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SC Court of Appeals

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

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

The present case is nothing more than a blatant attempt by Plaintiff Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas ("Covil") to bully Defendant Pennsylvania National Mutual Casualty Insurance Company ("Penn National") into paying money to settle an underlying asbestos personal injury case (the "Rollins Lawsuit") for which there clearly is no coverage under the policies of insurance issued by Penn National (the "Penn National Policies"). In this case, it is undisputed that Covil failed to provide timely notice to Penn National of the Rollins Lawsuit, waiting until the eleventh hour to do so. Notice of the Rollins Lawsuit was finally provided to Penn National nine (9) months after Covil was served with the Rollins Lawsuit, two (2) months prior to trial, and just twelve (12) business days before the scheduled mediation. When Penn National was unable to contribute the amount of money sought by Covil at the mediation due to Covil's delayed notice to Penn National which deprived Penn National of the time and information it needed to evaluate both Covil's potential liability in the Rollins Lawsuit and also Penn National's potential coverage for that liability, Covil settled the Rollins Lawsuit at the mediation and then just three (3) days after the mediation, filed the present action against Penn National for coverage.

Determined to avoid discovery, Covil then filed a motion for partial summary judgment on the merits of the coverage issue just twenty-three (23) days after Penn National had filed its Motion to Transfer Venue and Answer. As clearly shown from the fact that Covil moved for summary judgment a mere three (3) months after it initially gave notice of the Rollins Lawsuit to Penn National, Covil has raced to obtain a coverage ruling in this case.

However, in its rush to judgment, Covil's method was fatally flawed. Covil presented no competent evidence to the trial court to support entry of summary judgment in its favor in this

case. In addition, Covil's haste prevented the parties from engaging in any discovery, a tactic clearly frowned upon by the appellate courts of this State.

On appeal and in support of the trial court's order granting summary judgment in its favor, Covil does not: (1) cite to any allegations in the Rollins Lawsuit that implicate coverage under the Penn National Policies; or (2) cite to any actual language in the Penn National Policies under which coverage is provided. Instead, Covil hides behind meritless preservation arguments and its baseless contention that, in clear ignorance of the lack of any opportunity to actually conduct discovery in this case, Penn National failed to meet its burden of proof regarding the application of the policy exclusions.

A measured yet straightforward review of the Rollins Lawsuit and the terms of the Penn National Policies shows that Covil is not entitled to coverage under the Penn National Policies for the Rollins Lawsuit. First, Covil breached the conditions of the Penn National Policies when it failed to provide timely notice of the Rollins Lawsuit to Penn National. Second, the Rollins Lawsuit sought liability against Covil based on products liability claims – claims which are specifically excluded from coverage under the Penn National Policies due to the products hazard exclusion in the policies. Accordingly, 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 allow the parties to engage in discovery.

ARGUMENT AND ANALYSIS

I. The Timing and Propriety Of The Granting Of Summary Judgment In Favor Of Covil Is Properly Before This Court.

It is axiomatic that issues are preserved for appellate review when they are raised to and ruled on by the lower court. *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 23, 602

S.E.2d 772, 779-80 (2004). In this case, the propriety of granting summary judgment – not only because of the failure of Penn National to have a full and fair opportunity to conduct discovery but also the unsupported record before the court – was raised by Penn National in its opposition to Covil's Motion for Partial Summary Judgment. The trial court then ruled on Penn National's objections and nevertheless granted partial summary judgment in favor of Covil. These issues are properly before this Court for its review.

A. *The Fact That The Granting Of Summary Judgment Would Be Premature Was Raised Before The Trial Court, And Therefore Is Properly Preserved For Review.*

In its Memorandum of Law in Opposition to Covil's Motion for Partial Summary Judgment, Penn National specifically argued that summary judgment should not be granted because it was premature given that Penn National did not have a full and fair opportunity to complete discovery in this case. [Penn National's Memo in Opposition, pp.22-23 (RI pp. 183-184] In its Order Granting Covil Corporation's Motion for Partial Summary Judgment, the trial court found that "Penn National had access to all available information related to the Rollins action, …" [Order dated 8/13/2020, p.9 (RI p. 10)] In fact, in its Order denying Penn National's Motion for Reconsideration, based in part on the fact that the order granting partial summary judgment was premature because no discovery had been completed, the trial court held that "the court has already ruled on the arguments Penn National raises in its Motion." [Order dated 9/21/2020, p.3 (RI p. 15)]

In subparagraph 3 under this holding, the court specifically addressed that summary judgment was not premature, and found that it had ruled on this argument in its previous order:

> Penn National complains that summary judgment is premature because it did not have the opportunity to engage in discovery. Penn National made this exact argument in its Opposition. The Court found, "It had access to

> all of the same materials as the insurers that elected to resolve the Rollins action at mediation." Order [dated 8/13/2020] at 9.

