THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Jean Hoefer Toal, Chief Justice (Ret.)

Case No. 2020-CP-40-01226

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Appellate Case No. 2020-001239

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

Respondent,

v.

Pennsylvania National Mutual Casualty Insurance Company,

Appellant.

_____

RESPONDENT'S FINAL BRIEF

_____

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I. STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court properly grant partial summary judgment where the Receiver's motion was sufficiently supported by evidence that was before the Court without objection from Penn National and the motion was not premature?

2. Did the circuit court properly find Penn National failed to meet its burden to prove a policy exclusion applied to bar coverage to Covil where the underlying injury occurred *before* Covil completed its work installing insulation materials at the Bowater Paper Mill ("Bowater") in Catawba, South Carolina?

3. Did the circuit court properly find Penn National's purported late notice defense failed where Penn National had sufficient notice of the action and attended mediation with a willingness to contribute toward settlement?

II. STATEMENT OF THE CASE

Appellant Pennsylvania National Mutual Insurance Company ("Penn National") insured Covil against suits seeking the recovery of damages for bodily injury during the period of two Penn National policies issued to Covil between 1986 and 1988. The Penn National policies exclude coverage for damages for bodily injury within either the "products hazard" or the "completed operations hazard." It has been understood for decades that the risk insured by the "products hazard" and the "completed operations hazard" excluded from the Penn National policies is "the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself." Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971). The Penn National policies therefore cover Covil against the possibility that its goods, products or work will cause third-party bodily injury or property damage *before* Covil "relinquished" its products or *before* Covil "completed" its work.

David Rollins ("Rollins") sued Covil through its Court-appointed Receiver, Peter D. Protopapas, in 2019 for contributing to his mesothelioma. The evidence adduced in the asbestos

litigation established that Rollins was exposed to asbestos attributed to Covil *before* Covil completed its work installing insulation materials at Bowater. The Receiver therefore requested that Penn National attend a court-ordered mediation so that it could settle the *Rollins* lawsuit. Penn National *attended* the mediation but *refused* to fund the *Rollins* settlement based on its policy exclusions for products and completed operations. The Receiver settled *Rollins* and paid the settlement amount.

The Receiver thereafter sued Penn National for breach of contract. He moved for partial summary judgment based on the complaint in the *Rollins* action, deposition testimony from the asbestos litigation, Covil's Bowater contract, Covil's Bowater payment records, and one of the two Penn National policies. Penn National opposed the Receiver's motion and requested additional time to conduct discovery. It did not, however, submit the required Rule 56(f), SCRCP, affidavit to support its purported need to engage in fact-finding before the circuit court ruled on the Receiver's motion. Penn National did not object to any evidence submitted by the Receiver in support of his motion.

The circuit court granted the Receiver's motion, finding Penn National could not meet its burden to show the "products hazard" or the "completed operations hazard" barred coverage for the *Rollins* settlement. The circuit court also held that Penn National failed to meet its burden to support its "late notice" defense, particularly since Penn National attended the mediation session that resulted in the *Rollins* settlement. The circuit court did not, however, rule on Penn National's purported need to conduct discovery necessary to oppose the Receiver's motion.

Penn National sought reconsideration of the circuit court's order granting the Receiver's motion and filed the instant appeal of the circuit court's order granting the Receiver's motion for partial summary judgment while its motion for reconsideration was pending. The circuit court

subsequently denied Penn National's motion for reconsideration, holding that its ruling on the Receiver's motion was not premature in that Penn National did not require discovery and because Penn National did not submit a Rule 56(f), SCRCP, affidavit in support of its request for additional time. Penn National did not appeal the circuit court's order denying reconsideration.

III. STATEMENT OF FACTS

A. Current Status of Covil Corporation

From the time of its original formation in or about 1954, Covil Corporation ("Covil") was engaged in the installation and removal of insulation in various industrial facilities across South Carolina and elsewhere. Covil's operations involved the installation, removal and disturbance of insulation materials, typically supplied, required or acquired by other parties. At certain times, insulation materials contained asbestos, and Covil's operations are alleged to have resulted in bodily injury in South Carolina and elsewhere. In 1991, Covil's business failed, and it ceased operations. Thereafter, in 1993, the State of South Carolina rescinded Covil's corporate charter for failing to file the appropriate documentation with the Secretary of State.

Despite Covil's failure as a going concern and its subsequent forfeiture of its corporate charter, Covil continued to be sued in numerous asbestos cases. In the fall of 2018, Covil defaulted on two mesothelioma asbestos cases pending in South Carolina.[1] On November 2, 2018, Chief Justice Jean Hoefer Toal (Ret.), serving as the state's asbestos judge, appointed Peter D. Protopapas to serve as a Receiver (the "Receiver") for Covil to manage its affairs according to South Carolina law. Among other things, the Order empowers the Receiver "with the power and authority to fully administer all assets" of Covil. (R. p. 56). This order "is inclusive of, but not

[1] *See James Michael Hill v. Advance Auto Parts, Inc. et al.*, November 2, 2018 Order Granting Default Judgment, C/A No. 2018-CP-40-04680 (Richland Cty. Ct. Comm. Pleas); *Denver D. Taylor et al. v. Air & Liquid Sys. Corp., et al.*, November 2, 2018 Order Granting Default Judgment, C/A No. 2018-CP-40-04940 (Richland Cty. Ct. Comm. Pleas).

limited to, the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil's insurance carriers." (*Id.*).

