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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 Hoefer 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.

REPLY BRIEF OF THE APPELLANT

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INTRODUCTION

This matter was filed by the Receiver for Covil Corporation ("Covil") to seek a judicial advisory opinion regarding what coverages were provided by two policies of general liability insurance issued by Pennsylvania National Mutual Casualty Insurance Company ("Penn National") to Covil for Covil's asbestos liability (the "Penn National Policies"). Once assigned to the asbestos docket, Covil engaged in a judicially sanctioned fishing expedition to find more liability policies even in the absence of any evidence that such additional policies actually existed. Intent on requiring Penn National to search its repository of hundreds of thousands of historic policies, Covil filed multiple motions seeking to compel this search. The trial court agreed, and without any evidence that any additional general liability policies were actually issued to Covil, mandated that Penn National digitize its entire repository of historic policy-related documents. This digitization process took over thirteen months and cost Penn National over $2.2 million. The results of a search on this new digital database showed: no additional general liability policies were issued by Penn National to Covil. This result was entirely predictable based on the evidence (or more accurately, the lack thereof) before the court.

Undeterred, Covil immediately moved for a nonjury trial of all issues in this case, including a new issue of spoliation, *i.e.* there were no additional general liability policies because Penn National must have destroyed them after it produced the two acknowledged general liability policies to Covil. Penn National's efforts to preserve its constitutional right to a jury trial notwithstanding, the trial court tried the issues in this case and issued a 102-page Final Order.

In truth, this case evolved and changed as Covil created new issues for the trial court's determination, highlighting the fact that this case failed to present a justiciable controversy at its inception. When asked to do so, the trial court issued a number of judicial opinions regarding

whether coverage was afforded under the Penn National Policies for unidentified current and future asbestos liability cases, whether Penn National was required to settle future asbestos liability cases on an "all sums" basis, and whether payments made in settlement of any asbestos liability cases were subject to the stated limit on the Penn National Policies. In reaching its opinions on these issues, however, the trial court failed to adhere to well-established canons of insurance policy construction, ignored Supreme Court precedent, and failed to hold Covil to its burden of proof. For example, on the issue of spoliation, the trial court entered an order finding that Penn National destroyed historical policies based on nothing but mere speculation. On appeal, Covil has been unable to support the trial court's determinations in this case with either relevant case law or evidence. Therefore, Penn National respectfully requests that this Court review the ten orders on appeal, vacate the orders, and dismiss this case.

I. Covil Has Failed To Identify Any Actual Justiciable Controversy Resolved By The Trial Court.

In its Final Order, the trial court made declarations regarding the coverage generally available under the Penn National Policies for Covil's potential liability in unidentified claims. These declarations include: "the aggregate limit of liability in the Penn National Policies does not apply to operations claims – it only applies to completed operations and products claims" (Final Order, p. 39); "the completed operations hazard includes asbestos claims only when a claimant is exposed to asbestos after Covil completes its operations" (*Id.*, p. 44); "Penn National has the burden to prove an asbestos claim is a completed operations or product hazard claim to apply it to the aggregate limit of liability" (*Id.*, p. 53); "coverage should be allocated on an all sums basis" (*Id.*, p. 54); "Covil is entitled to multiple 'per occurrence' limits of liability to resolve each of the asbestos suits" (*Id.*, p. 63); and "continuous trigger of coverage applies to Covil Asbestos Suits" (*Id.*, p.65). These declarations were made in a contextual void. No specific facts of any case

actually filed against Covil were referenced in any of these declarations or the reasoning supporting them. (*Id.*, pp. 39-53, 54-99).

The Final Order makes sparse reference to "Covil's Asbestos Suits." This term is defined as "Covil has continued to be sued in asbestos litigation for claims arising out of Covil's historic operations, among other allegations, throughout the southeastern United States." (*Id.*, p. 7). This definition does not include any particular lawsuit filed against Covil, but generically refers to both unidentified lawsuits that have been filed and those that may be filed in the future. There are also two paragraphs in sixty-three pages of "conclusions of law" where the trial court found that settlements paid by Penn National to settle twelve prior cases (not mentioned in the pleadings of this lawsuit) did not impair the aggregate limit contained in the Penn National Policies. (*Id.*, p. 54). There is no other reference to any facts of any underlying case throughout the totality of the trial court's 102-page Final Order. However, even the references to twelve cases in one small portion of its decision did not give the trial court carte blanche to issue advisory opinions regarding all other aspects of coverage potentially afforded for future cases filed against Covil.

It is clear from the entirety of the Final Order entered in this case that Covil requested, and trial court readily provided, an improper advisory opinion regarding how Covil and Penn National should respond to claims where "Covil has continued to be sued." (*See* Protopapas testimony (11/27/2023 AM Session), p. 143: "I'm seeking declarations so we both know going forward how we're going to operate."). It is black letter law that courts are not permitted to provide such judicial advice to parties under the auspices of a declaratory judgment action. As the Supreme Court of South Carolina has stated:

> The Uniform Declaratory Judgment Act . . . does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise, or license litigants to fish in judicial ponds for legal advice.

Columbia v. Sanders, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957) (internal citations and quotations omitted). Here, Covil was clearly fishing for legal advice from the trial court regarding Penn National's obligations for future claims. The trial court improperly allowed Covil to do so.

In its Brief, Covil appears to concede that the present action did not request declarations regarding any actual breach by Penn National of its contractual obligations,[1] but argues that a declaratory judgment is appropriate even before a breach. (Covil's Brief, pp. 31-32). While it is true that the appellate courts have found that a declaratory judgment may be appropriate even before one party breaches a contract, a key requirement remains that "there must be 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, 748 S.E.2d 781, 787 (2013).[2] In all three cases cited by Covil in support of its argument, there was a concrete substantial controversy between the parties that the appellate court found was appropriate for judicial determination, an element missing in the present case. *See id.* at 595-96, 748 S.E.2d at 787 (finding that a justiciable controversy existed between the parties regarding coverage for an underlying pending lawsuit where the insurer had denied coverage for portions of the claim); *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 72, 459 S.E.2d 844, 845-46 (1995) (declaratory judgment seeking reformation of policy to include UIM coverage after insurer denied coverage); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462 (2004) (declaratory judgment seeking validity of ordinance preventing developer from building homes on property presents a judicial controversy).

Covil does not identify any actual controversy in this case. It argues that Penn National

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[1] Covil did not even assert a breach of contract claim against Penn National in this lawsuit. (Complaint, ¶¶ 14-26).

[2] A case cited by Covil in support of its argument.

has a "far more restrictive interpretation" of the Penn National Policies than it has. However, Covil has not shown that Penn National's "interpretation" has resulted in the denial of any benefits under the Penn National Policies. In an apparent acknowledgment of this point, Covil also argues that because Penn National defended fourteen lawsuits under a reservation of rights, and because a defense under a reservation of rights is akin to a denial of coverage, there was a current dispute between the parties.[3] However, none of the declarations made by the trial court addressed Penn National's defense obligations. (Final Order, pp. 99-101). Indeed, Covil has not incurred any defense costs because it is being defended in all asbestos liability cases by its insurers, including Penn National. (Wright testimony (11/27/2023 AM session), pp. 116-18; Protopapas testimony (11/27/2023 AM session), pp. 171-75). Therefore, Penn National's position regarding its defense obligation was never a controversy raised to or addressed by the trial court. Most importantly, these fourteen lawsuits were settled with contributions from Penn National, and neither Penn National nor Covil seek either recoupment or additional funds from the other with regard to these settlements. (Protopapas testimony (11/27/2023 AM session), pp. 149-52; (11/27/2023 PM session), p. 23; Wright testimony (11/27/2023 AM session), p. 122; Def. Exh. 24).