[Order dated 9/21/2020, p.4 (RI p.16)] Clearly, Penn National raised the issue of whether the summary judgment motion was premature and the trial court ruled on that issue in its Order Granting Partial Summary Judgment. Penn National's appeal of the Order Granting Partial Summary Judgment places this issue squarely before this Court for its review. <u>See</u>, *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 286 (2012)(reversing Court of Appeals' declination to review issue on the grounds that the issue was in fact raised and ruled on by the lower court).

In its Brief, Covil argues that any discovery in the present case would have been unavailing and therefore was unnecessary. (Respondent's Brief, pp.13-16) Because the coverage issue in this case is based on the pleadings and discovery in the Rollins Lawsuit, Covil argues that any discovery in the present action was unwarranted. Covil's argument is wholly without merit. First, there is no evidence that Penn National received all the pleadings and discovery in the Rollins Lawsuit at any time. Covil did not attach any documents to its motion for partial summary judgment indicating that it provided a complete copy of the discovery and pleadings in the Rollins Lawsuit to Penn National. On the other hand, Penn National attached documents to its Opposition to Covil's Motion for Partial Summary Judgment showing that it only received a copy of the Complaint filed in the Rollins Lawsuit. [Penn National's Memo in Opposition, Exh. 10 (RI p. 412-413] Covil apparently indicated that Penn National could receive copies of the information obtained by its defense counsel in the Rollins Lawsuit if Penn National would agree to pay for the defense costs incurred. [*Id.*, Exh. 11 (RI pp. 415-416)] Penn National requested copies of the discovery and pleadings in the Rollins Lawsuit. [*Id.*, Exh. 12 (RI p. 418-421)]

However, there is no verification that a complete copy of the discovery and pleadings in the Rollins Lawsuit was actually provided to Penn National.

Furthermore, Penn National is entitled to the production of information and documents in the present case under the discovery rules of the Rules of Civil Procedure. Specifically, the Rules of Civil Procedure require that information and documents provided to a party be verified and be complete. See, Rule 33(a), SCRCP ("Each interrogatory shall be answered separately and fully in writing under oath …"); Rule 34(b), SCRCP ("The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested …"). Under the Rules of Civil Procedure, failure to provide information or complete production of requested documents subjects the party to a motion to compel and sanctions. See, Rule 37(a)(2), SCRCP ("If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovery party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request."); Rule 37(b), SCRCP. Without the safeguards provided in the Rules of Civil Procedure, Penn National cannot be assured that it has all the information and documents from the Rollins Lawsuit. See also, *Oncology & Hematology Assocs. v. South Carolina Dep't of Health & Envtl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010)("discovery serves an important tool in the truth-seeking function our legal system").

Furthermore, and not insignificantly, the portions of transcripts from deposition testimony that Covil attached to its Motion for Partial Summary Judgment were from depositions

that were **not** taken in the Rollins Lawsuit. See, [Covil's Motion for Partial Summary Judgment, Exhs. E[1] & F[2] (RI p. 113, 117)]. Therefore, even if Penn National was able to informally obtain copies of all the discovery and pleadings in the Rollins Lawsuit, which there is no evidence that it did, it is obvious that this information by itself would not have provided Penn National with all the relevant information and documents regarding the coverage issues – clearly, it would not have provided the actual evidence on which Covil moved for partial summary judgment.

Covil also takes the position that by arguing that summary judgment was premature, Penn National only wants to engage in a fishing expedition and cannot show what evidence would have been developed in discovery in the present case. [Respondent's Brief, p.15] That is simply not true. In its Brief, Penn National detailed exactly what discovery was needed in the present case, specifically evidence regarding what notice was provided by Covil to Penn National and its other insurers regarding the Rollins Lawsuit and when; the method, manner and extent of Mr. Rollins' exposure to asbestos; the role that Covil's products played in the asbestos exposure suffered by Mr. Rollins; and whether any of that exposure occurred during the Penn National Policies. See, Penn National's Brief, pp.16-19.

The significance of this need for discovery in the present case is made more apparent because the trial court granted summary judgment in favor of Covil on the grounds that Penn National did not meet its burden of proving the applicability of policy exclusions. By immediately filing its motion for partial summary judgment, Covil sought to prevent Penn National from engaging in discovery regarding the coverage issues, and then argued that Penn

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[1] Deposition of Robert Ashworth taken in *Ashworth v. Air & Liquid Systems Corp., et al.*, Civil Action No. N17C-04-003 ASB. (RI p. 113)

[2] Deposition of David Rollins taken in *Taylor v. Air & Liquid Systems Corp, et al.*, Civil Action No. 2018-CP-40-04940. (RI p. 117)

National had no evidence to support its denial of coverage. The trial court acquiesced in Covil's procedural tactics; this Court should not also condone such antics.

