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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

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pennsylvania National Mutual Casualty Insurance Company ("Penn National"), by and through counsel, and pursuant to the South Carolina Appellate Court Rules, Rules 221(a) and Rule 240, hereby respectfully moves and petitions the Court for a rehearing of the Court's opinion issued January 5, 2022, ("January 5 Opinion"), affirming the trial court's entry of partial summary judgment on behalf of Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas ("Plaintiff" or "Covil"). *Covil Corp. v. Pa. Nat'l Mut. Cas. Ins. Co.*, Op. No. 5888 (S.C. Ct. App. filed Jan. 5, 2022) (Howard Advance Sheet No. 1 at 37). Penn National further

suggests rehearing *en banc* pursuant to Rule 219(b) of the South Carolina Appellate Court Rules. Consideration by the full court is necessary to maintain uniformity of decisions and involves questions of exceptional importance, including but not limited to questions relating to the standard for summary judgment and the apparent wavier of rights by parties and their insurers for mere participation in mandatory mediation under the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

The Court misapprehended the law in denying Penn National a full and fair opportunity to conduct discovery prior to entry of summary judgment and incorrectly held that an affidavit is required setting out a party's forecast of evidence expected to be discovered, in derogation of prior settled law. The Court also overlooked clear evidence of Penn National's stated intent not to waive any rights by attending mediation in compliance with the mandatory Alternative Dispute Resolution Rules of this State and incorrectly held, despite no ruling from the trial court, that participation in mediation waived Penn National's late notice coverage defense. The Court also overlooked issues of fact precluding summary judgment on the record before the trial court, as well as deficiencies with this record. Further, the Court misapprehended settled law as to the interpretation of policies of insurance in finding coverage existed for Covil under Penn National policy no. 515 50 28 53-7, effective from March 31, 1986 until March 31, 1987 ("the Policy").[1]

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[1] The Court of Appeals does not reference or address coverage under the renewal policy, Penn National policy no. 515 5028 53-8 and, indeed, this appears to be because there is no contest that the order only finds coverage under policy no. 515 50 28 53-7, as the renewal policy period was after the alleged exposure dates. Nevertheless, to the extent the January 5 Opinion holds or finds coverage under policy no. 515 5028 53-8, Penn National would incorporate its arguments herein, as well as all arguments previously raised by Penn National in its prior briefs and at oral argument, in reference to this policy as well.

The Court should grant Penn National's Petition for Rehearing and reverse the trial court's order granting partial summary judgment based on the arguments herein, as well as all arguments previously raised by Penn National in its prior briefs and at oral argument, which Penn National incorporates herein by reference.

I. The Court misapprehended the law on premature summary judgment

In this case, the trial court was asked to grant summary judgment to Plaintiff twenty-three (23) days after Penn National filed its answer. (R. pp. 34-43 (file-stamped date of April 22, 2020 on Covil's Motion for Summary Judgment); R. pp. 23-33 (file-stamped date of March 30, 2020 on Penn National's Answer). Despite the absence of any discovery conducted in the case, the fact that Penn National did not participate in the underlying action (*David D. Rollins v. Covil Corporation et al.*, Civil Action No. 2019-CP-25-0118 ("the Rollins Lawsuit")) or any previous action involving Covil because Penn National was never informed of the existence of the Rollins Lawsuit until nine (9) months after it began and only informed of an impending mediation in the action two (2) weeks before it occurred, the lack of a sufficient basis for granting summary judgment, the existence of factual disputes on the limited and deficient record in front of the trial court,[2] and the lack of *any* case law supporting such a premature grant of summary judgment, judgment was entered by the trial court on behalf of the Plaintiff. In the face of this undeniable procedural posture, the Court's January 5 Opinion incorrectly disposes of the prematurity of the motion for summary judgment on the basis that "Penn failed to submit a Rule 56(f) affidavit setting forth the discovery it needed to conduct." Op. No. 5888 (Howard Adv. Sh. No. 1 at 37) (citations omitted). However, there is no requirement for such an affidavit under any existing South Carolina case law and, in fact, such a holding is contrary to the well-settled law and practice

[2] These issues are discussed further in Section III, *infra*.

of South Carolina, as well as *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001), which the Court cites in support of its holding.

The January 5 Opinion incorrectly applies Rule 56 of the South Carolina Rules of Civil Procedure and improperly conflates two different standards under South Carolina law relating to a premature grant of summary judgment. Initially, *there is no requirement in Rule 56 that a party opposing summary judgment provide an affidavit to the Court*. Rule 56, SCRCP. In fact, the plain language of Rule 56 states that the party resisting a motion for summary judgment may do so "by affidavits *or as otherwise provided in this rule*." Rule 56(e), SCRCP (emphasis added). Thus, any party resisting summary judgment is entitled to rely on the record before the trial court. Rule 56 simply provides that an opposing party may not rely solely on "his [own initial] pleading" to rebut an otherwise undisputed record. *Id.*; *Baird v. Charleston Cnty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, *even if no opposing evidentiary matter is presented*" (citing *Title Ins. Co. of Minnesota v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976); Rule 56(c), SCRCP) (emphasis added). Here, as discussed further below, Penn National's opposition to the motion for partial summary judgment cited to un-objected to documents in the record in support of its position and, therefore, there was no requirement for Penn National to submit an affidavit in opposition to summary judgment. *See also Doe ex rel. Doe v. Batson*, 345 S.C. at 320, 548 S.E.2d at 856 ("Rule 56(e) . . . .requires a party opposing summary judgment to come forward with affidavits *or other supporting documents* demonstrating the existence of a genuine issue for trial") (emphasis added).