B. The *Rollins* Action

David D. Rollins sued Covil, and others, in the case styled *David D. Rollins v. Air & Liquid Systems Corp.*, C/A No. 2019-CP-25-00118, pending in Hampton County, South Carolina (the "*Rollins* Action"). Rollins alleged that he suffered from mesothelioma as a result of exposure to asbestos. (R. pp. 62–63, 66). He was diagnosed with mesothelioma on or around January 17, 2019. (R. p. 87). Rollins produced a pathology report in support of his allegation of asbestos-related disease. (R. pp. 111–12).

Among other things, Rollins alleged "take home" exposure to asbestos via his stepfather, Robert J. Ashworth ("Ashworth"), with whom he lived between 1980 and 1991. (R. pp. 87–88, 120). Ashworth invariably returned home from work covered in dust from working at plants with asbestos. (R. pp. 87–88, 119). The dust filled the family home and family vehicles. (R. p. 119). Rollins recalled that Ashworth worked as a pipefitter welder supervisor at numerous facilities, including at Bowater. (R. pp. 118–19). Ashworth performed pipe, pump and boiler work at Bowater between 1986 and 1988. (R. pp. 114–16). Ashworth died of asbestos-related cancer in November 2018. (R. p. 118).

Covil performed insulation work at Bowater when Ashworth worked at the facility. (R. pp. 114–15, 126–27). On February 26, 1986, Covil entered a subcontract with BE&K Construction Company, denominated as "Contract No. 4192-F-6410," to "[f]urnish all supervision, labor, equipment and tools, materials (except as noted), and incidentals required to supply and install all insulation on required piping systems" at Bowater. (R. p. 121–25). The contract required Covil to maintain at least $1,000,000 in liability insurance coverage to respond to claims seeking the

recovery of damages for bodily injury and property damage during Covil's work. (*Id.*). Covil worked on the Bowater pipe insulation project at least between March 11, 1986 and January 25, 1987. (R. p. 126–27). Covil was paid more than $1.2 million for this work. (R. p. 128).

C. The Penn National Coverage

Penn National issued two successive primary comprehensive general liability insurance policies to Covil. (R. pp. 44–55). The policies were written on standard forms. (*Id.*).

Penn National issued the first policy for the March 31, 1986 to March 31, 1987 period (the "Relevant Policy") and the second policy for the March 31, 1987 to March 31, 1988 period. (R. pp. 47, 53). Both policies provide $1,000,000 in coverage for claims seeking the recovery of damages against Covil for bodily injury and property damage "per occurrence" and in the aggregate. (R. pp. 44–55). Covil's procurement of the Penn National policies therefore satisfied the insurance requirements of Contract No. 4192-F-6410, which governed Covil's work at Bowater. (R. pp. 121–25).

Both of the Penn National policies exclude coverage for claims seeking the recovery of damages for bodily injury or property damage within either the "products hazard" or "completed operations hazard" of the policies. Penn National had not produced complete copies of the policies at the time Covil filed its motion for summary judgment in the circuit court.[2]

Nevertheless, a standard definition[3] of a "products hazard" exclusion used by insurers in the 1980s included the following verbiage pertinent to the issues on appeal:

> [B]odily 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 premises owned

[2] Penn National submitted the policy materials as an exhibit to its memorandum in opposition to the Receiver's motion for summary judgment. (R. pp. 423–514).

[3] Penn National admitted this standard definition mirrors the definition in the Penn National policies. (R. p. 179).

> by or rented to the named insured and after physical possession of such products has been relinquished to others . . . .

A standard definition[4] of a "completed operations hazard" exclusion used by insurers in the 1980s included the following verbiage pertinent to the issues on appeal:

> [B]odily 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 . . . .

Penn National denied coverage for the *Rollins* action based on the "products hazard" and "completed operations hazard" exclusions found in its policies.

D. The *Rollins* Settlement

Penn National received notice of the *Rollins* action in January 2020 and attended the court-ordered mediation in *Rollins* on February 25, 2020, in Charleston. The Receiver requested $50,000 to settle *Rollins*—a fraction of the $1,000,000 bodily injury limits of liability afforded by the Relevant Policy. Penn National, however, refused to commit to pay that amount. The Receiver thereafter settled *Rollins* without Penn National's participation.

E. The Circuit Court Action

The Receiver filed the instant action styled *Covil Corporation v. Pennsylvania National Mutual Insurance Co.*, in the Court of Common Pleas for the Fifth Judicial Circuit against Penn National on February 28, 2020 (the "Coverage Action"). The complaint alleges that Penn National breached its insurance contract with Covil when, as noted above, Penn National attended the court-ordered mediation in *Rollins* yet declined to contribute any dollar amount toward settlement even

[4] Penn National admitted this standard definition mirrors the definition in the Penn National policies. (R. p. 179).

though the $50,000 request was well within the limits of the Relevant Policy it issued to Covil. (R. pp. 21–22).

The Receiver moved for partial summary judgment in the Coverage Action on April 22, 2020 (the "Motion"). He asserted coverage for the settlement of the *Rollins* action was not barred by either the "products hazard" exclusion or the "completed operations hazard" exclusion in the Relevant Policy. (R. pp. 41–42). The Motion sought only to establish Penn National's liability under the Relevant Policy. (R. pp. 40–43). It did not seek to establish the amount Penn National was required to pay.