Finally, Covil contends that there is an actual controversy regarding whether Penn National's payment of settlements in these fourteen lawsuits impairs the Penn National Policies' aggregate limits. In support of this contention, Covil references a September 1, 2022 letter that Penn National sent to Covil indicating that Penn National's contribution toward settlement of these

[3] Oddly, Covil also references a case, *Howe v. Covil Corp, et al.*, for which Penn National denied coverage on August 21, 2019 based on the products hazard and completed operations hazard exclusions and late notice. (Pl. Exh. 37). However, the *Howe* case does not form the basis of the present declaratory judgment action. It was not cited in the Complaint, it was not referenced in either party's pretrial filings, no testimony regarding this claim was adduced at the trial, and *Howe* is not mentioned or referenced at all in the Final Order.

fourteen lawsuits impaired the global aggregate limits contained in the Penn National Policies. (Def. Exh. 14). However, this contention does not form the basis of a justiciable controversy because Penn National has not refused to participate in any settlements or denied coverage for any claims based on its aggregate limits being reached. Even Covil characterizes the controversy as a contingent one, impacting "which future claims Penn National may pay." (Covil's Brief, p. 33). In any event, even if this scenario presented a "controversy," which Penn National denies, the letter was sent in September 2022, over two years after the present lawsuit was filed on April 27, 2020. Therefore, even this letter cannot satisfy the requirement that a real or actual controversy existed between the litigants "at the time of the institution of the DJ action." *See Rhodes*, 405 S.C. at 595, 748 S.E.2d at 787.

In truth, this lawsuit was filed in an attempt to gain enough leverage over Penn National to force Penn National to pay a substantial sum to the Covil Qualified Settlement Fund (QSF) in order to "buy back" the Penn National Policies. This lawsuit was thus filed for an improper purpose from the outset. Because this case did not present an actual or justiciable controversy for judicial determination, the trial court should have dismissed this lawsuit. Penn National respectfully requests that this Court reverse the finding of a justiciable controversy by the trial court, vacate the orders entered by the trial court, and dismiss this case.

II. Covil Cannot Dispute That This Case Presented Issues Of Fact That Should Have Been Tried By A Jury.

While it is true that the interpretation of an unambiguous insurance policy is a question of law for the court, this case presented several issues of fact, and the trial court deprived Penn National of its constitutional right to have these issues of fact determined by a jury. As noted in Penn National's Initial Brief, the trial court made factual determinations regarding the reasonableness of Penn National's maintenance of its historical policies, the meaning of and the

intent of the parties regarding the words on a change endorsement contained in one of the Penn National Policies, Penn National's alleged issuance of an additional policy, when asbestos injuries occur, and whether Penn National had a duty to preserve documents and failed to do so with a culpable state of mind. Of significance, Covil does not dispute in its brief that these factual findings were actually made by the trial court.

Instead, Covil argues that this Court has already ruled that Penn National was not entitled to a jury trial in this case, and that Penn National somehow waived its right to a jury trial in this case. It is true that when the trial court entered its order denying Penn National's motion to confirm jury trial demand, Penn National promptly appealed the order as required under South Carolina law. *See Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997). Covil immediately moved to dismiss the appeal even before this Court could address this issue on its merits. This Court granted that motion in a one sentence order. (2-8-2023 Ct. App. Order). Dismissing an appeal before briefing, however, is not an adjudication of the merits of the appeal, and Covil has cited no case indicating that it is. Therefore, Penn National's prior appeal of the order denying its right to a jury trial in this case does not preclude this Court's ability to now review this issue on its merits.

Covil's contention that Penn National somehow waived its right to a jury trial is also without basis. The law is clear that once invoked, a demand for a jury trial can only be waived through stipulation of the parties or court order:

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

Rule 39(a), SCRCP. Here, it is undisputed that Penn National properly pled its request for a jury trial in its Answer. (Answer, p. 8). It is also undisputed that Penn National never filed a written stipulation with the court indicating that it was waiving its right to a jury trial or entered into an oral stipulation in open court that it was doing so. Indeed, Covil does not and cannot point to any such stipulation. Therefore, under the Rules of Civil Procedure, Penn National did not waive its right to a jury trial in this case.

Covil contends that because it made a request for a nonjury trial and Penn National's counsel did not object to the request, that was sufficient to waive Penn National's right to a jury trial. (Covil's Brief, p. 59). First, Penn National disputes that it failed to object to Covil's request for a nonjury trial. Covil claims that during a September 8, 2022 hearing, its counsel made a verbal request for a nonjury trial and Penn National's counsel did not respond.[4] After that hearing, the trial court entered a scheduling order stating that a "trial," without designating the trial as jury or nonjury, was scheduled for December. (9-16-2022 Order). Because the order did not specify a jury trial, Penn National's counsel sent a letter to Ret. Chief Justice Toal confirming that Penn National demanded a jury trial in this case and requesting that its right to such a trial be preserved. (11-7-2022 letter from B. Yntema to J. Toal). The next day, Zitel Poswal, judicial law clerk for Ret. Chief Justice Toal, sent an email to Penn National's counsel indicating that the court recognized that Penn National had requested a trial by jury and had not waived its right to a jury trial in this case. (11-8-2022 email from Z. Poswal to B. Yntema). At the next hearing, held on November 14, 2022, one of the issues was whether a jury trial would be held in this case. (11-14-2022 hearing

[4] Penn National's counsel was sick with COVID-19 at the time of the September 8, 2022 hearing and was participating remotely. (9-8-2022 hearing transcript, p. 3). Both Penn National's counsel and the trial court had difficulty hearing each other during that hearing. (*Id.*, pp. 8, 14).

transcript, pp. 92-106; *see also,* p. 5: Mr. Protopapas: "[T]hen we would like to discuss with you the proposed trial schedule and the jury/nonjury issue that Mr. Yntema and his client has presented."). Therefore, contrary to Covil's position on appeal, neither the parties nor the trial court believed that Penn National's earlier silence in response to Covil's request to schedule a nonjury trial somehow waived Penn National's right to a jury trial.

More importantly, however, Penn National's silence in the face of verbal request for a nonjury trial does not, as a matter of law, waive Penn National's constitutional right to a jury trial. *See* Rule 39(a), SCRCP; *Shaw v. Atlantic Coast Life Ins. Co.*, 322 S.C. 139, 470 S.E.2d 382 (Ct. App. 1996) ("Once a jury trial is properly demanded it may only be waived based on the provisions of Rule 39(a), SCRCP . . . ."). Because Penn National did not enter into either a written or oral stipulation consenting to a nonjury trial in this case as required by Rule 39(a), it did not waive its right to a jury trial. This Court should thus vacate the orders entered after trial in this case and remand this matter for a jury trial.

III. Covil Misunderstands Or Deliberately Misconstrues The Record And South Carolina Supreme Court Precedent In Its Attempts To Find Support For The Trial Court's Coverage Determinations.

A. Covil Confuses Whether A Progressive Injury Can Trigger Coverage Under More Than One Policy With Whether The Penn National Policies Provide Coverage Under Its Policy Terms.

1. *Covil's Argument That Penn National Espoused A "Different" Trigger of Coverage Theory Is A Red Herring.*

There is no dispute that under South Carolina law, a long-tail injury claim triggers coverage under multiple policies from the time of the first injury-in-fact through the progressive damage. As the Supreme Court held in *Joe Harden Builders v. Aetna Casualty and Surety Company*, 326 S.C. 231, 486 S.E.2d 89 (1997):

We hold coverage is triggered at the time of an injury-in-fact and continuously

> thereafter to allow coverage under all policies in effect from the time of the injury-in-fact during the progressive damage. Such an injury-in-fact/continuous trigger does not penalize the insured by requiring a manifestation of damage during the policy period, nor does it penalize the insurer by extending coverage from the time of the underlying event when no injury has yet occurred. We conclude this interpretation of the policy best meets the fair expectations of the parties under the language of the policy. Further, this theory of coverage will allow allocation of risk among insurers when more than one insurance policy is in effect during the progressive damage.

Id. at 236-37, 486 S.E.2d at 91. The continuous trigger theory for progressive injury claims is the law in South Carolina. Penn National has never disputed that.

The fact that a progressive injury claim may trigger coverage under multiple policies of insurance in effect during the period of progressive damage does not mean that there actually is coverage under each policy issued to the insured during the trigger spread. Each policy in the trigger spread must be analyzed to determine if the terms contained in that particular policy provide coverage for the claim at issue. *See Crossmann Cmtys. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 48-50, 717 S.E.2d 589, 593-94 (2011) (starting its analysis with whether the policies at issue provided coverage for the underlying defective construction claim).