By filing its Motion for Partial Summary Judgment on the coverage issues a mere twenty-three (23) days from Penn National's filing of its Answer, Covil prevented Penn National from the opportunity to develop evidence in discovery. As the Supreme Court has held, a party's development of evidence in a litigated case "should not be precipitously terminated by summary judgment." *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 114, 410 S.E.2d 537, 545 (1991). Because Penn National has not had a full and fair opportunity to complete discovery in the present case, the order granting partial summary judgment in favor of Covil should be vacated and this case remanded for discovery.

B. *The Fact That The Granting Of Summary Judgment Would Be Inappropriate Based On The Record Was Raised Before The Trial Court, And Therefore Is Properly Preserved For Review.*

Penn National also raised the issue of whether summary judgment for Covil was properly supported in the lower court. In its Opposition to Covil's Motion for Partial Summary Judgment, Penn National repeatedly argued that, "Covil's Motion for Partial Summary Judgment should be denied based on the record before the Court." [Penn National's Memo in Opposition, p.22 (RI p. 183)] See also, [*Id.* at p.5, n.8 (RI p. 166)] The trial court rejected this argument and ruled in favor of Covil, granting its motion for partial summary judgment. [Order dated 8/13/2020, p.2 (RI p. 3)] On review of an order granting summary judgment, this Court is tasked with a *de novo* review of this decision; specifically whether summary judgment is supported by "the pleadings, depositions, affidavits and discovery on file." See, *Froneberger v. Smith*, 406 S.C. 37, 46, 748 S.E.2d 625, 629 (Ct. App. 2013). In carrying out this review, the Court is required to review the materials reviewed by the trial court to determine whether:

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

Rule 56(c), SCRCP.

In its Brief, Covil does not – indeed cannot – dispute that the order granting summary judgment was not based on the pleadings, depositions, answers to interrogatories and admissions on file. First, although Penn National denied coverage in the pleadings after this action was filed, there is no evidence – and no depositions or discovery of any kind undertaken by the parties prior to the entry of summary judgment in favor of Covil – that Penn National denied coverage for the Rollins Lawsuit prior to the settlement entered into by Covil in such lawsuit. Furthermore, Covil cannot dispute that its exhibits to its Motion for Partial Summary Judgment were not submitted into evidence through use of an affidavit.

In reviewing whether summary judgment was properly granted in favor of Covil, this Court cannot rely on the unsworn and unauthenticated documents attached to Covil's motion for partial summary judgment. See, *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003)(holding that verified Complaint should not have been considered in ruling on motion for summary judgment because it did not satisfy the affidavit requirements contained in Rule 56(e)); *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 352, 565 S.E.2d S.E.2d 309, 316 (Ct. App. 2002), *cert. denied*, 357 S.C. 191, 592 S.E.2d 625 (2004)(finding that an unsigned "appraisal review" was not admissible as evidence on summary judgment motion). Accordingly, because there is no competent evidence before this Court to support the trial court's order, this Court should vacate the order granting partial summary judgment in favor of Covil.

II. Covil Has Not Shown That It Actually Complied With The Notice Provisions In The Penn National Policies.

In its Brief, Covil did not argue that it complied with the notice conditions contained in the Penn National Policies. In truth, Covil cannot make this argument because it did not comply with the policy conditions that required Covil to provide notice to Penn National of the Rollins Lawsuit immediately. Covil admits that the first notice that it provided to Penn National of the Rollins Lawsuit was in January 2020. See, Respondent's Brief, p.6 ("Penn National received notice of the Rollins action in January 2020 …"). The Rollins Lawsuit was filed on April 5, 2019. [Penn National's Memo in Opposition, Exh.4 (RI p. 237)] The Amended Complaint was served on Covil on April 25, 2019. [*Id.*, Exh. 5 (RI p. 292)] The Receiver entered a special appearance for Covil in the Rollins Lawsuit on May 13, 2019. [*Id.*, Exh. 6 (RI p. 351)] There was a nine month delay between the time when Covil was served with the Rollins Lawsuit and when notice of the Rollins Lawsuit was provided to Penn National. Such an unreasonable delay clearly violates the notice provisions in the Penn National Policies and voids coverage as a matter of law. 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)(finding that four (4) month delay constituted untimely notice and barred coverage under policy); *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 434-35, 137 S.E.2d 608, 612-13 (1964)(holding that four (4) month delay in providing notice of accident, and six (6) week delay in providing notice of lawsuit violated notice provision in automobile policy and obviated coverage as a matter of law).