In fact, the Court need not even have addressed whether the record was properly supported, as the January 5 Opinion misapprehends the law relating to a party's full and fair opportunity to conduct discovery. As held by the South Carolina Supreme Court in *Batson*, the issue as to whether the opposition to a motion for summary judgment is properly supported is a separate issue from whether a party has had a "full and fair opportunity to complete discovery." *Id.* at 321, 548 S.E.2d at 857. In *Batson*, the South Carolina Supreme Court examined the issue of prematurity and lack of a full and fair opportunity to conduct discovery *under a separate heading and with a separate analysis* from the issue of whether the response to the motion for summary judgment was properly supported in the absence of any countervailing affidavits. Importantly, the *Batson* court reversed the entry of summary judgment, *in the absence of a counter-affidavit*, because the non-moving party had not had an opportunity to fully conduct discovery. *Id.* at 321-22, 548 S.E.2d at 857.

The court in *Batson* quoted with approval both *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991), and *J.S. v. R.T.H.*, 155 N.J. 330, 714 A.2d 924, 936 (N.J. 1998). As Penn National discussed at length in its prior briefs, *Baughman* held that summary judgment was premature even two (2) years after the action was initiated because additional discovery needed to be conducted. Similarly, *Batson* cites *J.S.* for its holding that "summary judgment entered five months after defendant's answer was filed was premature." *Id.*

In *Baird*, the South Carolina Supreme Court held that summary judgment was improper where no discovery occurred between the filing of a motion to dismiss (which the trial judge converted to a motion for summary judgment upon submission of evidence outside the pleadings

by both parties) and the hearing, which was conducted three (3) months later.[3] Instead, the court reiterated the law in this State that "summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." 333 S.C. 519, 529, 511 S.E.2d 69, 74 (citing *Baughman*, 306 S.C. 101, 410 S.E.2d 537). In reaching its holding, the court noted that "the parties have yet to engage in discovery." *Baird*, 333 S.C. at 529, 511 S.E.2d at 70.

None of these cases stand for the proposition that a party opposing summary judgment must provide an affidavit to demonstrate the discovery it needs to conduct.[4] In fact, the case law cited by the January 5 Opinion expressly holds to the contrary. Therefore, the Court should grant rehearing, follow the opinions in *Batson*, *Baughman*, and *Baird*, and reverse the trial court's grant of summary judgment to Plaintiff.

II. The Court overlooked facts and misapplied the law in holding that Penn National's attendance at mediation waived its right to assert the notice provisions in the Policy

By holding that Penn National waived its right to assert the clear notice provisions of the Policy by attending mediation, the Court overlooked and misapprehended facts in the record and misapplied the law. The Court's January 5 Opinion cites the "findings" of the trial court that Penn National "hired the same defense counsel as the other insurers, had access to the same defense counsel as the other insurers, and deliberately decided not to contribute" at mediation. Op. No. 5888 (Howard Adv. Sh. No. 1 at 38). The Court ignores the fact, however, that the Rollins Lawsuit

[3] Although the January 5 Opinion bases its holding solely on the fact that "Penn failed to submit a Rule 56(f) affidavit setting forth the discovery it needed to conduct," *Batson*, *Baughman*, and *Baird* all refute the notion that summary judgment should be granted on the basis of a motion filed twenty-three (23) days after a party files its initial pleading and a decision is returned without a hearing less than four (4) months later. There has been no dilatory conduct by Penn National under the facts of this case.

[4] In fact, as noted above, the South Carolina Supreme Court has cautioned that "if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, *even if no opposing evidentiary matter is presented*." *Baird*, 333 S.C. at 529, 511 S.E.2d at 74 (citations omitted) (emphasis added).

was not tendered to Penn National until February 3, 2020, a notification which provided no information regarding the lawsuit other than a copy of the Complaint. (R. p. 413). Despite knowing of the mediation at that time, Covil did not notify Penn National of the pending mediation until the following week, on February 10, 2020, even though the mediation was scheduled to occur in two (2) weeks. (R. p. 415).

At that time, Covil *still* had not provided Penn National with *any* information beyond the existence of the Complaint and the impending mediation. Covil did not even provide Penn National with the identity of the attorneys defending it in the action. (R. p. 418). Instead, it was left to Penn National, only approximately eleven (11) days prior to the mediation, to locate and contact defense counsel that had been previously been retained to defend Covil in the case. *Id.* In fact, from the limited record in this case, it is clear that on February 14, 2020, eleven (11) days prior to the mediation in an action that had been ongoing for approximately nine (9) months, Penn National had not been provided with *any discovery documents to review and evaluate in preparation for the mediation*. *Id.* The January 5 Opinion ignores these crucial facts which, *at a minimum*, create an issue of fact as to late notice and misconstrues the record in reaching its conclusion as to waiver. *See, e.g. Hancock v. Mid-South Mgmt.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 802-03 (2009) ("the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment"); *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011) ("When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.") (citation omitted).