Covil claims that Penn National has argued for an "exposure theory" in this case even though the words, "exposure theory," are not found in Penn National's Initial Brief. Covil's attempts to characterize Penn National's arguments as espousing a trigger theory other than the *Joe Harden* modified continuous trigger theory ring hollow. First, "exposure theory" is not a separate theory of how policies are triggered. Indeed, *Joe Harden* did not address the "exposure theory" in analyzing the four main theories of how insurance policies are triggered for progressive injury claims. *See Joe Harden*, 326 S.C. at 234-36, 486 S.E.2d at 90-91. Courts have used the term, "exposure theory," in defining the period of progressive injuries caused by asbestos, i.e. injuries only occurred during the period in which the claimant was exposed to asbestos fibers. *See,*

e.g., Insurance Co. of N. Am. v. Forty-Eight Insulations, 633 F.2d 1212, 1217 (6th Cir. 1980) (defining "exposure theory" as the period of time when "tissue damage starts to occur shortly after the initial inhalation of asbestos fibers and that the tissue damage worsens as the victim breathes in more and more asbestos fibers"). "Exposure theory" is not a different insurance policy trigger theory, as argued by Covil. It simply defines the continuous trigger spread as that period of time where the claimant was actually exposed to asbestos.

At no time has Penn National argued that the modified continuous trigger was somehow inappropriate in claims of asbestos injuries. In the present case, the trial court did not adopt the exposure theory in defining the period of continuous trigger for asbestos injuries. Instead, the trial court defined the period of progressive damage as being from the time of exposure to asbestos fibers through the manifestation of the asbestos-caused disease (even though the claimant may not have been diagnosed with the disease until years after asbestos exposure ended). Penn National does not argue that this was error. Indeed, Covil cites to closing argument during which Penn National's counsel agreed that the *Joe Harden* modified continuous trigger applied to claims of asbestos injury.[5]

Under the *Joe Harden* modified continuous trigger theory, and as found by the trial court, asbestos injuries occur at the first inhalation of asbestos fibers and continuously thereafter through the diagnosis of the asbestos-causing disease. Therefore, if the Penn National Policies were issued to Covil during this trigger spread, then bodily injury from asbestos occurred during the Penn National Policy periods. However, just because the Penn National Policies may have been

[5] Penn National does not understand Covil's argument that counsel's closing arguments at trial somehow waived Penn National's arguments regarding whether coverage is afforded under the Penn National Policies. Clearly, they do not. Significantly, the trial court did not find that Penn National's counsel's closing arguments constituted a waiver of Penn National's coverage position.

triggered by a particular asbestos injury claim does not mean that Penn National necessarily provides coverage for that claim. The terms of the Penn National Policies still control whether coverage is afforded under the Penn National Policies for a particular asbestos injury claim. *See Reeves v. S.C. Mun. Ins. & Risk Fin. Fund*, 434 S.C. 18, 862 S.E.2d 248 (2021) (indicating that its analysis of coverage begins with the insuring language contained in the policy).

2. *The Terms Of The Penn National Policies Control Whether Coverage Is Afforded For Any Particular Asbestos Injury Claim.*

The insuring agreement contained in the Penn National Policies states that coverage is afforded for "damages because of . . . bodily injury . . . to which this insurance applies, caused by an occurrence . . . ." (Def. Exh. 5, p. 2; Exh. 6, p. 2). "Bodily injury" is a term specifically defined under the Penn National Policies as "bodily injury, sickness or disease sustained by any person which *occurs during the policy period* . . . ." (Def. Exh. 5, p, 36; Exh. 6, p. 38) (emphasis added). Therefore, under the insuring agreement, coverage is initially granted for injuries, sickness or diseases which occur during the policy period. In asbestos injury claims, if the claimant was exposed to asbestos fibers from Covil's work on or before the inception of the Penn National Policies, bodily injury most likely occurred during the Penn National Policy periods.

After a review of the insuring agreement, the exclusions in the Penn National Policies must be analyzed to determine if an exclusion operates to exclude coverage for the bodily injury that occurred during the Penn National Policies. *See USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 657, 661 S.E.2d 791, 798 (2008) (analysis of whether policy affords coverage includes both whether the injury falls within the insuring agreement as well as whether the injury is excluded from coverage through operation of an exclusion). The Penn National Policies contain a completed operations hazard exclusion which states that the Policies do not provide coverage for "bodily injury . . . included within the Completed Operations Hazard . . . ." (Def. Exh. 5, p. 30; Exh. 6, p.

25). The Completed Operations Hazard is specifically defined in the Penn National Policies as "bodily injury . . . arising out of operations . . . *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. . . ." (Def. Exh. 5, p. 36; Exh. 6, p. 38) (emphasis added). Therefore, under the plain terms of the Penn National Policies, there is no coverage for claims of bodily injury if those injuries, even though they occurred during the Penn National Policy periods, occurred **after** Covil's operations were completed. Put another way, if a claimant was exposed to asbestos fibers caused by Covil's operations in the 1970's, there is no coverage for continuing asbestos injuries that occurred during 1986-1988 because the injuries in 1986-1988 occurred after the completion of Covil's operations in the 1970's. However, if a claimant was exposed to asbestos fibers caused by Covil's operations during the 1986-1988 time period, then there is coverage under the Penn National Policies because the injuries that occurred during the 1986-1988 time period occurred during Covil's ongoing operations (and not after those operations were completed).

This exact issue was recently decided by the Supreme Court in *Covil Corp. v. Pennsylvania National Mutual Casualty Insurance Co.*, Op. No. 28221 (S.C. Sup. filed July 24, 2024) (Howard Adv. Sh. No. 28 at 20), and the Supreme Court's decision is binding on this Court. In *Covil*, the Supreme Court addressed whether an underlying lawsuit, *Rollins v. Covil Corp. et al* (Civil Action No. 2019-CP-25-0118, Hampton County), was covered under the exact same Penn National Policies at issue in this case. The evidence in the underlying lawsuit indicated that Mr. Rollins was exposed to take-home asbestos fibers from his father who worked at the Bowater Paper Mill facility when Covil did piping insulation work at that facility from March 16, 1986 through January 25, 1987 (during the Penn National Policy periods). *Id.* at 21-22. Penn National denied coverage for the Rollins lawsuit due to Covil's violation of its notice provisions and because liability was

excluded under the products hazard and completed operations hazard exclusions. *Id.* at 23.

After reviewing the Penn National's late notice defense and the applicability of the products hazard exclusion, the Supreme Court addressed whether the completed operations hazard exclusion barred coverage for the Rollins lawsuit. After quoting the definition of "completed operations hazard" from the Penn National Policies, the Supreme Court reasoned:

> Thus, the Completed Operations Hazard exclusion applies 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. at 34. The Supreme Court then held that the completed operations hazard exclusion did not preclude coverage for the Rollins lawsuit because Mr. Rollins' injuries from take-home asbestos fibers during the Penn National Policy periods (*i.e.*, 1986-1988), occurred while Covil was performing ongoing operations at the Bowater facility.

> Covil did work at the Bowater facility from March 16, 1986, to January 25, 1987. Rollins was exposed to asbestos through take-home exposure during the period in which Covil performed under the subcontract. Therefore, 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. Thus, the Completed Operations Hazard exclusion does not apply, and the court of appeals correctly affirmed summary judgment on its application.

Id. at 35.

The Supreme Court's holding in *Covil* controls the outcome of this case. If the injuries that took place during the Penn National Policy periods occurred while Covil was performing operations during the policy period (similar to the facts in the *Rollins* case), then there is coverage under the Penn National Policies for that injury. However, if the injuries that took place during the Penn National Policy periods occur **after** Covil completed its operations, then those injuries are excluded from coverage through operation of the completed operations hazard exclusion.

Covil misrepresents the holding in *Covil* in its brief. Covil argues that the Supreme Court held that the determining factor in whether the completed operations hazard exclusion applies was whether the injury occurred during Covil's operations, not whether those operations occurred during the policy period, arguing that the question of whether Covil's operations took place during the policy period is "irrelevant." But that is not what the *Covil* Court held. In determining that the completed operations exclusion did not apply, the Covil Court expressly found that the injuries occurred during Covil's operations at the Bowater facility that were ongoing—not completed—during the policy period, specifically from March 16, 1986 to January 25, 1987.[6]

The determinative factor regarding whether the completed operations hazard exclusion is applicable is when Covil's operations occurred. Because the injuries covered under the Penn National Policies must occur during the Penn National Policy periods (according to the definition of "bodily injury" contained in the Policies), the completed operations hazard exclusion precludes coverage for those injuries if they were caused by Covil's operations that were completed prior to the Penn National Policy periods, and does not exclude coverage for those injuries that were caused by ongoing operations during the Penn National Policy periods.

