THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Opinion No. 5888 (S.C. Ct. App. Filed Jan. 5, 2022)

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

v.

Pennsylvania National Mutual Casualty Insurance Company, Petitioner.

PETITION FOR A WRIT OF CERTIORARI

David G. Harris, II
Brady A. Yntema
David L. Brown
GOLDBERG SEGALLA LLP
701 Green Valley Road, Suite 310
Greensboro, NC 27408
(336) 419-4900
Attorneys for Petitioner

Other Counsel of Record:
G. Murrell Smith, Jr.
Jonathan M. Robinson
Shanon N. Peake
SMITH ROBINSON HOLLER
DuBOSE AND MORGAN, LLC
2530 Devine Street
Columbia, SC 29205
Attorneys for Respondent

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CERTIFICATION OF COUNSEL

Counsel for Petitioner Pennsylvania National Mutual Casualty Insurance Company ("Penn National") certifies the Petition for Rehearing was made and finally ruled on by the Court of Appeals on February 23, 2022.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred when it found that Penn National waived the conditions in its policies requiring timely notice when it participated in the court-ordered mediation in the underlying Rollins Lawsuit.

2. Whether the Court of Appeals erred when it found that Covil Corporation's motion for summary judgment was appropriate and not premature based solely on Penn National's failure to file a Rule 56(f) affidavit.

3. Whether the Court of Appeals erred when it found that the products hazard exclusion and the completed operations exclusion did not operate to preclude coverage for the product liability claims asserted against Covil Corporation in the Rollins Lawsuit as a matter of law.

STATEMENT OF THE CASE

A. Present Action

The present action is a coverage action arising out of an underlying lawsuit filed against Covil Corporation ("Covil") asserting asbestos products liability claims. Specifically, Peter D. Protopapas, appointed Receiver for Covil, filed this action against Penn National on February 28, 2020, asserting a claim for breach of contract. (R.pp. 18-22) Covil alleged that Penn National provided coverage under two policies of insurance for Covil's liability in an underlying lawsuit, *David D. Rollins v. Covil Corporation, et al.*," Civil Action No. 2019-CP-25-0118, in Hampton County, South Carolina ("Rollins Lawsuit"). Covil asserted that Penn National breached its policies when it allegedly failed to meaningfully participate in a mediated settlement conference held in the Rollins Lawsuit and refused to contribute $50,000 towards the settlement that was

reached during that mediation.

On March 30, 2020, Penn National filed its Answer to the Complaint. (R.pp. 23-33) In its Answer, Penn National denied the material allegations contained in the Complaint. Penn National admitted that it did, in fact, attend the mediation in the Rollins Lawsuit, but denied that coverage was provided under the policies of insurance issued by Penn National to Covil for the Rollins Lawsuit. In addition, Penn National raised certain defenses in its Answer, including Covil's failure to comply with its duties under the policies, including the duty to provide timely notice to Penn National of the Rollins Lawsuit, and other policy provisions and exclusions.

Without engaging in any discovery and a mere twenty-three (23) days after Penn National filed its Answer, Covil moved for partial summary judgment. (R.pp. 34-161) In its motion, Covil argued that the injuries alleged in the Rollins Lawsuit fell within the coverage period of the policies of insurance issued by Penn National, that Covil paid amounts in settlement of the Rollins Lawsuit for those injuries, and that Penn National breached its policies when it failed to reimburse Covil for the amounts paid in settlement of the Rollins Lawsuit. Covil also addressed two exclusions contained in the policies issued by Penn National, specifically the products hazard exclusion and the completed operations exclusion. Covil did not address, or even mention, Penn National's defense, raised in its Answer, of late notice.

