury, the appellate court will not disturb the trial court’s findings of fact unless there is no evidence to reasonably support them.”). Moreover, “[t]he selection of a sanction for discovery violations is within the trial court’s discretion.” *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999). South Carolina’s appellate courts “will not interfere with that decision unless the trial court abused its discretion.” *Id.* “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.” *Id.* “[T]he party appealing from the order of

sanction carries the burden of proving an abuse of discretion occurred.” *McNair v. Fairfield Cnty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008).

The standard for spoliation asks whether the party with control over the relevant evidence had a duty to preserve and the evidence was destroyed with a culpable state of mind. *See Hawkins v. Coll. of Charleston*, No. 2:12-cv-0384, 2013 WL 6050324, *2 (D.S.C. Nov. 15, 2013). The level of culpability will affect the nature of the sanction, but “‘willfulness’ is not required in order to satisfy the ‘culpable state of mind’ factor.” *Cytec Carbon Fibers LLC v. Hopkins*, No. CIV.A. 2:11-0217-RMG, 2012 WL 6044778, at *2 (D.S.C. Oct. 22, 2012), *report and recommendation adopted*, No. 2:11-CV-0217-RMG, 2012 WL 6050595 (D.S.C. Dec. 5, 2012). Negligence will suffice. *Id.*

Here, the trial court’s finding that Penn National spoliated evidence was supported by the evidence, and the sanctions it imposed against Penn National were reasonable and necessary. Accordingly, the trial court did not abuse its discretion, and its rulings should be affirmed.

1. *The trial court’s finding that Penn National destroyed Covil-related policy documents was not an abuse of discretion and should be affirmed.*

Penn National’s duty to preserve documents related to insurance policies protective of Covil was triggered in 2018, when it received a subpoena and discovery requests for such materials in the *Finch* case. *See Silvestri*, 271 F.3d at 591 (“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.”). Penn National admits in its brief that it nonetheless destroyed its records pursuant to a 25-year document retention policy, including records that may have been related to Covil, until 2021, when it finally issued a litigation hold. (*See App. Br. 49.*) Penn National destroyed these documents because it failed to impose a litigation hold or otherwise act to stop destruction of Covil policy or policy-

related documents until over three years after receiving the subpoena for all Covil policies in the *Finch* lawsuit in 2018. Final Order, at 79–81.

Penn National points to its document retention policy to argue that it could not have destroyed Covil-related records because Covil ceased operations in 1991, and therefore any such records would have been destroyed by 2016. However, as the trial court found, Penn National admitted that it “destroyed historic liability policies that were contained on microfiche on an annual basis in 2018, 2019, and 2020”; “did not search for Covil in the documents it destroyed in 2018, 2019, and 2020”; and “has no record of the historic general liability insurance policies and policy-related documents it destroyed in 2018, 2019, and 2020.” Final Order, at 79. As a result, Penn National cannot confirm that no Covil-related records were destroyed.

Additionally, Penn National employee Brent Reifsnyder testified in a deposition that Penn National “knowingly destroyed microfiche containing historic insurance policies issued prior to 1992,” “did in fact destroy such historic insurance policies without searching for any reference to Covil,” and “failed to keep any records of which insurance policy documents were destroyed.” *Id.* at 83. Specifically, Reifsnyder was asked, “Have you purged any microfiche with policies with a nonrenewal date prior to 1992?” Covil Trial Ex. 84, at 68:13–14. He responded, “So the answer is, yes, we would have destroyed them.” *Id.* at 68:20–21. This admission by Penn National, along with Penn National’s failure to issue a litigation hold for three years and the haphazard way in which it carried out document destruction (as described above and in the Final Order), provides reasonable factual support for the trial court’s finding that Penn National destroyed Covil policy-related documents. *See Griffin Grading & Clearing*, 334 S.C. at 198, 511 S.E.2d at 718 (recognizing South Carolina’s appellate courts should not reverse a trial court’s decision to sanction a party for a discovery violation if it has “reasonable factual support”).