Covil also argues that the coverage issue hinges not on the policy language as a whole, but on the fact that the word "the" precedes the term "bodily injury" in the definition of "completed operations hazard." According to Covil, because the policy refers to "the" bodily injury, that somehow means that there is "only one continuous bodily injury for purposes of this provision, and the entire injury must occur after operations have been completed in order for this exclusion to apply." (Covil's Brief, p. 42) (internal quotations and ellipses omitted).

[6] Interestingly, Covil omits this part of the Supreme Court's analysis from the portions it quotes from the *Covil* case in its Brief.

Covil's argument makes no sense, and in any event is contrary to the actual language of the Penn National Policies. The Penn National Policies define "completed operations hazard" as including "**bodily injury** . . . arising out of operations . . . but only if the **bodily injury** . . . occurs after such operations have been completed . . . ." (Def. Exh. 5, p. 36; Exh. 6, p. 38) (bolded in original). "Bodily injury," as used in this definition, is a defined term (and is bolded in the policy to indicate such). The Policies define "bodily injury" as "bodily injury, sickness or disease . . . which occurs during the policy period . . . ." (*Id.*). Inserting the actual policy definition of "bodily injury" into the definition of "completed operations hazard," the completed operations hazard includes bodily injury arising out of operations *but only if the bodily injury, sickness or disease which occurs during the policy period occurs after such operations have been completed*.

It is well-established that insurance policies must be interpreted according to their plain terms, giving effect to all terms and ignoring none.

> As a rule of construction, the Court must consider the entire contract between the parties to determine the meaning of its provisions. That construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so. … [I]t is stated that the meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract.

Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592-93, 225 S.E.2d 344, 349 (1976). Applying the canons of insurance policy construction to the Policies' definition of "completed operations hazard," it is clear that if the injury which is taking place during the policy period is occurring after the insured's operations are completed, the injury falls within the completed operations hazard and is excluded from coverage under the policy. Covil's argument fails to interpret the full definition of "completed operations hazard" by emphasizing the word "the" to the exclusion of the actual definition of "bodily injury." *See Reeves*, 434 S.C. at 24, 862 S.E.2d at

251 (courts "are not permitted to use our intuitive definition of a term defined in an insurance policy" when interpreting policy provisions).

Further, in making this argument, it appears that Covil misunderstands the nature of an asbestos disease, confusing it with injuries caused by an ordinary accident. In the run-of-the-mill accident, such as a motor vehicle accident, the accident and resulting harm occur almost simultaneously. In such circumstances, only one policy is triggered for the resulting injuries, the policy in effect when the accident occurred. In asbestos cases, however, the injuries that occur from the inhalation of asbestos fibers are continuous. It is not just one injury, but an ongoing and progressive injury that occurs in every year from the date the asbestos fibers are inhaled until diagnosis. Therefore, the injury that occurs immediately upon inhalation of the asbestos fibers is not the same injury that occurs years later. That is the nature of a progressive damages case and what justifies the triggering of coverage under multiple policies of insurance.

> In order to make an injury-in-fact trigger consistent with coverage under multiple policies, we had to recognize the ongoing or repetitive nature of the injuries in a progressive damage case. We did precisely that by (a) adopting the continuous trigger theory (theory three), and (b) modifying it to require an injury-in-fact during each policy period.

Crossmann, 395 S.C. at 55-56, 717 S.E.2d at 597. *See also Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034, 1058 (D.C. Cir. 1981) ("In short, the 'injury' is taking place every year that the asbestos fiber remains in situs until tissue damage in the lungs is significant enough to be detected by X-rays or to produce symptomatic effects of asbestosis, mesothelioma or lung cancer.") (concurrence); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178 (2nd Cir. 1995) ("Even if an individual is no longer exposed to asbestos, asbestos fibers within the lung continue to split or divide over time, which is the main cause of the disease continuing and progressing. 'Injury' continues as long as there is asbestos in the lungs.").

Therefore, if the injury-in-fact that occurs during the Penn National Policy periods was from operations that were already completed by Covil prior to the inception of the Penn National Policies, the completed operations hazard exclusion applies to preclude coverage for that injury. If, however, the injury-in-fact that occurs during the Penn National periods was from Covil's ongoing operations during the Penn National Policy periods, there is coverage under the Penn National Policies for that injury. *See Covil*, Op. No. 28221, (Howard Adv. Sh. No. 28 at 35).

This issue has now been definitively decided by the Supreme Court in *Covil v. Penn National*. This Court is bound by this precedent. *See* S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) ("[T]his court lacks the authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court."), *aff'd as modified*, 408 S.C. 198, 758 S.E.2d 715 (2014). Therefore, this Court is compelled to reverse the trial court and find that there is no coverage under the Penn National Policies for claimants who were injured as a result of exposure to asbestos fibers from Covil's operations which preceded the Penn National Policy periods. *See S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 610, 730 S.E.2d 862, 864 (2012) ("[A]n appellate court may make its own determinations on questions of law and need not defer to the trial court's rulings in this regard.").

B. Covil Improperly Construes The Supreme Court's Holding Regarding Pro-Rata Allocation In *Crossmann* Too Narrowly.

The Supreme Court in *Crossmann Communities of North Carolina v. Harleysville Mutual Insurance Company*, 395 S.C. 40, 717 S.E.2d 589 (2011) definitively established how damages are to be allocated when multiple policies are triggered by long-tail liability claims. Specifically, the Supreme Court rejected the "joint and several"/"all sums" approach in favor of the pro-rata time-on-the-risk approach.

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

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

The language contained in the policies of insurance issued by Harleysville that the *Crossmann* Court analyzed in reaching its decision regarding pro-rata time-on-the-risk allocation is functionally the same as the language contained in the Penn National Policies. The Harleysville policies state in pertinent part:

> **A. COVERAGE**
>
> **1. Business Liability.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury," "property damage," "personal injury" or "advertising injury" to which this insurance applies. …
>
> a. This insurance applies only:
>
> (1) To "***bodily injury***" or "property damage:"
>
> (a) ***That occurs during the policy period***; and
> (b) That is caused by an "occurrence." The "occurrence" must take place in the coverage territory.
>
> * * *
>
> **F. LIABILITY AND MEDICAL EXPENSES DEFINITIONS**
>
> 3. "**Bodily Injury**" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
>
> 9. "**Occurrence**" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.
>
> 12. "**Property damage**" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property; or
> b. Loss of use of tangible property that is not physically injured.

(*Crossmann* Record on Appeal, pp. 1109, 1118, 1120) (words in bolded italics emphasized).

The Penn National Policies at issue in this case state:

INSURING AGREEMENT

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

The company will pay on behalf of the **insured** all sums which the **insured** shall become legally obligated to pay as damages because of

Coverage A. **bodily injury** or
Coverage B. **property damage**

to which this insurance applies, caused by an **occurrence** …

DEFINITIONS APPLICABLE TO SECTION II

"**bodily injury**" means bodily injury, sickness or disease sustained by any person ***which occurs during the policy period***, including death at any time resulting therefrom;

"**occurrence**" means an accident, including continuous or repeated exposure to conditions, which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **insured;**

"**property damage**" means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period;

(Def. Exh. 5, pp. 2, 36; Exh. 6, pp. 2, 38) (words in bolded italics emphasized).

Covil argues that the trial court properly failed to follow *Crossmann* in this case solely because the language in the Penn National Policies is slightly different from the language contained in the Harleysville policies and analyzed by the *Crossmann* Court. Specifically, Covil points to the Penn National Policies' definition of "bodily injury." The Penn National Policies define "bodily injury" to mean "bodily injury, sickness or disease sustained by any one person

which occurs during the policy period, including death at any time resulting therefrom." (*Id.*). Focusing on the language "including death at any time resulting therefrom," Covil argues that the Penn National Policies provide coverage for injuries that occur at any time, which Covil contends differentiates the Penn National Policies from the Harleysville policies.[7] According to Covil, this difference in policy language is sufficient to discard *Crossmann*'s pro-rata time-on-risk allocation method and return South Carolina law to the joint and several/all sums approach rejected by *Crossmann*.

Covil's arguments are without merit. Its emphasis on the language "including death at any time resulting therefrom" wholly ignores the first part of the Policies' definition of "bodily injury," which mandates that the bodily injury, sickness or disease "occur during the policy period." Covil's interpretation would write "occurs during the policy period" entirely out of the policy. This is contrary to the canons of insurance policy construction and should not be accepted by this Court. *See Yarborough*, 266 N.C. at 592, 225 S.E.2d at 349 ("That construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so.").