Regardless, under South Carolina law, Penn National did not waive its right to contest coverage under the notice provisions of the Policy merely through its good faith attendance at

mediation and willingness to potentially contribute to a settlement. Indeed, it cannot have waived this right. Such a result is both illogical and directly antithetical to the South Carolina Court-Annexed Alternative Dispute Resolution Rules.

Pursuant to the rules, attendance is required at mediation "[f]or any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim." Rule 6(b)(4), SCADR. Yet the Court's entire basis for holding that Penn National waived its right to assert these provisions in the Policy is that a representative of Penn National a) attended mediation in good faith, and b) "expressed willingness to contribute to the settlement." Op. No. 5888 (Howard Adv. Sh. No. 1 at 38-39). Both of these actions, however, are baseline requirements for any insurer to comply with the Court-Annexed Alternative Dispute Resolution Rules. *Id.* *See also* (R. p. 533) (citing requirement of insurers to attend mediation under the SCADR 6(b)(4)). Failure to comply will result in sanctions to an insurer. *See, e.g* Rule 10(b), SCADR ("If any person or entity subject to the ADR Rules violates any provision of the ADR Rules without good cause, the court may, on its own motion or motion by any party, impose upon that party, person or entity, any lawful sanctions, including, but not limited to, the payment of attorney's fees, neutral's fees, and expenses incurred by persons attending the conference; contempt; and any other sanction authorized by Rule 37(b), SCRCP."); *Jobst v. Jobst*, 424 S.C. 64, 78-79, 817 S.E.2d 515, 523-24 (Ct. App. 2018) (affirming contempt finding against party for failure to appear at mediation as required by the South Carolina ADR Rules); (R. pp. 532-35). The Court's opinion puts Penn National and other insurers in an impossible catch-22 – attend mediation as required under South Carolina law and waive any coverage defenses or refuse to attend and be sanctioned for violating the Court-Annexed Alternative Dispute Resolution Rules. This is not the law of South Carolina, and the Court

misapprehended the law when it held to the contrary. *See also Agape Senior Primary Care, Inc. v. Evanston Ins. Co.,* 304 F. Supp. 3d 492, 502 (D.S.C. 2018) (rejecting a policy-holder's claim that attendance by insurer's attorney representative at mediation where coverage action relating to cases was concurrently pending elsewhere was improper and stating that "[i]f there is blame to be ascribed here, it is the South Carolina mediation rule that compels a party to mediate while there is a coverage question pending").

This is especially true where, as here, Penn National *expressly asserted it was not waiving its rights* prior to mediation in Non-Waiver Agreement signed by Penn National and sent to the Plaintiff prior to the mediation. (R. pp. 418-421). Although Plaintiff failed to execute the Non-Waiver Agreement, this is of no moment to an analysis of waiver. As the Court correctly noted in the January 5 Opinion, waiver must be both voluntary and intentional. Op. No. 5888 (Howard Adv. Sh. No. 1 at 39) (quoting *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994) (per curiam)). Here, however, as in the *Provident Life* case quoted by the Court, in which the Court of Appeals reversed a finding of waiver by the trial court, "the . . . findings of . . . waiver are without evidentiary support." 317 S.C. at 478. Instead, the only evidence in the record, the Non-Waiver Agreement, demonstrates that Penn National expressly intended *not* to waive any rights. *See Strickland v. Strickland*, 375 S.C. 76, 85-86, 650 S.E.2d 465, 471 (2007) (waiver only exists where it is a party's "*unequivocal* intent to relinquish a known right") (citing 7 S.C. Jur. *Estoppel and Waiver* § 17 (1991)).

Waiver also must be specifically pled by the party seeking to assert it. *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 114, 276 S.E.2d 296, 297 (1981). While the pleading does not have to specifically use the word "waiver," the pleading must still address all the facts and allegations necessary to plead it, in the absence of its precise identification. *Id.*. Here, nowhere

in Plaintiff's complaint were there *any* facts or allegations that would establish waiver and, therefore, waiver was not properly pled. *Id.*; (R. pp. 19-22).[5] Thus, the Court has overlooked and misapprehended the evidence in reaching a directly contrary holding to the case law it cites and the record in this action, and the Court should grant rehearing and reverse the trial court's entry of summary judgment as to Plaintiff.[6]

Further, although not addressed by the Court in the January 5 Opinion, it is evident from even the incomplete record that coverage is precluded by failure of Covil to comply with the notice provisions in the Policy. The Penn National Policy contains the following conditions:

CONDITIONS APPLICABLE TO SECTION II

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

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

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

(c) The insured shall cooperate with the Company and, upon the Company's request, assist in making settlements,

[5] South Carolina's appellate courts have also cautioned that waiver is "protective only, and [is] to be invoked as [a] shield[], and not as [an] offensive weapon[]" as would be the case in this action, had it been pled by Plaintiff. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992).