Furthermore, Penn National’s argument ignores the fact that Covil may have been named as an additional insured on policies issued to other Penn National policyholders that were renewed past 1991. Penn National even admits “it is likely that policies that inceptioned 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.” (App. Br. 51.)

And, Penn National once again claims that “there is no evidence that Penn National actually issued other policies to Covil” before the 1986–1987 Policy. (App. Br. 45.) Of course, it can make that argument only by ignoring the text in that very policy stating that it was a “renewal” policy. Final Order, at 86–89. It is hard to think of clearer evidence, which at the very least precludes a finding of abuse of discretion. The trial court also noted that “Penn National admitted that there may have been responsive discovery in its microfiche archive” (such as other insurance policies that provide Covil with additional, supplemental, or special named insurance) that it destroyed. Final Order at, 90.

Accordingly, there is sufficient evidence supporting the trial court’s finding, and this Court should not disturb it.

2. *The trial court’s finding that Penn National had a culpable state of mind was not an abuse of discretion and should be affirmed.*

In its brief, Penn National narrowly focuses its argument on whether it intentionally destroyed Covil-related policy documents. (App. Br. 51–53.) This was not the trial court’s finding, however. Instead, the trial court found “Penn National had a culpable state of mind because it either intentionally *or negligently* destroyed the evidence.” Final Order, at 90. The trial court further clarified that “[t]he ‘culpable’ state of mind requirement [needed for spoliation sanctions to be imposed] does not require willful destruction.” *Id.* at 91 (citing *Byrnie v. Town of Cromwell*,

Bd. of Educ., 243 F.3d 93, 109 (2d Cir. 2001); *Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 179 (D. Md. 2008)). There is ample factual support for the trial court’s finding.

As demonstrated above, Penn National’s obligation to retain Covil-related policy documents began at least as early as 2018, when it received a subpoena seeking, among other things, “[c]opies of all liability insurance policies and endorsements issued to Covil between 1969 and 1995, including, without limitation, commercial general liability, umbrella, and other liability policies.” Covil Trial Ex. 12, at 5. Through this subpoena, Penn National was put on notice that it was obligated to retain *all* Covil-related policy documents, and not just those related to the 1986–1987 and 1987–1988 policy years. At that point, Penn National knew or should have known it was required to take the necessary steps at that time to ensure such materials were retained, but it failed to do so. By failing to issue a litigation hold in 2018 or ensure that Covil-related policy documents were not destroyed as a result of its yearly document destruction, Penn National acted negligently at the very least, and the trial court’s finding has reasonable factual support. Final Order, at 91–92.

Moreover, as the trial court noted, Penn National violated “its own written policies and procedures” and also misstated and omitted terms from the 1986–1987 policy in letters to Covil’s defense counsel in 2018 and 2019, “deliberately or recklessly” failing to disclose those terms (including that that policy was a “renewal” policy). Final Order, at 92–93. This evidence plainly supports the court’s culpability finding, which was not an abuse of discretion.

C. The trial court acted within its discretion by ordering Penn National to digitize its records as a sanction for its refusal to participate in discovery.

“The selection of a sanction for discovery violations is within the trial court’s discretion.” *Griffin Grading & Clearing*, 334 S.C. at 198, 511 S.E.2d at 718. “[T]he sanction should be aimed at the specific conduct.” *Id.* Here, the trial court’s order that Penn National digitize its policy-

related documents to allow a search for policies protective of Covil was a direct, targeted response to Penn National's stubborn adherence to its position that it could only search its records by policy number, and the violation of its discovery obligations to Covil that resulted. The sanction was the culmination of a multi-year effort to force Penn National to undertake its discovery obligations in good faith, during which Covil was required to file multiple motions to compel. The trial court took an iterative approach in responding to each successive motion and gave Penn National numerous chances to comply and conduct the necessary document searches, but because of Penn National's refusal to do so, the trial court ordered the digitization of its records as a last resort.

