THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHMOND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-01226

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

v.

Pennsylvania National Mutual Casualty Insurance Company, Appellant.

Appellate Case No. 2020-001239

INITIAL BRIEF OF APPELLANT

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6. Whether the trial court erred by finding that coverage for Covil Corporation under the policies of insurance issued by Pennsylvania National Mutual Casualty Insurance Company for the Rollins Lawsuit was not barred through the operation of the completed operations hazard exclusion?

II. STATEMENT OF THE CASE

On February 28, 2020, Peter D. Protopapas, appointed Receiver for Covil Corporation ("Covil"), filed this action against Pennsylvania National Mutual Casualty Insurance Company ("Penn National") alleging damages in an amount "not greater than $74,999.99" resulting from a single claim asserted against Penn National for breach of contract. [Complaint, p.5, ¶18] Specifically, Covil alleged that Penn National provided coverage under two policies of insurance for Covil's liability in an underlying lawsuit, *David D. Rollins v. Covil Corporation, et al.*," Civil Action No. 2019-CP-25-0118, in Hampton County, South Carolina ("Rollins Lawsuit"). [Complaint, p.3, ¶¶8-11] Covil asserted that Penn National breached its policies when it failed to participate in a mediated settlement conference held in the Rollins Lawsuit and refused to contribute $50,000 towards the settlement that was reached in the Rollins Lawsuit. [Complaint, p.4, ¶¶15-18]

On March 30, 2020, Penn National filed its Notice of Motion and Motion to Transfer Venue and Answer to Complaint. In its Answer, Penn National denied the material allegations contained in the Complaint, including the court's jurisdiction over the matter and proper venue.

[Defendant's Answer, pp.3-5] Penn National admitted that it did, in fact, attend the mediation in the Rollins Lawsuit, but questioned whether coverage was provided under the policies of insurance issued by Penn National to Covil for the Rollins Lawsuit. [Defendant's Answer, pp.4-5] In addition, Penn National raised certain defenses in its Answer, including Covil's failure to comply with its duties under the policies, including the duty to provide timely notice to Penn National of the Rollins Lawsuit, and other policy provisions and exclusions. [Defendant's Answer, pp.5-6, First Defense, Third Defense, Fourth Defense]

Without engaging in any discovery or even addressing Penn National's motion to transfer venue, and a mere twenty-three (23) days after Penn National filed its Answer, Covil moved for partial summary judgment. [Covil's Motion for Partial Summary Judgment] In its motion, Covil argued that the injuries alleged in the Rollins Lawsuit fell within the coverage period of the policies of insurance issued by Penn National, that Covil paid amounts in settlement of the Rollins Lawsuit for those injuries, and that therefore Penn National breached its policies when it failed to reimburse Covil for the amounts paid in settlement of the Rollins Lawsuit. [Covil's Motion for Partial Summary Judgment, pp.7-8] Covil also addressed two exclusions contained in the policies issued by Penn National, specifically the products hazard exclusion and the completed operations exclusion. [Covil's Motion for Partial Summary Judgment, pp.8-9] Covil did not address, or even mention, Penn National's defense, raised in its Answer, of late notice.

Of significance, in making its motion for summary judgment, Covil did not attach or submit any supporting affidavits. Instead, Covil merely attached "exhibits" consisting of: uncertified copies of what Covil alleged to be the policies of insurance issued by Penn National

[Covil's Motion for Partial Summary Judgment, Exhs. A, B];[1] the Amended Complaint filed in the Rollins Lawsuit [Covil's Motion for Partial Summary Judgment, Exh. D]; an unsworn three-page excerpt from the deposition of Robert Ashworth (not taken in the present action or even in the Rollins Lawsuit but in a different asbestos personal injury lawsuit) [Covil's Motion for Partial Summary Judgment, Exh. E]; an unsworn twelve-page excerpt from the deposition of Mr. Rollins (again, not taken in the present action or in the Rollins Lawsuit but in yet another asbestos personal injury lawsuit) [Covil's Motion for Partial Summary Judgment, Exh. F]; an unsigned, partial Subcontract Agreement between Bowater Carolina Company and Covil [Covil's Motion for Partial Summary Judgment, Exh. G]; unverified, unsigned, and unidentified handwritten notes [Covil's Motion for Partial Summary Judgment, Exh. H]; an unverified and unauthenticated interoffice memo from Bowater Carolina Company to Covil [Covil's Motion for Partial Summary Judgment, Exh.I]; and a copy of an article from the Spring 1971 edition of the Nebraska Law Review [Covil's Motion for Partial Summary Judgment, Exh. J]. Of note, these documents were not produced in any discovery in the present case (as no discovery had yet been undertaken).

Penn National filed its Memorandum of Law in Opposition to Covil's Motion for Partial Summary Judgment on May 8, 2020. [Penn National's Memo in Opposition]
In its Opposition, Penn National moved to stay the present action pending the disposition of identical coverage issues pending in federal court. [Penn National's Memo in Opposition, pp.10-12] Penn National also raised defenses of late notice and the application of the products hazard exclusion and the completed operations hazard, which barred coverage in its entirety for the

[1] Penn National denies that what was attached to Covil's Motion for Partial Summary Judgment constitutes complete copies of its policies. Penn National provided complete copies of its policies with its Memorandum in Opposition to Motion for Partial Summary Judgment. See, [Penn National's Memo in Opposition, Exhs. 13-1, 13-2]

Rollins Lawsuit under the Penn National Policies. [Penn National's Memo in Opposition, pp.12-22] Finally, and not insignificantly, Penn National argued that granting summary judgment at this stage in the litigation, i.e. a mere twenty-three (23) days after Penn National had filed its Answer, was premature because Penn National did not have a full and fair opportunity to engage in, let alone complete, discovery. [Penn National's Memo in Opposition, pp.22-23]

Without the benefit of a hearing, on August 13, 2020, Retired Justice Jean H. Toal issued an Order Granting Covil's Motion for Partial Summary Judgment. In the Order, the trial court considered extrinsic evidence, not duly supported by any filed affidavits, and found that Penn National had coverage for the damages alleged in the Rollins Lawsuit and that the exclusions for products hazard and completed operations hazard did not apply. [Order dated 8/13/2020, pp.3-8] The trial court further found that because Penn National actually attended the mediation, its late notice defense was invalid. [Order dated 8/13/2020, p.9] Ultimately, the trial court held "that there is no triable issue that Penn National was required to defend Covil against the *Rollins* action, and is required to indemnify Covil against the settlement of the *Rollins* action." [Order dated 8/13/2020, p.10]

On August 24, 2020, Penn National moved pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, for reconsideration of the Order granting partial summary judgment in favor of Covil. [Penn National's Motion for Reconsideration] On September 21, 2020, again without the benefit of a hearing, the trial court denied Penn National's Motion for Reconsideration in its entirety. [Order dated 9/21/2020] Penn National timely filed its Notice of Appeal on September 14, 2020. [Notice of Appeal]

III. STATEMENT OF FACTS

Covil, a South Carolina corporation formed in 1954, was in the business of selling, distributing, and installing insulation products, some of which allegedly contained asbestos. In 1991, Covil went out of business and its charter was thereafter administratively revoked. [Complaint, p.3, ¶7] On or about November 2, 2018, Retired Justice Toal appointed Mr. Protopapas as the Receiver for Covil, with the power and authority to administer all of Covil's assets. [Covil's Motion for Partial Summary Judgment, Exh. C]

Covil has been sued in numerous lawsuits brought by individuals allegedly injured through their exposure to asbestos, or their estates, claiming that such injuries were caused by Covil's alleged distribution and/or installation of asbestos-containing products. See, e.g., *Covil Corp. v. Zurich Am. Ins. Co.*, 2020 U.S. Dist. LEXIS 33140, *4-5 (D.S.C. 2020); *Zurich Am. Ins. Co. v. Covil Corp.*, 2020 U.S. Dist. LEXIS 138062, *15 (M.D.N.C.). One of the cases filed against Covil is the Rollins Lawsuit.

