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May 29 2025

SC Court of Appeals

STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Jean H. Toal  
Acting Circuit Court Judge

Appellate Case No. 2021-000648  
Opinion No. 6110

Peter D. Protopapas, as Receiver for Starr Davis Company, Inc. and Starr Davis  
Company of S.C., Inc..... Respondents,

v.

Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company;  
The Standard Fire Insurance Company; St. Paul Fire and Marine Insurance Company;  
The Employers' Fire Insurance Company; Southeastern Agency Group and M.I.A.  
Company, Inc. individually and as successors to or f/k/a Merrimon Insurance Agency,  
Inc.; Robert E. Aspray; Nell Ashworth, individually and as personal representative of the  
Estate of Robert J. Ashworth; Betty C. D'Amico, individually and as Executor of the  
Estate of Julian D'Amico, Jr.; Kayla Keith, individually and as the personal  
representative of the Estate of Jerry W. Archer, Sr.; Richard L. Knight II, as personal  
representative of the Estate of Teddy L. Knight, Sr., and Linda Knight, individually;  
David D. Rollins; James W. Smith and Frances R. Smith; and Linda J. White,  
individually and as personal representative of the Estate of Lubert R. White, Jr.,..... Defendants,

of which

Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company  
and The Standard Fire Insurance Company are the ..... Appellants.

PETITION FOR REHEARING

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May 29, 2025

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

PETITION FOR REHEARING..... 1

    I.    The Court Erred in Affirming the Circuit Court’s Summary Judgment Order Because It Purported to Interpret Dozens of Insurance Policies That Were Not Part of the Summary Judgment Record ..... 1

    II.   The Receiver’s Counsel-Prepared “Demonstrative Charts” Are Inadmissible and Cannot Substitute for the Policies Themselves ..... 2

    III.  The Court of Appeals Overlooked Travelers’ Rule 56(f) Affidavit Demonstrating the Need for Additional Discovery ..... 3

    IV.  The Court Misinterpreted the Parties’ 1985 Interim Agreement ..... 5

    V.   The Coverage Declarations Are Incorrect as a Matter of Law and Fact ..... 6

        A.   The Court Erred by Affirming the Circuit Court’s “Allocation” Ruling in Violation of Binding Precedent in *Crossmann*..... 7

        B.   The Court Erred by Affirming the Circuit Court’s “Completed Operations” Ruling. 9

        C.   The Court Erred in Affirming the Circuit Court’s Improper Shifting of the Burden of Proof ..... 12

        D.   The Court Erred in Affirming the Circuit Court’s “Number of Occurrences” Ruling ..... 13

CONCLUSION..... 15

**TABLE OF AUTHORITIES**

**Cases**

*Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204 (1990)..... 3

*Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 52-53 (2011) 1, 7, 8, 9

*Dawkins v. Fields*, 354 S.C. 58 (2003) ..... 4

*Ex parte Builders Mut. Ins. Co.*, 431 S.C. 93 (2020)..... 13

*Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75 (1962)..... 13

*Gaskins v. Firemen’s Ins. Co. of Newark, N. J.*, 206 S.C. 213 (1945) ..... 13

*Gen. Ins. Co. of Am. v. U.S. Fire Ins. Co.*, 886 F.3d 346 (4th Cir. 2018)..... 11, 13

*Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321 (2017)..... 9

*In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004) ..... 9, 11

*Liberty Mut. Ins. Co v. Treesdale, Inc.*, 418 F.3d 330 (3d Cir. 2005) ..... 14

*Nat’l Union Fire Ins. Co. v. Porter Hayden Co.*, No. CIV. CCB-03-3408, 2012 WL 734170 (D. Md. Mar. 6, 2012)..... 13

*Orr v. Clyburn*, 277 S.C. 536 (1982) ..... 15

*Owners Insurance Co. v. Salmonsens*, 366 S.C. 336 (2005)..... 14

*Plant Insulation Co. v. Fireman’s Fund Ins. Co.*, 2013 WL 3286410 (Cal. Super. Ct. Apr. 8, 2013) ..... 12