[6] At bare minimum, the existence of the Non-Waiver Agreement creates an issue of fact that precludes summary judgment as to these provisions. *See, e.g. Hancock*, 381 S.C. at 330-31, 673 S.E.2d at 802-03 ("the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment"); *Turner*, 392 S.C. at 122, 708 at 769 ("When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.") (citation omitted).

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

(R. p. 456; 502). Accordingly, under the Policy, the insured has the duty to: (1) notify Penn National in writing *as soon as practicable* of an "occurrence" which may result in a claim against it; (2) *immediately* send copies to Penn National of any demands, notices, summons, or legal papers received in connection with any lawsuit; and (3) cooperate with Penn National in the defense of the lawsuit.

As more fully set forth in Penn National's prior briefs, South Carolina courts have universally found that similar notice and cooperation clauses are valid and enforceable. *Neumayer v. Philadelphia Idem. Ins. Co.*, 427 S.C. 261, 266, 831 S.E.2d 406, 408 (2019). In the present case, Covil was served with the Rollins Lawsuit on April 25, 2019. (R. p. 291-349). Counsel was retained and an Answer was filed on behalf of Covil in the Rollins Lawsuit on May 28, 2019. (R. p. 352-391). The Rollins Lawsuit was not tendered to Penn National for defense and indemnity until February 3, 2020, over nine (9) months later. (R. pp. 412-13). This tender to Penn National was three (3) weeks prior to the scheduled mediation and eight (8) weeks prior to trial. (R. p. 516-19).

Under South Carolina law, the failure of an insured to comply with policy conditions requiring that the insured provide timely notice, forward suit papers and cooperate with the insurer with respect to a claim or lawsuit will bar coverage for the insured under the policy. *See Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 250, 407 S.E.2d 655,

657 (Ct. App. 1991)(quoting *Lee v. Metro. Life Ins. Co.*, 180 S.C. 475, 186 S.E. 376 (S.C. 1936))(holding that the insured was not entitled to coverage where he failed to provide timely notice of the claim and also failed to forward suit papers until approximately four months after he had received them); *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 435, 137 S.E.2d 608, 613 (1964)(stating that it is "well settled" that the insured's failure to adhere to the notice provisions will bar recovery under the policy); *Tucker v. State Farm Mut. Auto. Ins. Co.*, 232 S.C. 615, 616, 103 S.E.2d 272, 273 (1958)(finding that the insured's breach of the cooperation clause relieved the insurer of its coverage obligation under the policy).

The holding in *Prior* applies with equal force and dictates the result in the present case. Indeed, the facts of the present case are even more egregious than in *Prior*. Covil did not comply with the conditions for coverage under the Policy. Further, Covil admits that the entirety of the settlement in the Rollins Lawsuit has been paid. Therefore, no rights of an innocent third-party are jeopardized by Covil's failure to comply with the notice conditions in the Policy. Contrary to the trial court's holding, and based on this Court's decision in *Prior*, Covil is not entitled to coverage under the Policy for the settlement in the Rollins Lawsuit.

Further, even if the Court were to hold, contrary to established case law, that "substantial prejudice" must be shown, the facts of this case demonstrate that Penn National was in fact "substantially prejudiced" by Covil's failure to comply with the timely notice condition contained in the Policy. By the time Covil provided notice to Penn National, in addition to the pleadings and discovery that had taken place, the following deadlines had already expired:

- Plaintiff's Deposition (June 19, 2019)
- Defendants Answer Master Discovery (July 12, 2019)
- Designate Fact Witnesses (August 8, 2019)

- Designate Expert Witnesses (August 8, 2019)
- Deposition of Plaintiff's fact witnesses except for family members who do not have product identification testimony (January 13, 2020)
- Deposition of Defendants' fact witnesses except for Defendants' 30(b)(6) witnesses (January 13, 2020)

(R. pp. 408-10). Additionally, the Pre-trial Scheduling Order entered by the Court in the Rollins Lawsuit set a deadline of February 7, 2020 for the filing of motions for summary judgment (which was just eleven (11) days after Penn National had received its first notice of the action) and set trial for March 23, 2020 (just eight (8) weeks after Penn National's first notice of the action). (R. pp. 516-19).

Further prejudicing Penn National, the parties in the Rollins Lawsuit participated in a mediation on February 25, 2020, less than a month after Penn National received its first notice of the action. Covil did not provide notice of the mediation to Penn National until February 10, 2020, providing even less time for Penn National to gather the necessary information and documents in order to evaluate the matter for potential settlement. (R. pp. 415-16; 418-21). In fact, the only evidence in the record show that only eleven (11) days before mediation, Penn National had yet to receive *any discovery documents* in Rollins Lawsuit. (R. p. 415). Under these facts, Penn National was "substantially prejudiced" by Covil's untimely notice in this matter.