Covil cannot show that it provided timely notice to Penn National of the Rollins Lawsuit. Indeed, Covil does not provide any explanation as to why notice of the Rollins Lawsuit was not provided to Penn National for nine (9) months. Instead, Covil merely repeats that Penn National had "ample" notice. (Respondent's Brief, pp. 25-27) However, merely repeating a conclusory

statement does not make it so, and counsel's remarks, by themselves, are not evidence of compliance with policy conditions. See, *South Carolina Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 413 (Ct. App. 2003)("Arguments made by counsel are not evidence.").

Covil repeatedly argues that because a representative of Penn National was in attendance at the mediation of the Rollins Lawsuit, that is sufficient by itself to show as a matter of law that Covil did not breach the notice provisions in the Penn National Policies. (Respondent's Brief, pp. 2, 6, 8, 14, 25-26, 27-28) Covil's arguments are wholly without merit. The insured's compliance, or non-compliance, with policy conditions are based on the insured's actions or inactions, not on the insurer's actions. The focus of this inquire is solely on the actions taken by the insured. See, *Merit Ins. Co. v. Koza*, 274 S.C. 362, 365-66, 264 S.E.2d 146, 147-48 (1980)(finding that insurer's knowledge of claim from a third-party was not sufficient to fulfill the insured's duty to comply with notice condition); *Founders Ins. Co. v. Richard Ruth's Bar & Grill LLC*, 761 Fed. Appx. 178, 183 (4th Cir. 2019)(under South Carolina law, "even where an insurer has actual knowledge of a potential claim or occurrence triggering coverage under the policy, the insured is not relieved of his contractual obligation to provide the legal papers to the insurer unless the insurer waives that provision.").

Therefore, the determinative issue is when notice was first provided by Covil to Penn National of the Rollins Lawsuit. The undisputed answer is nine (9) months after the Rollins Lawsuit was served on Covil. This ends the inquiry. Covil breached the notice provisions in the Penn National Policies, therefore voiding coverage for the Rollins Lawsuit. Summary judgment should have been granted in favor of Penn National because Covil failed to comply with the notice provisions contained in the Penn National Policies. See, *Wright v. UNUM Life Ins. Co.*,

2001 U.S. Dist. LEXIS 26063, *4 (D.S.C. 2001)("As a general rule, breach 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.").

Covil attempts to muddy the waters by claiming that Penn National cannot show that it was prejudiced by the late notice. However, South Carolina law is clear: where the rights of innocent third-parties are not affected, an insured's failure to give timely notice of the claim voids all coverage for that claim without any showing of prejudice.

> 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. And the Court has gone so far as to hold that 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. Metropolitan Life Ins. Co., 180 S.C. 475, 486-87, 186 S.E. 376, 381 (1936). It is only where rights of innocent third-parties are at issue that an insurer must show prejudice before the failure to comply with a notice provision will void coverage.

> Courts eventually recognized the potential inequities in permitting an insurer to avoid coverage to an innocent third party merely because the at-fault party – the insured – did not inform its insurer or a lawsuit. Accordingly, many jurisdictions, including South Carolina, judicially adopted a notice-prejudice rule, whereby the insurer had the burden to show that it was substantially prejudiced by the failure of its insured to comply with the notice and cooperation provisions.

Neumayer v. Philadelphia Indem. Ins. Co., 427 S.C. 261, 266, 831 S.E.2d 406, 408 (2019). However, where the insured has paid its obligation to the innocent third-party, such as in the present case, the insurance company does not have to show prejudice. It merely needs to show that the insured failed to comply with the notice provisions of its policy.

> [The insured] argues that [the insurer] must show that it was substantially prejudiced by the delay in order to deny coverage. The cases upon which [the insured] 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. [The insured] failed to notify [the insurer] in a timely manner, thus violating the insurance policy. This failure justified [the insurer's] refusal to defend and deny coverage.

Prior, 305 S.C. at 250, 407 S.E.2d at 657.[3]

In the present case, it is undisputed that the full settlement has been paid in the Rollins Lawsuit. Covil is merely seeking reimbursement of a portion of that settlement from Penn National. [Complaint, ¶13 (RI p. 21)]; (Respondent's Brief, p.6-7, 27) Here, there is no innocent third-party because the plaintiff in the Rollins Lawsuit has been paid his settlement. Because the rights of an innocent third-party is not at issue, Covil's failure to provide timely notice of the Rollins Lawsuit to Penn National violated the Penn National Policies and justifies the denial of coverage.