Furthermore, the "including death at any time resulting therefrom" cannot be interpreted to mean that any and all injuries, sickness and disease occurring after the policy period are actually covered under the Penn National Policies. The policy language is limited to "*death* at any time" and is nowhere as broad as Covil makes it out to be. Indeed, the language, "including death at any time resulting therefrom" is supposed to ensure that in claims where there are no progressive damages (and therefore multiple policies are not triggered for coverage), such as the ordinary

[7] The *Crossmann* Court analyzed the definition of "property damage" and not "bodily injury" in its decision.

motor vehicle accident claim, the resulting bodily injuries include death even if the death occurs later, after the policy period ends. This policy language ensures that death is not seen as a separate injury that may trigger coverage under a subsequent policy. *See R.T. Vanderbilt Co. v. Hartford Acc. & Indem. Co.*, 156 A.3d 539, 578 (Conn. App. 2017) ("[P]rogressive, long-latency injuries such as asbestos related disease are fundamentally different from those sorts of traditional accidents.").

Finally, Covil's argument ignores the fact that the *Crossmann* Court expressly overruled the Supreme Court's earlier decision in *Century Indemnity Co. v. Golden Hill Builders*, 348 S.C. 359, 561 S.E.2d 355 (2002), which adopted a joint and several/all sums approach for the allocation of damages. In *Century Indemnity*, the policy language at issue actually included a deemer clause, which stated that "all such loss of use shall be deemed to occur at the time of the physical injury that caused it." *Id.* at 563, 561 S.E.2d at 357. This language more clearly afforded coverage under the triggered policy for property damage that occurred outside of the policy period. In fact, the *Century* Court so held when it found that the triggered policy "provides coverage for property damage that occurred during the policy period and for any continuing damage." *Id.* at 564, 561 S.E.2d at 357. Despite this seemingly clear policy language, the *Crossmann* Court found that the allocation method adopted in *Century Indemnity* was improper, expressly overruling *Century Indemnity*'s adoption of a joint and several/all sums approach in favor of the pro-rata time-on-risk approach.

Covil also argues that the language in the Harleysville policies is different from the Penn National Policies because the insuring agreement in the Harleysville policies indicated that the insurance applied "only if" the injury or damage was caused by an occurrence and the injury or damage occurred during the policy period. *Crossmann*, 395 S.C. at 53, 717 S.E.2d at 595.

However, the *Crossmann* Court did not rely on the "only if" language in adopting the pro-rata time-on-the-risk allocation method. The policy language relied upon by the *Crossmann* Court was the language that required the damage to "occur during the policy period":

> This requirement limits the promise of payment, obligating the insurer to pay only those damages caused by property damage that "occurs during the policy period."

Id. at 62, 717 S.E.2d at 600. The *Crossmann* Court also noted that its decision "relies heavily on the opinion of the Supreme Judicial Court of Massachusetts in *Boston Gas Company v. Century Indemnity Company*." *Id.* at 61, 717 S.E.2d at 600. The portion of the *Boston Gas* decision quoted by the *Crossmann* Court does not contain the "only if" language. *Id.* Indeed, none of the policies analyzed in *Boston Gas* actually contained the "only if" language. *Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290, 295-96 (Mass. 2009). In both cases, the pertinent policy language that mandated a pro-rata time-on-risk allocation was language that indicated that coverage under the insurance policy was for damages that "occur during the policy period," language also contained in the Penn National Policies.

Crossmann held that in progressive damages cases, where multiple policies are triggered for coverage, South Carolina will follow the pro-rata time-on-risk allocation method to allocate damages among triggered policies during the progressive damage period:

> In sum, we construe the standard CGL policy to require that each insurer cover only that portion of a loss attributable to property damage that occurred during its policy period. In light of the difficulty in proving the exact amount of damage incurred during each policy period, we adopt the formula above as the default method for allocating shares of the loss. Trial courts may vary from this default formula where appropriate to the circumstances of a particular case, *but they must remain faithful to the premise that each insurer is responsible only for a pro rata portion of the total loss, and each pro rata portion must be defined by the insurer's time on the risk*.

Crossmann, 395 S.C. at 66, 717 S.E.2d at 603 (emphasis added). Every case issued by the Supreme Court after *Crossmann* has affirmed the propriety of the pro-rata time-on-the-risk method of

allocation among all triggered policies in progressive damages cases. *See Harleysville Group Ins. v. Heritage Cmtys., Inc.*, 420 S.C. 321, 336, 803 S.E.2d 288, 296 (2017) (affirming the adoption of pro-rata time-on-the-risk allocation of damages and noting that "*Crossmann* represented a sea change in terms of adopting the time-on-the-risk approach and abandoning the 'joint and several' approach") (internal parenthesis omitted); *Id.* at 354, 803 S.E.2d at 306-07 ("The concept of time on the risk is a judicially created, equitable method of allocating progressive damages where it is impossible to know the exact measure of damages attributable to the injury that triggered each policy, as is the case here.") (internal quotations omitted); *Builders Mut. Ins. Co. v. Island Pointe, LLC*, 431 S.C. 93, 110, 847 S.E.2d 87, 96 (2020) (affirming the allocation of damages pursuant to each insurer's pro-rata time-on-risk).

Covil's citation to this Court's decision in *Portrait Homes-SC, LLC v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 442 S.C. 515, 900 S.E.2d 245 (Ct. App. 2023) is unavailing. The policies at issue in *Portrait Homes* contained a more recent version of the general liability coverage form than the one analyzed in *Crossmann*. The more recent coverage form included language stating that "property damage which occurs during the period of a Penn National policy includes any continuation, change or resumption of that property damage after the end of the policy period." *Id.* at 590, 900 S.E.2d at 285. Because of this explicit language, the *Portrait Homes* Court held that modifying the time-on-risk allocation to allow the first policy triggered for progressive damage to cover damages that occurred after the end of the policy period was appropriate under *Crossmann*. *Id.* at 590, 900 S.E.2d at 286. Here, however, the Penn National Policies do not contain the same explicit language as contained in the policies at issue in *Portrait Homes*. Furthermore, the *Portrait Homes* Court allocated all damages to the first triggered policy period, not to any policy issued to the insured at any time during the progressive damage period as

advocated by Covil and found by the trial court in this case.

The trial court's return to the joint and several/all sums approach for claims covered under the Penn National Policies for Covil's asbestos liability is directly contrary to the *Crossmann* Court's directive of pro-rata time-on-risk allocation. Because the trial court's holding conflicts with Supreme Court precedent, it should be reversed by this Court.

C. Covil Cannot Dispute That The Plain Language Of The Penn National Policies Requires A Limit Of $1 Million For All Bodily Injury Claims Arising Out Of The Claimants' Exposure To Asbestos.

All policies of insurance contain limits which define the amount of coverage to be provided under the policy. *See Williams*, 409 S.C. at 598, 762 S.E.2d at 712 ("As a general rule, insurers have the right to limit their liability …"). The Penn National Policies are no exception. The declarations pages of the Penn National Policies contain a "bodily injury and property damage liability combined single limit" of $1 million each occurrence and $1 million aggregate. (Def. Exh. 5, p. 1; Exh. 6, p. 1). The Penn National Policies then define the limits of the coverage provided thereunder under the section of the Policies entitled "Limits of Liability." In that section, it expressly states:

> Regardless of the number of (1) insureds under this policy, (2) persons or organizations who sustain **bodily injury** or **property damage**, or (3) claims made or suits brought on account of **bodily injury** or **property damage**, the company's liability is limited as follows:
>
> * * *
>
> **Coverage A [bodily injury] and B [property damage]** – for the purpose of determining the limit of the company's liability, all **bodily injury** and **property damage** arising out of the continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

(Def. Exh. 5, p. 4; Exh. 6, p. 4). Interpreting this language according to its plain meaning as required by the canons of insurance policy construction, Penn National's limit for "all" bodily injury arising out of exposure to substantially the same general conditions (i.e., asbestos),

regardless of the number of persons who sustained bodily injury or the number of claims made, is the per occurrence limit of $1 million. *See Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 5, 747 S.E.2d 426, 428 (2013) ("When policy language is undefined, courts must give it its plain, ordinary, and popular meaning.").

