

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean H. Toal, Circuit Court Judge

Case No. 2020-CP-40-01226

Appellate Case No. 2020-001239

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

v.

Pennsylvania National Mutual
Casualty Insurance Company, Appellant.

RETURN TO MOTION TO DISMISS

Pursuant to Rule 240 of the South Carolina Rules of Appellate Procedure, Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) responds to the Motion to Dismiss filed by Peter D. Protopapas, in his capacity as the Receiver for Covil Corporation (“the Receiver”) on September 15, 2020, seeking dismissal of the Notice of Appeal filed by Penn National in this action.

Penn National timely filed its Notice of Appeal in this action on September 14, 2020, appealing the Order entered by the Honorable Jean H. Toal on August 13, 2020, which granted Covil Corporation’s Motion for Partial Summary Judgment, and held that a liability insurance policy issued by Penn National affords coverage to Covil Corporation (“Covil”) for claims asserted against Covil in an underlying lawsuit and that Penn National was not relieved of its coverage obligation

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by Covil's failure to timely provide notice of the underlying lawsuit to Penn National. As a result, the August 13, 2020 Order found that Penn National was required to defend and indemnify Covil in the underlying lawsuit.

The sole basis raised by the Receiver for its request that this Court dismiss this appeal is that Penn National filed a Motion for Reconsideration of the August 13, 2020 Order, pursuant to Rule 59(e) of the S.C. Rules of Civil Procedure on August 24, 2020, which had not been ruled upon at the time that Penn National filed its Notice of Appeal on September 14, 2020. Therefore, the Receiver argues that the August 13, 2020 Order was not yet final and appealable when Penn National filed its Notice of Appeal on September 14, 2020, and so the Notice of Appeal should be dismissed.¹

In support of its position, the Receiver cites a single case—*Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004)—as well as Rule 203(b)(1), both of which stand for the proposition that the filing of a timely motion under Rule 59(e) stays the time for all parties to appeal until receipt of written notice of entry of the order on the motion under Rule 59(e). However, neither the case cited by the Receiver nor Rule 203(b)(1) provide that the filing of a motion under Rule 59(e) precludes a party from filing a Notice of Appeal of the original order entered by the trial court prior to the trial court's ruling on the Rule 59(e) motion, or that such a motion deprives the appellate court of jurisdiction pending determination of the Rule 59(e) motion by the trial court.

In fact, this Court and other appellate courts have addressed the merits of an appeal of an order entered by a trial court even though the appeal was taken prior to the trial court ruling on

¹ Penn National filed the Notice of Appeal prior to the trial court ruling on its Motion for Reconsideration out of an abundance of caution to the extent that the Receiver argued that the Motion for Reconsideration was defective in some manner such that the motion did not stay the time period for Penn National to file a Notice of Appeal.

the motion for reconsideration. *See e.g. Smith v. Fedor*, 422 S.C. 118, 124 n.3, 809 S.E.2d 612, 615 (Ct. App. 2017) (addressing an appeal taken before trial court had ruled on motion for reconsideration); *Ponds v. State*, 437 P.3d 85, 93 (Kan. App. 2019) (holding that where the notice of appeal was filed before the district court ruled on the motion for reconsideration, the court still had jurisdiction to review the district court’s original judgment); *Mughni v. Beyond Mgmt. Grp., Inc.*, 825 S.E.2d 829, 833 (Ga. App. 2019) (addressing an appeal taken before the trial court had ruled on a pending motion for reconsideration and finding that the trial court was without jurisdiction to rule on the motion for reconsideration after the appeal had been noticed); *Herring v. Shirah*, 542 So. 2d 271, 273 (Ala. 1989) (addressing an appeal taken while a post-judgment motion was pending that stayed the time to appeal); *see also Byrd v. Branigan*, No. AW-06-0895, 2006 U.S. Dist. LEXIS 95954, at *13 (D. Md. Nov. 29, 2006) (noting that “if a party files a notice of appeal before the court rules on a timely filed motion to reconsider, the notice of appeal may be amended to include review of the court’s decision on the motion to reconsider”). Accordingly, Penn National timely filed its Notice of Appeal within thirty (30) days of the August 13, 2020 Order entered by the trial court, and its previously-filed motion for reconsideration does not deprive this Court of jurisdiction over this appeal.

Furthermore, the issue raised by the Receiver has become moot since the filing of the Receiver’s Motion to Dismiss on September 15, 2020. The relief sought by the Receiver was that this Court dismiss Penn National’s Notice of Appeal of the August 13, 2020 Order as premature and remand this case to the circuit court to rule on Penn National’s Motion for Reconsideration. On September 21, 2020, the trial court entered an Order denying Penn National’s

Motion for Reconsideration.² Therefore, such motion is no longer pending before the trial court, thereby mooting any argument by the Receiver that Penn National's Notice of Appeal was premature.

Accordingly, Penn National respectfully requests that this Court deny the Receiver's Motion to Dismiss.

Respectfully submitted,

/s/ David G. Harris II

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September 25, 2020.

² A true and accurate copy of the Order entered by the trial court denying Penn National's Motion for Reconsideration is attached hereto as **Exhibit 1**.

EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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

Plaintiff,

Vs.

Pennsylvania National Mutual Casualty
Insurance Co.,

Defendant.