Covil's attempts to distinguish the *Prior* case is unavailing. In *Prior*, this Court clearly held that the failure to comply with the notice provisions contained in the policy, by itself, voided coverage under the policy. See, *Prior*, 305 S.C. at 249, 407 S.E.2d at 657 ("Even if the Patient's claim had arisen from professional services, JUA had no duty to defend because Prior failed to timely notify JUA.") Covil's attempt to distinguish Prior because "that case did not turn on whether notice was timely," (Respondent's Brief, p.26) is simply not true.

In a feeble attempt to show that prejudice must be shown prior to the avoidance of coverage in this case, Covil argues that "the rights of innocent third parties are plainly

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[3] Covil argues that late notice should not be used as an "escape hatch" to avoid coverage in the absence of any prejudice to the insurer. (Respondent's Brief, p.25) Tellingly, to support its argument that prejudice is required to be shown in every circumstance, Covil cites to cases from other jurisdictions, specifically Wyoming and Louisiana. However, this is not the law in South Carolina. In South Carolina, where the rights of innocent third-parties are not at issue, because their claims have been fully paid, an insurer does not have to show prejudice to deny coverage when the insured failed to comply with policy conditions to provide timely notice.

implicated." (Respondent's Brief, p.27) Covil argues that because it was forced to use its own funds to satisfy the settlement it agreed to pay in the Rollins Lawsuit, Covil now "has less money to defend and satisfy its liabilities to other innocent claimants." (*Id.*) However, potential future claimants are not the "innocent third-parties" to whom reference is made in the cases requiring the showing of prejudice prior to the voidance of coverage due to late notice. In every case where prejudice was required to be shown before an insurer could deny coverage for failure to comply with its policy's notice provisions, the innocent third-party was the actual claimant whose claim against the insured was being denied. See, e.g., *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 12, 446 S.E.2d 417, 422 (1994)(insurer must show that delay "engendered substantial prejudice to Vermont's ability to investigate or defend against the Singleton's claim."). In accord, *Neumayer*, 427 S.C. at 272-73, 831 S.E.2d at 411-12; *Factory Mut. Liab. Ins. Co. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729-30 (1971); *Tucker v. State Farm Mut. Auto. Ins. Co.*, 232 S.C. 615, 623-24, 103 S.E.2d 272, 277 (1958); *Founders*, 761 Fed. Appx. at 183-84; *Jessco, Inc. v. Builders Mut. Ins. Co.*, 472 Fed. Appx. 225, 230 (4th Cir. 2012); *CAMICO Mut. Ins. Co. v. Jackson CPA Firm*, 2016 U.S. Dist. LEXIS 1777122, *33-37 (D.S.C. 2016); *Greenwood Dev. Corp. v. Cincinnati Ins. Co.*, 2012 U.S. Dist. LEXIS 204018, *29 (D.S.C. 2012). See also, *Prior*, 305 S.C. at 250, 407 S.E.2d at 657 (because the judgment against the insured has been paid, no rights of innocent third-parties were at issue). Covil's argument that Penn National must show prejudice because the rights of potential future claimants may be implicated is simply not the law in South Carolina.

Lastly, Penn National's presence at the mediation of the Rollins Lawsuit does not, as a matter of law, show that Penn National received timely notice of the Rollins Lawsuit. First, it is clear that Justice Toal has sanctioned Covil's other insurance carriers when they have failed to

come to scheduled mediations. See, [Order dated 1/8/2020, pp.1-2 (RII pp. 532-533)] Furthermore, Covil's Receiver, Mr. Protopapas, when he first notified Penn National about the mediation scheduled in the Rollins Lawsuit, threatened such sanctions against Penn National if Penn National failed to come to the mediation held in the Rollins Lawsuit:

> The trial judge for this matter requires that insurance companies attend mediations with full settlement authority. This requirement is echoed in South Carolina's ADR rules. Judges in South Carolina have sanctioned defendants/insurers that fail to comply with the ADR rules. Attached is an order granting sanctions for failure to participate in a mediation in a non-asbestos case.

[Penn National's Memo in Opposition, Exh.11 (RI pp. 415-416)] Penn National attended the mediation. However, it was unable to pay the amount of money being requested by Covil because it did not have sufficient time or information (due to Covil's failure to provide timely notice) to evaluate Covil's potential liability in the Rollins Lawsuit and Penn National's potential coverage for that liability. See, [*Id.*, Exh. 12 (RI p. 418-421) ("… Penn National is unable to evaluate coverage in lieu of the limited information presently in our possession…")]. Penn National's presence at the mediation of the Rollins Lawsuit has no bearing on whether Covil actually complied with the notice provisions in the Penn National Policies. To hold otherwise would discourage carriers from attending mediations where late notice is an issue.