F. Chief Justice Toal's Ruling On Partial Summary Judgment

Chief Justice Toal began her ruling on the Motion ("the Order") by noting that the "principal dispute between Covil and Penn National is whether an exclusion in the Penn National Policy applies to bar coverage for the *Rollins* action." (R. p. 5). There was no dispute that Rollins suffered from bodily injury during the period of the Relevant Policy. (R. p. 4). Chief Justice Toal then quoted venerable South Carolina Supreme Court authority holding that "[i]nsurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." (R. p. 5–6 (quoting *Owners Ins. Co. v. Clayton,* 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2004))). Chief Justice Toal found Penn National could not meet its burden to show that the exclusions in the Relevant Policy for "products hazard" or "completed operations hazard" bodily injury damages barred coverage for the *Rollins* settlement:

> [T]he evidence from the *Rollins* action demonstrates that while Mr. Rollins' stepfather, Robert Ashworth, performed pipefitting work at the Bowater facility between 1986 and 1987, Covil employees also were at the site at the same time performing insulation work. Covil's operations at the Bowater facility were not complete at the time that Mr. Ashworth worked at Bowater—they were ongoing, and happening simultaneously with, Mr. Ashworth's work.

(R. pp. 6–7).

Chief Justice Toal easily disposed of Penn National's "late notice" defense based on its involvement in the *Rollins* action *and* its participation in the court-ordered mediation that produced the settlement:

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

(internal citations omitted) (R. p. 10).

Therefore, Chief Justice Toal granted the Receiver's motion for partial summary judgment, holding that Penn National breached its insurance contract with Covil. (R. p. 11). She subsequently denied Penn National's motion for reconsideration. (R. pp. 13–17).

IV. STANDARD OF REVIEW

The Receiver agrees that an appellate court conducts a *de novo* review of a grant of partial summary judgment. *See David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) ("When reviewing an order granting summary judgment, the appellate court applies the

same standard as the trial court."). Summary judgment is appropriate when "there is no genuine issue as to any material fact." Rule 56(c), SCRCP.

> Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.

Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). As Chief Justice Toal properly found, and as is discussed further herein, Penn National failed to meet its burden to prove the application of the policy exclusions and a breach of a condition to coverage as a matter of law.

Moreover, this Court reviews the question of whether the circuit court erred in finding additional discovery unnecessary for the purposes of summary judgment under an abuse of discretion standard. *See Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 347, 565 S.E.2d 309, 313 (Ct. App. 2002) (finding "no abuse of discretion in the trial court's finding that discovery was complete for the purposes of summary judgment"); *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) ("The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion."). Chief Justice Toal did not abuse her discretion in finding further discovery was not necessary for the purposes of summary judgment.

V. ARGUMENT

A. The Receiver's Motion Was Neither Premature Nor Un-Supported By The Evidence, and These Issues Are Not Preserved for Review

Initially, the Receiver notes Penn National's arguments that it needed additional discovery, the Receiver's Motion was premature, and the Receiver's motion was not properly supported are not preserved for appellate review.

As to Penn National's arguments related to discovery and the timing of the Receiver's motion, Penn National is precluded from arguing this on appeal because it did not file a notice of appeal from the circuit court's September 21, 2020 Order denying its motion for reconsideration ("Order Denying Reconsideration"). While Penn National raised this argument to the circuit court in its memorandum in opposition to the Receiver's motion for partial summary judgment, the circuit court did not rule the issue in the Order from which appeal was actually taken. The Order on appeal found Penn National did not meet its burden to show a policy exclusion applied and did not meet its burden in proving the validity of its late notice defense. (R. pp. 4–11). Penn National re-raised its argument that summary judgment was premature because it needed additional discovery in its motion to reconsider. (R. p. 557). In denying reconsideration, the circuit court found summary judgment was not premature because Penn National did not need additional discovery and did not submit a Rule 56(f), SCRCP, affidavit to support its argument. (R. p. 16). As the issue was not ruled upon by the circuit court until the unappealed Order Denying Reconsideration, Penn National's arguments regarding the timing of summary judgment and its need for additional discovery are not properly before this Court. *See Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file [a Rule 59(e), SCRCP] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."); *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.").

Rule 203 of the South Carolina Appellate Court Rules firmly requires would-be appellants to serve a notice of appeal "within thirty (30) days after receipt of written notice of entry of the order or judgment" and attach a copy of the order to be challenged on appeal. Timely service of the notice is a jurisdictional requirement, and, without a properly-served notice of appeal, this

Court does not have jurisdiction over the unappealed order. *See Burnett v. S.C. State Highway Dep't*, 252 S.C. 568, 571, 167 S.E.2d 571, 572 (1969); *Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000). In the instant case, the circuit court issued the Order on August 13, 2020. On August 24, 2020, Penn National filed a Motion to Reconsider the Order. On September 14, 2020, Penn National timely appealed the Order while its Motion to Reconsider was still pending before the circuit court.[5] The circuit court issued the Order Denying Reconsideration on September 21, 2020. Importantly, Penn National never appealed the subsequent Order Denying Reconsideration. Therefore, its arguments about the timing of the Receiver's motion and its purported need for further discovery are not properly before this Court. *See In re GNC Corp.*, 789 F.3d 505, 512 (4th Cir. 2015) (granting a motion to dismiss an appeal where a party timely filed a notice of appeal of an order but failed to file either "an amended notice of appeal or a new notice of appeal within 30 days of the entry of" the order denying their Rule 60 motion); *see also Prof'l Bankers Corp. v. Floyd*, 285 S.C. 607, 613, 331 S.E.2d 362, 365 (Ct. App. 1985) ("An appealable order from which no appeal is taken becomes the law of the case . . . .").