1. *Rollins Lawsuit*

On April 5, 2019, David D. Rollins filed a lawsuit in Hampton County, against fifty-three (53) defendants, alleging that he was exposed to asbestos fibers both during his employment and while he lived with his parents who brought asbestos fibers home on their clothes from their respective places of employment. [Penn National's Memo in Opposition, Exh. 4, p.29, ¶73] Mr. Rollins was diagnosed with malignant Meosthelioma on or about January 17, 2019. [*Id.* at ¶72] In the Amended Complaint filed in the Rollins Lawsuit on April 10, 2019, Mr. Rollins alleged that his exposure to asbestos occurred continuously between 1973 and 2001. Specifically, Mr. Rollins alleged that he was exposed to "take-home" asbestos fibers from dust carried home by Mr. Rollins' father, mother, and stepfather from their respective job sites. This

"take-home" exposure allegedly occurred between 1973 and 1991. Mr. Rollins also worked at locations where asbestos fibers were present from 1988 until 2001. [*Id.* at ¶¶74-78]

In the Rollins Lawsuit, Mr. Rollins alleged liability against the defendants, which were separated into two categories and identified as being either a "Product Defendant" or a "Premises Defendant." These categories were specifically defined in the Amended Complaint:

> 3. Plaintiff's claims against the Product Defendants, as defined herein, arise out of Defendants' purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina.
>
> 4. Plaintiff's claims against the Premises Defendants, as defined herein, arise out of Defendants' ownership and/or control of real property located in South Carolina and the purchase and use of asbestos-containing products on their premises located in South Carolina.

[Penn National's Memo in Opposition, Exh. 5, p.5] In the Rollins Lawsuit, Covil was designated as a Product Defendant:

> 25. Defendant, COVIL CORPORATION was and is a South Carolina corporation with its principle place of business in South Carolina. At all times material hereto, COVIL CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation. COVIL CORPORATION is sued as a ***Product Defendant***. Plaintiff's claims against COVIL CORPORATION arise out of this Defendant's business activities in the State of South Carolina.

[*Id.* p.12] (emphasis added).

Mr. Rollins alleged six claims in the Rollins Lawsuit: (1) products liability: negligence; (2) products liability: strict liability pursuant to S.C. Code. Ann. §15-73-10, *et seq.*; (3) vicarious liability based on respondeat superior; (4) premises liability: negligence as to

premises owner/contractor; (5) products liability: breach of implied warranties pursuant to S.C. Code. Ann. §36-2-314; and (6) fraudulent misrepresentation. [*Id.* ¶¶85-157]

2. *Penn National Policies*

Penn National issued a Special Multi-Peril Policy to Named Insured, Covil Corporation, Inc., Policy No. 515 50 28 53-7, for the policy period of March 31, 1986 through March 31, 1987 ("1986-87 Policy"). The 1986-87 Policy provided both commercial property coverage and general liability coverage. The liability limits on the 1986-87 Policy was $1 million per occurrence and in the aggregate. [Penn National's Memo in Opposition, Exh. 13, p.1] This policy was renewed, Policy No. 515 50 28 53-8, for the next policy period of March 31, 1987 through March 31, 1988 ("1987-88 Policy"), with identical coverages, policy forms and liability limits. [Penn National's Memo in Opposition, Exh. 13, pp.44-91] (The 1986-87 Policy and the 1987-88 Policy will collectively be referred to as the "Penn National Policies.")

3. *Late Notice of the Rollins Lawsuit*

The Amended Complaint in the Rollins Lawsuit was served on Covil on April 25, 2019. [Penn National's Memo in Opposition, Exh. 5, p.1] Mr. Protopapas entered a special appearance in the Rollins Lawsuit as Receiver for Covil on May 13, 2019, [Penn National's Memo in Opposition, Exh. 6] and Covil filed an Answer to the Amended Complaint on May 28, 2019 [Penn National's Memo in Opposition, Exh. 7], through defense counsel retained by other insurers to whom Covil had tendered the Rollins Lawsuit at that time. Covil did not provide notice to Penn National of the Rollins Lawsuit when it was served on Covil.

On June 6, 2019, Mr. Rollins was deposed in the Rollins Lawsuit [Penn National's Memo in Opposition, Exh. 8, pp.5-15], and the parties engaged in other fact and expert discovery

as required by the Master Asbestos Discovery/Scheduling Order, adopted and filed in the Rollins Lawsuit on May 8, 2020. [Penn National's Memo in Opposition, Exh. 9] It was not until January 27, 2020, after the pleadings had been closed and discovery (both fact and also expert) had long since been completed, that Covil sent its first notice of the Rollins Lawsuit to Penn National. In fact, the "notice" provided by Covil at that time consisted of an email sent by the Receiver's office to various counsel for different insurers for Covil. In that email dated January 27, 2020, Mr. Protopapas stated:

> As you know, Peter D. Protopapas, as Receiver for Covil Corporation, was served via process on **April 25, 2019** with the attached lawsuit captioned **ROLLINS vs. Air & Liquid, et al (Case Number 2019-CP-25-00118**).
>
> This matter is pending in **HAMPTON** County, South Carolina **AND IS SET FOR TRIAL** on **March 23, 2020** (please see attached order for date certain).
>
> Again, the Receiver respectfully requests that the insurers provide and/or continue to provide a defense to Covil Corporation in these asbestos lawsuits. To the extent that a defense will not be provided, please advise so that I can take the actions necessary to protect Covil Corporation.

[Penn National's Memo in Opposition, Exh. 5, p.2] (emphasis in original).

Contrary to the statement in the email sent by Mr. Protopapas on January 27, 2020, Covil had not previously provided notice to Penn National of the Rollins Lawsuit. The email to counsel for Penn National was the first notice that Penn National had received with regard to the Rollins Lawsuit. However, based upon the language in the email sent by Mr. Protopapas, Covil had previously provided notice to its other insurers and some or all of these other insurers were defending Covil in the Rollins Lawsuit.

Cognizant that Covil had not timely notified Penn National of the Rollins Lawsuit, counsel for the Receiver sent a letter to Penn National and its counsel on February 3, 2020.

In that letter, Covil officially tendered the Rollins Lawsuit to Penn National:

> Covil hereby tenders this suit to Pennsylvania National Mutual Casualty Insurance Company ("Penn National") for defense and indemnity, pursuant to the terms and conditions of the insurance policies issued to and/or covering Covil.

[Penn National's Memo in Opposition, Exh. 10] Although Covil enclosed a copy of the Amended Complaint filed in the Rollins Lawsuit with its letter dated February 3, 2020, Covil did not enclose any additional pleadings filed or discovery exchanged in the Rollins Lawsuit, and did not provide any information regarding the status of the Rollins Lawsuit or the identity of Covil's defense counsel in that Lawsuit.

On February 10, 2020, Mr. Protopapas wrote to counsel for Penn National to notify Penn National for the first time that a mediation had been scheduled in the Rollins Lawsuit for February 25, 2020. Covil provided this notice of the mediation just twelve (12) business days before the date of the mediation.