1. *Whether Penn National was legally required to store its insurance policies in a certain way is irrelevant to its discovery obligations under the South Carolina Rules of Civil Procedure.*

Penn National spends several pages of its brief arguing its practice of storing historic insurance policy-related documents by policy number was reasonable, and it was not legally required to store its records in any particular way. (App. Br. 55–57.) This argument is irrelevant and entirely misses the point that, regardless of insurance industry practices or legal minimums concerning record storage, Penn National was required to fulfill its discovery obligations to Covil in this action under the South Carolina Rules of Civil Procedure. Penn National cites no legal authority supporting its contention that its discovery obligations are somehow tied to industry practices or legal record-keeping requirements, and its argument provides no basis for reversing the trial court's determination that it was not meeting its discovery obligations or the court's sanction ruling.

In South Carolina, “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.” Rule

20(b)(1), SCRCP. Rule 34 of the South Carolina Rules of Civil Procedure requires that a party produce documents “within the scope of Rule 26(b) and which are in the possession, custody or control of the party” in response to a request for production, regardless of whether relevant statutory record-keeping schemes otherwise require the party to maintain such documents in a manner that makes searching for relevant documents convenient to the responding party.

Courts that have considered this issue roundly reject Penn National’s suggestion that it be excused from its discovery obligations merely because it chose to maintain its records in an inefficient manner. *See, e.g., Briddell v. Saint Gobain Abrasives Inc.*, 233 F.R.D. 57, 61 (D. Mass. 2005) (“Courts have been loathe to reward (and possibly encourage) poor record keeping by shielding companies with inefficient recording methods from discovery.”); *Baxter Travenol Labs., Inc. v. Le May*, 93 F.R.D. 379, 383 (S.D. Ohio 1981) (“[C]ourts have held that an unwieldy record-keeping system, which requires heavy expenditures in money and time to produce relevant records, is simply not an adequate excuse to frustrate discovery.”); *In re Richardson-Merrell, Inc.*, 97 F.R.D. 481, 483 (S.D. Ohio 1983) (“A discoveree cannot avoid a proper discovery request by utilizing record keeping which conceals rather than discloses.”); *Broward Cnty. v. Kerr*, 454 So. 2d 1068, 1070 (Fla. Dist. Ct. App. 1984) (“Discovery which is otherwise appropriate should not be refused solely because production of documents would hamper a party’s business operations.”).

As the United States District Court for the District of Massachusetts reasoned:

[T]he requested documents are clearly within the scope of Rule 26(b), . . . the plaintiff has a demonstrable need for the documents, the defendant undisputedly has possession of them, and the plaintiff has no other access to them. Thus, the defendant has a duty pursuant to Rule 34 . . . to produce its records The defendant seeks to absolve itself of this responsibility by alleging the herculean effort which would be necessary to locate the documents. The defendant may not excuse itself from compliance with Rule 34 . . . by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition. To allow a defendant whose

business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.

Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 76 (D. Mass. 1976); *see also id.* (“It is well established that a private corporation cannot avoid producing documents by an allegation of “impossibility” if it can obtain the requested information from the sources under its control.”).

Penn National’s argument here is the same as the one rejected in the above cases—that because it decided to store its historical policy records in a manner that makes it difficult to search for policies, it should be excused from its discovery obligation. If that argument succeeded, it would create a perverse incentive for all insurers (and other litigants) to do likewise and thereby avoid their contractual and discovery obligations. The law does not reward such gamesmanship. However inefficient Penn National’s choices make complying with discovery requests, Penn National is obligated to comply.

2. *The trial court’s decision to require Penn National to digitize its records was supported by then-existing facts.*

Penn National argues no evidence was ever presented that it issued any general liability insurance policy to Covil other than the 1986–1987 and 1987–1988 policies. As Covil demonstrated above, however, this is simply not true. Covil presented evidence that Penn National issued a general liability policy to Covil for the 1985–1986 period, and the trial court properly found that this policy existed and was either lost or destroyed by Penn National.

