

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHMOND COUNTY
Court of Common Pleas

Jean Hoefler 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

**APPELLANT'S RETURN TO
RESPONDENT'S MOTION TO EXPEDITE**

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SC Court of Appeals

INTRODUCTION

Without complying with the requirements of Rule 240 of the South Carolina Appellate Court Rules, Covil urges this Court to expedite consideration of this appeal. However, Covil fails to cite to any basis to justify such a request. Instead, Covil uses its motion as an opportunity to impugn Defendant Pennsylvania National Mutual Casualty Insurance Company (“Penn National”) before this Court. Covil’s histrionics are inappropriate and, as set forth below, untrue.

The simple fact is that there is nothing in this case that justifies the extraordinary remedy of an expedited appeal. The underlying lawsuit at issue in this case has already been settled – there is no ongoing defense obligation or other right that will be jeopardized by this Court’s consideration of this appeal in due course. Furthermore, the primary issues for consideration in this appeal have no impact on the cases listed by Covil in its motion. The primary issues on appeal in this case deal specifically with the conduct of Covil in providing late notice to Penn National regarding the underlying lawsuit at issue in this case, and Covil’s rush to obtain an adverse ruling against Penn National for contribution to a settlement in that same underlying lawsuit. The outcome of this appeal on those dispositive issues in this appeal has no bearing on whether and to what extent Penn National provides coverage in the other asbestos cases listed by Covil in its motion. Penn National respectfully requests that this Court consider this appeal as it deems appropriate and without regard to Covil’s motion to expedite.

I. Covil Has Failed To Comply With The South Carolina Appellate Court Rules In Filing Its Motion.

In its motion, Covil cites to Rule 240 of the South Carolina Appellate Court Rules as the Rule under which its motion is filed. However, Covil failed to adhere to the requirements imposed by Rule 240. Specifically, Rule 240(c)(2) and (3) mandate that all motions filed in the appellate courts include certain matters:

(c) Form and Content of Motions and Petitions. All motions or petitions filed in an appellate court shall be in writing, shall state the grounds thereof, and shall comply with the requirements of Rule 267. The pages of the motion or petition and all supporting documents shall be consecutively numbered. **Each motion or petition shall include the following:**

* * *

- (2) A memorandum with citation of authorities in support of the motion.
- (3) Where the Record on Appeal or Appendix has not been filed, or where the facts relied upon in support of the motion are not contained in the Record on Appeal or Appendix, the parties shall file affidavits and other documents in support of their positions.

Rule 240(c), SCRACR (emphasis added). Despite these requirements, Covil did not provide a memorandum with citation to any authorities in support of its motion. Indeed, no authorities were cited in Covil's actual motion. Furthermore, in its motion, Covil cites other pending asbestos cases and makes bald assertions regarding Penn National's position and participation with regard to these cases. Covil's accusations are not supported by the Record in this case. Furthermore, Covil did not submit any affidavits or other documents supporting these claims. In short, Covil has failed to adhere to the procedural requirements for filing its motion to expedite.

Under Rule 269 of the South Carolina Appellate Court Rules, this Court may sanction an offending attorney or party for its failure to comply with the Rules. Rule 269 states:

Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon the offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require. ...

Rule 269, SCARC. Because Covil has failed to comply with the requirements for filing a motion in this Court, Penn National respectfully requests that this motion be summarily denied.

II. The Posture Of The Present Case Does Not Justify An Expedited Appeal.

In this case, Covil asserted one claim against Penn National, breach of contract, for Penn National's failure to contribute \$50,000 under the Penn National Policies to the settlement of one underlying asbestos lawsuit, *David D. Rollins v. Covil Corporation, et al.*," Civil Action No. 2019-CP-25-0118, in Hampton County, South Carolina ("Rollins Lawsuit"). (RI p. 20; ¶¶ 8-11) It is undisputed that the underlying case at the center of the dispute in this case, the Rollins Lawsuit, has already been settled and that Covil's portion of the settlement has been paid in full. (RI p. 21; ¶ 13) Covil has no ongoing obligations to the plaintiff in the Rollins Lawsuit, is not incurring ongoing defense costs in the Rollins Lawsuit, and otherwise has no further exposure as a result of the Rollins Lawsuit. There is no basis in the present case to expedite this Court's consideration of the present appeal. Indeed, Covil has not pointed to any in its motion.