*S.C. Ins. Co. v. White*, 301 S.C. 133 (1990)..... 9

*Schrillo Co. v. Hartford Acc. & Indem. Co.*, 181 Cal. App. 3d 766 (1986) ..... 12

*State v. Warner*, 430 S.C. 76 (Ct. App. 2020) ..... 2

*Zurich American. Insurance. Co. v. Covil Corp.*, No. 1:18-CV-932, 2020 WL 4483236 (M.D.N.C. Aug. 4, 2020)..... 8, 9

**Statutes**

S.C. Code Ann. § 38-61-10..... 4

**Rules**

Rule 1006, SCRE ..... 2

Rule 221(a), SCACR ..... 1

## PETITION FOR REHEARING

Rule 221(a), SCACR, provides that a petition for rehearing should be granted when the Court has “overlooked or misapprehended” relevant information or law. That is the case here.

### **I. The Court Erred in Affirming the Circuit Court’s Summary Judgment Order Because It Purported to Interpret Dozens of Insurance Policies That Were Not Part of the Summary Judgment Record**

The order on appeal is a summary judgment decision that holds that Travelers issued insurance policies to Starr Davis for 40 consecutive years, and then it purports to construe the terms of all policies issued during that time. (R. 8 (finding “a 40-year uninterrupted” insuring relationship).) A key error in the circuit court’s ruling is that it issued sweeping coverage declarations without reviewing the actual policies. *See, e.g., Crossmann Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 52-53 (2011) (as with any contract, the interpretation of an insurance policy must “begin[] with the language of the policies themselves”).

In his summary judgment motion, the Receiver sought coverage declarations regarding the interpretation of dozens of policies allegedly issued to Starr Davis annually between 1946 and 1986. (R. 362–64.) Despite Travelers having located and produced more than 20 policies to the Receiver before he filed his motion, the Receiver chose to submit only *two* policies to the court. Travelers submitted two additional policies as part of its opposition, bringing the total to just four policies. The circuit court orally granted the Receiver’s motion on January 25, 2021, and issued a written order on March 3, 2021. (R. 34.) No additional policies were part of the record at the time of the court’s decision. Travelers later learned that the Receiver hand-delivered additional policy documents to the circuit court judge at her home *after* the summary judgment decision had already been issued—documents the Receiver failed to serve on Travelers and that were never part of the record. (Trav. Reply at 1–3.)

This Court’s statement that “the Receiver filed under seal other underlying documentation produced by Travelers” (Decision at 13 n.3) is not correct and, in any event, misses the point. The Receiver’s delivery of materials to the circuit court judge’s house (but never filed) occurred *after* the circuit court had entered the summary judgment order, making it impossible for those materials to have impacted the decision in any way. Because the Receiver failed to provide the court with copies of the majority of the policies or secondary evidence of their terms *before* the court issued its decision—despite possessing those materials—numerous alleged policies were not part of the summary judgment record, and the circuit court’s order purporting to interpret them was improper.

## **II. The Receiver’s Counsel-Prepared “Demonstrative Charts” Are Inadmissible and Cannot Substitute for the Policies Themselves**

Rather than actual copies of the policies—that is, actual evidence—the Receiver’s summary judgment motion relied primarily on counsel-prepared charts that purportedly summarized certain policy provisions. These charts—devoid of policy language, unauthenticated, and unsupported by admissible evidence—are not competent evidence.

While Rule 1006, SCRE, permits the use of “summaries” under certain circumstances, the purported summaries must meet strict evidentiary standards. The proponent must show that the underlying documents are admissible, are so voluminous that they cannot conveniently be examined in court, that the summary faithfully and neutrally reflects the data, and that the underlying documents have been made reasonably available to the other parties. *State v. Warner*, 430 S.C. 76, 95 (Ct. App. 2020), *aff’d in part and remanded*, 436 S.C. 395 (2022).