Covil argues that this cannot be correct because multiple people who were exposed to asbestos from Covil's operations at different times and at different locations cannot have suffered a single "occurrence" under the policy. Covil misconstrues the language in the Penn National Policies. In this section of the Policies, Penn National is setting forth the maximum amount of coverage available under its Policies. It is not attempting to define what an "occurrence" is under the Policies. In fact, the Penn National Policies expressly limit the intent of this section by specifically including language that states that it is "for [the] purposes of determining the limit of the company's liability." So limited, the Policies continue by stating that all bodily injury from exposure claims is subject to the "each occurrence" limit (as opposed to the "aggregate" limit). Importantly, under the Penn National Policies, the distinction between the "each occurrence" limit and the "aggregate" limit does not make a difference as both limits are the same, *i.e.* $1 million.

The cases cited by Covil are unavailing as they are from jurisdictions other than South Carolina, apply law of other jurisdictions, address whether asbestos liability claims constitute one or more than one occurrence under triggered policies, and do not address the insurer's limits contained in any one policy. *See Travelers Cas. & Sur. Co. v. Gerling Global Reins. Corp.*, 419 F.3d 181 (2nd Cir. 2004) (no discussion of occurrence or limits other than in presentation of underlying facts); *Babcock & Wilcox Co. v. Arkwright-Boston Mfg. Mut. Ins. Co.*, 53 F.3d 762 (6th Cir. 1995) (applying Ohio law and determining the number of occurrences under the policy); *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 886 N.E.2d 876 (Ohio App. 2007) (applying Ohio

law to interpret the definition of "occurrence" under policy, not limits of liability); *Commercial Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167 (Md. App. 1997) (applying New York and Maryland law to define "occurrence" under the policies at issue); *Cole v. Celotex Corp.*, 588 So.2d 376 (La. App. 1991) (applying Louisiana law and determining whether asbestos liability constituted a single occurrence under each year of coverage).

Interestingly, even Covil does not argue in support of the trial court's finding that each plaintiff's exposure to asbestos constitutes a separate occurrence subject to the "each occurrence" limit, which is not subject to any aggregate limits at all. Instead, Covil argues that the proper interpretation of the "Limits of Liability" section is:

> [T]his 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."

(Covil's Brief, p. 54). Thus, under Covil's proposed interpretation, there would be some limit to Penn National's liability for claims asserting liability against Covil for asbestos exposure. Specifically, according to Covil, all claims arising from Covil's operations at one location during one time period would be subject to the "each occurrence" limit. *See Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 765 A.2d 891, 898 (Ct. 2000) ("Under the plain and ordinary meaning of the policy, the continuous exposure clause combines claims arising from each claimant's exposure to asbestos at the same place at approximately the same time into one occurrence.").

The plain language contained in the "Limits of Liability" section of the Penn National Policies does not support even Covil's interpretation. The language plainly states that Penn National's liability for all bodily injury claims arising out of exposure to asbestos, regardless of the number of persons who sustained bodily injuries or the number of claims filed, is subject to the single "each occurrence" limit of $1 million. This Court is required under the canons of

insurance policy construction to construe the Penn National's liability limit accordingly and to reverse the trial court's holding to the contrary.[8]

IV. Covil Cannot Point To Any Evidence That Reasonably Supports The Trial Court's Rulings Regarding Penn National's Alleged Spoliation.

A. The Issue Of Whether Penn National Spoliated Evidence Should Not Have Been Subject To A Bench Trial.

Covil argues that the issue of whether Penn National spoliated evidence was appropriately determined by the trial court because (1) spoliation is not an independent cause of action requiring a jury trial; and (2) spoliation is treated as an evidentiary ruling which is not subject to a jury trial. The problem with Covil's argument is that Covil, and the trial court, treated Penn National's alleged spoliation as an independent cause of action, not an evidentiary ruling.

At the trial court, Covil argued that Penn National spoliated evidence of other general liability policies it **may** have issued to Covil that **may** have afforded coverage for Covil's asbestos liability. However, this evidence – other general liability policies allegedly issued by Penn National to Covil other than the two undisputed Penn National Policies – was never used or purported to be used by Covil to prove any element of its case at trial. It never had any tendency to make the existence of any fact that was consequential to the determination of the claims actually pled by Covil in this case more or less probable. In truth, the spoliation issues in this case were

[8] Covil makes the perplexing argument that Penn National abandoned this argument because it was raised for the first time at trial. In support of this argument, Covil cited *Carolina Renewal, Inc. v. S.C. DOT*, 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009). However, *Carolina Renewal* does not support Covil's argument. The *Carolina Renewal* Court stated, "Because Carolina Renewal does not argue these issues on appeal, they are considered abandoned." *Id.* at 557, 684 S.E.2dd at 783. Here, however, even Covil agrees that the issue of Penn National's limit for asbestos liability claims was actually litigated at the trial in this case. (*See also* Penn National's Post-trial FOF/COL, pp. 25-27). And, Penn National raised this issue in its initial brief. Therefore, the issue of Penn National's limits for payment of asbestos liability claims was properly appealed, Covil's meritless arguments to the contrary notwithstanding.

never "evidentiary" issues in this case, which differentiates it from the spoliation cases cited by Covil in its Brief. *See Kershaw Cty. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990) (the destruction of allegedly "asbestos material" from one school building constituted spoliation); *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446 (4th Cir. 2004) (failure to obtain contact information from eyewitness to falling mirrors at store did not constitute spoliation); *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) (destruction of air bag that failed to deploy prior to inspection by defendant was spoliation); *Brookshire Bros, Ltd. v. Aldridge*, 438 S.W.2d 9 (Tex. 2014) (retention of only a portion of surveillance video tape of plaintiff's fall at store).

This case was not a "missing policy" case. There are no allegations in the Complaint filed in this action that state or even imply that Penn National issued more than the two Penn National Policies to Covil. (Complaint, ¶¶ 8-9, 23, 25). Therefore, evidence of additional policies of insurance that may have been issued by Penn National to Covil was simply irrelevant to any claims asserted in this case. *See* Rule 402, SCRE: "Evidence which is not relevant is not admissible."

How the spoliation issue was tried lends further support to the fact that this was never an "evidentiary issue." The spoliation issue was tried at the same time as the trial of the requested declarations in this case. It was not addressed prior to the start of the trial, which is the accepted method of addressing evidentiary issues. *See Kershaw*, 302 S.C. at 394, 396 S.E.2d at 372 (determining that adverse instruction at trial was appropriate but allowing party to explain its actions to the jury). In fact, the trial court addressed the spoliation issues in its Final Order only after it had already addressed all coverage issues. (Final Order, coverage determinations start at p. 37; spoliation addressed starting at p. 78).

Covil treated the spoliation issues in this case as a separate cause of action, requesting that

Penn National be sanctioned for its conduct, not by requesting an adverse jury instruction – determined by courts to be one of the "harshest" remedies to be imposed for spoliating evidence,[9] but by demanding that the trial court find that an additional policy of insurance was actually issued by Penn National to Covil. Covil's actions regarding spoliation were impermissible and should be reversed by this Court. *See Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011) ("South Carolina does not recognize an independent tort for the negligent spoliation of evidence, third-party or otherwise.").

B. Covil Cannot Show That Other Penn National Policies Existed.

From the time that the Complaint was filed in this case, it was undisputed that Penn National issued two policies of commercial general liability insurance to Covil that covered Covil from March 31, 1986 through March 31, 1988. (Complaint, ¶¶ 8, 23). There was never any secondary evidence showing that another general liability policy issued by Penn National to Covil existed. *See, e.g., Century Indem. Co. v. Aero-Motive Co.,* 254 F.Supp.2d 670, 680 (W.D. Mich. 2003) ("To sustain its burden in a 'lost policy' case, an insured must present secondary evidence establishing both the issuance and terms of the policy … Secondary evidence may include documentary evidence, such as binders and declarations pages, testimony from insurance agents or brokers responsible for obtaining insurance for the insured, testimony from representatives of the insurer, insurance policy reconstruction experts, and standard policy forms in use by the insurer during the relevant period."); *Northeast Utils. v. Century Indem. Co.,* 1999 Conn. Super. LEXIS 1660 (Ct. Super., June 21, 1999) ("Missing insurance policies may be proven by secondary evidence – e.g. correspondence, memos, testimony, etc.").[10]

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[9] *See Brookshire Bros.*, 438 S.W.3d at 23 ("Further, [a spoliation instruction] is among the harshest sanctions a trial court may utilize to remedy an act of spoliation.").