Moreover, Penn National's brand-new argument that the Receiver's motion for summary judgment was not properly supported is clearly not preserved for review as Penn National did not raise the arguments to the circuit court at all. In its initial brief, Penn National argues for the first time that the circuit court erred in relying on the documents attached to the Receiver's Motion to

[5] While a timely Rule 59(e), SCRCP, motion stays the time limit for filing a notice of appeal from an order, it does not follow that once a party chooses to appeal the original order that their notice of appeal automatically subsumes any future order issued by the circuit court. *See Elam*, 361 S.C. at 15, 602 S.E.2d at 775 ("A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.").

grant summary judgment. (App. Br., pp. 12–14). Throughout its initial brief, Penn National refers to the evidence submitted by the Receiver as unverified, unsubstantiated, and unsworn. (App. Br., pp. 3–4, 18, 33–34, 39). However, in the circuit court, Penn National did not object to these documents, raise any argument that the court should not consider them, or raise any argument that the Receiver's motion was not sufficiently supported. *See State v. Stone*, 376 S.C. 32, 36, 655 S.E.2d 487, 489 (2007) ("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."). Accordingly, this argument is also not preserved for appellate review.[6] *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Penn National's treatise on the "drastic" nature of summary judgment and its apparent need to conduct fulsome discovery before its *affirmative defenses* on policy exclusions and a condition to coverage lacks merits and can be summarily rejected. Insurance coverage litigation is based on the evidence developed in the underlying liability action from which a coverage determination is sought. *See, e.g.*, *Ex parte: Builders Mut. Ins. Co.*, 431 S.C. 93, 109, 847 S.E.2d 87, 95 (2020)

[6] In its Statement of the Case, Penn National suggests the circuit court erred in deciding the Receiver's motion for summary judgment prior to "addressing Penn National's motion to transfer venue" and in ruling on the Receiver's motion for summary judgment and Penn National's motion to reconsider "[w]ithout the benefit of a hearing." (App. Br., pp. 3, 5). However, neither of these arguments are preserved for review because they were not raised to and ruled on by the circuit court and are not contained in the statement of issues on appeal. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review."). Further, as noted in the Order, these motions were fully briefed and hearings were not necessary in light of the ongoing Coronavirus emergency and guidance from the South Carolina Supreme Court. (R. p. 3).

(explaining the primary source of evidence in a coverage dispute is the record from the underlying proceeding).

The ability of Penn National and the Receiver to conduct discovery against each other in the Coverage Action yielding "answers to interrogatories" and "admissions on file" could not and would not change the nature of the testimonial and documentary evidence adduced in the *Rollins* action and upon which the Receiver based his motion for partial summary judgment. That evidence existed before the Receiver filed the Coverage Action. It is the very evidence upon which the Receiver settled *Rollins*, and upon which the Receiver demanded that Penn National fund the *Rollins* settlement. The nature and manner of Rollins' injurious exposure to asbestos attributed to Covil is detailed in the deposition testimony adduced in the *Rollins* action. The nature of Covil's work at Bowater is described in documents produced in the underlying litigation.

Consequently, Penn National's stated need to "engage in discovery" in the Coverage Action "to determine the applicability of the products hazard exclusion and completed operations hazard exclusion in its Policies," (App Br., p. 17), is an attempted delay tactic. All of that evidence was adduced in the *Rollins* Action and has been available to Penn National.

Penn National's apparent need to conduct discovery in the Coverage Action to support its "late notice" defense, (App. Br., p. 16), is also of no moment. Penn National attended the mediation that produced the settlement in *Rollins*. It knows that it did not fund the settlement. It knows why it chose not to fund the settlement. It does not need to obtain discovery from the Receiver to find this out. Further, Penn National submitted evidence to the circuit court in opposition to the Receiver's motion and in support of its "late notice" defense, such a January 2020 email sent on behalf of the Receiver to Penn National, filings in the *Rollins* Action, and correspondence between the Receiver and Penn National about *Rollins* and the *Rollins* mediation. The Receiver did not

dispute that notice occurred in January 2020, and Penn National already possessed all of the evidence it needed to make its "late notice" argument prior to the circuit court's adjudication of the Receiver's motion for partial summary judgment. This argument just fails.

In short, all of the documents relevant to the Receiver's motion were *historical* in nature, such as the insurance policies, the Bowater contract, and a list of labor costs showing when Covil performed much of its work at the site. This evidence was attached as exhibits to the Receiver's motion. Additionally, the Receiver has no personal knowledge of Covil's work at Bowater thirty-four years ago; thus, he could not possibly supply Penn National with any other pertinent facts. Penn National received copies of all of the discovery materials in *Rollins*. All of the *Ashworth*[7] materials were available to it, as well. Penn National could have relied on these materials in support of its opposition to the Receiver's motion. In fact, Penn National did just that by submitting 14 exhibits.

Moreover, the Receiver's motion for partial summary judgment solely concerned matters—policy exclusions and the Receiver's alleged failure to provide timely notice of the *Rollins* Action—upon which Penn National has the burden of proof. Discovery from the Receiver in the Coverage Action is not relevant to those issues. The evidence necessary for Chief Justice Toal to rule on whether Penn National could meet its burden of proof as a matter of law on affirmative defenses to its liability to pay the *Rollins* settlement arose solely in the *Rollins* action.