The Receiver did not meet any of these requirements. He provided neither the admissible underlying policies nor an affidavit authenticating the charts or explaining their methodology. By his own admission, the charts were merely “*demonstrative* charts prepared by [the Receiver’s] counsel.” (Receiver’s Br. at 12 (emphasis added).) Demonstrative aids are illustrative tools, not

substitutes for evidence, and cannot establish the existence or terms of policies—especially given his heightened burden of proof in this case. (Trav. Br. at 12–17.) Critically, although these “demonstrative charts” were “prepared by [the Receiver’s] counsel,” Travelers was never permitted to examine the Receiver’s counsel on the accuracy of the purported summaries. The “demonstrative charts,” therefore, are not admissible evidence, and the circuit court improperly relied upon them in its ruling. *See Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 208 (1990) (finding no abuse of discretion in admitting summaries as evidence because appellant “was permitted to cross-examine [respondent] on the accuracy of his summaries”) (emphasis added).

This Court found that “additional evidence of insurance coverage was provided to the circuit court at a later date[,]” which “is precisely what Rule 1006 contemplates.” (Decision at 14.) Respectfully, this misapprehends Rule 1006. The Receiver’s unsubstantiated “demonstrative charts” and post-decision, *ex parte* document dump is not at all what Rule 1006 contemplates. And contrary to the Court’s suggestion that Travelers was not prejudiced because “Travelers had access to its own documents” (Decision at 14), portions of the Receiver’s charts lack identifying details that would allow Travelers to identify and challenge all source documents independently.

### **III. The Court of Appeals Overlooked Travelers’ Rule 56(f) Affidavit Demonstrating the Need for Additional Discovery**

The circuit court further erred by prematurely granting summary judgment in the face of ongoing discovery efforts and disputed material facts. Travelers provided the circuit court with a Rule 56(f) affidavit detailing the critical need for further discovery. (R. 967.) The Receiver blocked access to much of this discovery, including by asserting a specious claim of “privilege” over communications with asbestos plaintiffs—the Receiver’s *litigation adversaries*. (Trav. Br. at 3, 23.) Despite the need for additional discovery and the Receiver’s baseless privilege claims, the circuit court closed discovery prematurely, violating the basic principle that summary judgment

“must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Dawkins v. Fields*, 354 S.C. 58, 69 (2003).

This Court held that “questions relating to what percentage of Starr Davis’s business activity involved asbestos-containing materials or when it ceased activity involving asbestos-containing materials are inconsequential,” and that “fact-specific” questions about whether and when Starr Davis was engaged in asbestos operations are “immaterial[.]” (Decision at 13.) Not so. These disputed facts are directly tied to the coverage declarations.

For example, this Court cited a document suggesting that “*Starr-Davis of South Carolina is involved primarily in installation and contract work*,” (*id.* (this Court’s emphasis)), but as that same document shows, Starr Davis is made up of two distinct entities, and their asbestos-related risks and operations are fact-specific, distinct, and central to determining coverage. Record evidence shows that 90% of Starr Davis’s business consisted of non-contracting work and that it ceased handling asbestos in 1972. (Trav. Br. at 7–8, 18, 47.) Ignoring these and other disputed facts, the Court improperly declared that most of Starr Davis’s business was asbestos-related contracting work, that significant asbestos exposure occurred during contracting operations, and that it was immaterial whether bodily injury occurred before or after 1972. (Decision at 13.)

The court also erred by applying South Carolina law without allowing Travelers to conduct discovery and without performing a proper conflict-of-laws analysis. (Trav. Br. at 21–25.) This discovery was especially important given Starr Davis’s multistate operations and the issuance of policies to Starr Davis in North Carolina. South Carolina Code § 38-61-10 does not automatically resolve the choice-of-law issues involving multistate risks and operations. Travelers’ intended discovery may have uncovered evidence supporting the application of North Carolina law to certain policies or claims. The circuit court also misapplied the “false conflict” doctrine, unfairly

requiring Travelers to establish material conflicts between South Carolina and North Carolina law without access to necessary discovery. By closing discovery prematurely, the court deprived Travelers of the opportunity to fully develop its arguments, improperly shifting the burden and undermining its right to contest the Receiver's motion on a complete record.