[10] Both cases cited by Covil in its Brief.

Indeed, all the evidence shows that Penn National never issued another general liability policy to Covil for the preceding policy period of March 31, 1985 through March 31, 1986. Hartford Accident and Indemnity Insurance Company admitted that it issued a general liability policy to Covil for the March 31, 1985 through March 31, 1986 policy period. (Pl. Exh. 38, p. 3, ¶ 9). The Receiver for Covil testified at trial that he received money from Hartford in exchange for releasing all claims under the Hartford 1985-1986 policy period. (Protopapas testimony (11/27/2023 AM session), pp. 168-70).

Covil argues that this evidence is irrelevant because even if "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." (Covil's Brief, p. 56). However, the opposite is true in this case. The coverage chart prepared and produced by Covil shows that Covil never bought overlapping periods of coverage. (Def. Exh. 3, pp. 11-15; Exh. 9). Covil's own conduct shows that it would have not procured coverage from two different insurers for the same policy period. *See also Service Welding & Mach. Co. v. Michigan Mut. Liab. Co.*, 311 F.2d 612 (6th Cir. 1962) ("Also, it is pointed out that Service Welding had bought and had in effect an automobile liability policy from Great American. One would think that Service Welding did not intend to buy double coverage.").[11]

Covil does not dispute the fact that it never had secondary evidence that any other general liability insurance policy was issued by Penn National to Covil other than the two Penn National Policies.[12] Instead, it argues that one phrase, "left off at renewal," typed onto a change

[11] A case cited by Covil in its Brief.

[12] In its recitation of the facts, Covil states that Penn National issued other policies of insurance, an automobile liability policy and an inland marine policy, to Covil for the 1985-1986 policy period in addition to these same policies for the 1986-1987 and the 1987-1988 periods, in an attempt to bolster its argument that Penn National "must" have issued a third general liability

endorsement was sufficient, in and of itself, to meet its burden of showing that another general liability policy existed. No court has ever found that a typed phrase on a change endorsement, in the absence of any additional secondary evidence of the issuance of a policy, is sufficient to show that an additional policy was issued. And, Covil did not cite to any such case in its brief.

As argued by Penn National in its Initial Brief, the change endorsement to which Covil refers did not change anything on the declarations page. (Def. Exh. 5, p. 29 (a requirement of the change form is to "specify form nos. and edition dates affected by policy changes")). The declaration page of the 1986-87 Policy indicates that the policy is "NEW." Therefore, just because it is typed on the change endorsement that an exclusion "was left off at renewal" does not change the 1986-97 Policy from a "NEW" policy to a renewal policy. Indeed, the underwriting file for the Penn National Policies does not include a reference to any other general liability policies. (Def. Exh. 7). Significantly, after the mandated digitization of Penn National's entire historical repository of insurance policies, no additional commercial general liability policies issued to or for the protection of Covil were found. (Def. Exh. 58, p. 2: "Indeed, with respect to searches for general liability policies for Covil, Penn National's searches of the digitized microfiche have generated only the two already known general liability policies that exist for Covil …").

There is simply no evidence to reasonably support the finding that an additional general liability policy was issued to Covil other than the Penn National Policies. Even if the typed words

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policy for this earlier period consistent with its automobile liability and inland marine coverage program. Covil misstates the facts. The facts are that Penn National issued a number of different policies to Covil for different and varying time periods. Penn National issued automobile insurance policies to Covil from 1986 through 1991. (Pl. Exhs. 5, 107, 108, 109). Penn National issued inland marine policies to Covil from 1986 through 1991. (Pl. Exhs. 4, 114, 115, 116). Penn National issued property policies to Covil from 1988 through 1991 (Pl. Exhs. 111, 112, 113), a commercial crime policy from 1988 through 1989 (Pl. Exh. 119), and a computer policy from 1988 through 1989 (Pl. Exh. 120). The existence of any one policy does not prove the existence of a separate policy.

"left off at renewal" on a change endorsement was some evidence that another earlier policy existed, which Penn National does not concede, this evidence created at best a factual issue that was to be resolved by a jury, not by the trial court. *See Williams*, 409 S.C. at 594, 762 S.E.2d at 710 ("If the court decides the language is ambiguous, however, evidence may be admitted to show the intent of the parties, and the determination of the parties' intent becomes a question of fact for the fact-finder.").

The trial court's rulings on spoliation should be reversed. In the alternative, the rulings regarding spoliation present a factual issue that should have been tried to a jury. These rulings should be vacated on this basis and remanded for a jury trial.

C. Covil's Arguments That Penn National Destroyed Covil-Related Documents With A Culpable State of Mind Amount To Pure Speculation.

It is undisputed that Penn National had a document retention policy that required Penn National to preserve policy documents for a period of twenty-five years from the date of the policy's cancellation or non-renewal. (Def. Exh. 19). Penn National's procedure in implementing its Document Retention Policy is also undisputed. Policies that were cancelled or non-renewed on a date twenty-five years prior are collected throughout the year and destroyed the following January. (Def. Exh. 32, pp. 37-42). Covil did not present any evidence or testimony indicating that policy-related documents for policies canceled or nonrenewed in years other than 1993 were removed by Penn National from its historic repository in 2018, that policy-related documents for policies canceled or nonrenewed in years other than 1994 were removed in 2019, or that policy-related documents for policies canceled or nonrenewed in years other than 1995 were removed in 2020. It is undisputed that Penn National could not have issued general liability policies to Covil that were canceled or nonrenewed in 1993, 1994 and 1995 because Covil ceased to exist in 1991. (Pl. Exh. 101).

The only evidence that Covil references to support the trial court's finding that Penn National destroyed policies issued to Covil during 2018 to 2020 is testimony from Brent Reifsnyder, Penn National's Director of Corporate Services and Facilities:

> Q: Have you purged any microfiche with policies with a nonrenewal date prior to 1992?
>
> A: I have to do math in my head. Bear with me. So microfiche ended in 1991, so using the 25-year rule, things that were dated in 1991 and cancelled/non-renewed would have been eligible for destruction. So, the answer is, yes, we would have destroyed them.

(Def. Exh. 32, p. 68). Missing from this testimony, however, is that any microfiche was in fact destroyed during the time period of 2018 to 2020. This testimony merely states that during the course of Penn National's annual implementation of its Document Retention Policy policy-related documents on microfiche were destroyed in the past. To extrapolate from this testimony that policy-related documents issued to or for the protection of Covil were destroyed at any time from 2018 to 2020 is mere speculation.

Furthermore, in 2018, Penn National acknowledged and produced to Covil the Penn National Policies. (Def. Exh. 4). It defies common sense and logic for Penn National to have produced and preserved the 1986-87 Policy and the 1987-88 Policy in 2018 but thereafter to have destroyed a single additional general liability policy issued to Covil during a prior policy period.

There is simply no evidence that Penn National destroyed policy-related documents from general liability policies issued to Covil from 2018 to 2020. Furthermore, because there is no evidence that Penn National actually destroyed Covil policy-related documents, there is no evidence that Penn National had a culpable state of mind.

Not even Covil can credibly argue that Penn National destroyed any Covil-related general liability policies with a culpable state of mind. The only evidence Covil references to support the

trial court's finding of a culpable state of mind is the fact that Penn National did not issue a litigation hold, discontinuing the implementation of its Document Retention Policy, until 2021. However, as demonstrated above, the maintenance of Penn National's Document Retention Policy from 2018, when Covil asserts that the litigation hold should have been entered, until 2021 when the litigation hold was entered does not show that any Covil-related policy documents were actually destroyed during this time period. *See Sampson v. City of Cambridge*, 251 F.R.D. 172 (D. Mass. 2008) (refusing to impose sanctions for spoliation because "it would be sheer speculation to conclude that there were any emails which were lost or destroyed and which contained relevant information, let alone evidence favorable to plaintiff's case.").[13]

There is no evidence that substantiates the trial court's finding that Penn National issued a third general liability policy to Covil for the period of 1985-1986, that Penn National possessed this policy in 2018, that Penn National then destroyed this policy between 2018 and 2020, and that Penn National's destruction of this additional policy was done with a culpable state of mind. Covil has not met its burden of showing that such evidence exists. Without any such evidence, the trial court's findings regarding Penn National's alleged spoliation should be reversed.

V. Covil Has Failed To Show That The Court-Mandated Digitization Of Penn National's Historical Repository Of Insurance Policy Documents Was Either Relevant Or Necessary.