In making its motion for summary judgment, Covil did not attach or submit any supporting affidavits. Instead, Covil merely attached "exhibits" consisting of: uncertified copies of what Covil alleged to be the policies of insurance issued by Penn National; the Amended Complaint filed in the Rollins Lawsuit; an unsworn three-page excerpt from the deposition of Robert Ashworth (not taken in the present action or even in the Rollins Lawsuit but in a different asbestos personal injury lawsuit); an unsworn twelve-page excerpt from the deposition of

Mr. Rollins (again, not taken in the present action or in the Rollins Lawsuit but in yet another asbestos personal injury lawsuit); an unsigned, partial Subcontract Agreement between Bowater Carolina Company and Covil; unverified, unsigned, and unidentified handwritten notes; an unverified and unauthenticated interoffice memo from Bowater Carolina Company to Covil; and a copy of an article from the Spring 1971 edition of the Nebraska Law Review. (R.pp. 44-16) Of note, these documents were not produced in any discovery in the present case (as no discovery had yet been undertaken).

Penn National filed its Memorandum of Law in Opposition to Covil's Motion for Partial Summary Judgment on May 8, 2020. (R.pp. 162-519) In its Opposition, Penn National raised defenses of late notice and the application of the products hazard exclusion and the completed operations hazard, which barred coverage in its entirety for the Rollins Lawsuit under the Penn National Policies. Finally, and not insignificantly, Penn National argued that granting summary judgment at this stage in the litigation, i.e. a mere twenty-three (23) days after Penn National had filed its Answer, was premature because Penn National was not involved in the litigation of the Rollins Lawsuit and did not have a full and fair opportunity to engage in, let alone complete, discovery in the present action.

Without the benefit of a hearing, on August 13, 2020, the trial court issued an Order Granting Covil's Motion for Partial Summary Judgment. (R.pp. 2-12) In the Order, the trial court considered extrinsic evidence, not duly supported by any filed affidavits, and found that Penn National had coverage for the damages alleged in the Rollins Lawsuit and that the exclusions for products hazard and completed operations hazard did not apply. The trial court further found that because Penn National attended the mediation, its late notice defense was invalid. Ultimately, the trial court held "that there is no triable issue that Penn National was

required to defend Covil against the *Rollins* action, and is required to indemnify Covil against the settlement of the *Rollins* action." Penn National timely appealed to the Court of Appeals. The Court of Appeals affirmed the judgment of the circuit court. *Covil Corp. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, Op. No. 5888 (S.C. Ct. App. filed Jan. 5, 2022). Petitioner seeks a writ of certiorari to review that decision.

B. Underlying Lawsuit

Covil, a South Carolina corporation formed in 1954, was in the business of selling, distributing, and installing insulation products, some of which allegedly contained asbestos. In 1991, Covil went out of business and its charter was thereafter administratively revoked. Covil has been sued in numerous lawsuits brought by individuals allegedly injured through their exposure to asbestos, or their estates, claiming that such injuries were caused by Covil's alleged distribution and/or installation of asbestos-containing products. One of the cases filed against Covil is the Rollins Lawsuit.

1. *Allegations in Rollins Lawsuit*

On April 5, 2019, David D. Rollins filed a lawsuit in Hampton County, against fifty-three (53) defendants, after being diagnosed with malignant Meosthelioma on or about January 17, 2019. In the Amended Complaint filed in the Rollins Lawsuit on April 10, 2019, Mr. Rollins alleged that his exposure to asbestos occurred continuously between 1973 and 2001. (R.pp. 87-89) Specifically, Mr. Rollins alleged that he was exposed to "take-home" asbestos fibers from dust carried home by Mr. Rollins' father, mother, and stepfather from their respective job sites. This "take-home" exposure allegedly occurred between 1973 and 1991. (R.pp. 88, ¶¶ 76-78) Mr. Rollins also worked at locations where asbestos fibers were present from 1988 until 2001.

In the Amended Complaint, Mr. Rollins alleged liability against the defendants, which

were separated into two categories and identified as being either "Product Defendants" or "Premises Defendants". The Amended Complaint alleged claims against these categories of defendants as follows:

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

(R.p. 63) In the Rollins Lawsuit, Covil was designated as a Product Defendant:

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

(R.p. 70) (emphasis added).