#### **IV. The Court Misinterpreted the Parties' 1985 Interim Agreement**

The circuit court refused to consider the parties' 1985 Interim Agreement based on the Agreement's stated prohibition against using it to interpret policy terms. (Decision at 16.) In refusing to consider the Agreement, the circuit court misinterpreted and then misapplied this provision of the Agreement. The Agreement only prohibits the parties from using it to support their respective positions on the "meaning, intent, or construction" of Starr Davis's policies—it does *not* preclude use of the Agreement for other purposes, such as enforcing its terms or establishing factual issues, including the existence and scope of the policies. The Receiver's motion for summary judgment sought to resurrect a dispute that the parties themselves had already resolved in 1985 and memorialized in the Agreement—a binding, superseding contract negotiated between counsel for the parties separately from and after the issuance of the policies at issue.

Travelers did not and does not seek to use the Agreement to *construe* the pre-existing policies; rather, it seeks to *enforce* the Agreement's terms, particularly those governing how asbestos claims will be handled and paid. (Trav. Br. at 26–30; Reply at 4–6.) The parties agreed coverage would be limited to the period of 1959 to 1985; yet, despite this agreement between the parties themselves, the circuit court declared an "uninterrupted" relationship spanning 1946 to 1986. By disregarding the Agreement, the circuit court improperly constrained Travelers' ability to refute the Receiver's broad and unsupported claims about decades of alleged coverage—claims that were conclusively resolved in 1985 and documented in the Agreement.

## V. The Coverage Declarations Are Incorrect as a Matter of Law and Fact

In adopting the circuit court’s coverage declarations, this Court overlooked or misapprehended the fact that they were premised largely on a sanctions order issued in an entirely different case, *Covil*, under entirely different circumstances. In *Covil*, the circuit court applied a different standard of review and drew adverse policy construction inferences against insurers as a sanction for perceived discovery violations—even though no insurer was a party to those proceedings and had no discovery obligations in the first place. Here, by contrast, in the context of a summary judgment motion, the court was required to review all evidence and draw all inferences in the light most *favorable* to Travelers. (Trav. Br. at 4, 6, 20; Reply at 19–20.)<sup>1</sup>

Without citation to anything in the record, this Court suggested that Travelers had a “systematic policy of destroying insurance documentation” and thus “cannot now complain” about insufficient policy evidence in the record. (Decision at 17; *see also id.* at 27.) These assertions are not only irrelevant and factually unsupported, they overlook the fact that *Starr Davis* destroyed substantially all of its records. The Receiver *admitted* that Starr Davis’s CFO destroyed its records following its bankruptcy in 1999. (Trav. Br. at 3, 10.) Starr Davis’s broker destroyed its documents as well. (*Id.*) All alleged policies would have been destroyed by *Starr Davis*.

Travelers, by contrast, retained and produced extensive policy documents to the Receiver. Travelers searched for and produced these records in good faith well before the Receiver filed his motion for summary judgment. Yet, instead of including these policy documents with his motion—as was his burden—the Receiver chose to include only two of them. Any gaps in Travelers’ records

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<sup>1</sup> Appellate review of that sanctions order has been blocked by the same circuit court, which has not ruled on a Rule 59 motion that has been pending since January 17, 2020—*more than five years*. (Non-Party USF&G’s Motion to Reconsider, Alter or Amend Contempt Order of January 8, 2020, filed in Case No. 2015-CP-46-02155, among several others (Jan. 17, 2020).)

are attributable solely to historical compliance with decades-old document retention policies and pale in comparison to Starr Davis’s deliberate destruction of all of its own files as recently as 1999.

This Court’s finding that “issues regarding the completeness of the insurance policies . . . are the result of Travelers’s own failure to retain and produce complete policies to the Receiver” (Decision at 17) entirely misstates the record and turns the summary judgment standard on its head.