Additionally, on November 5, 2021—six months prior to entering the order requiring Penn National to digitize its records—the circuit court ordered Penn National “to open its repository of insurance policies and to facilitate a review supervised and performed by Covil’s insurer-appointed defense counsel, Ellis & Winters, LLP.” Covil Trial Ex. 63, at 1. In a March 22, 2022 report to the trial court, Ellis & Winters noted that after only a single day of manually searching Penn National’s

records, *it discovered the existence of three additional insurance policies issued to Covil that Penn National had not disclosed the existence of or produced*. See Covil Trial Ex. 70, at 5. Accordingly, the trial court had every reason to believe that further review of Penn National's records was likely to yield positive results, and it acted well within its discretion by ordering the digitization of the records in order that they could be fulsomely searched.

3. *The trial court's decision to require Penn National to digitize its records was appropriately targeted to Penn National's discovery misconduct.*

Penn National cites *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009), to argue that the trial court was required to undertake “a proportionality analysis” before sanctioning Penn National. (App. Br. 59.) However, *Hollman* is inapposite, as it addresses the analysis a trial court should undertake when deciding whether to grant a motion for a protective order under Rule 26(c), SCRPC, and not when determining what sanctions are appropriate under Rule 37, SCRPC.¹⁶³ See *id.* at 578, 683 S.E.2d at 498 (“If a person *requesting a protective order* shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is “relevant and necessary” to the case.” (emphasis added)).

Sanctions for discovery misconduct can range in scope and severity up to and including “striking pleadings, dismissing the action, or rendering a default judgment.” *Griffin Grading & Clearing*, 334 S.C. at 198, 511 S.E.2d at 718. “In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery

¹⁶³ In *Hollman*, the petitioner filed a petition for a writ of certiorari seeking review of a circuit court discovery order, as Penn National did in this case. *Id.* at 576, 683 S.E.2d at 497. The Supreme Court granted the petition because the “matter present[ed] exceptional circumstances.” *Id.* at 577, 683 S.E.2d at 498. In this case, however, the Supreme Court—twice—denied Penn National's attempt to seek certiorari review of the trial court's May 5, 2022 order, thus demonstrating that this is not such an instance where the trial court's discovery order presented “exceptional circumstances” warranting immediate intervention by the appellate courts.

posture of the case, willfulness, and degree of prejudice.” *Id.* at 199, 511 S.E.2d at 719. Here, the trial court reviewed the extensive discovery dispute between Covil and Penn National, and Penn National’s unwavering refusal to adequately search its records for Covil-related policy documents, which preceded its decision to require Penn National to digitize its records. *See* May 5, 2022 Order, at 4–8. The trial court’s decision was the culmination of a multi-year effort to require Penn National to fulfill its discovery obligations, and in ordering Penn National to digitize its records, the trial court did only what was necessary to accomplish that result. The cost and time needed to digitize the records was entirely due to the inefficient manner in which Penn National decided to store its historical records and does not constitute an abuse of discretion. *Cf. Griffin Grading & Clearing*, 334 S.C. at 199, 511 S.E.2d at 719. (“While recognizing that Tire Service would be greatly prejudiced, the court nevertheless imposed the sanction, finding Tire Service’s willful disobedience of previous orders warranted such a sanction. Under the circumstances here, we find the trial court did not abuse its discretion in striking Tire Service’s answer.”).

The trial court did not abuse its discretion in ordering Penn National to digitize its records to comply with its discovery obligations in the face of years of intransigence.

D. The trial court’s award of attorneys’ fees to Covil was appropriate and supported by South Carolina law.

Penn National admits in its brief that an insured may recover attorneys’ fees when it is forced to litigate against its insurer regarding the insurer’s defense obligations. (App. Br. 62–63.) It argues, however, that Covil is not entitled to fees because Penn National has paid its proportional share of Covil’s defense costs thus far. (*Id.* at 63.) Penn National is wrong for several reasons.