On February 14, 2020, Penn National sent a letter to Mr. Protopapas, advising that it had contacted defense counsel for Covil in the Rollins Lawsuit (who had been retained by another insurer) and had requested copies of discovery for review and evaluation. However, given that Penn National was unable to evaluate coverage due to the limited information provided to Penn National at that time, Penn National also requested that Covil execute a Non-Waiver Agreement in order to allow Penn National to investigate the matter without either party waiving any rights under the Penn National Policies. [Penn National's Memo in Opposition, Exh. 12]

Given the late notice of the mediation and lack of sufficient information and documentation provided by Covil to Penn National prior to the mediation, Penn National was unable to evaluate its potential coverage obligation or the liability and damages exposure for Covil prior to the mediation. As such, although a representative of Penn National attended the

mediation, Penn National was not in a position to contribute to any settlement. Covil alleges in the present action that Penn National declined to contribute $50,000 to the settlement, which Covil alleges resulted in "other Covil assets" being expended to resolve the action. [Complaint, ¶¶12–13]

IV. STANDARD OF REVIEW

This Court is tasked with reviewing whether the trial court correctly granted summary judgment in favor of Covil. In so doing, this Court is to apply the standard that should have been applied by the trial court, specifically "summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Froneberger v. Smith*, 406 S.C. 37, 46, 748 S.E.2d 625, 629 (Ct. App. 2013)(quoting *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011)). In reviewing whether summary judgment was properly granted, this Court is to consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008).

In the present case, the trial court failed to hold Covil to its burden of clearly establishing the absence of any genuine issues of material fact. Based on nothing more than bald assertions made by Covil in its motion, and unsupported and unverified documents attached to the motion but never produced in discovery in this case, the trial court granted summary judgment on the coverage issues in favor of Covil. The trial court's grant of summary judgment cannot stand. Penn National respectfully requests that this Court review this matter in the light most favorable to Penn National, vacate the entry of judgment, and remand this case with instructions to enter summary judgment in Penn National's favor, or alternatively, remand this case for discovery.

V. ARGUMENT AND ANALYSIS

A. The Trial Court's Grant of Summary Judgment on the Record Developed in This Case Was Both Improper and Premature.

1. *Covil's Motion for Partial Summary Judgment Was Not Properly Supported.*

The Supreme Court of South Carolina has characterized summary judgment as a "drastic remedy" that should be "cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)(quoting *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C. 1975)). To prevent an unwarranted deprivation of the right to trial, the Rules of Civil Procedure set forth certain requirements that must be met prior to the entry of summary judgment. Specifically, the Rule states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule, 56(c), SCRCP. The trial court failed to follow this directive when it granted partial summary judgment in favor of Covil.

In the present case, the truth is that there were "no depositions, answers to interrogatories and admissions on file" on which the trial court could have based its summary judgment ruling simply because no discovery had yet been initiated, let alone completed. When the trial court granted summary judgment, the only documents "on file" were the Covil's unverified Complaint (to which no documents were either attached or incorporated) [Complaint] and Penn National's Notice of Motion and Motion to Transfer and Answer to Complaint [Penn National's Answer]. In its Answer, Penn National denied the material allegations contained in the Complaint, including that Penn National had breached its policies with regard to the underlying

Rollins Lawsuit and that Covil was damaged as a result. Based on this record, and the directive that the court is to consider the evidence in the light most favorable to the non-moving party, i.e. Penn National, there was insufficient evidence on which to grant partial summary judgment in favor of Covil. See, *Froneberger*, 406 S.C. at 55-56. 748 S.E.2d at 634-35 (finding that summary judgment on agency was improperly granted where defendant's assertion of non-employment was disputed by the plaintiff).

It appears that the trial court granted summary judgment to Covil based on bald, unsupported assertions contained in Covil's motion and the documents attached thereto. However, there were no affidavits attached to Covil's motion for partial summary judgment that supported any "facts" asserted in Covil's motion, or that identified or in any way provided a basis for the trial court, or this Court on review, to determine the attached documents' authenticity and genuineness. [Covil's Motion for Partial Summary Judgment] As this Court has found, "affidavits are the principal means of bringing information before the court in a motion for summary judgment." *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 351, 565 S.E.2d 309, 316 (Ct. App. 2002), *cert. denied*, 357 S.C. 191, 592 S.E.2d 625 (2004)(quoting James F. Flanagan, South Carolina Civil Procedure 454 (2nd ed. 1996)). The Rules of Civil Procedure set forth the requirements for affidavits filed in conjunction with motions for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Rule 56(e), SCRCP.

In the present case, no affidavits were attached to Covil's motion for partial summary judgment to support the "undisputed" evidence referred to in both the motion and the trial court's

order granting summary judgment. See, [Covil's Motion for Partial Summary Judgment, pp.1-5, 7-9; Order dated 8/13/2020, pp.5-9] The documents attached to Covil's motion for partial summary judgment were not authenticated by anyone with personal knowledge of the documents. Furthermore, the documents themselves were not sworn or certified copies. Indeed, they had never been produced in discovery in this case to Penn National. Without some measure that the information and documents attached to Covil's motion would be admissible into evidence, the trial court erred in relying on them in granting summary judgment in Covil's favor.[2] See, *Robertson*, 350 S.C. at 352, 565 S.E.2d at 316 (finding that an unsigned statement in opposition to defendant's motion for summary judgment could not be considered by the court); *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003)(finding that the trial court properly refused to consider the plaintiff's verified complaint as an affidavit because the allegations therein were not based on personal knowledge, would not by themselves be admissible in evidence, and did not affirmatively show that the plaintiff was competent to testify to matters stated therein).

2. *Covil's Motion for Partial Summary Judgment Was Premature.*

Covil's motion for partial summary judgment was not supported, as required, by "depositions, answers to interrogatories and admissions on file." Rule 56(c), SCRCP. In truth, Covil was unable to so support its motion for partial summary judgment for the simple fact that no discovery had yet been commenced in the present case. Covil filed its motion for partial

[2] It is true that Retired Justice Toal, who granted judgment in favor of Covil in the present case, presided over the Rollins Lawsuit, and therefore, may have some personal knowledge herself regarding the facts of that case. However, as alleged in the present action, the Rollins Lawsuit was never tried, but settled by the parties prior to trial, and therefore, no facts were definitively established by a factfinder in that case. Therefore, Retired Justice Toal was constrained to limit her consideration of the evidence properly before her in this case when considering Covil's motion for partial summary judgment. Her failure to do so constitutes error.

summary judgment a mere twenty-three (23) days after Penn National filed its Notice of Motion and Motion to Transfer Venue and Answer to Amended Complaint.[3] Between the time of Penn National's Answer and Covil's Motion for Partial Summary Judgment, no interrogatories were served on any party, no depositions were scheduled or taken, and no documents were requested or produced. In fact, no discovery of any kind was undertaken by any party. Indeed, even if written discovery had been served, Covil's motion for summary judgment was filed prior to the expiration of any deadline for response. Accordingly, the trial court's grant of partial summary judgment in this case was premature.

The Supreme Court of South Carolina has declared that summary judgment "***must not*** be granted" until the opposing party has had a full and fair opportunity to complete discovery. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 543 (emphasis added). In the present case, the parties have had ***no*** opportunity, let alone a full and fair opportunity, to complete any discovery. Accordingly, this Court should vacate the order granting partial summary judgment to Covil and remand for the completion of discovery.

The Supreme Court's decision in *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) is instructive. In *Baughman*, 271 plaintiffs brought a lawsuit for personal injuries caused by pollution from a refinery operated by the defendants. After two years of discovery, including the taking of approximately 300 depositions, the defendants moved for partial summary judgment. *Id.* at 104-05, 410 S.E.2d at 539-40. As one of the bases for opposing the motion, the plaintiffs argued that the motion was premature. The Supreme Court agreed and reversed the entry of partial summary judgment in favor of the defendants, holding

[3] Penn National filed its Notice of Motion and Motion to Transfer Venue and Answer to Complaint on March 30, 2020. [Penn National's Answer] Covil filed its Motion for Partial Summary Judgment on April 22, 2020. [Covil's Motion for Partial Summary Judgment]

that the plaintiffs' development of evidence "should not be precipitously terminated by summary judgment." *Id.* at 114, 410 S.E.2d at 545. In support of its holding, the Supreme Court emphasized two points:

> First, Plaintiffs have demonstrated a likelihood that further discovery will uncover additional evidence relevant to the issue of medical causation and that they are not merely engaged in a "fishing expedition." …
>
> Second, Plaintiffs were not dilatory in seeking discovery on the issue of causation, but have been reasonably diligent in pursuit of a qualified expert to substantiate their claims. …

Id. at 112-13, 410 S.E.2d at 544.