**A. The Court Erred by Affirming the Circuit Court’s “Allocation” Ruling in Violation of Binding Precedent in *Crossmann***

The Court erred in affirming the circuit court’s allocation ruling, which directly contradicts the South Carolina Supreme Court’s binding decision in *Crossmann*. Under *Crossmann*, South Carolina law mandates time-on-the-risk allocation for progressive injury claims—including *asbestos bodily injury claims*—with no exceptions for perceived equity or insured insolvency. This Court has allowed the circuit court to mischaracterize *Crossmann* and the *identical* policy language at issue to endorse an improper “all sums” model *Crossmann* unequivocally rejected. (Trav. Br. at 31–37; Reply at 8–13.)

In *Crossmann*, the Supreme Court held that insurers are liable only for liability associated with damages occurring during their policy periods and rejected joint and several liability, including contrary policyholder arguments based on perceived fairness or convenience. 395 S.C. at 59. It confirmed that time-on-the-risk allocation applies broadly to progressive injury claims, whether arising from property damage or bodily injury, *including asbestos-related claims*, and requires damages to be apportioned according to each insurer’s time on the risk. *Id.* at 64–65.

Despite the Supreme Court’s directive, the circuit court disregarded *Crossmann* and purported to create an exception for asbestos claims that *Crossmann* explicitly stated fell within its ruling. Indeed, *Crossmann* specifically referenced “long-term exposure to asbestos fibers”—encompassing all types of asbestos-related injuries—within its discussion of progressive injury

allocation. 395 S.C. at 51–52 n.8. *Crossmann* offers no carve-outs or exceptions to the time-on-the-risk rule for asbestos claims or for personal injury cases. To the contrary, its language makes clear that the principles governing time-on-the-risk allocation apply uniformly across all progressive injury claims, including asbestos claims. (Trav. Br. at 31–33; Reply at 9–10.)

Other courts applying South Carolina law *in the specific context of asbestos claims* have reached the same conclusion. In *Zurich American Insurance Co. v. Covil Corp.*, No. 1:18-CV-932, 2020 WL 4483236 (M.D.N.C. Aug. 4, 2020), the court rejected the Receiver’s reliance on the *Covil* contempt order and, instead, faithfully applied *Crossmann*: “The Court is applying South Carolina law here, and the Supreme Court of South Carolina spoke directly *to this situation*—how to allocate a long-term loss over multiple insurance policy periods—in *Crossmann*.” *Zurich Am. Ins. Co.*, 2020 WL 4483236, at \*9; Trav. Br. at 36. There is simply no lawful basis to exclude asbestos claims from the time-on-the-risk allocation rule established in *Crossmann*.

This Court noted that trial courts retain the discretion to alter *Crossmann*’s default allocation formula “in appropriate circumstances.” (Decision at 22.) But *Crossmann* expressly limits any modifications to adjustments within the framework of the time-on-the-risk allocation model, and it explicitly rejects an “all sums” approach. 395 S.C. at 65-66; Trav. Br. at 34-36. While *Crossmann* allows some flexibility in applying its formula, “the flexibility applies to the formula itself, not the overall approach in allocating risk,” which “must remain within the bounds” of a pro rata/time-on-the-risk framework. *Zurich Am. Ins. Co.*, 2020 WL 4483236, at \*11. A trial court’s discretion does not extend to disregarding the Supreme Court’s *Crossmann* decision and creating an entirely different allocation model disconnected from the principle of time-on-the-risk.

This Court further erred by endorsing the circuit court’s “unavailability” exception to time-on-the-risk allocation. The circuit court declared that “allocation of loss will not be made to policy

years after 1986, when Starr Davis does not have any available or responsive coverage.” (Decision at 23.) This, too, is directly contrary to *Crossmann*, which expressly rejected exemptions for uninsured periods. 395 S.C. at 66 n.16; Trav. Br. at 34–35; Reply at 10–11.