III. The Issues Before This Court In This Case Have No Bearing On The Asbestos Cases Pending Against Covil.

Covil urges this Court to expedite its consideration of this appeal because it believes that this Court's ruling would somehow "clarify these issues for the many other asbestos cases currently pending (and coming up for trials) against Covil." (Motion to Expedite, p. 2) Covil is simply wrong. The primary issues for consideration in this appeal, which are dispositive of this appeal, have no bearing on any other asbestos case currently pending against Covil.

As stated in the opening brief of the Appellant, Penn National set forth the specific issues to be considered by this Court on appeal:

1. Whether the trial court erred in granting partial summary judgment in favor of Covil Corporation where Covil Corporation's motion for summary judgment was not properly supported through sworn affidavits, pleadings, depositions, answers to interrogatories, and admissions on file?

2. Whether the trial court erred in granting partial summary judgment in favor of Covil Corporation when Pennsylvania National Mutual Casualty Insurance Company had no opportunity, let alone a full and fair opportunity, to engage in discovery prior to the entry of partial summary against it?
3. Whether the trial court erred when it found that coverage was afforded to Covil Corporation under the policies of insurance issued by Pennsylvania National Mutual Casualty Insurance Company for the Rollins Lawsuit even though Covil Corporation violated the conditions contained in the policies by: (1) failing to provide written notice of the Rollins Lawsuit to Pennsylvania National Mutual Casualty Insurance Company as soon as practicable after it was served with the Lawsuit, and (2) failing to immediately forward copies of the Summons and Complaint to Pennsylvania National Mutual Casualty Insurance Company?
4. Whether the trial court erred when it found that coverage was afforded to Covil Corporation under the policies of insurance issued by Pennsylvania National Mutual Casualty Insurance Company for the Rollins Lawsuit even though Covil Corporation violated the conditions contained in the policies because Pennsylvania National Mutual Casualty Insurance Company was not substantially prejudiced by Covil Corporation's untimely notice?
5. 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 products hazard exclusion?
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?

(Appellant's Final Brief, pp. 1-2) Covil's Statement of Issues on Appeal mirrored those noted by Penn National. (See, Respondent's Final Brief, p.1)

As is set forth above, the main issues for consideration by this Court on appeal deal with the facts peculiar to this case. These issues concern procedural matters in this case, i.e. whether Covil properly supported its motion for summary judgment and whether such motion was

premature in that it was made before Penn National had a full and fair opportunity to engage in discovery in this case. This Court is also being tasked with determining whether Covil's notice to Penn National of the Rollins Lawsuit, which was given (9) nine months after Covil was served with the lawsuit and a mere two (2) months prior to trial, violated the Conditions contained in the Penn National Policies. These main issues, both procedural and late notice, are specific to this particular case. This Court's ruling on these issues will not, indeed cannot, impact any other case. For Covil to suggest otherwise is disingenuous.

In its motion, Covil makes the bald, unsupported assertion that "Penn National continues to cling to its own contrary view of South Carolina insurance jurisprudence, due in part to this Court's pending consideration of this appeal." (Motion to Expedite, p. 3) This statement makes no sense in view of the main issues that are to be considered by this Court on appeal. There is nothing about either (1) procedural irregularities in Covil's motion for summary judgment filed in this case, or (2) Covil's late notice to Penn National of the Rollins Lawsuit that would form Penn National's coverage position with regard to any other asbestos cases. For this reason, Penn National respectfully requests that this Court determine the appeal in this case in due course.

IV. Covil's Motion Improperly Attempts To Influence This Court's Decision Based On Unsupported And Untrue Assertions About Penn National's Position With Regard To Other Asbestos Cases Filed Against Covil.

In its motion, Covil makes several unsupported statements regarding Penn National's coverage position in other asbestos cases. Specifically, Covil accuses Penn National of (1) "refus[ing] to meaningfully participate in settlement discussions in the pending asbestos cases;" and (2) "cling[ing] to its own contrary view of South Carolina insurance jurisprudence."