In the present case, Penn National has demonstrated that discovery will uncover relevant evidence. Specifically, in its Answer, Penn National raised the defense of late notice and the applicability of exclusions contained in the Penn National Policies. See, [Penn National's Answer, pp.5-6, First Defense, Third Defense, Fourth Defense] To its Memorandum in Opposition to Covil's Motion for Partial Summary Judgment, Penn National attached communications between Mr. Protopapas, the Receiver for Covil, and counsel for Penn National that indicate that notice of the Rollins Lawsuit was not provided to Penn National for over nine (9) months after Covil was served with the Rollins Lawsuit, and less than two months prior to trial. [Penn National's Memo in Opposition, Exhs.5, 6, 10, 11, 12, 14] An insured's failure to comply with its obligations contained in the conditions to an insurance policy bars all coverage for the insured under that policy. See, *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 265-66, 831 S.E.2d 406, 408 (2019); *Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 250, 407 S.E.2d 655, 657 (Ct. App. 1991). Penn National should have been allowed to engage in discovery to support its defense of late notice.

Furthermore, Penn National raised the defense of the exclusions contained in the Penn National Policies, including the products hazard exclusion and the completed operations exclusion. These exclusions bar coverage for injuries arising out of an insured's products or operations if such injuries occurred away from the premises of the insured after such products were relinquished or operations completed. As pled in the Complaint, Penn National was not involved in the Rollins Lawsuit, and therefore, the evidence regarding the method, manner, and extent of Mr. Rollins' exposure is relevant to whether these exclusions apply to bar coverage for the Rollins Lawsuit. See, *In re Wallace & Gale Co.*, 385 F.3d 820, 833 (4th Cir. 2004) (holding that exposure to asbestos that occurred both during and after an insured's operations were included within the completed operations hazard). Again, Penn National should have been allowed to engage in discovery to determine the applicability of the products hazard exclusion and completed operations exclusion contained in its Policies.

Finally, it cannot be said that Penn National was dilatory in its pursuant of discovery. Indeed, no discovery was or could have been completed in the present case as Covil filed its motion for summary judgment within twenty-three (23) days of Penn National's filing of its Answer. Pursuant to the Supreme Court's holding in *Baughman*, this Court should vacate the grant of partial summary judgment in favor of Covil because it was premature. *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544.

In its Order denying Penn National's Motion for Reconsideration, the trial court dismissed Penn National's argument that the granting of summary judgment in the present case was premature based on the failure of Penn National to submit a Rule 56(f) affidavit in support of its position. [Order dated 9/21/2020, p.4] Although Penn National did not submit a Rule 56(f) affidavit, the Supreme Court has held that strict compliance with this technical

requirement of Rule 56 is not mandated where the need for further discovery is otherwise made known to the trial court. *Baughman*, 306 S.C. at 112 n.4, 410 S.E.2d at 544 n.4. See also, *John Doe v. Batson*, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001)(finding that trial court improperly granted summary judgment for defendant because plaintiff did not have a full and fair opportunity to complete discovery even though no Rule 56(f) affidavit was filed). It is undisputed that Penn National argued to the trial court in its Memorandum of Law submitted in opposition to the motion that discovery was needed in the present case before Covil's motion for partial summary judgment could be considered. [Penn National's Memo in Opposition, pp.22-23] Further, from the timing of the motion for partial summary judgment, i.e. twenty-three (23) days after Penn National's Answer was filed, and the unverified nature of the evidence referred to by Covil in support of its motion for partial summary judgment, it was clear that no discovery had yet been completed in this case. Accordingly, the failure of Penn National to file a Rule 56(f) affidavit is not fatal to its argument that the entry of summary judgment was premature in this case.

In the present case, Covil rushed to obtain judgment in its favor on whether Penn National breached its Policies when it failed to contribute to a settlement of the Rollins Lawsuit. In so doing, Covil attempted to prevent any discovery into whether: (1) coverage was barred under the Penn National Policies by Covil's failure to provide timely notice of the Rollins Lawsuit to Penn National; and (2) coverage was excluded under the products hazard and/or completed operations hazard exclusions contained in the Penn National Policies. The trial court's acquiescence in Covil's procedural antics by granting judgment in favor of Covil regarding coverage under the Penn National Policies should not be condoned by this Court. As this Court has previously found, "[s]ummary judgment is not

appropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law." *Robertson*, 350 S.C. at 345, 565 S.E.2d at 312. In the present case, further inquiry into the facts is required to determine whether Penn National did, in fact, breach its Policies with regard to the Rollins Lawsuit or whether Penn National's defenses to coverage are valid. Penn National respectfully requests that summary judgment in favor of Covil be vacated and this case remanded for discovery.

B. The Trial Court Erred When It Held That Covil's Late Notice of the Rollins Lawsuit Did Not Bar Coverage for Covil.

The trial court found that coverage was afforded under the Penn National Policies for the Rollins Lawsuit. In so doing, the trial court disregarded the fundamental tenant that an insured is obligated to comply with the duties ascribed to it in the insurance policy as a condition of coverage. Although this issue was raised by Penn National, the trial completely ignored Covil's actions in determining whether the insured's duty was met, concentrating instead on whether Penn National suffered any prejudice from the late notice. Prejudice, however, must only be shown if the rights of innocent third-parties are at issue. *Neumayer*, 427 S.C. at 266-67, 831 S.E.2d at 408-09. Here, the only issue is whether Covil should be reimbursed for the amount it paid to settle the Rollins Lawsuit. Because the Rollins Lawsuit has already been settled and the settlement amount paid [Complaint, ¶¶12-13], the rights of any third-parties are not at issue. Therefore, the sole inquiry is whether Covil complied with its duties under the Penn National Policies. It did not, and the trial court never found that it did. [Order dated 8/13/2020, p.9] Therefore, summary judgment in favor of Covil should be vacated on this separate basis.

It is axiomatic that insurers have the right under their insurance policies to limit their liability and impose conditions on their obligations as long as the limitations and conditions

do not violate statutory provisions or public policy. *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999). The Penn National Policies both contained the same conditions, which stated:

CONDITIONS APPLICABLE TO SECTION II[4]

4. Insured's Duties in the Event of Occurrence, Claim or Suit.

(a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof and the names and addresses of the injured and of available witnesses shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable.

(b) If a claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

(c) The insured shall cooperate with the Company and, upon the Company's request, assist in making settlements, in the conduct of suits, and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident.

[Penn National's Memo in Opposition, Exhs. 13-1, p.34; 13-2, p.36] Accordingly, under the Penn National Policies, the insured has the duty to: (1) notify Penn National in writing *as soon as practicable* of an "occurrence" which may result in a claim against it; (2) *immediately* send copies to Penn National of any demands, notices, summons, or legal papers received in

[4] Under the Penn National Policies, Section I provides Property Coverage, and Section II provides liability coverage. [Penn National's Memo in Opposition, Exh.13-1, p.2; Exh. 13-2, p.2]

connection with any lawsuit; and (3) cooperate with Penn National in the defense of the lawsuit.