2. *Late Notice of the Rollins Lawsuit*

The Amended Complaint in the Rollins Lawsuit was served on Covil on April 25, 2019. (R.p. 292) Mr. Protopapas entered a special appearance in the Rollins Lawsuit as Receiver for Covil on May 13, 2019. (R.p. 351) Covil filed an Answer to the Amended Complaint on May 28, 2019, through defense counsel retained by other insurers to whom Covil had tendered the Rollins Lawsuit at that time. (R.pp. 353-91) Covil did not provide notice to Penn National of the Rollins Lawsuit at that time.

On June 6, 2019, Mr. Rollins was deposed in the Rollins Lawsuit (R.pp. 396-406), and the parties engaged in other fact and expert discovery as required by the Master Asbestos Discovery/Scheduling Order. (R.pp. 408-10) It was not until January 27, 2020, after the pleadings had been closed and discovery (both fact and also expert) had been completed, that Covil sent its first notice of the Rollins Lawsuit to Penn National. (R.p. 292) The "notice" provided by Covil consisted of an email sent by the Receiver's office to various counsel for different insurers for Covil. In that email dated January 27, 2020, the Receiver stated:

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

(*Id.*) (emphasis in original).

This email to counsel for Penn National was the first notice that Penn National received with regard to the Rollins Lawsuit. However, based upon the language in the email sent by the Receiver, Covil had previously provided notice to its other insurers and some or all of these other insurers were defending Covil in the Rollins Lawsuit.

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

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

(R.pp. 412-13) Although Covil enclosed a copy of the Amended Complaint filed in the Rollins Lawsuit with its letter dated February 3, 2020, Covil did not enclose any additional pleadings filed or discovery exchanged in the Rollins Lawsuit, and did not provide any information regarding the status of the Rollins Lawsuit or the identity of Covil's defense counsel in that Lawsuit.

On February 10, 2020, the Receiver wrote to counsel for Penn National to notify Penn National for the first time that a mediation had been scheduled in the Rollins Lawsuit for February 25, 2020. (R.pp. 415-16) The Receiver demanded that Penn National attend the mediation and threatened that sanctions may be sought if Penn National failed to attend:

> 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.

(R.p. 415)

On February 14, 2020, Penn National sent a letter to the Receiver, advising that it had contacted defense counsel for Covil in the Rollins Lawsuit and had requested copies of discovery for review and evaluation. However, given that Penn National only had limited information regarding the alleged asbestos exposure at issue in the Rollins Lawsuit, and therefore, could not evaluate what coverage, if any, Penn National had for the damages sought in the Rollins Lawsuit, Penn National provided to Covil a Non-Waiver Agreement in which Penn National explicitly advised Covil that Penn National was not waiving any rights, defenses or conditions under the Penn National Policies. (R.pp. 418-21)

In compliance with the South Carolina Court-Annexed Alternative Dispute Resolution

Rules, a representative of Penn National participated in good faith in the mediation in the Rollins Lawsuit. However, Penn National had not had an opportunity to sufficiently investigate and consider the underlying facts and potential evidence in the Rollins Lawsuit to determine whether coverage was indeed triggered under the Penn National Policies. Covil alleges in this action that at the mediation it requested Penn National to contribute $50,000 to the settlement. Ultimately, Covil unilaterally settled the Rollins Lawsuit at mediation without any contribution from Penn National.

C. Penn National Policies

Penn National issued a Special Multi-Peril Policy to Covil, Policy No. 515 50 28 53-7, for the policy period of March 31, 1986 through March 31, 1987 ("1986-87 Policy"). (R.pp. 423-65) The liability limits on the 1986-87 Policy were $1 million per occurrence and in the aggregate. This policy was renewed, Policy No. 515 50 28 53-8, for the next policy period of March 31, 1987 through March 31, 1988 ("1987-88 Policy"), with identical coverages, policy forms, and liability limits. (R.pp. 467-514)