First, although Penn National has contributed towards Covil’s defense costs, it has done so only under a reservation of rights. *See* Final Order, at 97 (noting “Penn National did not deny that it defended the underlying cases under a reservation of rights”). As the South Carolina Supreme

Court has stated, “[t]here is no material difference in the legal effect between an outright refusal to defend and in undertaking the defense under a reservation of rights until a declaratory judgment is prosecuted to resolve the question of coverage.” *Hegler*, 270 S.C. at 550, 243 S.E.2d at 444. Here, Penn National defended under a reservation of rights (as did the insurer in *Hegler*) due to the disagreements it had with Covil concerning the parties’ interpretation of the Penn National Policies. Like the plaintiff insured in *Hegler*, Covil was forced to bring this Declaratory Judgment action to vindicate its rights under the policies, and Covil was successful in doing so.

Additionally, *Hegler*’s holding is broader than Penn National would have this Court believe, and it applies whenever an insured is forced to litigate its rights under an insurance contract, whether related to its insurer’s defense or indemnity obligations. *See id.* (“Counsel fees should have been allowed for the defense of the declaratory action brought by respondent to avoid coverage under the policy.”); *id.* at 549–550, 243 S.E.2d at 444 (noting “[t]he applicable policy provisions require the” insurer to indemnify the insured and defend suits against the insured). Subsequent case law addressing this issue also supports Covil’s entitlement to attorneys’ fees in this action. *See Portrait Homes*, 442 S.C. at 595, 900 S.E.2d at 288 (citing *Hegler*) (affirming attorneys’ fee award in a declaratory judgment action brought by the insured against Penn National); *Jessco, Inc. v. Builders Mut. Ins. Co.*, No. 2:08-CV-1759-PMD, 2012 WL 1570015, at *2 (D.S.C. May 3, 2012) (citing *Hegler*) (“South Carolina courts have unanimously found that an insured may be entitled to reasonable attorney fees and costs for defending the underlying action brought against it as well for bringing a declaratory judgment action against the insurer.”); *First Fin. Ins. Co. v. Sea Island Sport Fishing Soc’y*, 327 S.C. 12, 17, 490 S.E.2d 257, 259 (1997) (citing *Hegler* for the general proposition that “where [an] insured prevailed in defense of a declaratory judgment action brought by [its] insurer, [the] insured is entitled to recover attorney’s fees incurred

in defending the action”); *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 472, 265 S.E.2d 38, 40 (1980) (finding the insured was entitled to attorneys’ fees because it “was forced to prosecute this action to enforce its rights under the policy”).

The trial court also found that its award of attorneys’ fees to Covil was appropriate as a sanction for Penn National’s discovery misconduct and spoliation of evidence. *See* Final Order, at 98–99. In a footnote, Penn National states that it “addressed more fully above [in its brief] the reasons that this Court should overturn the spoliation award, including the imposition of attorneys’ fees and costs on that basis.” (App. Br. 64 n.13.) However, while Penn National presented arguments in its brief concerning the propriety of the trial court’s spoliation rulings, there is no substantive argument regarding the propriety of the resulting award of attorneys’ fees. (*See* App. Br. 44–53.) Moreover, the trial court made clear in the Final Order that its award of sanctions was based not only on Penn National’s spoliation of evidence, but also its discovery misconduct apart from the spoliation. *See* Final Order, at 98 (“Covil is independently entitled to attorneys’ fees as a sanction for Penn National’s discovery misconduct *and* spoliation in this case.” (emphasis added)). Because it failed to present a full argument regarding whether the attorneys’ fees were appropriately awarded, either as a sanction for its spoliation of evidence or its other discovery misconduct, it has abandoned the issue on appeal. *See Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (“South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”); *Carolina Renewal, Inc.*, 385 S.C. at 557, 684 S.E.2d at 783 (stating an issue not argued on appeal is abandoned). As a result, the trial court’s award of attorneys’ fees as a sanction is the law of the case and must be affirmed. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (“Under the two issue rule, where a decision

is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.”).