South Carolina courts have universally found that similar notice and cooperation clauses are valid and enforceable. *Neumayer*, 427 S.C. at 266, 831 S.E.2d at 408. In the present case, Covil was served with the Rollins Lawsuit on April 25, 2019. [Penn National's Memo in Opposition, Exh. 5][5] Counsel was retained and an Answer was filed on behalf of Covil in the Rollins Lawsuit on May 28, 2019. [Penn National's Memo in Opposition, Exh. 7] The Rollins Lawsuit was not tendered to Penn National for defense and indemnity until February 3, 2020, over nine (9) months later. [Penn National's Memo in Opposition, Exh. 10] This tender to Penn National was three (3) weeks prior to the scheduled mediation and eight (8) weeks prior to trial. [Penn National's Memo in Opposition, Exh. 14] Covil clearly breached the notice provision in the Penn National Policies.[6]

Under South Carolina law, the failure of an insured to comply with policy conditions requiring that the insured provide timely notice, forward suit papers and cooperate with the insurer with respect to a claim or lawsuit will bar coverage for the insured under the policy. See, *Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 250, 407 S.E.2d 655, 657 (Ct. App. 1991)(quoting *Lee v. Metro. Life Ins. Co.*, 180 S.C. 475, 186 S.E. 376 (S.C. 1936))(holding that the insured was not entitled to coverage where he failed to provide timely notice of the claim and also failed to forward suit papers until approximately four months after he had received them); *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 435, 137 S.E.2d

[5] Even though the referenced documents were not submitted for consideration by the court by way of an affidavit, this Court is able to take judicial notice of pleadings filed in the courts of this State. See, e.g., *Radeker v. Wickensimer*, 2019 S.C. C.P. LEXIS 7796, *2 n.1 (Greenville Cty., Sept. 23, 2019); *Mullis v. U.S. Bankruptcy Court*, 828 F.2d 1385, 1388 (9th Cir. 1987).

[6] It is telling that neither Covil argued, nor the trial court found, that Covil actually complied with the notice provisions contained in the Penn National Policies with regard to the Rollins Lawsuit. [Covil's Motion for Partial Summary Judgment; Order dated 8/13/2020, p.9]

608, 613 (1964)(stating that it is "well settled" that the insured's failure to adhere to the notice provisions will bar recovery under the policy); *Tucker v. State Farm Mut. Auto. Ins. Co.*, 232 S.C. 615, 616, 103 S.E.2d 272, 273 (1958)(finding that the insured's breach of the cooperation clause relieved the insurer of its coverage obligation under the policy).

The case of *Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 407 S.E.2d 655 (Ct. App. 1991) is determinative. In the *Prior* case, William F. Prior ("Prior"), a medical doctor, brought a declaratory judgment action against his professional liability insurance carrier, S.C. Medical Malpractice Liability Insurance Joint Underwriting Association (JUA), to determine if JUA owed a duty to defend Prior in a medical malpractice action and to indemnify him for the judgment entered in that case. *Id.* at 248, 407 S.E.2d at 656. Prior's patient brought suit against Prior on May 1, 1986; however, Prior did not advise JUA of the lawsuit at that time, but instead hired his own attorney to defend the suit. *Id.*
After the attorney retained directly by Prior withdrew from the case in August 1986, Prior forwarded the suit papers to JUA on August 21, 1986. *Id.* At that time, JUA began to defend Prior, but under a reservation of rights to later disclaim coverage. *Id.* JUA subsequently withdrew its defense of Prior on several grounds, including Prior's breach of its duty to notify JUA of the lawsuit in a prompt fashion and forward suit papers immediately to JUA. *Id.*
The case then proceeded to trial in October 1986, with the jury returning a verdict against Prior in the amount of $15,000 in actual damages and $80,000 in punitive damages. *Id.* After the case was affirmed on appeal, Prior brought the declaratory judgment action against JUA seeking indemnification. *Id.*

On appeal in the declaratory judgment action, this Court held that Prior was not entitled

to coverage under the policy issued by JUA because Prior failed to timely notify JUA of the lawsuit:

> JUA had no duty to defend because Prior failed to timely notify JUA. "No rule of law is more firmly established in this jurisdiction than that one suing on a policy of insurance, where the notice required by the policy is not timely given, cannot recover …" *Lee v. Metropolitan Life Ins. Co.*, 180 S.C. 475, 486, 186 S.E. 376, 381 (1936). In November 1984, Prior knew that the Patient was complaining of his conduct, but he did not contact JUA until August 1986. Prior also failed to forward the summons and complaint to JUA until approximately four months after he received them. JUA's insurance policy clearly states that it is the insured's duty to notify JUA "upon the Insured's becoming aware of any alleged injury…" Prior was aware that the policy imposed an obligation to advice JUA any time there was a claim or lawsuit.

Id. at 249–50, 407 S.E.2d at 657. Prior argued that JUA could not show that it was substantially prejudiced by any delay in providing notice of the underlying malpractice lawsuit and therefore JUA should be required to provide coverage despite Prior's breach of the notice provisions. This Court rejected this argument:

> Prior argues that JUA must show that it was substantially prejudiced by the delay in order to deny coverage. The cases upon which Prior relies, however, involve innocent third parties. Here there is no innocent third party beneficiary. The Patient has been paid her judgment. "The failure to give the required notice in the allotted time is fatal to the right of recovery, even if it be shown that the insurance company has suffered no harm by the delay." *Lee v. Metorpolitan Life Ins. Co.*, 180 S.C. at 487, 186 S.E. at 381. Prior failed to notify JUA in a timely manner, thus violating the insurance policy. This failure justified JUA's refusal to defend and to deny coverage.

Id.

The holding in *Prior* applies with equal force and dictates the result in the present case. Indeed, the facts of the present case are even more egregious than in *Prior*. Covil did not provide any notice or forward any suit papers in the Rollins Lawsuit to Penn National until January 27, 2020—over nine (9) months after it had been served with the complaint.

[Penn National's Memo in Opposition, Exh. 5] Then, less than a month after providing Penn National with its first notice of the *Rollins* Asbestos Action, and while Penn National was still in the process of gathering information from the defense counsel retained by other insurers, Covil settled the claims asserted against it during the course of a mediation conducted on February 25, 2020. [Penn National's Memo in Opposition, Exh.10] Covil alleges that the Rollins Lawsuit was settled at mediation and that Covil contributed $50,000 of its own assets to the settlement. [Complaint, ¶¶12-13]

Clearly, Covil failed to comply with the conditions for coverage under the Penn National Policies. Further, Covil admits that the entirety of the settlement in the Rollins Lawsuit has been paid. Therefore, no rights of an innocent third-party are jeopardized by Covil's failure to comply with the notice conditions in the policies. Contrary to the trial court's holding, and based on this Court's decision in *Prior,* Covil is not entitled to coverage under the Penn National Policies for the settlement in the Rollins Lawsuit.

In its decision granting summary judgment, the trial court disregarded Penn National's late notice defense based on its finding that Penn National was not substantially prejudiced by Covil's conduct. In the decision, the trial court states:

> Penn National had access to all available information related to the Rollins action, attended the Rollins mediation with a "willingness to contribute toward settlement," and then made the deliberate decision not to resolve Rollins, presumably because it believe [sic] that its policy exclusion barred coverage. Penn National's deliberate choice to decline to settle the Rollins action within its policy limit is not equivalent to the late notice defenses established in the cases it cites. Penn National's alleged late notice of the Rollins action is not a valid defense to breach of its insurance contract with Covil.

[Order dated 8/13/2020, p.9] The trial court's findings and conclusions are in error. First and foremost, whether an insured has complied with the notice provisions contained in an insurance

policy should focus on the insured's actions, specifically the timing and provision of the notice. The trial court failed to even address Covil's actions, or inactions, in this regard. Second, the law in South Carolina is clear: if the insured is seeking coverage under an insurance policy, the insured's breach of the notice conditions will obviate coverage under that policy. *Prior*, 305 S.C. at 250, 407 S.E.2d at 657.