Equally flawed is the Court’s reliance on Starr Davis’s insolvency to justify abandoning time-on-the-risk allocation. In *Crossmann*, the Supreme Court held that liability must remain proportional to the injury years for which coverage was purchased and explicitly rejected any argument that insolvency could justify imposing liability beyond those limits. (Trav. Br. at 35–36; Reply at 11–12.) This principle was reaffirmed by the Supreme Court in *Harleysville Group Insurance v. Heritage Communities, Inc.*, 420 S.C. 321, 348 (2017), where time-on-the-risk allocation was upheld *despite the policyholder’s insolvency*. The Fourth Circuit has also rejected the argument that an insured’s insolvency can provide a basis for courts to deviate from pro rata allocation. *See In re Wallace & Gale Co.*, 385 F.3d 820, 833 (4th Cir. 2004). So did a North Carolina court in a case involving this same Receiver. *See Zurich Am. Ins. Co.*, 2020 WL 4483236, at \*10-11 (“the South Carolina Supreme Court explicitly gave the insured the responsibility for whatever portion of the total loss is attributed to those uninsured years.”).

South Carolina law prohibits courts from rewriting insurance contracts to achieve a perceived equitable result. *S.C. Ins. Co. v. White*, 301 S.C. 133, 137 (1990). Undefined notions of equity cannot override or enlarge an insurer’s clear contractual obligations, nor can it justify deviations from the allocation model *Crossmann* mandates.

**B. The Court Erred by Affirming the Circuit Court’s “Completed Operations” Ruling**

The circuit court declared that an injury during a particular policy period can only qualify as a “Completed Operations” injury if *all* of the claimant’s asbestos-related injuries—including injuries that occurred *after* the operation ended and *after* the particular policy period came into

being—arose after the injury-causing operations were completed. (Decision at 26.) This declaration allows the Receiver to avoid the aggregate liability limits for damages that fall within the scope of the “Completed Operations” hazard.

The policies define “Completed Operations” injuries as those occurring during the specific policy period and after the particular operations are over. (Trav. Br. at 38; Reply at 13–14.) Under this definition, damages allocated to policy years using the *Crossmann* time-on-the-risk rule are subject to aggregate limits if the policy period began after operations ended. Conversely, damages during ongoing operations fall under the “per occurrence” limit. The circuit court’s approach improperly excludes nearly all asbestos-related injuries from aggregate limits, undermining the policies’ timing-based framework and expanding the policies’ coverage beyond their terms.

This Court summarily held that “Travelers has failed to demonstrate how the circuit court’s declarations contravene these policy terms.” (Decision at 26.) The Court should reconsider:

Absence of Policy Language in the Record. As discussed above, the decision is critically flawed because it purports to interpret “policy terms” that were not actually part of the summary judgment record.

Mischaracterization of the Circuit Court’s Findings. This Court held that “[d]espite Travelers’ contention that the circuit court declared ‘nearly all asbestos-related injuries’ fall outside the completed operations hazard, we see no such finding in the circuit court’s order.” (Decision at 26.) This misconstrues the circuit court’s ruling, which effectively excluded most such claims through an overly restrictive interpretation of the “Completed Operations” hazard language in the policies. The circuit court disregarded the progressive and latent nature of asbestos-related injuries, which develop over time and often implicate both ongoing and completed operations hazards within different policy periods.

Misapplication of Policy Language. The policies define “Completed Operations” injuries as bodily injury arising out of operations, but only if the injury occurs *after* the operations are completed and during the policy period. (R. 421 (bodily injury that falls within the “Completed Operations” hazard is “bodily injury ... arising out of operations ... if such bodily injury occurs *after* such operations have been completed . . . .”); *id.* (“bodily injury” is defined as “bodily injury, sickness or disease sustained by any person *which occurs during the policy period* . . . .” (emphasis added)).) Thus, whether bodily injury is categorized as an aggregated “Completed Operations” injury or an unaggregated “operations” injury depends on its timing relative to the policy period and whether the injury-causing operations had been completed.

The circuit court’s ruling, and this Court’s affirmation of it, improperly rewrites the policies by requiring that all asbestos-related injuries, including pre-policy injuries, must occur after the completion of operations for the “Completed Operations” hazard and its aggregate limits to apply. This interpretation is contrary to the policy language, which focuses on whether injuries occurring *during the policy period* arose after operations were completed.