Further, Penn National’s argument that the trial court erred in awarding attorneys’ fees for its discovery violations is moot because Penn National paid the award of attorneys’ fees and the judgment has been satisfied. *See Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973) (“A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.”); *Jones v. Dillon-Marion Hum. Res. Dev. Comm’n*, 277 S.C. 533, 536, 291 S.E.2d 195, 196 (1982) (“This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.”).

On the merits, the trial court did not abuse its discretion in awarding attorneys’ fees to Covil due to Penn National’s discovery misconduct and spoliation of evidence. *See Griffin Grading & Clearing*, 334 S.C. at 198, 511 S.E.2d at 718 (“The selection of a sanction for discovery violations is within the trial court’s discretion.”); Rule 37(b), SCRCP (allowing a court to award attorneys’ fees as a sanction for a party’s discovery abuses); *Davis v. Parkview Apartments*, 409 S.C. 266, 270, 762 S.E.2d 535, 537 (2014) (affirming award of attorneys’ fees and costs as sanctions for refusal to comply with discovery rulings). Described in more detail above and in the trial court’s Final Order, Penn National spoliated evidence and repeatedly refused to meet basic discovery obligations to Covil, requiring Covil to file six motions to compel against Penn National, all of which were granted. *See* Final Order, at 15–37. The trial court’s award of Covil’s attorneys’ fees as a sanction for such egregious misconduct was well within its discretion and should be upheld on appeal.¹⁶⁴

¹⁶⁴ Although not a basis for the trial court’s ruling below, this Court can also find the award of

Finally, Penn National complains—for the first time—that the affidavits and billing records Covil submitted to the trial court to substantiate its attorneys’ fees and costs did not provide Penn National sufficient information to evaluate whether the amount of fees and costs were reasonable. (App. Br. 64–65.) Penn National also complains that it “was unable to respond to Covil’s Report” because the trial court awarded Covil’s fees shortly after Covil submitted the records. (*Id.* at 64 n.13.) However, Penn National was required to file a motion to reconsider under Rule 59(e), SCRCP, to raise its objection to the trial court and preserve this argument for appellate review. *See Wright v. Hiester Constr. Co.*, 389 S.C. 504, 524-25, 698 S.E.2d 822, 833 (Ct. App. 2010) (“To preserve an issue for appellate review, an appellant must object at his first opportunity.” (quoting *State v. Sullivan*, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993))); *Lafaye v. Timmerman (in Re Estate of Timmerman)*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (“When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal.”); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for” appeal.).

On the merits, Penn National cites no authority establishing that it was entitled to Covil’s unredacted attorneys’ fee statements, and South Carolina courts do not require that such

attorneys’ fees was allowed under sections 15-53-120 and -130 of the South Carolina Code. *See* Rule 220(c), SCACR (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”); § 15-53-120 (“Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.”); § 15-53-130 (“This chapter is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered.”); *see also Thames v. Rouse*, 85 S.C. 71, 72, 67 S.E. 139, 140 (1910) (“There can be no doubt that the Court appointing a receiver has the authority to provide for the payment of his expenses, including reasonable attorney’s fees.”).

information be provided in support of an attorneys' fee award. *See Messer v. Messer*, 359 S.C. 614, 632, 598 S.E.2d 310, 320 (Ct. App. 2004) ("Husband argues the family court erred by awarding Wife attorney's fees. Specifically, Husband contends the family court did not substantiate its award by requiring the production of detailed time sheets and other documentation. This argument is without merit."); *Horton v. Jasper Cnty. Sch. Dist.*, 423 S.C. 325, 815 S.E.2d 442 (2018) (affirming an award of attorneys' fees based on limited billing information). Here, Covil filed redacted billing records on the public docket and submitted unredacted billing records to the trial court for *in camera* review. The trial court reviewed the unredacted records and granted Covil's request for fees and costs consistent with the reasonableness standards enumerated in *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). Accordingly, the trial court's award was correct, both substantively and procedurally, and there is no need for this Court to reverse the award or remand the issue for further consideration by the trial court.

CONCLUSION

Based on the foregoing, the Court should affirm in full—both the trial court's coverage determinations, as well as its discovery-related orders.

Respectfully submitted,

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