Although Penn National repeatedly argues that the Receiver's motion was premature because the Receiver filed it "a mere twenty-three (23) days after Penn National" filed its answer, this does not make the Receiver's motion improper. (App. Br., p. 15). Rule 56(a), SCRCP,

[7] Ashworth brought a suit in the Delaware Superior Court for his asbestos-related cancer. *See Robert Ashworth and Nell Ashworth v. Air & Liquid Sys. Corp. et al.*, C/A No. N17C-04-003 ADB (Del. Sup. Ct.).

indicates a party may "at any time after the expiration of 30 days from the commencement of the action . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part" of the case. The Receiver commenced this action on February 28, 2020, and moved for partial summary judgment over 50 days later, on April 22, 2020. (R. pp. 18–22, 34–161). The circuit court did not rule on the Receiver's motion until August 13, 2020, almost four months after it was filed. At no point in its arguments to the circuit court did Penn National cite to any discovery it attempted to undertake within the four months that the Receiver's motion was pending. *See Middleborough Horiz. Prop. Regime Council of Co–Owners v. Montedison S.p.A.*, 320 S.C. 470, 479–80, 465 S.E.2d 765, 771 (Ct. App. 1995) (affirming summary judgment where appellants "advance[d] no good reason why four months was insufficient time under the facts of this case to develop documentation in opposition to the motion for summary judgment"). Instead, Penn National relied on conclusory and self-serving arguments that it needed to do more discovery without specifying what evidence it was likely to discover, needed to discover, or currently sought through outstanding discovery requests. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) (explaining the nonmoving party must demonstrate that further discovery will likely uncover additional relevant evidence "and that they are not merely engaged in a 'fishing expedition'" (quoting *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209 (Minn. 1985))). To this day, Penn National has failed to suggest its bald, conclusory requests for further discovery would amount to anything other than a fishing expedition and an unnecessary delay.

As Chief Justice Toal noted in the unappealed Order Denying Reconsideration, Penn National did not submit a Rule 56(f), SCRCP affidavit outlining why it needed additional time for discovery. *See Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) ("Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why

he needs more time for discovery."); Rule 56(f), SCRCP ("Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just."). Penn National argues "strict compliance" with the Rule 56(f) affidavit is "not mandated where the need for further discovery is otherwise made known to the trial court." (App. Br., pp. 17–18). Although a Rule 56(f) affidavit may not be a hardened requirement, it was definitely within the circuit court's discretion to find one necessary under the facts of this case. To be sure—and contrary to Penn National's conclusory assertion—the need for further *relevant* discovery was never made known to the circuit court.

Accordingly, Chief Justice Toal did not abuse her discretion in finding additional discovery was not necessary prior to a determination of the Receiver's motion for summary judgment.

B. Chief Justice Toal Correctly Held That Penn National Could Not Sustain Its Burden Of Proof On Policy Exclusions

Penn National waits until page 34 of its initial brief to actually analyze the legal issues arising from the two policy exclusions to which it pointed in refusing to fund the *Rollins* settlement. Those issues are quite simple:

- Was Rollins' mesothelioma attributed to Covil caused by products Covil placed into the stream of commerce during the period of the Relevant Policy?
- Was Rollins' mesothelioma attributed to Covil caused by Covil's completed work during the period of the Relevant Policy?

Chief Justice Toal concluded correctly that the answer to both questions is "no," such that Penn National could not sustain its burden of proof to establish the applicability of any policy exclusion.

Rollins established in his lawsuit that he suffers from mesothelioma. He established further that "take home" asbestos exposures via Ashworth substantially contributed to his asbestos-related disease. Those "take home" exposures occurred during the period of the Relevant Policy because Rollins incurred "take home" exposure via Ashworth between 1980 and 1991. Rollins described a family home and family vehicles filled with asbestos dust during at least the entirety of the period of the Relevant Policy.

It has been long-established that the risk insured by the "products hazard" and the "completed operations hazard" is "the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself." Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971). By contrast, "[w]here an insured begins an operation and the evidence shows it is still in progress" when an injury or damage occurs, the applicable hazard is "premises-operations" and not "completed operations." *Id*. at 434–35.

Despite Penn National's characterization of Dean Henderson's article as "evidence" upon which the Receiver relied, (App. Br., p. 4),[8] the article is actually the seminal academic exploration of the "products hazard" and the "completed operations hazard" in liability insurance policies. A Westlaw search reveals that courts have readily accepted Henderson's formulation, *citing it more than 150 times*. For example, in *Boyer Metal Fab, Inc. v. Maryland Casualty Co.*, 750 P.2d 1195, 1197 n.2 (Or. Ct. App. 1988), the Oregon Court of Appeals cited Dean Henderson's article for the proposition that "the purpose of the product hazard and completed operations hazard coverage is

[8] The Receiver submitted Henderson's article as an exhibit in its hard copy, non-electronic, form. (R. pp. 129–161).

to insure against the risk that the product or work, if defective, *will cause bodily injury or damage to property of others after it leaves the insured's hands*." (emphasis added); *see also W. Emp'rs Ins. Co. v. Arciero & Sons, Inc*., 146 Cal. App. 3d 1027, 1031 (Ct. App. 1983) (quoting Henderson directly).

Another case that looked substantially to Dean Henderson's formulation is *Friestad v. Travelers Indemnity Co*., 393 A.2d 1212 (Pa. Super. Ct. 1978), which the Receiver cited for its *legal discussion*, and not because the facts of that case are factually analogous to this one. There, the Superior Court looked to Henderson's article in its discussion of the basic "timing" issues underlying the "products hazard" and "completed operations hazard" in liability insurance policies:

> Regardless of the involvement of the insured's products, so long as an accident occurs on the insured's business premises or away from his premises, *but while he has the jobsite under his control*, *the premises operations clause obtains and coverage is afforded* thereunder. *It is only after he has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.*

Id. at 1215 n.5 (emphases added). It is not surprising, then, that other courts have noted that the "products hazard" applies only when the injury *is caused by a defective product placed into the stream of commerce*, or when injury or damage is *caused by the insured's completed work. See B & R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co*., 483 N.E.2d 1076, 1077 (Ind. 1985); *see also CPS Chemical Co. v. Cont'l Ins. Co*., 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), *reversed on other grounds by* 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985) ("Commentators are in *complete agreement* that [the completed operations hazard] refers to accidents *caused by defective workmanship which arise after completion of work* by the insured on construction or service contracts." (emphases added)).