(Motion to Expedite, p. 3) These statements are improper, wholly unsupported, are made with the intention of disparaging Penn National to this Court, and are, in fact, untrue.

In truth, Penn National has participated in the defense, under a reservation of rights, of past and all currently pending asbestos lawsuits filed against Covil that have been tendered to Penn National. Mediations have been conducted in numerous Covil related asbestos lawsuits tendered to Penn National. Penn National has attended these mediations and has participated fully in the settlement discussions. Penn National has also participated and collaborated in countless pre-mediation and pre-trial conferences with Covil's Receiver, Covil's asbestos defense counsel, and other participating Covil insurers with respect to strategy, valuation, and potential insurer contribution to settlement discussions based on the evidence known in each underlying asbestos case. Covil cannot dispute this.

Covil's position in the present motion is solely based on its disagreement with Penn National over the amount that Penn National should contribute to the settlement of these cases. In fact, Covil's filing of this motion is just another attempt to bully Penn National into blindly paying amounts under its Policies without regard to the facts of any particular case or the potential exposure within the policy periods of the Penn National Policies. There are many reasons justifying Penn National's evaluation of pending asbestos cases and its position at any one particular mediation, including (1) whether the asbestos plaintiff has evidence of an exposure to Covil's asbestos products within the policy periods of the Penn National Policies (See, e.g., Insurance Co. of N. Am. v. Forty-Eight Insulations, 633 F.2d 1212, 1223 (6th Cir. 1980)); (2) a time-on-the-risk allocation of the portion of Covil's total liability for which Penn National may be responsible (See, e.g., Crossman Cmty. of N.C. v. Harlesville Mut. Ins. Co., 395 S.C. 40, 45, 717 S.E.2d 589, 591 (2011); *Joe Harden Builders v. Aetna Cas. & Sur. Co.*, 326 S.C. 231, 236-

37, 486 S.E.2d 89, 91 (1997)); and/or (3) whether Covil's liability defense is strong in the pending asbestos case (See, e.g., Lohrmann v. Pittsburgh Corning Corp., 782 F.2d 1156, 1162-63 (4th Cir. 1986); *Connor v. Covil Corp.*, -- F.3d. --, 2021 U.S. App. LEXIS 12507, *19-20 (4th Cir., April 27, 2021).

Any issue Covil may have with Penn National over Penn National's evaluation of other pending asbestos lawsuits does not justify the extraordinary remedy of an expedited appeal in this case. Penn National respectfully requests that this Court disregard the derogatory statements made by Covil in its motion to expedite and deny Covil's motion to expedite.

CONCLUSION

The present motion by Covil is consistent with Covil's tactics during the entirety of the present case. As opposed to affording Penn National a full and fair opportunity to engage in discovery in this case, Covil immediately sought an adverse ruling against Penn National, filing its motion for summary judgment a mere twenty-three (23) days after Penn National filed its Answer. After summary judgment was granted in Covil's favor and Penn National appealed, Covil is again requesting this Court to expedite its consideration of the issues on appeal. Covil is clearly attempting to accelerate its race to obtain a favorable coverage ruling against one of its insurers. Covil's tactics should not be endorsed or allowed by this Court.

Even if this Court were to consider this motion – despite Covil's failure to adhere to the requirements of the Appellate Court Rules, there is nothing about the primary issues on appeal in this case that warrant such an extraordinary remedy as an expedited appeal.

The underlying Rollins Lawsuit for which coverage is sought has been settled and Covil's liability exposure for that case has been capped. The main issues on appeal are particular to the facts in the present case and the late-notice provided of the Rollins Lawsuit, issues not germane

to other pending asbestos lawsuits. Therefore, Penn National respectfully requests that this Court consider this appeal as it deems appropriate and without regard to Covil's motion to expedite.

Respectfully submitted,

/s/ David G. Harris II
David G. Harris II
S.C. State Bar No. 101951
Brady A. Yntema (*Admitted Pro Hac Vice*)
David L. Brown
GOLDBERG SEGALLA LLP
701 Green Valley Road, Suite 310
Greensboro, NC 27408
(336) 419-4900

*Attorneys for Appellant Pennsylvania National
Mutual Casualty Insurance Company*

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Greensboro, NC