Conflicts with Case Law. The Fourth Circuit addressed this exact issue in *Wallace & Gale*, a decision this Court overlooks. *Wallace & Gale* held that aggregate limits apply to bodily injury claims arising after the completion of injury-causing operations if exposure persists after completion; however, aggregate limits do not apply to policies that cover bodily injury that occurs during ongoing operations. 385 F.3d at 834. This has recently been reaffirmed. *Gen. Ins. Co. of Am. v. U.S. Fire Ins. Co.*, 886 F.3d 346, 355 (4th Cir. 2018)

In *Crossmann*, the Supreme Court similarly established that each insurer is responsible only for damages during its policy’s time on the risk. *Wallace & Gale* complements and affirms

*Crossmann* by holding that the application of aggregate limits depends on whether the injury-causing operations were completed before the policy coverage period began.

Other rulings reinforce this interpretation: “the timing of the bodily injury during the policy period” determines whether completed operations hazards apply—not the injury’s source or cause. *Plant Insulation Co. v. Fireman’s Fund Ins. Co.*, 2013 WL 3286410, at \*11 (Cal. Super. Ct. Apr. 8, 2013); *see also Schrillo Co. v. Hartford Acc. & Indem. Co.*, 181 Cal. App. 3d 766, 777–78 (1986) (coverage focuses solely on injuries occurring within the policy period).

Disregards Material Record Evidence. The Court also overlooked key record evidence, including that (i) 90% of Starr Davis’s work involved sales and distribution, and (ii) Starr Davis ceased handling asbestos after 1972. (*E.g.*, R. 1897, 1909, 1914.) This evidence shows that most claims against Starr Davis involve “Products” hazard injuries or operations that ended before 1972, making those injuries subject to aggregate limits as “Products” or “Completed Operations” injuries. The circuit court ignored this evidence and allowed the Receiver to block further discovery on the issue. (R. 829–30, 838–39, 850, 856.) Instead, the circuit court adopted language from an unrelated, still-challenged sanctions order. (Trav. Br. at 19–20.) Adopting dubious findings from an unrelated case was inappropriate, particularly given the case-specific facts critical to this issue, and the court’s declarations regarding “Completed Operations” should be reversed.

### **C. The Court Erred in Affirming the Circuit Court’s Improper Shifting of the Burden of Proof**

The circuit court found that “Travelers bears the burden of proving... the application of aggregate limits to particular suits and the ‘exhaustion’ of the aggregate limits of liability in their policies.” (Decision at 26.) This Court affirmed, apparently because: (i) “certain insurers in the asbestos coverage arena historically destroyed coverage documentation” in an effort to undermine claims, (ii) “aggregate policy limits cap coverage,” and (iii) putting the burden on Starr Davis

would lead to impractical results. (*Id.* at 27.) These findings do not withstand scrutiny. The suggestion that “insurers” destroyed policy documents is irrelevant to the analysis and is entirely unsupported by the record, and the Court’s burden-shifting is contrary to South Carolina law.

The insured bears the burden of proving that a claim falls within the scope of coverage, while the insurer bears the burden of proving that an exclusion bars coverage. *Ex parte Builders Mut. Ins. Co.*, 431 S.C. 93, 102 (2020). Hazard classifications such as “Completed Operations” or “Products” are core terms of coverage, not exclusions. (Trav. Reply at 21.) They delineate the scope of coverage and the limits of liability, rather than negating otherwise available coverage. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89 (1962); *Gaskins v. Firemen’s Ins. Co. of Newark, N.J.*, 206 S.C. 213, 217 (1945). Because liability limits, including aggregate caps, set the boundaries of the policy’s indemnity obligation, Starr Davis, not Travelers, is responsible for proving that claims fall outside those aggregate caps. *Gen. Ins. Co. of Am.*, 886 F.3d at 356; *Nat’l Union Fire Ins. Co. v. Porter Hayden Co.*, No. CIV. CCB-03-3408, 2012 WL 734170, at \*2 (D. Md. Mar. 6, 2012). The circuit court’s reliance on incomplete policy documentation cannot justify shifting the burden. An insured cannot avoid its burden simply because policy terms need to be reconstructed, especially where, as here, the insured admittedly destroyed its records. Travelers cannot reasonably be expected to disprove claims that Starr Davis itself fails to substantiate.