Penn National's attempt to embrace the Receiver's cited authorities as supporting application of the policy exclusions to the *Rollins* settlement is unavailing. At issue is the scope and extent of the "products hazard" and "completed operations hazard" in liability insurance policies and whether these exclusions bar coverage for the *Rollins* settlement, and not whether *the results* reached in factually different litigation are relevant here. *Friestad* and *B & R Farm Services* elucidate issues of insurance contract interpretation relevant to this matter, as does another case that Penn National curiously seeks to embrace, *Heyward v. American Casualty Co. of Reading, Pa.*, 129 F.Supp. 4 (E.D.S.C. 1955). In *Heyward*, the insured contracted to perform the entire plumbing and heating portion of a new housing project in Aiken, South Carolina. Prior to the completion of the project, however, individual housing units in the project became usable for occupancy. An explosion in one of the occupied units caused injury before the completion of the project.

The insured was sued for causing injury and damage. Its policy contained an earlier version of an exclusion for products and completed operations called "Products Liability." As respects products, it excluded coverage for liability arising out of

> goods or products manufactured, sold, handled or distributed by the Insured, other than equipment rented to or located for use of others but not sold, if the accident or occurrence takes place after the Insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the Insured.

Id. at 7. As respects operations, it excluded coverage if "the accident or occurrence takes place after such operations have been completed or abandoned at the place of accident or occurrence thereof and away from premises owned, rented or controlled by the Insured." *Id*.

The insurer denied coverage based on the exclusion for "Products Liability." The district court disagreed with this assertion. It first questioned whether the policy's exclusion for "products" even applied to injury and damage arising out of insured's plumbing and heating work:

> I must conclude that a plumbing and heating contractor's comprehensive liability coverage is not covered under the heading 'Products', and that the policy here involved should be construed to cover the liability for accidents arising from plaintiff's operations whether the accident happened before or after the housing project was completed.

Id. at 9.

The district court then analyzed the timing of the plaintiff's injury in connection with the contracting work the insured undertook at the project. It held that the insurer was not entitled to summary judgment because "the entire work that [the insured] had agreed to perform had been completed." *Id*. at 10. Although the insured might have completed its work on the unit where the explosion occurred, "[t]here is no showing, however, *that the entire work* which plaintiff had agreed to do had been completed." *Id*. (emphasis added); *see also Szczeklik v. Markel Intern. Ins. Co., Ltd*., 942 F. Supp. 2d 1254, 1265 (M.D. Fla. 2013) (finding the "products hazard" exclusion did not apply because "the product in this case (*i.e*., the rim) was not a 'completed' product ready for resale by Neubert, but rather was a component of a final product akin to a work in progress").

Here, Rollins' injury did not occur after Covil "relinquished control" of the Bowater job site. Covil supplied and installed all insulation on required piping systems at Bowater between March 11, 1986, and January 25, 1987, during the period of the Relevant Policy. Rollins' stepfather, Ashworth, did pipe, pump, and boiler work at Bowater *while* Covil installed insulation at the site. Asbestos dust on Ashworth's clothing, in turn, injuriously exposed Rollins to asbestos during the period of the Relevant Policy.

It is therefore indisputable from underlying case testimony that Ashworth did pipe, pump, and boiler work at Bowater *while* Covil was installing "all insulation on required piping systems" at the site in 1986 and 1987. Ashworth thus was exposed to asbestos *during* the period of the Penn National coverage and *before* Covil completed its work at Bowater. Covil's completed work, or its "completed operations," *did not cause* Ashworth's mesothelioma. Covil's products released into the stream of commerce *did not cause* Ashworth's mesothelioma. By the same token, Rollins incurred "take home" exposure to asbestos via Ashworth *before* Covil completed its piping insulation work at Bowater under Contract No. 4192-F-64, and, therefore, also *before* Covil relinquished possession over the products it installed as part of the contract.

The case law and commentary is clear that the "products hazard" applies *only* when injury is caused by a "completed" product placed into the stream of commerce,[9] or by a product previously installed at a job site *and* the injury occurs *after* the insured "has relinquished control of [the] jobsite."[10] Injuries caused by "un-completed" products, injuries caused by "component" products, or injuries caused by products installed as part of a continuing installation or construction project are *not* within the "products hazard." It is only *after* the insured "has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage." *Friestad*, 393 A.2d at 1215 n.5. There is no evidence that Covil had relinquished control over the Bowater jobsite when Ashworth was exposed to asbestos for which Covil was allegedly responsible. In fact, all of the evidence is to the contrary. Penn National thus could not, and still cannot, establish the applicability of either its "products hazard" or "completed operations hazard" exclusions to bar coverage for the *Rollins* settlement. Again, it is well-established in South

[9] *See, e.g., B & R Farm Servs., Inc.*, 483 N.E.2d at 1077; *Szczeklik,* 942 F. Supp. 2d at 1265.
[10] *See, e.g., Friestad,* 393 A.2d at 1215 n.5.

Carolina that "[p]olicies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer." *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010).

Penn National's reliance on the insurers' oft-cited Fourth Circuit decision articulating an "*Erie* guess"[11] on the state of Maryland law—*In re The Wallace & Gale Company*, 385 F.3d 820 (4th Cir. 2004)—is not helpful here. The *Wallace & Gale* line of decisions, arising from the bankruptcy and district courts in Maryland, involve the applicability of aggregate limits of liability when multiple successive liability insurance policies cover a claim for damages for bodily injury arising from the insured's installation activities. The issue in that particular situation is whether aggregate limits of liability apply under policies *covering the claimant's bodily injury* but which were issued after the cessation of work activities that caused the claimant's injury attributed to the insured.