Covil is required to comply with the conditions in the Penn National Policies, including the condition that it provide notice to Penn National immediately when it has been sued in a lawsuit. The undisputed fact is that Covil failed to provide such notice to Penn National regarding the Rollins Lawsuit. Covil's breach of the policy conditions voids coverage under the policy. Penn National respectfully requests that this Court vacate the grant of partial summary judgment in favor of Covil and enter judgment in favor of Penn National.

III. The Products Hazard Exclusion Applies To Bar Coverage For The Rollins Lawsuit Under the Penn National Policies.

At the trial court, Penn National argued that a comparison between the Amended Complaint filed in the Rollins Lawsuit and the provisions in the Penn National Policies showed that the products hazard exclusion applied to exclude coverage for the Rollins Lawsuit under the Penn National Policies. Specifically, the Rollins Lawsuit only alleged products liability claims against Covil and products liability claims are specifically excluded by the products hazard exclusion. Therefore, summary judgment in favor of Penn National should have been granted based on the products hazard exclusion. Penn National also argued that the completed operations hazard exclusion may also apply, but that discovery was needed to determine the applicability of this exclusion. Therefore, summary judgment in favor of the insured on the completed operations hazard exclusion should be vacated because it was premature.

Without once citing to the actual language of the exclusions at issue, Covil argues in its Brief that the products hazard exclusion does not apply, borrowing language from the completed operations hazard exclusion, to "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." (Respondent's Brief, pp. 21-22) Of significance, Covil cites to no case law to support this argument.

Covil shies away from citing to either the Penn National Policies or the allegations contained in the Rollins Lawsuit because neither the policies nor the Rollins Lawsuit support the granting of partial summary judgment in Covil's favor on this issue. A straightforward review of the actual language of the Penn National Policies and the allegations made and claims asserted against Covil in the Rollins Lawsuit shows that the products hazard exclusion clearly excludes coverage for the Rollins Lawsuit.

The Penn National Policies state that "it is agreed that such insurance as is afford [under the Penn National Policies] does not apply to **bodily injury** … included within the … **Products Hazard**." [Penn National's Memo in Opposition, Exh.13, pp. 30, 68 (RI p. 452; RII p. 491)] "Products hazard" is specifically defined in the Penn National Policies as:

> "**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;

[*Id*. at pp. 36, 81 (RI p. 458; RII p. 504)] Nowhere does the policy require that the products hazard exclusion will only apply to "completed" products, and not to "un-completed" products, component parts, or products installed as part of a continuing installation. The sole requirements as stated in the policy language are that the (1) bodily injury occur away from premises owned by or rented to Covil, and (2) physical possession of the product be relinquished by Covil to others. Because the Covil's liability in the Rollins Lawsuit allegedly arose from "take-home" asbestos exposure, both requirements are aptly met: (1) Mr. Rollins' injury occurred away from premises owned by or rented to Covil, and (2) physical possession of the product was relinquished by Covil before Mr. Rollins was exposed to the asbestos fibers "taken-home" by his step-father.

Covil avoids this straightforward analysis by conflating the requirements of the products hazard exclusion with the completed operations hazard exclusion, which expressly requires that the "bodily injury" occur "after such operations have been completed …" [*Id.* (RI p. 458; RII p. 504)], language missing from the definition of "products hazard." This Covil cannot do. The law in South Carolina is clear: "Exclusions in an insurance policy are to be read independently of each other; they are not to be read cumulatively." *Engineered Prod., Inc. v. Aetna Cas. & Sur.*

Co., 295 S.C. 375, 378, 368 S.E.2d 674, 675 (Ct. App. 1988). Accordingly, the language of the products hazard exclusion alone is determinative of whether coverage is afforded for the claims asserted against Covil in the Rollins Lawsuit. Because only products liability claims are asserted against Covil in the Rollins Lawsuit, the products hazard exclusion clearly applies to preclude coverage. See, *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (the language contained in the insurance policy alone determines the policy's force and effect).

Covil's ubiquitous citations in its Brief to Roger C. Henderson, *Insurance Protection for Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415 (1971) do not support its argument on appeal. (Respondent's Brief, pp. 1, 17, 18, 19) The quotation cited to by Covil is taken from the section of the 1971 Nebraska Law Review article dedicated to a discussion regarding "Damage to Property Other Than the Product or Work Itself." *Id.* at p. 441 (RI p. 156). The full context of the single sentence oft-cited by Covil is:

> The products hazard and completed operations provisions are not intended to cover damage to the insured's products or work project out of which an accident arises. The risk intended to be insured 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 to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damages person bargained.