Therefore, even if "substantial prejudice" is required before coverage for Covil can be barred for Covil's failure to comply with the notice conditions in the Policy, which Penn National disputes, the trial court erred in finding as a matter of law that Penn National was not "substantially prejudiced" by Covil's untimely notice. Given this, any coverage under the Policy was obviated when Covil failed to comply with its contractual obligations to provide written notice of the Rollins Lawsuit as soon as practicable and to immediately send copies of the Summons and Complaint to

Penn National. "[B]reach of an insurance policy's notice clause automatically relieves the insurer of its obligations under the contract, including the payment of proceeds due, and the duty to defend and to indemnify the insured." *Wright v. UNUM Life Ins. Co.*, 2001 U.S. Dist. LEXIS 26063, *4 (D.S.C. 2001). Penn National respectfully requests the Court grant its petition for rehearing and reverse the grant of summary judgment to Covil.

III. The Court overlooked issues of fact precluding summary judgment on the record before the trial court and improperly ruled that Penn National waived certain arguments regarding the sufficiency of the record

The Court also erroneously held that the Plaintiff's Motion for Partial Summary Judgment was properly supported by the evidence in the record. Initially, Penn National properly raised the issue of whether the record supported Plaintiff's motion. In holding that the issue was not raised or ruled upon, the Court ignored the plain record, where Penn National raised numerous times the problematic record before the trial court in both its initial opposition to the Plaintiff's Motion for Summary Judgment, as well as in its Motion for Reconsideration. *See, e.g.*, (R. p. 165 ("even if the Court were inclined to consider Covil's Motion at this time" and noting that the only exposure asserted by Plaintiff was take-home exposure from Plaintiff's step-father "who is *alleged to have worked* at the Bowater paper mill") (emphasis added); R. p. 166 fn. 8 (requesting that should the trial court "not believe that the motion should be denied based on the record before the court" that the trial court find that the motion is premature because of a lack of discovery); R. p. 176 (identifying pertinent facts and documents that have not been provided to Penn National relating to the settlement of the Rollins Lawsuit); R. p. 179 n. 19 (identifying a specific example of the incomplete record in front of the trial court, as admitted by Plaintiff); R. p. 181 (noting that at the time of the motion Plaintiff's stepfather was only "*alleged* to have been present at Bowater, while Covil performed . . . work . . .under a subcontract" and that *"[e]ven accepting the facts*

alleged by Covil for the purposes of responding to its motion" there was no coverage under the Policy) (emphasis added); R. p. 182 (noting that it was merely "alleged" that the injuries arose out of Covil's work); R. p. 183 ("Covil's Motion for Partial Summary Judgment should be denied based on the record before the Court" and, if not, additional discovery is required, including relating to certain specific issues identified by Penn National); R. p. 184 (noting that additional discovery is needed regarding any evidence of "alleged asbestos exposure" asserted by Plaintiff and specifically stating the record before the trial court was an "incomplete record"); R. p. 556 (noting repeatedly in the Motion for Reconsideration that "facts" relating to Mr. Rollins exposure are nothing more than allegations); R. p. 557 (again noting that additional evidence was needed relating to the "*alleged* asbestos exposure" of Mr. Rollins) (emphasis added)).

The Court's holding improperly narrows the issue before it and is over-restrictive in its application of South Carolina's preservation rules. Initially, as noted above, the problematic nature of the record and the lack of undisputed facts was *repeatedly* raised to the trial court. These arguments were raised and ruled upon and, therefore, Penn National's argument regarding the improperly supported documents in the record is properly before the Court. To hold otherwise would improperly convert issue preservation into "a 'gotcha' game," a result which has been repeatedly disavowed by South Carolina's appellate courts. *See Johnson v. Roberts*, 422 S.C. 406, 411, 812 SE.2d 207, 210 (Ct. App. 2018) (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)). Further, even where an argument is not "clearly preserved" but also is not "clearly unpreserved . . . any doubt should be resolved in favor of preservation." *Id.* at 412, 812 S.E.2d at 210 (quoting *Atl. Coast*, 398 S.C. at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part)). Here, the problematic, incomplete record before the trial court included unauthenticated and unsupported documents

which were not a proper basis for granting summary judgment, and the Court should grant rehearing, address this deficiency, and reverse the grant of summary judgment to Plaintiff. *See, e.g.*, Rule 56(e), SCRCP ("supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein"); *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 352, 565 S.E.2d 309, 316 (Ct. App. 2002), *cert. denied*, 357 S.C. 191, 592 S.E.2d 625 (2004) (unsigned statement in opposition to defendant's motion for summary judgment could not be considered by the court); *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003) (holding trial court properly refused to consider verified complaint as affidavit because the allegations therein were not based on personal knowledge, would not by themselves be admissible in evidence, and did not affirmatively show that the plaintiff was competent to testify to the matters stated therein).

Even assuming, *arguendo*, the issue of *authentication* was not properly raised and ruled upon, which Penn National denies, the broader issue of whether Plaintiff carried its initial burden to show entitlement to summary judgment certainly was.[7] In addition to Penn National's argument that summary judgment was pre-mature, Penn National raised numerous times the problematic record before the trial court in both its initial opposition to the Plaintiff's Motion for Summary Judgment, as well as in its Motion for Reconsideration. *See, e.g.*, (R. p. 165; R. p. 166 fn. 8; R. p. 176; R. p. 179 n. 19; R. pp. 181-184; R. pp. 556-557).