If this Court should find, however, contrary to established case law, that "substantial prejudice" must be shown, the facts of this case demonstrate that Penn National was in fact "substantially prejudiced" by Covil's failure to comply with the timely notice condition contained in the Penn National Policies. By the time that Covil provided notice to Penn National, Covil had already filed an Answer on May 28, 2019 [Penn National's Memo in Opposition, Exh. 7], completed written discovery, and participated in depositions in the case [Penn National's Memo in Opposition, Exh. 8, pp.5-15]. In fact, under the Master Asbestos Discovery/Scheduling Order, the following deadlines had already expired by the time that Penn National was first put on notice of the Rollins Lawsuit:

- Plaintiff's Deposition (June 19, 2029)
- Defendants Answer Master Discovery (July 12, 2019)
- Designate Fact Witnesses (August 8, 2019)
- Designate Expert Witnesses (August 8, 2019)
- Deposition of Plaintiff's fact witnesses except for family members who do not have product identification testimony (January 13, 2020)
- Deposition of Defendants' fact witnesses except for Defendants' 30(b)(6) witnesses (January 13, 2020)

[Penn National's Memo in Opposition, Exh. 9]

Additionally, the Pre-trial Scheduling Order entered by the Court in the Rollins Lawsuit

set a deadline of February 7, 2020, for the filing of motions for summary judgment (which was just eleven (11) days after Penn National had received its first notice of the action) and set trial for March 23, 2020 (just eight (8) weeks after Penn National's first notice of the action). [Penn National's Memo in Opposition, Exh. 14]

Adding to the prejudice to Penn National, the parties in the Rollins Lawsuit participated in a mediation on February 25, 2020, less than a month after Penn National received its first notice of the action. Covil did not provide notice of the mediation to Penn National until February 10, 2020, providing even less time for Penn National to gather the necessary information and documents in order to evaluate the matter for potential settlement. [Penn National's Memo in Opposition, Exh. 12] As such, although a representative of Penn National attended the mediation, and expressed a willingness to contribute toward settlement on behalf of Covil, Penn National was not in a position to contribute the amount requested by Covil at the mediation.[7]

Under these facts, Penn National was "substantially prejudiced" by Covil's untimely notice in this matter. Under similar circumstances, a federal court in South Carolina found that

[7] In justifying her decision to reject Penn National's late notice defense, the trial court found that "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," and "[Penn National] had access to all the same materials as the insurers that elected to resolve the Rollins action at mediation." [Order dated 8/13/2020, p.9] This is simply not true. Penn National never defended Covil in the Rollins Lawsuit and was not contemporaneously provided with the discovery obtained in that case, facts not disputed by Covil and which actually form the bases for Covil's breach of contract claim in this action. [Complaint, ¶16] In support of these "findings," the trial court cites to page 7 of Penn National's Memorandum of Law in Opposition to Covil's Motion for Partial Summary Judgment. However, on page 7 of its Memorandum, Penn National states, "Despite the untimely notice of the *Rollins* Asbestos Action and the mediation, Penn National responded to the notice on February 14, 2020, advising that it had located and contacted defense counsel for Covil in the action (who had been retained by other insurers who had been provided notice of the action) and had requested copies of discovery for review and evaluation." [Penn National's Memo in Opposition, p.7] See also, [Penn National's Memo in Opposition, Exh. 12] Clearly, Penn National did not have copies of the discovery or other materials in the Rollins Lawsuit prior to its efforts to obtain the same after untimely notice was provided.

the insurer was substantially prejudiced by the insured's late notice:

> By the time Cincinnati received the summons and complaint, mediation had already occurred, the parties had conducted discovery, and trial was scheduled to begin the following Monday. Thus, Stringer Development's failure to forward a copy of the summons and complaint in a timely manner deprived Cincinnati of any realistic opportunity to analyze coverage of the claims asserted in the complaint in time to participate in the investigation, defense, and/or settlement negotiations in any meaningful way, thereby prejudicing Cincinnati.

Greenwood Dev. Corp. v. Cincinnati Ins. Co., 2012 U.S. Dist. LEXIS 204018, *29 (D.S.C. 2012). See also, *Hatchett*, 244 S.C. at 434, 137 S.E.2d at 613 (finding that insured's late notice substantially prejudiced the insurer because the insurer was unable to investigate promptly, sponsor a defense, and negotiate a settlement).

Therefore, even if "substantial prejudice" is required before coverage for Covil can be barred for Covil's failure to comply with the notice conditions in the Policies, which Penn National disputes, the trial court erred in finding as a matter of law that Penn National was not "substantially prejudiced" by Covil's untimely notice.

Coverage under the Penn National Policies was obviated when Covil failed to comply with his contractual obligations to provide written notice of the Rollins Lawsuit as soon as practicable and to immediately send copies of the Summons and Complaint to Penn National. "[B]reach of an insurance policy's notice clause automatically relieves the insurer of its obligations under the contract, including the payment of proceeds due, and the duty to defend and to indemnify the insured." *Wright v. UNUM Life Ins. Co.*, 2001 U.S. Dist. LEXIS 26063, *4 (D.S.C. 2001). Because Covil does not dispute that it failed to provide timely notice to Penn National of the Rollins Lawsuit, Penn National had no obligation to indemnify Covil for any moneys it paid to settle the Rollins Lawsuit. Accordingly, the trial court erred when it found that coverage was afforded under the Penn National Policies despite Covil's untimely notice.

Penn National respectfully requests that summary judgment in favor of Covil be vacated and this case be remanded with instructions to enter summary judgment in Penn National's favor.

C. The Trial Court Erred When It Held That the Products Hazard Exclusion and the Completed Operations Exclusion Did Not Apply to Bar Coverage for Covil Under the Penn National Policies.

A fundamental tenet of insurance policy construction is: "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999). Because an insurance policy is to be interpreted according to the language contained therein, "[t]he court's duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their interests carefully." *Id.* "An insurer's obligation under a policy of insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction." *MGC Mgmt v. Kinghorn Ins. Agency*, 336 S.C. 542, 549, 520 S.E.2d 820, 823 (Ct. App. 1999).

The trial court failed to follow these bedrock principles when it found that two exclusions contained in the Penn National Policies, the products hazard exclusion and the completed operations exclusion, clearly did not apply to the Rollins Lawsuit. The trial court erred in so finding. In reviewing the trial court's determination regarding the applicability of exclusions, no deference is given to the trial court's findings. *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 167, 594 S.E.2d 511, 516 (Ct. App. 2004).

The coverage afforded by the Penn National Policies is governed by the language contained therein. The grant of coverage under the Policies is found in the insuring agreement, which states:

INSURING AGREEMENT

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

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

[Penn National's Memo in Opposition, Exh. 13, pp.2, 45] The bolded terms are specifically defined by the Penn National Policies, as follows:

DEFINITIONS APPLICABLE TO SECTION II

When used in the provisions applicable to Section II of this policy (including endorsements forming a part hereof)

"**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**;

[Penn National's Memo in Opposition, Exh. 13, pp.36, 81] Therefore, under the plain terms of the Penn National Policies, coverage is only provided for "bodily injury" that occurs during the policy period and which is caused by an "occurrence," as those terms are defined in the Penn National Policies. However, even if a claim falls within the insuring agreement contained in an insurance policy, exclusions contained within that policy can preclude coverage.

The Penn National Policies contain two exclusions that apply to bar coverage for

the Rollins Lawsuit. Specifically, the Penn National Policies state:

EXCLUSION
(Complete Operations Hazard and Products Hazard)

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

[Penn National's Memo in Opposition, Exh. 13, pp. 30, 68] The Penn National Policies define the bolded terms as:

DEFINITIONS APPLICABLE TO SECTION II

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

property damage arising out of:

(a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,
(b) the existence of tools, uninstalled equipment or abandoned or unused materials, or
(c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations";

* * *

"**products hazard**" includes **bodily injury** and **property damage** arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** or **property damage** occurs away from the premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others;

[Penn National's Memo in Opposition, Exh. 13, pp.36, 81] If either the completed operations hazard exclusion or the products hazard exclusion applies to the Rollins Lawsuit, no coverage is afforded under the Penn National Policies. *South Carolina Mun. Ins. & Risk Fund v. City of Myrtle Beach*, 368 S.C. 240, 245, 628 S.E.2d 276, 279 (Ct. App. 2006).