The *Wallace & Gale* line of Maryland-related decisions do not involve application of policy exclusions, under which the insurer always has the burden of proof. Nor do the decisions hold, as Penn National asserts in parenthetical commentary, that "exposure to asbestos that occurred both during and after an insured's operations were included within the completed operations hazard." (App. Br., p.17). Penn National's facile summary is shorn of context:

> That argument, however, on its face is far broader than the district court's decision we have quoted just above from 275 B.R. at 241. For example, a claimant's initial exposure which occurred while Wallace & Gale was still conducting operations was not subject to any aggregate limit for policies in effect at that time even if the exposure extended beyond the operations of Wallace & Gale. Also,

[11] *See Highlands Ins. Co. v. Hobbs Grp., LLC*, 373 F.3d 347, 351 (3d Cir. 2004) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) and explaining, "a federal court must apply the substantive law of the forum state-and where the state's highest court has not spoken definitively on a particular issue, the federal court must make an informed prediction[(or *Erie* guess)] as to how the highest state court would decide the issue").

> if exposure which began during operations continued after operations were completed, *the aggregate limits of policies which came into effect after operations would apply*, but, as stated, the *aggregate limits would not apply to those policies in effect at the time of the exposure during Wallace & Gale's operations*.

Id. at 834 (emphases added).

The issue in the Maryland cases concerns the "inception" dates of each of the many policies covering the claimant's injuries. If a policy covering a claimant's injury "came into effect after operations" were completed, the aggregate limits of liability in the policy will apply to the claim. If, however, a claimant's "initial exposure" occurred while the insured was conducting operations, the claim would be covered without an aggregate limit of liability.

The Receiver has asserted successfully in other cases that the *Wallace & Gale* "*Erie* guess" line of decisions from Maryland is not relevant in South Carolina for many reasons. Here, these decisions are also distinguishable because Penn National relies on policy exclusions under which it alone has the burden of proof. Moreover, the Receiver did not seek a ruling of partial summary judgment under the *second* Penn National policy, which "came into effect" after Covil's completed its work at Bowater. The Relevant Policy had a period of March 31, 1986, to March 31, 1987. Covil supplied and installed all insulation on required piping systems at Bowater between March 11, 1986, and January 25, 1987, during the period of the Relevant Policy.

To the extent that the *Wallace & Gale* line of cases have any potential application here, they do not cause the *Rollins* settlement to fall within either the "products hazard" or the "completed operations hazard" in the Relevant Policy. Covil's "operations" during the period of the Relevant Policy caused injury to Ashworth. It then caused injury to Rollins before Covil completed its work at Bowater. Penn National's position that Chief Justice Toal erred in holding

that it could not sustain its burden of showing the applicability of its policy exclusions lacks merit. The decision should be affirmed.[12]

C. Chief Justice Toal Correctly Disposed Of Penn National's Notice Defense

The circuit court did not err in finding Penn National failed to meet its burden of proving the applicability of a "late notice" defense. First, Penn National has failed to show it received untimely notice. Second, even if it did receive untimely notice, Penn National has failed to show it was substantially prejudiced by any late notice.

"Although exclusions in an insurance policy are construed against the insurer, . . . insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535–36, 514 S.E.2d 327, 330 (1999). Notice clauses are an approved means for an insurer to limit its liability. The Receiver is aware of the fact that "[c]ommon sense dictates that the insurer must have notice of a claim or lawsuit in order to properly investigate and defend against it, and these clauses ensure that the insurer receives notice by imposing this obligation on the insured." *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 266, 831 S.E.2d 406, 408 (2019). Here, however, the Receiver provided ample notice to Penn National of the *Rollins* action. Penn National's argument to the contrary is without merit.

The burden of proof as to whether an insured failed to comply with the notice provision in an insurance contract rests entirely with the insurer. *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994). Even if an insurer does not receive timely notice, the insurer

[12] *At most*, Penn National would have an issue of allocation between covered and non-covered portions of the $50,000 *Rollins* loss. The Receiver, however, did not seek a summary judgment ruling on the amount of money Penn National owes for *Rollins* and allocation is therefore not at issue in this appeal.

must also show substantial prejudice to the insurer's rights. *Id.* at 12, 446 S.E.2d at 421. "A vast majority of jurisdictions now follow the modern trend and have adopted the notice-prejudice rule." *Century Sur. Co. v. Hipner, LLC*, 377 P.3d 784, 788 (Wyo. 2016). "The function of the notice requirements is simply to prevent the insurer from being prejudiced, not to provide a technical escape hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental protective purpose of the insurance contract . . . ." *State ex rel. Div. of Admin., Office of Risk Mgmt. v. Nat'l Union Fire Ins. Co. of La.*, 56 So. 3d 1236, 1246 (La. Ct. App. 2011). Here, the circuit court rightly saw through Penn National's attempted "escape hatch" argument. Respectfully, this Court, like the circuit court, should reject Penn National's argument.

Reduced to its essence, Penn National's "late notice" defense is that it should be relieved from liability for the *Rollins* settlement because it received untimely notice of a lawsuit *that settled in connection with a mediation that its representatives prepared for and attended*. Chief Justice Toal correctly noted in her order granting partial summary judgment that Penn National is not actually pursuing a "late notice" defense. (R. p. 10). Penn National had sufficient notice of the court-ordered mediation for its representative to attend, with an apparent "willingness to contribute toward settlement." (R. p. 10, 169). It then decided not to contribute to the settlement in disregard of the evidence indicating coverage was necessary under the Relevant Policy. As Chief Justice Toal also noted in the Order, "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."[13] (R. p. 10).