COURT OF APPEALS DECISION

The Circuit Court entered partial summary judgment against Penn National finding (without the benefit of any discovery) that there was coverage under the Penn National Policies for the Rollins Lawsuit, that Penn National's defense to coverage that Covil breached the condition of providing timely notice of the Rollins Lawsuit was "not a valid defense," and that the exclusions contained in the Penn National Policies, specifically the products hazard exclusion and the completed operations exclusion, did not apply to preclude coverage. (R.pp. 2-12) The Court of Appeals affirmed this decision. (App. pp. 684-94)

Addressing first the procedural improprieties of Covil's motion for summary judgment,

the Court of Appeals held that a motion for summary judgment was proper even though (1) Penn National had no opportunity to engage in any discovery in this case, let alone a full and fair opportunity to do so, and (2) the motion was only supported by documents that were neither authenticated nor attached to any affidavit (nor produced in discovery, since no discovery was undertaken in this case). With regard to whether the dispositive motion was premature, the Court of Appeals held, contrary to Supreme Court precedent, that Penn National was required to file a Rule 56(f) affidavit setting forth the discovery it needed to conduct. Because no Rule 56(f) affidavit was filed by Penn National, the Court found that Penn National's argument that summary judgment was entered prematurely had no merit. (App. pp. 687-88)

The Court of Appeals further found that Penn National's argument that summary judgment was not appropriate based on the record before the Circuit Court did not properly preserve for appellate review the issue of whether summary judgment could be granted on the unsupported and unverified documents presented by Covil. (App. p. 687) Essentially, the Court of Appeals upheld the manner by which judgment was granted against Penn National in this case, finding that it was appropriate that Covil moved for summary judgment less than one month after the pleadings were closed and based its motion on unauthenticated and unsworn documents that were not previously produced to Penn National in discovery.[1]

The Court of Appeals then rejected Penn National's late notice defense, finding that Penn National waived this defense, an argument never made by Covil or relied upon by the trial court. (App. pp. 688-90) The Court of Appeals took the unprecedented step of finding that Penn National's mandatory attendance at a court-ordered mediation served to waive

[1] It should be noted that the effect of the Court of Appeals' decision was to strictly hold one party, Penn National, to the requirements contained in Rule 56 of the South Carolina Rules of Civil Procedure while absolving the failure of the other party, Covil, to do so.

the conditions in the Penn National Policies that required Covil to provide timely notice to Penn National of the Rollins Lawsuit: "We find Penn's actions at mediation inferred a waiver of its right to timely notice." (App. p. 690) The Court of Appeals' holding is unsupported by case law and is in direct contradiction of this Court's prior decisions regarding the intentional and voluntary nature of waiver.

Finally, the Court of Appeals addressed two exclusions in the Penn National Policies, finding that neither operated to exclude coverage for the Rollins Lawsuit. (App. pp. 690-94) Specifically, the Court of Appeals held that Penn National failed to provide any evidence that either exclusion applied to the Rollins Lawsuit. However, the Court of Appeals failed to recognize that Penn National was not involved in the Rollins Lawsuit due to Covil's untimely notice and that Penn National was deprived of any opportunity to engage in discovery in the present case.

Because the Court of Appeals' decision in this case (1) decided a novel question of law when it held that Penn National waived the conditions of its Policies when it complied with the South Carolina Court-Annexed Dispute Resolution Rules and attended the court-ordered mediation in the Rollins Lawsuit, and (2) is in conflict with prior decisions of this Court, Penn National respectfully requests that this Court accept its Petition and issue a writ of certiorari to review the Court of Appeals' decision.

ARGUMENT IN SUPPORT OF PETITION

1. The Court Of Appeals Decided A Novel Question Of Law By Holding That Penn National Waived The Conditions In Its Policies Requiring Timely Notice When It Participated In The Court-Ordered Mediation In The Rollins Lawsuit.

This Court has long recognized the essential purpose and validity of notice conditions contained in policies of insurance:

> Nearly every insurance policy contains a provision requiring the insured to timely notify its insurer when a lawsuit is filed against the insured. Common sense dictates that the insurer must have notice of a claim or lawsuit in order to properly investigate and defend against it and these clauses ensure that the insurer receives notice by imposing this obligation on the insured.