1. ***The Products Hazard Exclusion***

The Penn National Policies clearly exclude from coverage all claims of bodily injury if the bodily injury is included in the "products hazard," as that term is defined by the Penn National Policies. South Carolina courts have routinely upheld the validity and enforceability of the products hazard exclusion. See, e.g., *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 536, 514 S.E.2d 327, 330-31(1999). According to the plain language contained in the Penn National Policies, claims of bodily injury are included in the products hazard if: (1) the bodily injury arises out of the named insured's products; (2) the bodily injury occurs away from the named insured's premises; and (3) physical possession of such products has been

relinquished by the named insured to others. The allegations made and damages sought in the Rollins Lawsuit are clearly within the products hazard exclusion.

It is axiomatic that an insurer's duty to defend is based on the allegations contained in the underlying complaint. *Federated Mut. Ins. Co. v. Piedmont Petroleum Corp.*, 314 S.C. 393, 396, 444 S.E.2d 532, 533 (Ct. App. 1994). The allegations in the Rollins Lawsuit establish that Covil was being sued in its capacity as a "Product Defendant:"[8]

> 25. … At all times material hereto, COVIL CORPORATION mined, manufactured, processed, imported, converted, compounded, supplied, installed, replaced, repaired, used, and/or retailed substantial amounts of asbestos and/or asbestos-containing products, materials, or equipment, including, but not limited to, the installation and removal of asbestos-containing thermal insulation. COVIL CORPORATION is sued as a ***Product Defendant***. …

[Penn National's Memo in Opposition, Exh. 5, p.12](emphasis added). The Rollins Lawsuit defined what it meant by designating a defendant as a "Product Defendant:"

> 3. Plaintiff's claims against the Product Defendants, as defined herein, arise out of Defendants' purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina.

[*Id.* at p.5] Based on these designations, the plaintiff in the Rollins Lawsuit then asserted claims, designated as either products liability claims [*Id.* at pp.32-42, 49; First Cause of Action, Second Cause of Action, Fifth Cause of Action] or premises liability claims [*Id.* at pp.45-49; Fourth Cause of Action]. Because Covil was identified as a "Products Defendant," only products liability claims were asserted against it.

The Rollins Lawsuit does not allege the specific circumstances and/or any dates that Mr. Rollins might have been exposed to asbestos fibers from Covil's products. In its motion for

[8] Other defendants were sued in their capacities as "Premises Defendants."

partial summary judgment, Covil alleges, without any supporting affidavits, that Covil was retained to supply materials and install piping insulation at a facility at which Mr. Rollins' stepfather worked. The Rollins Complaint does allege that Mr. Rollins was exposed to "take-home" asbestos fibers in the dust attached to his stepfather's clothes and person when he came home from work. [*Id.* at ¶77]

Because no discovery has been done in the present action, and Penn National was unable to participate in the defense of the Rollins Lawsuit because of Covil's late notice, Penn National cannot confirm or refute the dates and circumstances of Mr. Rollins' exposure to asbestos fibers from Covil's products.[9] What is undisputed is that the Rollins Lawsuit alleged liability against Covil based on Covil's products, including "take-home" exposure. Based on the allegations asserted in the Rollins Lawsuit, it is clear that the products hazard exclusion applies to bar coverage. All the elements for application of the products hazard exclusion are met: (1) the Rollins Lawsuit alleges that Mr. Rollins' mesothelioma arose out of exposure to Covil's products; (2) it is not disputed that Mr. Rollins' bodily injury claim occurred away from Covil's premises; and (3) because the exposure to Mr. Rollins is alleged to be "take-home" exposure, physical possession of Covil's products must necessarily have been relinquished.

Despite this rather straightforward construction of the products hazard exclusion, and despite the fact that Penn National never had the chance to engage in discovery, the trial court found as a matter of law that the products hazard exclusion did not apply. Although unclear,

[9] Throughout its Order granting Covil's Motion for Partial Summary Judgment, the trial court frequently states that "Penn National agrees …" or that "Penn National does not dispute …" This is, in fact, not true. Because no discovery was completed in the present case, and Penn National was not involved in the Rollins Lawsuit, Penn National is not in a position to either confirm or deny the "facts" stated in the Order. The only admissions made by Penn National in the present case are contained in Penn National's Answer where Penn National admitted that it issued the Penn National Policies but denied that any coverage was afforded under those Policies for the Rollins Lawsuit.

it appears that the trial court found, based on the unverified documents attached to Covil's motion for partial summary judgment and her own recollection of what was established in the Rollins Lawsuit,[10] that because the "take-home" fibers were the result of on-going installation of insulation by Covil during the periods of the Penn National Policies, Covil never "relinquished" physical possession of its products. [Order dated 8/13/2020, pp.6-8]

In support of its conclusion, the trial court cites to three cases, each of which are unavailing and actually support the applicability of the products hazard exclusion to the Rollins Lawsuit. In *Heyward v. American Casualty Co.*, 129 F.Supp. 4 (E.D.S.C. 1955), the federal district court was tasked with determining whether coverage was afforded for an explosion that occurred during the insured's installation of heating and plumbing units at a housing project. The insured entered into a contract to install all heating and plumbing units in the housing project, and as each unit was completed, the unit was leased to residents. An explosion occurred after the heating and plumbing fixtures were installed in one unit and that unit was leased. *Id.* at 6. The insured tendered the resulting lawsuit to its insurance carrier, who denied coverage based on the completed operations hazard and products hazard exclusions. *Id.* at 6-7. The court found that the products hazard exclusion was not implicated by the underlying lawsuit because there were no claims asserted against the insured for products liability:

> "Products Liability", to the average person, refers to liability arising out of the use of, or existence of any condition in goods or products manufactured, sold, handled or distributed by the insured. The suit in the State Court involved no such liability, but is based on the alleged negligent construction by the plaintiff.

Id. at 9. Accordingly, *Heyward* does not support the trial court's conclusion that the products

[10] As way of example, in the Order, Retired Justice Toal states: "Additionally, no evidence in this case or in the underlying Rollins action suggests that Covil supplied asbestos insulation to the Bowater facility between 1986 and 1987." [Order dated 8/13/2020, p.6]

hazard exclusion does not apply to the Rollins Lawsuit. To the contrary, because the Rollins Lawsuit asserted liability against Covil as a "product defendant," *Heyward* supports the application of the products hazard exclusion to preclude coverage for such liability.

Similarly, in *Friestad v. Travelers Indem. Co.*, 393 A.2d 1212 (Pa. Super. 1978), a case interpreting Pennsylvania law, the court found that the insured's liability for injuries caused by a furnace fire after the furnace was installed by the insured was not excluded by the products hazard exclusion specifically because the liability of the insured was not based on the product but on its service in installing the furnace. *Id.* at 1217.

> Hence, it is more preferable by far to define the products hazard in terms of products liability law, and apply the exclusion only when a product, other than a service, is the cause in fact of damages or injuries to a third person.
>
> * * *
>
> Hence, we conclude that the lower court erred in holding that Friestad's installation of the Sears furnace in the Thompson home fell within the products hazard provision of the contract. Under the proper reading of the policy, the furnace installation in this case was a completed operations hazard.

Id. See also, *B&R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985)(interpreting Indiana law, the trial court found, "The claims in this case have nothing to do with any defect in a product. They arose because of negligent release of the product from the premises. Product liability clauses are designed to cover situations such as the asphyxiation of a car's passengers by a defective exhaust system; premises liability coverage is designed to cover the pedestrian who is injured if a car rolls out of the factory door due to some negligent act of an employee.")