Id.(RI p. 156)[4] However, the coverage being sought by Covil is not for its liability for damage to its own product, but for Mr. Rollins' contraction of a disease caused by exposure to its product. Therefore, this section of the Nebraska Law Review article is not relevant.

Another section of the same 1971 Nebraska Law Review article addresses the coverage actually intended to be provided by "products hazard" coverage, which was first introduced in 1966. "It is clear that the new products hazard provision will protect against defective products, breached warranties and misrepresentations." *Id.* at p.426 (RI p. 144). The 1971 Nebraska Law Review article, although having no precedential value, is helpful in understanding what products hazard coverage was intended to cover. The Penn National Policies, however, exclude coverage for bodily injury included within the products hazard. Using the interpretation of the products hazard included in the 1971 Nebraska Law Review article, by including a products hazard exclusion, the Penn National Policies were not intended to provide coverage for bodily injury claims arising from defective products and breached warranties. The Rollins Lawsuit, however, only asserted claims against Covil for products liability. [Penn National's Memo in Opposition, Exh. 5, ¶¶ 85-117, 150-53; First Cause of Action (Products Liability: Negligence), Second Cause of Action (Products Liability: Strict Liability – S.C. Code Ann. §15-73-10), Fifth Cause of Action (Products Liability: Breach of Implied Warranties – S.C. Code Ann. §36-2-314)(RI pp. 330-340, 347)]. Even under the rationale propounded by the 1971 Nebraska Law Review article, the products hazard exclusion in the Penn National Policies would bar coverage for Covil for the claims asserted against it in the Rollins Lawsuit. Summary Judgment was improperly granted

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[4] The 1971 Nebraska Law Review article discusses coverages provided by policies that include products hazard and completed operations hazard coverage. In the Penn National Policies, coverage for the products hazard and completed operations hazard are specifically excluded, not included.

for Covil and should have been entered in favor of Penn National on the coverage issues in this case.

Covil's argument on appeal can be distilled to the following convoluted contentions: Covil was involved in a project in which it installed insulation at the Bowater facility where Mr. Rollins' step-father, Robert Ashworth, worked. During Covil's work at the Bowater facility, Mr. Ashworth was exposed to asbestos. Mr. Ashworth then brought home the asbestos fibers on his clothes and person, therefore exposing Mr. Rollins to "take-home" asbestos. Because Covil's work at the Bowater facility was not "completed" during the 1986-87 Policy, the first Penn National Policy, the products hazard exclusion does not apply. Covil's argument misses the mark.

The issue is coverage for Mr. Rollins' injury, not Mr. Ashworth's injury. Although no discovery was completed and therefore Penn National cannot confirm or deny whether Mr. Rollins' injury was caused by take-home asbestos fibers during the 1986-87 Policy period,[5] even assuming Covil's unsupported statements to be true, Mr. Rollins was never present at the Bowater facility during any time that Covil was performing work at that facility. Mr. Rollins' only exposure during that time period was to asbestos fibers brought home from the Bowater facility by Mr. Ashworth. As to Mr. Rollins' injury, the injurious exposure clearly occurred away from Covil's premises after Covil relinquished control over its products and the fibers taken home by Mr. Ashworth. By the plain language of the products hazard exclusion contained

[5] Indeed, in the Complaint filed in the present action, Covil alleged that Mr. Rollins was exposed to both direct asbestos fibers and take-home asbestos fibers resulting from Covil's operations: "(a) at a facility in 1986 and 1988; (b) at Bowater's Rock Hill/Catawba plant; (c) at a Celanese facility as part of an ongoing business relationship; (d) at a Hoechst Celanese facility and Hoechst Fibers facility; and (e) at such other places as the record supports." [Complaint, ¶11 (RI pp. 20-21)] Covil may have settled the Rollins Lawsuit based on exposures that occurred outside of the Penn National Policy periods. Because no discovery was allowed, Penn National was unable to obtain information regard the basis for Covil's actual liability in the Rollins Lawsuit.

in the Penn National Policies, there is no coverage for Covil's alleged liability in the Rollins Lawsuit.

Furthermore, and significantly, Justice Toal, in her order granting partial summary judgment in favor of Covil, specifically found:

> Most importantly, Penn National has not proven that any of the materials subject to the 1986 contract contained asbestos. By 1986 asbestos was not found in pipe insulation.