[7] The Court does not appear to have specifically addressed this issue, having amalgamated the general proposition that the record before the trial court was insufficient to establish entitlement to summary judgment with the more specific contention in support of this assertion that there were no properly authenticated documents in the record. Here, as repeatedly asserted by Penn National in its briefing before the trial court, the record was insufficient to support Plaintiff's Motion for Partial Summary Judgment regardless of whether the documents themselves were properly authenticated.

In reviewing a Motion for Summary Judgment to determine "if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Utilizing this standard, a non-moving party need only identify "a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 802-03 (2009). Indeed, "if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, *even if no opposing evidentiary matter is presented*." *Baird*, 333 S.C. at 529, 511 S.E.2d at 74 (citing *Title Ins. Co. of Minnesota v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976); Rule 56(c), SCRCP) (emphasis added). This is because "summary judgment is a drastic remedy" and "it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial." *Spence v. Wingate*, 395 S.C. 148, 156, 716 S.E.2d 920, 925 (2011) (citing *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004)).

Applying this standard, it is clear that summary judgment was improper. As cited above, the facts in this case are in dispute. The trial judge's own order, while erroneously referring to facts as "undisputed" despite the clear dispute in the record, is itself contradictory and demonstrates the unclear and disputed nature of the facts. For instance, while finding that Mr. Rollins was exposed to asbestos as a result of Covil's work insulating pipes at the Bowater plant, the order also finds that "[b]y 1986, asbestos was not found in pipe insulation." (R. p. 9).[8]

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[8] The January 5 Order holds that Penn National may not argue this specific inconsistency in the Court's order because it was not raised or ruled upon in the motion for reconsideration. Op. No. 5888 (Howard Adv. Sh. No. 1 at 42). However, this holding misapplies the law of South Carolina, where courts have held that where a trial court is on notice that a party is seeking a review of all the court's holdings or the motion is *permissive*, and not mandatory, because it is not seeking to preserve unaddressed error, the issues in the original order are preserved for review. *E.g. State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 227, 837 S.E.2d 910, 918 (Ct.

Compare, (R. p. 63, ¶ 3 ("Plaintiff's claims against the Product Defendants, as defined herein, arise out of Defendants' purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina."; R. p. 70, ¶ 25 ("Defendant, **COVIL CORPORATION** . . . is sued as a Product Defendant")).

Simply put, it is facially clear from the order itself that there are factual disputes in the action. Thus, Plaintiff has not carried its burden of establishing entitlement to summary judgment. *E.g.*, *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant") (citations omitted); *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) ("[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "[a]t the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact") (citations omitted).

Based on the foregoing, the Court has ignored conflicting evidence in the limited, incomplete record in this case and improperly applied the law as to summary judgment. Therefore,

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App. 2019). In the Order Denying Penn National's Motion for Reconsideration, the trial court held that its first order properly addressed all of Penn National's arguments. R. p. 15. Therefore, the trial court understood Penn National's Motion for Reconsideration both addressed *all* of its prior rulings and that the motion was permissive, not mandatory. Even assuming, *arguendo*, that this was not the case, Penn National repeatedly and squarely addressed the issue of the insufficient and unsupported record before the trial court, which was sufficient to preserve this issue for review.

the Court should grant rehearing and reverse the trial court's entry of summary judgment as to Plaintiff.

IV. The Court misapprehended settled law as to the interpretation of policies of insurance in finding coverage existed for Covil under the Penn National Policy

The Court misinterpreted the plain language of Penn National's Policy and conflated the exclusions for "products hazard" and "completed operations hazard," eliminating the existence of any distinction between the two and ignoring case law highlighting this distinction. Further, the conclusion of the Court with regard to these exclusions ignores the plainly conflicting evidence in the incomplete record, improperly dispenses of consideration of facts in conflict with its holding, and fails to identify the legal underpinnings of its holdings.

a. The "products hazard" exclusion excludes coverage for the alleged injuries

The Court misinterprets both the case law and contractual language of the Policy in determining that the products hazard exclusion could not apply to bar coverage for the claims in the *Rollins* action. Initially, the Court's bald conclusion that "we find Covil had neither placed a product into the stream of nor relinquished possession of the product while installing it at the Bowater jobsite during the policy period" is not supported by any case law or the record in this action. Op. No. 5888 (Howard Adv. Sh. No. 1 at 42). In fact, as the record demonstrates, this is precisely the allegation that was leveled against Covil in the Rollins Lawsuit. (R. p. 63, ¶ 3 ("Plaintiff's claims against the Product Defendants, as defined herein, arise out of Defendants' purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina."; R. p. 70, ¶ 25 ("Defendant, **COVIL CORPORATION** . . . is sued as a Product Defendant")). Nothing in the record clearly refutes this allegation.

At best, the contract, which states only that Covil will "[f]urnish all supervision, labor, equipment, tool, *materials* . . . and incidentals required to supply and install all insulation on required piping systems," creates an issue of fact as to whether this exclusion or the products-completed exclusion applies to the facts of the instant case. (R. p. 121). To find otherwise requires that the trial court and this Court find facts in this action, *which is expressly against established South Carolina case law*. *E.g.*, *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997) ("[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant") (citations omitted); *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) ("[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "[a]t the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact") (citations omitted).