All the cases cited to by the trial court do not support its conclusion that the products hazard exclusion does not apply to the Rollins Lawsuit. To the contrary, each one of the cases cited by the trial court held that claims of products liability ***are*** excluded from coverage by the

products hazard exclusion. See, *Heyward*, 129 F.Supp. at 9; *Friestad*, 393 A.2d at 1217; *B&R Farm*, 483 N.E.2d at 1077. It is undisputed that the Rollins Lawsuit alleged products liability claims against Covil. Therefore, the products hazard exclusion clearly applies to bar coverage for the Rollins Lawsuit. The trial court erred in failing to so find.[11]

2. *The Completed Operations Hazard Exclusion*

The completed operations hazard exclusion may also apply to bar coverage for the Rollins Lawsuit under the Penn National Policies. Based on the plain language contained in the Penn National Policies, the completed operations hazard exclusion applies to claims: (1) arising out of Covil's operations; (2) after such operations are completed (as further described in the Policies' definition); and (3) if the bodily injury occurs away from Covil's premises. Again, because no discovery was completed in the present action, Penn National has not had the opportunity to obtain evidence to support this exclusion. However, based on the admissions made by Covil in its motion for partial summary judgment, it appears clear that Covil is not disputing that in the Rollins Lawsuit, Mr. Rollins alleged that he suffered mesothelioma arising out of Covil's operations of installing insulation at a facility where Mr. Rollins' stepfather worked. Therefore, the requirements of arising out of operations and occurring away from Covil's premises are met. The determinative issue is whether Mr. Rollins' exposure to asbestos occurred after Covil's operation were completed.

The Penn National Policies state that an insured's operations "shall be deemed completed

[11] The trial court also made the "finding," again based on no evidence presented by either party in this case, that none of the materials used by Covil in its pipe insulation operations in 1986 contained asbestos. [Order dated 8/13/2020, p.8] If that is in fact true, then the products hazard would clearly apply since any products producing asbestos fibers/dust would have already been installed and relinquished by Covil prior to its operations in 1986. See, *Ohio Cas. Ins. Co. v. Scott & Jones*, 2006 U.S. Dist. LEXIS 113027, *6 (D.S.C. 2006) (finding no coverage under the products-completed operations exclusion for a product sold by the insured and used for five years on premises not owned by the insured).

at the earliest" of three potential times: (1) when the contract entered into by the insured is completed, (2) when all operations at a specific site are completed, or (3) "when the portion of the work out of which the injury or damage arises has been put to its intended use." [Penn National's Memo in Opposition, Exh. 13, pp.36, 81] If it is in fact true, as Covil argued and the trial court "found," that Covil was engaged in installing insulation on pipes in the facility where Mr. Rollins' stepfather worked between March 11, 1986 and January 25, 1987 [Order dated 8/13/2020, p.3], and that Mr. Rollins' exposure to asbestos for which Covil is liable only occurred during this time period, then some of the exposure occurred before Covil's contract was completed and the work at the particular site was completed. However, the completed operations hazard exclusion also applies if the *portion* of the operations out of which the injury arises was put to its intended use.

As indicated above, Mr. Rollins' exposure during the periods of the Penn National Policies only occurred through "take-home" asbestos. If this "take-home" exposure occurred because a portion of Covil's operations had already been put to its intended use, then the completed operations hazard exclusion would apply to bar coverage. This, however, is a genuine issue of disputed fact, which has not been established either by any "evidence" submitted by Covil in support of its motion for partial summary judgment or by any "findings" made by the trial court. See, *W.N. Leslie, Inc. v. Travelers Ins. Co.*, 264 S.C. 408, 415, 215 S.E.2d 448, 451 (1975)(holding that whether a portion of the insured's work was put to its intended use was a jury issue). Therefore, it was improper for the trial court to grant judgment in favor of Covil on the grounds that the completed operations hazard exclusion did not apply as a matter of law.

In its decision, the trial court also ignored case law from the Fourth Circuit that has

interpreted the completed operations hazard with regard to asbestos injury claims. In interpreting an identical policy provision, the Fourth Circuit held that claims arising from exposure to asbestos that occurs during an insured's operations and continues thereafter are included within the completed operations hazard. *In re Wallace & Gale Co.*, 385 F.3d 820, 833-34 (4th Cir. 2004). Although the Fourth Circuit was applying Maryland law, the canons of insurance policy construction under Maryland law and South Carolina law are the same. Because the Rollins Lawsuit alleges that Mr. Rollins' exposure to asbestos occurred both prior to, during and after the periods of the Penn National Policies, the completed operations hazard exclusion applies to bar coverage for the Rollins Lawsuit. See, *Generali Ins. Co. v. United States Fire Ins. Co.*, 886 F.3d 346, 354 (4th Cir. 2018)(completed operations hazard also applies to injuries where starting point of bodily injury occurred during the insured's operations and continued thereafter).

Finally, the trial court "found" that "[b]y 1986 asbestos was not found in pipe insulation." [Order dated 8/13/2020, p.8] Therefore, during the periods of the Penn National Policies, i.e. 1986 through 1988, Covil apparently was not installing asbestos-containing insulation in any facility. Based on this "finding," Covil must have completed all asbestos-related operations prior to the inception of the Penn National Policies. Therefore, any injuries suffered by Mr. Rollins during the periods of the Penn National Policies must have occurred in the completed operations hazard. Accordingly, the completed operations hazard exclusion applies to bar coverage for the Rollins Lawsuit as a matter of law. The trial court erred in failing to so hold.[12] See, *Generali*

[12] In its Order granting partial summary judgment for Covil, the trial court held that Penn National failed to meet its burden of proving that either the products hazard exclusion or the completed operations hazard exclusion applied. [Order dated 8/13/2020, pp.4-5] The simple truth is that Penn National was deprived of the opportunity to conduct discovery into the applicability of the exclusions in its Policies because Covil immediately filed its Motion for Partial Summary Judgment after Penn National filed its Answer. By so doing, Covil prevented Penn National from engaging in discovery to support its exclusions and the trial court then held this against Penn National by finding that "Penn National has not met its burden in

Ins., 886 F.3d at 356-57 (finding that because the insured admitted that it had ceased the sale and installation of all asbestos products by 1972, years before the policies at issue incepted, any bodily injury claims triggering those policies clearly occurred after the insured completed its asbestos-related operations and fell within the completed operations hazard).

VI. CONCLUSION

This case presents the issue of whether Penn National breached its Policies when it did not agree to contribute to the settlement of the Rollins Lawsuit, an underlying asbestos liability lawsuit filed against its insured, Covil. Within twenty-three (23) days of Penn National's filing of its Answer, in which it disputed that coverage existed for the Rollins Lawsuit, Covil rushed to obtain judgment in its favor on the coverage issue. Covil did not wait until discovery was completed in this case. Instead, it presented unverified, unsubstantiated, and unsworn documents, unaccompanied by any affidavit, to the trial court in the hopes that the court would unquestioningly grant judgment in its favor. And, the trial court did.

The trial court's grant of partial summary judgment in favor of Covil cannot stand because it is not based on any evidence required by Rule 56 of the Rules of Civil Procedure – it is not based on any discovery responses, pleadings, admissions or affidavits. Furthermore, summary judgment was granted prior to Penn National having the opportunity to engage in any discovery, contrary to the mandates of this and the Supreme Court. Finally, the only evidence properly before the Court in this case is that Covil breached its obligations under the Penn National Policies to provide timely notice of the Rollins Lawsuit and that the Rollins Lawsuit is otherwise excluded from coverage through operation of the products

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this case." [*Id.* at p.5] Clearly, the entry of summary judgment in favor of Covil was premature and should be vacated. See, *Doe*, 345 S.C. at 322, 548 S.E.2d at 857.

hazard exclusion. Penn National respectfully requests that this Court vacate the entry of summary judgment in favor of Covil and remand this case with instructions to enter summary judgment in Penn National's favor, or alternatively, to remand this case to allow the parties to engage in discovery.

November 13, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHMOND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-01226

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

v.

Pennsylvania National Mutual Casualty Insurance Company, Appellant.

Appellate Case No. 2020-001239

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Initial Brief of Appellant and Appellant's Designation of Matter was served on all counsel of record by electronic mail as follows:

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