Neumayer v. Philadelphia Indem. Ins. Co., 427 S.C. 261, 266, 831 S.E.2d 406, 408 (2019). See, *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 434, 137 S.E.2d 608, 612 (1964) ("The policy provisions, which we have held to be valid, required, as conditions precedent to any right of recovery by the insured, that notice of claim under the uninsured motorist endorsement be given to the company as soon as practicable, and that upon the commencement of legal action a copy of the summons and complaint be forwarded to the insurer immediately."); *Factory Mut. Liab. Ins. Co. v. Kennedy*, 256 S.C. 376, 381, 182 S.E.2d 727, 729 (1971) ("The obvious function of the policy provisions, requiring the insured to give notice of the accident and forward suit papers, is to prevent prejudice to the insurer's right to conduct a reasonable investigation of the accident and adequately defend any action brought against the insured."). See also, *Williams v. Government Employees Ins. Co.*, 409 S.C. 586, 598, 762 S.E.2d 705, 712 (2014) ("As a general rule, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or some statutory prohibition."); *B.L.G. Enter. v. First Financial Ins. Co.*, 334 S.C. 529, 535-36, 514 S.E.2d 327, 330 (1999) (same).

An insured's violation of the notice provisions in an insurance policy with regard to a claim or lawsuit generally results in a forfeiture of coverage for that lawsuit.[2]

No rule of law is more firmly established in this jurisdiction than that one

[2] This Court has held that where rights of innocent third-parties are at issue, the insurer must show that the insured's failure to give notice substantially prejudiced the insurer before coverage can be disclaimed. See, *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 12, 446 S.E.2d 417, 421 (1994). In the present case, no rights of innocent third-parties are at issue. Covil seeks reimbursement of the funds it expended to settle the Rollins Lawsuit.

> 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). See also, *Hatchett*, 244 S.C. at 435, 137 S.E.2d at 613 ("It is well settled that, unless waived by the insurer, the failure of an insured to comply with policy provisions as to notice or forwarding suit papers, which are by the terms of the contract made conditions precedent to liability, will bar recovery.").

In the present case, the Penn National Policies contained notice provisions that required Covil to provide immediate notice to Penn National of any lawsuit filed against it:

CONDITIONS APPLICABLE TO SECTION II

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

***

(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.

(R.p. 456, 502) (emphasis added). Accordingly, under the Penn National Policies, Covil's Receiver had the obligation to immediately send copies to Penn National of any demands, notices, summons, or other legal papers received in connection with any lawsuit.

It is not disputed that Covil's Receiver failed to give Penn National immediate notice of the Rollins Lawsuit as required by the Penn National Policies. The uncontested facts show that the Amended Complaint filed in the Rollins Lawsuit was served on Covil on April 25, 2019. (R.p. 292) Covil's Receiver did not provide notice to Penn National of the Rollins Lawsuit until January 27, 2020, nine months later. (*Id.*) There is but one conclusion to be drawn from these

facts: Covil failed to comply with the notice condition contained in the Penn National Policies with regard to the Rollins Lawsuit.

The Court of Appeals did not find that Covil gave Penn National timely notice of the Rollins Lawsuit. Instead, the Court of Appeals held that Penn National waived this condition when it attended the mediation held in the Rollins Lawsuit. (App. pp. 689-90)

This Court has consistently defined "waiver" as the "voluntary and intentional abandonment or relinquishment of a known right." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). See also, *Boyle Road & Bridge Co. v. American Employers' Ins. Co.*, 195 S.C. 397, 401, 11 S.E.2d 438, 440 (1940); *Harvey v. Jefferson Standard Life Ins. Co.*, 165 S.C. 427, 429, 164 S.E. 6, 6 (1932). Waiver may be implied from circumstances showing an intent to waive, by acts that are inconsistent with the continued assertion of a right. *Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981).