Aside from the factual issues precluding summary judgment as to these exclusions, the Court also misapplies the law relating to the exclusions in question. The Court, like the trial court, improperly amalgamates the two exclusions, holding that neither exclusions applies because Covil's operations were ongoing at the time of the exposure. Even assuming, *arguendo*, that such undisputed facts exist in the record, which Penn National has repeatedly refuted, this analysis misunderstands the difference between the two (2) exclusions.

Initially, the difference between the two (2) exclusions is evident from their face. One is titled the "Products Hazard" and one is titled the "Completed Operations Hazard." It is only the latter which relates to and requires the completion of operations on a project. This is clear

not only from the title of the exclusion, but also from the text of the definition for the "completed operations hazard":

DEFINITIONS APPLICABLE TO SECTION II

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

* * *

"**completed operations hazard**" includes **bodily injury** and **property damage** arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the **bodily injury** or **property damage** occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

(1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
(2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
(3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The completed operations hazard does not include **bodily injury** or **property damage** arising out of:

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

* * *

(R. p. 458; 504).

On the other hand, the "products hazard" has nothing to do with operations being performed by a company. Instead, this exclusion applies to any of the "insured's products" after the product has left the "*physical possession*" of the insured:

> "**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;

(R. p. 458; 504). Nothing in this exclusion makes any reference to the operations of the insured or requires that any "operations" or other work being performed by the insured be completed. Rather, the exclusion applies to any product out of the "physical possession" of the insured. *Id.*

Here, even taking as true the disputed, incomplete facts cited by the trial court in support of summary judgment in direct contradiction of the standard for summary judgment, the "products hazard" exclusion would *still* apply to the injuries in this case. This is because regardless of who installed the asbestos products in question, as set forth in the complaint of Plaintiff in the Rollins Lawsuit, the products were allegedly manufactured and/or distributed by Covil. (R. p. 63, ¶ 3 ("Plaintiff's claims against the Product Defendants, as defined herein, arise out of Defendants' purposeful efforts to serve directly or indirectly the market for their asbestos and/or asbestos-containing products in this State, either through direct sales or through utilizing an established distribution channel with the expectation that their products would be purchased and/or used within South Carolina."; R. p. 70, ¶ 25 ("Defendant, **COVIL CORPORATION** . . . is sued as a Product Defendant")). Thus, as to these products, coverage was excluded as soon as they left the *physical possession* of Covil. There is simply no dispute that the products themselves were no longer within Covil's possession at the time of the exposure occurred.

They could not have caused exposure to third parties had they not. Thus, the Court misapplied the law as to this exclusion. *E.g. B.L.G. Enters. v. First Finn. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999) ("When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used."); *MGC Mgmt. v. Kinghorn Ins. Agency*, 336 S.C. 542, 549, 520 S.E.2d 820, 823 (Ct. App. 1999) ("An insurer's obligation under a policy of insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction").

Further, the Court mistakenly holds that the products in question were not "placed . . . into the stream of commerce." Op. No. 5888 (Howard Adv. Sh. No. 1 at 42). The Court does not cite any support for this holding and, indeed, it is not supported by established law. As noted above, even taking the facts before the trial court as "undisputed", despite Penn National's repeated disputation of same, Covil was alleged to have manufactured and/or distributed a product containing asbestos. (R. p. 63, ¶ 3; R. p. 70, ¶ 25). The Plaintiff was then allegedly exposed to such asbestos as a result of "take-home exposure." (R. p. 6).[9]

However, in order for this factual scenario to have occurred, Covil must have placed the products into the stream of commerce. This is because a company "places an item in the stream of commerce by selling it to an Initial User." *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875, 879 (1997); S.C. Code Ann. § 15-73-10(1) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm caused to the ultimate user or consumer . . ."). Here,

[9] As previously noted, Penn National disagrees with the characterization that the facts are "undisputed", as shown repeatedly throughout its own filings in this action. Nevertheless, even assuming, *arguendo*, that these facts were undisputed, there is still no coverage under the Penn National policies.

the Plaintiff in the Rollins Lawsuit specifically pled product liability against Covil for the sale and distribution of the alleged asbestos products. (R. pp. 90-100.) Further, as soon as Covil sold the alleged asbestos-containing products to the Bowater facility, the items were placed into the stream of commerce, regardless of who installed them or what happened to them from that point forward. *Saratoga Fishing*, 520 U.S. at 879 (a company places an item in the stream of commerce by selling to a user); Covil Contract, R. p. 121 (requiring Covil to "[f]urnish all supervision, labor, equipment, tool, *materials* . . . and incidentals required to supply and install all insulation on required piping systems) (emphasis added). In fact, this is true regardless of whether the allegedly asbestos-containing materials were separately sold as part of Covil's contract or simply provided for the installation. *See Henderson v. Gould, Inc.*, 288 S.C. 261, 268, 341 S.E.2d 806, 810 (Ct. App. 1986) ("[a]lthough . . . Section 15-73-10 use[s] the terms "sells" and "seller," these terms are merely descriptive and the doctrine of strict liability may be applied if the requirements for its application are otherwise met, even though no sale has occurred in the literal sense").