[Order dated 8/13/2020, p.8 (RI p. 9)] Covil did not appeal this finding by Justice Toal. Therefore, if Covil's liability is not based on products which it brought to the Bowater facility during the 1986-87 Policy period, but is based on products it had previously brought to the Bowater facility, the products hazard exclusion would clearly apply, even under Covil's strained interpretation of the same. See, *Ohio Cas. Ins. Co. v. Scott & Jones*, 2006 U.S. Dist. LEXIS 113027, *6 (D.S.C. 2006)(finding that the products-completed operations exclusion applied to preclude coverage for the underlying lawsuit which "arises from a product sold by Scott and Jones and, for five years used on premises not owned by Scott and Jones").

On appeal, this Court is tasked with reviewing the plain language in the Penn National Policies to determine whether the allegations made and claims asserted against Covil in the Rollins Lawsuit are covered under that language. *City of Hartsville v. South Carolina Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 543-44, 677 S.E.2d 574, 578 (2009). It is clear that in the Rollins Lawsuit, Covil was being sued as a "Product Defendant." [Penn National's Memo in Opposition, Exh.5, ¶25 (RI p. 310)] It is equally clear that the Penn National Policies excluded coverage for injuries arising out of the products hazard. [*Id.*, Exh. 13, pp. 30, 36, 68, 81 (RI pp. 452, 458; RII pp. 491, 504)] A straightforward comparison of the Rollins Lawsuit and the Penn National Policies plainly shows that no coverage is afforded under the Penn National Policies for

the Rollins Lawsuit. Accordingly, the order granting summary judgment for Covil should be vacated and judgment entered in favor of Penn National based on the products hazard exclusion. See, *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 167, 594 S.E.2d 511, 516 (Ct. App. 2004)(in reviewing a summary judgment order regarding coverage, "the appellate court does not have to defer to the trial court's findings.").

CONCLUSION

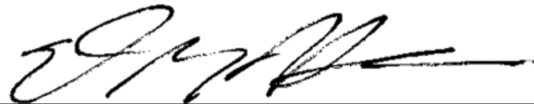
A careful review of the Rollins Lawsuit and the Penn National Policies shows that there is no coverage for Covil's liability in the Rollins Lawsuit under the Penn National Policies. First, in failing to provide notice to Penn National of the Rollins Lawsuit for nine (9) months, Covil did not comply with the policy conditions requiring that Covil immediately forward copies of lawsuits to Penn National. Second, the damages sought against Covil in the Rollins Lawsuit arose from Covil's liability as a "Product Defendant" and from products liability claims. This liability is excluded from coverage under the Penn National Policies through the operation of the products hazard exclusion, and potentially the completed operations hazard exclusion. It is clear that further information would have been obtained from depositions, answers to interrogatories and admissions to clearly set forth that coverage under the Penn National Policies was not afforded for Covil's liabilities in the Rollins Lawsuit.

However, Covil did not wait to allow Penn National a full and fair opportunity to conduct any discovery in this case. Instead, Covil immediately moved for summary judgment on coverage under the Penn National Policies a mere three (3) months after it first gave notice to Penn National of the Rollins Lawsuit, and only twenty-three (23) days after Penn National filed an Answer in the present action. It is obvious that Covil rushed to obtain a coverage determination against Penn National – a coverage determination that it was otherwise enjoined

from obtaining against its other insurers.[6] In its haste, Covil failed to present any properly supported evidence to support its position. As a result, Justice Toal erroneously granted partial summary judgment in Covil's favor. Covil's race to obtain a favorable coverage ruling should not be sanctioned by this Court.

Penn National respectfully requests that the grant of partial summary judgment in favor of Covil be vacated and that judgment be granted in favor of Penn National, or in the alternative, that the case be remanded to allow Penn National a full and fair opportunity to conduct discovery.

March 1, 2021.



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[6] See, *Covil Corp. v. Zurich Am. Ins. Co.*, 2020 U.S. Dist. LEXIS 33140, *42-43 (D.S.C. 2020) ("Nonetheless, the Court finds it proper, as both expressly authorized by an Act of Congress and necessary in aid of its jurisdiction, to enjoin the Receiver from further pursuing judicial determinations in underlying state tort suits regarding insurance coverage issues arising from policies issued or allegedly issued to Covil by the Insurers.").

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SC Court of Appeals

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.

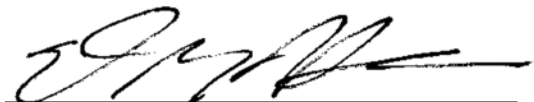
Pennsylvania National Mutual Casualty Insurance Company, Appellant.

Appellate Case No. 2020-001239

CERTIFICATE OF COUNSEL

I hereby certify that this Final Reply Brief of Appellant complies with Rule 211(b) of the SCACR.

This the 1st day of March, 2021.



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