**D. The Court Erred in Affirming the Circuit Court’s “Number of Occurrences” Ruling**

The Court erred in affirming the circuit court’s declaration that asbestos-related bodily injury claims arising from Starr Davis’s “operations” constitute multiple occurrences, thereby subjecting each claimant’s injuries to separate per-occurrence limits rather than a single per-occurrence limit. This decision misapplies policy language and is based on an incomplete factual record. The issue must be remanded for further factual development. (Trav. Reply at 23–25.)

Starr Davis’s policies define an “occurrence” as “an accident, including continuous or repeated exposure to conditions, which results in bodily injury . . . .” (R. 766.) They specify that “all bodily injury . . . arising out of continuous or repeated exposure to *substantially the same general conditions shall* be considered as arising out of one occurrence.” (R. 759, 776 (emphasis added).) This language requires the court to consider Starr Davis-specific facts to determine whether the claimants were exposed to “substantially the same general conditions,” a fact-specific inquiry the court failed to conduct.

Instead, relying on the still-challenged *Covil* sanctions order’s so-called “typical” policy language (R. 29), the court summarily found that claims against Starr Davis are not based on exposure to asbestos from the same defective product but rather stem from operations, which the court deemed to involve multiple occurrences. This disregards the specific policy language—particularly because the majority of Starr Davis’s alleged policies were absent from the record—and fails to assess the evidence necessary to determine whether the claimants’ injuries resulted from “substantially the same general conditions.”

The number of occurrences is generally decided by use of a fact-based “cause test,” which “asks if there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.” *Liberty Mut. Ins. Co v. Treesdale, Inc.*, 418 F.3d 330, 334 (3d Cir. 2005). While this Court acknowledged the “cause test,” it neither adopted nor rejected its application in this case. (Decision at 29.) However, our Supreme Court has recognized the “cause test” as the majority view and applied it in *Owners Insurance Co. v. Salmonsens*, 366 S.C. 336, 338–39 (2005), to find that injuries to multiple claimants over time arose from a single occurrence—the act of placing a defective product into the stream of commerce. Nothing in the record here warrants a departure from that reasoning.

The court failed to conduct the necessary fact-based analysis of the causes of the injuries or consider specific claim-related evidence. The record lacks the underlying asbestos complaints and competent evidence of the individual circumstances of the claimants' exposures. Instead, the court relied on generalized assumptions and unsupported allegations, including that Starr Davis's operations were substantially similar to Covil's. (Trav. Br. at 46–50; Reply at 23–25.)

In reality, the record demonstrates that the majority of Starr Davis's work involved sales activity, not contracting or installation, and Starr Davis's limited asbestos-related contracting operations ended by 1972. It is thus implausible that claimants first exposed to asbestos after 1972 could have been harmed by Starr Davis's operations. And even if contrary evidence existed, it would create genuine issues of material fact, precluding summary judgment. The circuit court's conclusion that each claimant's injuries arose from an independent occurrence is unsupported.

Finally, while this Court agreed with the circuit court's decision that bodily injury claims arising from Starr Davis's operations involved multiple occurrences, it also acknowledged the need for a fact-specific, case-by-case analysis of each claimant's exposure to determine whether their injuries arose from "substantially the same general conditions." (Decision at 30.) The Court held that "[t]he challenged circuit court order does not preclude such an analysis." (*Id.*) However, the circuit court failed to undertake this inquiry and instead issued an overly broad, premature determination akin to an advisory opinion. But the Declaratory Judgment Act "is not properly invoked for an advisory opinion to be put on ice by the plaintiff for use if the defendants or the applicant reach the occasion which might demand it, nor is the Act a license to fish in this judicial pond for legal advice . . . ." *Orr v. Clyburn*, 277 S.C. 536, 542 (1982).

### **CONCLUSION**

Because the Decision errs on the law and misunderstands the record, rehearing is essential.

Respectfully submitted,

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I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellants, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing them as the addresses below:

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