Thus, at the time of any alleged exposure, based on the limited, "undisputed" facts in the record, the alleged products had been placed into the stream of commerce by Covil and had left the "physical possession" of Covil. It is of no moment whether any operations of Covil were ongoing at the time, as such operations have no impact on the plain language of the "products hazard" exclusion. *See, e.g.*, *Heyward v. American Casualty Co.*, 129 F.Supp. 4, 9 (E.D.S.C. 1955) (holding that products liability claims are excluded from coverage by the products hazard exclusion as distinguished from the provision of a service); *Friestad v. Travelers Indem. Co.*, 393 A.2d 1212, 1217 (Pa. Super. 1978) (same); *B&R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985) (same). To hold otherwise improperly conflates

the products hazard exclusion and the products completed exclusion. Therefore, the Court should grant rehearing and reverse the trial court's entry of summary judgment in favor of Plaintiff.

b. The products-completed operations exclusion excludes coverage for the alleged injuries

The Court also misinterprets the completed operations hazard exclusion and the law pertaining to same. The Penn National Policy states that an insured's operations "shall be deemed completed at the earliest" of three potential times: (1) when the contract entered into by the insured is completed, (2) when all operations at a specific site are completed, or (3) "when the portion of the work out of which the injury or damage arises has been put to its intended use." (R. p. 458; 504). The Court found that "Covil's work was performed under the subcontract, which was entered into on February 26, 1986, and performed between March 11, 1986 and January 25, 1987." Op. No. 5888 (Howard Adv. Sh. No. 1 at 43). The Court then held that "because Rollins was exposed to asbestos during the period of the contract coverage, the completed operations exclusion did not apply." *Id.* at 44. However, the Court misconstrues the law and the law and facts of the case.

The completed operations hazard exclusion applies if the *portion* of the operations out of which the injury arises was put to its intended use. As indicated above, Mr. Rollins' exposure during the periods of the Policy only occurred through "take-home" asbestos. If this "take-home" exposure occurred because a portion of Covil's operations had already been put to its intended use, then the completed operations hazard exclusion would apply to bar coverage. The Court disposed of this contention by simply stating that Penn National "provided no evidence to support the application of the completed operations exclusion," ignoring the fact that Penn National was prevented from conducting any discovery in the action. However, such a finding is proper for the fact-finder, not the trial court, and the Court misapplied the law in finding otherwise.

See W.N. Leslie, Inc. v. Travelers Ins. Co., 264 S.C. 408, 415, 215 S.E.2d 448, 451 (1975) (holding that whether a portion of the insured's work was put to its intended use was a jury issue). This is especially true where, as here, the trial court's order included a factual finding directly contrary to this conclusion. (R. p. 9) ("[b]y 1986 asbestos was not found in pipe insulation").

The Court also misinterprets the *In re Wallace & Gale Co.*, 385 F.3d 820, 833-34 (4th Cir. 2004) line of cases in reaching its decision. Plaintiff alleges and the trial court found, despite disputed and unsupported facts, that Mr. Rollins' exposure to asbestos occurred both prior to, during and after the period of the Policy. *See* (R. p. 8). Given this, as the Fourth Circuit has held, the completed operations hazard exclusion applies to bar coverage. *See Generali Ins. Co. v. United States Fire Ins. Co.*, 886 F.3d 346, 354 (4th Cir. 2018)(completed operations hazard also applies to injuries where starting point of bodily injury occurred during the insured's operations and continued thereafter); *In re Wallace & Gale Co.*, 385 F.3d at 833-34. Given this, the Court should grant rehearing and reverse the trial court's entry of summary judgment in favor of Plaintiff.

Conclusion

Penn National respectfully requests that the Court grant rehearing and reverse the trial court for the reasons set forth herein. Penn National further requests rehearing *en banc* because consideration by the full court is necessary to maintain uniformity of decisions and involves questions of exceptional importance, as set forth above.

January 27, 2022.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHMOND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-01226

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

v.

Pennsylvania National Mutual Casualty Insurance Company, Appellant.

Appellate Case No. 2020-001239

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* was served on all counsel of record by electronic mail as follows:

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This the 27th day of January, 2022.

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January 27, 2022

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Via Federal Express

Attn: Jenny Abbott Kitchings
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Re: ***Covil Corporation v. Penn National***
Appellate Case No: 2020-001239

Dear Ms. Kitchings:

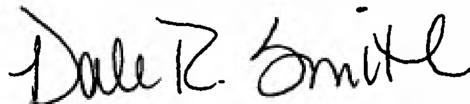
Pursuant to Section C of Supreme Court Order 2021-08-25-02, I am enclosing the filing fee of $50.00 for Appellant's Petition for Rehearing filed with the Court today in the above-referenced matter:

If you have any questions, please do not hesitate to contact me.

With kindest regards, I am

Sincerely,

GOLDBERG SEGALLA LLP



Dale R. Smith, NCCP
Paralegal to David G. Harris II

/drs

Enclosures (*via Federal Express*)

cc: All Counsel of Record (*w/ encls via E-mail*)