[13] In its brief, Penn National incorrectly claims "Covil does not dispute that it failed to provide timely notice to Penn National." (App. Br., p. 27). Covil and the Receiver clearly do dispute Penn National's argument.

Penn National's "late notice" defense lacks merit for other reasons, too. Its dissertation on the decision in *Prior v. South Carolina Medical Malpractice Liability Insurance Joint Underwriting Association*, 305 S.C. 247, 407 S.E.2d 655 (Ct. App. 1991), is not helpful because the decision in that case did not turn on whether notice was timely. Instead, the insured's claim was not covered by the insurance policy, and as a result, the insurer "had no duty to defend the claim." *Id*. at 249, 407 S.E.2d at 657. Here, Penn National chose not to contribute to the *Rollins* settlement because it erroneously believed that coverage for the *Rollins* settlement did not exist under the Relevant Policy.

Penn National's other authorities are equally distinguishable. In the unpublished decision of *Greenwood Development Corp. v. Cincinnati Insurance Co.*, 2012 U.S. Dist LEXIS 204018, 2012 WL 12981762, at *1 (D.S.C. 2012), the insurer received notice after mediation occurred, and less than a week before trial. As a result, the court noted that the insurer was unable "to analyze coverage" or "participate in . . . settlement negotiations." *Id.* at *11. Penn National, however, analyzed coverage before attending the *Rollins* mediation and decided not to contribute to the settlement of the case based on policy exclusions. The same goes for *Hatchett v. Nationwide Insurance Co.*, 244 S.C. 425, 137 S.E.2d 608 (1964). There, the insurer showed prejudice because the insured's untimely notice precluded the insurer from trying to negotiate a settlement. *Id.* at 435, 137 S.E.2d at 613. Here, Penn National could have negotiated a settlement at the *Rollins* mediation but chose not to do so based on erroneous coverage defenses.

The evidence in this case establishes Penn National was not provided late notice. However, even if Penn National was given late notice, it cannot show it was substantially prejudiced thereby. Penn National argues it is automatically excused from the substantial prejudice requirement under the facts of this case because the rights of innocent third parties are not at issue. (App. Br., p. 19).

Penn National's argument that it is not required to even show substantial prejudice is unavailing and contrary to the public policy of our State. (App. Br., p. 25); *Jessco, Inc. v. Builders Mut. Ins. Co.*, 472 F. App'x 225, 230 (4th Cir. 2012) ("Under South Carolina law, however, recovery under the Policy is barred only if BMIC proves that it was substantially prejudiced by the late notice."); *Neumayer*, 427 S.C. at 272, 831 S.E.2d at 411 (providing the policy behind the laws concerning notice clauses is not meant to provide a "technical escape-hatch" for the insurer to deny coverage). Nevertheless, contrary to Penn National's assertion, the rights of innocent third parties are plainly implicated. Covil had a valid insurance policy with Penn National and coverage was due. Because of Penn National's refusal to participate in the *Rollins* settlement, the Receiver was forced to use Covil's funds to settle the case. The use of these funds, which should not have been tapped into in the first place, depleted the assets of an already-dissolved corporation attempting to defend numerous lawsuits. Because Covil has less money to defend and satisfy its liabilities to other innocent claimants with valid claims against Covil, the rights of innocent third parties are clearly impacted.

Furthermore, Penn National's claims that it was substantially prejudiced by the Receiver's alleged late notice are entirely without merit. Penn National attended the mediation with the very same materials provided to the other insurers. Penn National's conclusory complaints of substantial prejudice fail to enumerate a single thing it would have done differently. Therefore, Penn National cannot prove substantial prejudice.

The Receiver only seeks from Penn National the settlement amount he incurred in *Rollins*. He incurred this expense after Penn National received notice of the litigation. He incurred this expense in connection with a mediation that Penn National attended. He incurred this expense in connection with a settlement that Penn National could have funded subject to a reservation of

rights on coverage issues. Penn National chose, with open eyes, not to pay the *Rollins* settlement. It has no "late notice" defense. The Court should affirm the order granting partial summary judgment in all respects.

VI. CONCLUSION

Penn National refused to fund the *Rollins* settlement based on two policy exclusions and a supposed breach by the Receiver of a condition to coverage. Penn National had the burden of proof on these three affirmative defenses. All of the documentation relevant to the two policy exclusions is historical in nature. It, along with relevant deposition testimony, was adduced in the underlying liability actions. It was accessible to Penn National just as it was to the Receiver. Chief Justice Toal held that Penn National could not sustain its burden of proof as to either of the two policy defenses. Thus, Chief Justice Toal properly granted partial summary judgment on the policy exclusions.

Chief Justice Toal also properly granted partial summary judgment on Penn National's "late notice" defense because, among other reasons, Penn National attended the mediation session that resulted in the settlement at issue with a willingness to contribute toward settlement. Notice thus was not untimely.

Further, Penn National's arguments related to discovery, the timing of the Receiver's motion, and the evidence submitted in support of the Receiver's motion are not preserved for appellate review. And, even if these arguments are properly before this Court, Chief Justice Toal did not abuse her discretion in finding further discovery was not necessary in the case prior to a determination of the Receiver's motion for partial summary judgment.

The Court should therefore affirm the order of partial summary judgment in all respects.

(Signature page follows)

RESPECTFULLY SUBMITTED,

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February 24, 2021.