Case Number: 2020-CP-40-01226

**ORDER DENYING PENN NATIONAL'S
MOTION FOR RECONSIDERATION**

This matter comes before the Court on Pennsylvania National Mutual Casualty Insurance Co.'s ("Penn National") August 24, 2020 Motion for Reconsideration ("Motion") of this Court's August 13, 2020 Order granting Covil Corporation's ("Covil") Motion for Partial Summary Judgment. Peter Protopapas, in his capacity as Receiver for Covil Corporation ("the Receiver"), and acting by and through the undersigned counsel, filed his response on August 27, 2020. After careful consideration of the parties' filings, the complete record before the Court, and applicable law, the Court hereby **DENIES** the Motion.

I. Factual Background

On February 28, 2020, the Receiver for Covil Corporation filed this lawsuit, which alleges that Penn National breached one of the two insurance contracts it has with Covil when it refused to participate in the settlement of the *David D. Rollins* matter pending against Covil.

On April 22, 2020, the Receiver moved for partial summary judgment on the ground that Penn National breached its insurance contract with Covil that it issued and which was in effect during the relevant time period, Penn National policy number 515 5028 537, for the policy period March 31, 1986 to March 31, 1987, when it attended the court-ordered mediation in the *Rollins*

case. At that time, Penn National declined to contribute any dollar amount to settle *Rollins*, even though the \$50,000 required to settle the case was within the limits of the insurance policy Penn National issued to Covil. In Penn National's May 8, 2020 Opposition, it argued, among other things, that it did not receive timely notice of the *Rollins* case or mediation therein, that an exclusion in its policy, the "completed operations hazard" and the "products hazard," bars coverage for *Rollins*, and that this case should be stayed due to pending litigation in federal court. In a one-sentence footnote, Penn National also made the conclusory statement that summary judgment is premature because it wanted to conduct discovery. It did not explain what discovery it needed to conduct or why it was needed.

The Court granted Covil's Motion in its August 13, 2020 Order ("Order"). Penn National filed its Motion for Reconsideration on August 24, 2020, and Covil filed its response shortly thereafter.

II. Argument and Authorities

A. Legal Standard

Penn National moves for reconsideration under Rule 59(e), SCRCP. Under that Rule, "a party may not raise an issue in a motion to reconsider, alter or amend a judgment that could have been presented prior to the judgment." *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (citing *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995)). The trial court has the discretion to deny a motion to reconsider "on the brief filed by the parties *without oral argument*." *Pollard v. Cnty. of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 534 (Ct. App. 1995) (emphasis in original).

B. The Court has already ruled on the arguments Penn National raises in its Motion.

The Court already has considered and rejected each of the arguments Penn National raises in its Motion, and Penn National has failed to identify any errors of law or fact.

1. Penn National's late notice defense.

Penn National re-asserts that it is not responsible for breach of its insurance contract with Covil because it did not receive timely notice of the *Rollins* action. As a result, Penn National did not believe it had a duty to defend or indemnify Covil in the *Rollins* action.

The Court previously addressed this issue and found as follows:

Penn National admits that “a representative of Penn National attended the mediation and expressed a willingness to contribute toward settlement on behalf of Covil.” . . . Penn National engaged the same defense counsel as all other Covil insurers to defend Covil’s interests for Penn National in the *Rollins* action and other Covil asbestos personal injury claims. *Id.* at 7. It had access to all of the same materials as the insurers that elected to resolve the *Rollins* action at mediation. Yet, Penn National alone states that “Penn National was not in a position to contribute the amount requested by Covil at the mediation.” *Id.* at 17.

Order at 9. “Penn National’s alleged late notice of the *Rollins* action is not a valid defense to breach of its insurance contract with Covil.” Order at 9. Penn National has presented no basis for altering or amended this holding.

2. Penn National did not met its burden to show that the “product liability hazard” exclusion or the “completed operations hazard” exclusion applies.

Penn National also argues that the “Completed Operations Hazard and Products Hazard” exclusion in the Penn National policy bars coverage for the claims asserted against Covil in the *Rollins* Asbestos Action. The Court carefully considered both Covil’s and Penn National’s arguments on this issue, as well as the undisputed facts. The Court held that Penn National has not met its burden of establishing that this action falls within either the “product liability hazard” or

the “completed operations hazard.” There is nothing new in Penn National’s Motion that affects the Court’s ruling.

3. Summary judgment is not premature.

Penn National complains that summary judgment is premature because it did not have the opportunity to engage in discovery. Penn National made this exact argument in its Opposition. The Court found, “It had access to all of the same materials as the insurers that elected to resolve the Rollins action at mediation.” Order at 9. And, again, a Penn National representative even attended the parties’ mediation. *Id.* Moreover, in its Opposition, Penn National did not submit a Rule 56(f) affidavit setting forth the discovery it needed to conduct in order to present “facts essential to justify [its] opposition.” Rule 56(f), SCRCPP; *see also Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003). Therefore, Penn National’s unsupported, and self-serving assertion that it needed additional time for discovery is not a valid ground for opposing summary judgment. There is no reason to reconsider the Court’s decision on this issue.

C. Any new arguments may not be considered because, to the extent they exist, they could have been raised in Penn National’s Opposition.

To the extent Penn National’s motion attempts to raise any new arguments, those arguments cannot be raised in a Rule 59(e) motion. *See Kiawah Prop. Owners Group*, 359 S.C. at 113, 597 S.E.2d at 149.

III. Ruling

For the reasons stated above, the Court hereby **DENIES** Penn National’s Motion.

AND IT SO ORDERED this ____ day of _____, 2020.

Jean H. Toal, Chief Justice of the Supreme Court, Retired, acting as Circuit Court Judge



Richland Common Pleas

Case Caption: Covil Corporation , plaintiff, et al vs Pennsylvania National Mutual Casualty Insurance Co

Case Number: 2020CP4001226

Type: Order/Other

So Ordered

Jean H. Toal