In its Brief, Covil attempts to justify the trial court's sanction requiring Penn National to digitize its entire historical repository of insurance policies by arguing that this sanction was the "last resort" after a multi-year effort to obtain "basic" discovery. This is simply not true. Throughout this litigation, Penn National has responded to multiple discovery requests including forty-eight (48) interrogatories, seventy-eight (78) requests for production of documents, and

[13] A case cited by Covil in its Brief.

twenty-six (26) requests for admission. (Def. Exhs. 43-51). Penn National produced over 54,000 pages of documents. Covil has taken multiple depositions of Brent Reifsnyder (Penn National Director of Administrative Services), Boyd Wright (Penn National Senior Home Office Claims Examiner), and Scott Maier (Associate General Counsel). (Def. Exh. 28-32, 38).

Covil repeatedly refers to its multiple motions to compel. However, these motions to compel are redundant; they request the same remedy each time: for Penn National to manually search its repository of historic insurance policies to find additional general liability policies issued to Covil. (1-15-2021 Motion to Compel; 4-22-2021 Motion to Compel; 8-20-2021 Motion to Compel; 9-8-2021 Motion to Compel; 10-5-2021 Motion to Compel). Each time, Penn National responded that it was unable to search its historic repository of insurance policies without first obtaining a policy number. If no policy number was provided, the policies could only be searched manually, expending an inordinate amount of time and personnel. (Def. Exh. 17).

At no time has Covil shown that this massive search to potentially find a third general liability policy issued by Penn National to Covil was either relevant or necessary or that the trial court performed any proportionality analysis as required by the Supreme Court. *See Hollman v. Woolfson,* 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009). Indeed, Covil again fails to do so in its Brief.

The cases from other jurisdictions that Covil cites in its Brief, none of which were issued in an insurance context, are equally unavailing. In each case, there was evidence that the documents sought by the opposing party actually existed. Therefore, the party's excuse for failing to produce those documents because of an inefficient storage system was not excused by the court. *See, e.g., Briddell v. St. Gobain Abrasives, Inc.*, 233 F.R.D. 57, 61 (D. Mass. 2005) (plaintiff sought information regarding other employees disciplined for certain safety violations in employment

discrimination case); *Baxter Travenol Labs. v. Le May*, 93 F.R.D. 379, 383 (D. Ohio 1981) (plaintiff sought invoices for sales of latex and vinyl gloves and bills of lading); *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, (D. Mass. 1976) (discovery of similar instances where pair of pajamas caught on fire). Here, however, Covil never produced any evidence that the documents it sought, additional general liability policies issued to Covil, ever existed.

Predictably, the digitization of Penn National's repository of historic policy-related documents took an inordinate amount of time and expense. The digitization process took over thirteen months and cost Penn National over $2.2 million. After searching these digitized records, unsurprisingly, no other general liability policies issued to or for the protection of Covil were discovered. (Pl. Exh. 58).

There was simply no evidence to show that a search of Penn National's repository of historical policy-related documents would disclose any additional general liability policies issued to Covil.[14] The trial court abused its discretion in mandating the digitization of records and prejudiced the rights of Penn National. The discovery order should be vacated, the Receiver and his attorneys should be prohibited from further accessing the digitized database, and the attorneys' fees awarded to Covil should be reimbursed to Penn National.

VI. Covil Has Not Shown That The Award Of Attorneys' Fees Was Appropriate.

Relying solely on *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978), the trial court awarded attorneys' fees to Covil for its prosecution of this case. Under *Hegler* and its

[14] In its Brief, Covil obliquely references that when Ellis & Winters did its manual review of Penn National's repository of historic policies, it found three additional policies issued to Covil. Covil's statement is misleading. In its report to the Court, Ellis & Winters stated that it found these policies (none of which were general liability policies) using policy numbers provided to it by Covil (but never provided by Covil to Penn National). (Def. Exh. 22, p. 3: "Ellis & Winters also cross-referenced microfiche policy documents … utilizing previously known Covil policy numbers.").

progeny, however, attorneys' fees are only recoverable if the coverage action adjudicates an insurer's duty to defend an underlying action. *See, e.g., Jessco, Inc. v. Builders Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 62114, * (D.S.C. May 3, 2012) (reviewing South Carolina cases which find that attorneys' fees for insured's participation in declaratory judgment action are allowed when the coverage issue includes whether the insurer had a duty to defend).[15] Indeed, Covil was unable to cite to a single case in which attorneys' fees were awarded where the court in the coverage case did not assess the insurer's defense obligation in an underlying case.

Penn National's duty to defend Covil in any underlying lawsuit was never an issue in the present case. Penn National defended every case tendered to it for defense by Covil. (Wright testimony (11/27/2023 AM session), pp. 116-18; Protopapas testimony (11/27/2023 AM session), pp. 171-75). Indeed, Penn National's defense obligation is not addressed in the "conclusions of law" or in the "ordering paragraphs" contained in the Final Order. Accordingly, *Hegler* and its progeny do not support the award of attorneys' fees in this case. The trial court's award of attorneys' fees in this case should be vacated.

Cognizant of the lack of authority to support an award of attorneys' fees in this case, Covil argues that the attorneys' fee award was justified as a sanction for Penn National's alleged discovery violations in this case. The trial court's award of attorneys' fees fails to meet this standard as well. Sanctions under Rule 37, SCRCP are required to be aimed at the specific misconduct of the party. *See QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004). However, the attorneys' fees and expenses awarded, over $2.7 million, are clearly not targeted at any discovery violation. Instead, this amount represents the total attorneys' fees and costs for the entire litigation of this case, from the filing of the Complaint through trial. The

[15] A case cited by Covil in its Brief.

imposition of the entirety of these fees as a discovery sanction is wholly unsupported by the facts in this case, amounts to an error of law, and should be vacated by this Court.[16] *See Kershaw*, 302 S.C. at 395, 396 S.E.2d at 372.

CONCLUSION

In this appeal, this Court is tasked with reviewing orders entered by the trial court in this case. Penn National has shown that each order cannot be upheld on appeal because the orders lack factual basis, are contrary to well-established canons of insurance policy construction, and are contrary to Supreme Court precedent. In its Brief, Covil has failed to show that the judgment and orders entered by the trial court in this case should be affirmed on appeal.

Accordingly, Penn National respectfully requests the following:

(1) that this Court find that the present action failed to present a justiciable controversy at its inception and therefore all orders entered by the trial court should be vacated;

(2) if this Court should find that the trial court had jurisdiction in this matter, then this Court should vacate the orders entered by the trial court after trial and remand this case for a jury trial of the factual issues in this case;

(3) if this Court should find that the trial court had jurisdiction in this matter and that there were no factual issues for determination by a jury, then this Court should vacate the coverage determinations made by the trial court and find (i) that the Penn

[16] Covil inexplicably argues that Penn National has already paid attorneys' fees awarded in this case and therefore this issue is moot. Penn National is uncertain to what Covil is referring. Penn National has not paid the $2.7 million in attorneys' fees and costs awarded to Covil post-trial. (4-5-2024 Order). The trial court previously ordered that Penn National pay $671,693 to Covil in conjunction with the May 5, 2022 discovery order. (5-12-2023 Order). Penn National paid this amount subject to its right to appeal this ruling. (7-5-2023 letter from K. Shealy to J. Robinson). In fact, the order awarding attorneys' fees for Penn National's alleged discovery violation is one of the orders that is subject to this appeal. (4-23-2024 Notice of Appeal). Therefore, Covil's arguments regarding mootness are specious.

National Policies only provide coverage for asbestos liability lawsuits where the exposure to asbestos fibers resulting from Covil's operation occurred during the Penn National Policy periods, (ii) that if the Penn National Policies provide coverage, then any covered damages be allocated to Penn National based on its pro-rata time-on-risk, and (iii) that the total limit of Penn National's liability for asbestos cases is $1 million under each Policy;

(4) that this Court find that there was no evidence of spoliation in this case and vacate the order that judicially decreed that Penn National issued a third general liability policy to Covil and vacate the orders awarding attorneys' fees and costs based on alleged spoliation;

(5) that this Court find that the mandated digitization order was improperly entered, vacate the award as well as the award of attorneys' fees, and prohibit Covil from accessing Penn National's data base of historic policies; and

(6) that this Court vacate the award of attorneys' fees and costs awarded to Covil post-trial as unsupported by law.

Respectfully submitted,

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