In the present case, however, there was no evidence that Penn National voluntarily and intentionally waived its right, under the Penn National Policies, to receive immediate notice of the Rollins Lawsuit. In fact, the undisputed evidence is to the contrary. Penn National first received notice of the Rollins Lawsuit (which was served on Covil on April 25, 2019) on January 27, 2020. (R.p. 292) Ten business days later, on February 10, 2020, Covil's Receiver first notified Penn National about the mediation which had been previously scheduled in the Rollins Lawsuit for February 25, 2020. (R.pp. 415-16) In its email notifying Penn National of the mediation, Covil's Receiver demanded that Penn National attend the mediation:

> 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.

(R.p. 415)

The South Carolina Court-Annexed Alternative Dispute Resolution Rules which applied to the Rollins Lawsuit mandated the physical attendance of a representative of the insurer at mediation:

Rule 6
Duties of the Parties, Representatives and Attorneys Mediation

> (b) **Attendance.** The following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Chief Judge for Administrative Purposes of the circuit:
>
> (4) For 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, SCADR. Consistent with the extortions of Covil, the Rules allow a court to sanction any violations:

Rule 10
Sanctions

> (b) **Sanctions.** 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.

Rule 10, SCADR.

In response to the Receiver's demand for Penn National's attendance at the mediation and the threat of sanctions if Penn National did not attend, Penn National attended and participated in good faith in the mediation in the Rollins Lawsuit. However, before its attendance, Penn National sent a letter to Covil, dated February 14, 2020, and attached a non-

waiver agreement. (R.pp. 418-21) This non-waiver agreement indicated, in writing, that it was Penn National's position that Covil was not entitled to coverage under the Penn National Policies because of Covil's failure to timely provide notice of the Rollins Lawsuit to Penn National, and that any actions of Penn National would not be construed as a waiver of this defense. (R.pp. 420-21)

Despite Penn National's actions intended to preserve its defenses to coverage as well as to comply with the mandates of the South Carolina Court-Annexed Alternative Dispute Resolution Rules, the Court of Appeals held that Penn National waived its late notice defense by participating in the mediation. This decision cannot stand. The Court of Appeals' decision, if not reviewed, would thwart the beneficial purposes of mediation by incentivizing insurers to avoid participating in such settlement conferences in order to avoid waiving coverage defenses.

Of note, waiver was never an issue in this case prior to the Court of Appeals' decision. It was not pled by Covil (R.pp. 19-22) and Covil did not argue waiver in support of its motion for summary judgment (R.pp. 34-43). Indeed, in its decision, the trial court did not find or hold that Penn National waived its late notice defense. (R.pp. 10-11) Even if waiver was sufficiently pled, which it was not, whether the evidence showed that Penn National waived its right to assert late notice as a defense to coverage should have been a jury question, and not decided as a matter of law. See, *Harvey*, 165 S.C. at 429, 164 S.E. at 6.

In truth, there is no evidence that Penn National intentionally or voluntarily relinquished its late notice defense. Penn National did not act in a manner that was inconsistent with its intent to preserve its right to deny coverage based on Covil's breach of the policy conditions. To the contrary, Penn National did not voluntarily attend the mediation – it was compelled to do so under threat of sanctions. Before it attended the mediation, Penn National clearly and

unambiguously indicated that it intended to preserve and not waive its rights under the Penn National Policies. Penn National's conduct in attending and participating in good faith in the mediation did not waive its late notice defense.

Whether an insurer's participation at a mediation operates to waive a condition precedent to recovering under a policy of insurance is a novel question of law that has not been considered by this Court. The Court of Appeals' decision that such waiver occurred, however, is contrary to years of precedent from this Court that has held that waiver must be both voluntary and intentional. Accordingly, Penn National respectfully requests that this Court grant its petition for certiorari to review this issue.

2. The Court Of Appeals' Holding That Covil's Motion For Summary Judgment Was Not Premature Based Solely On Penn National's Failure To File A Rule 56(f) Affidavit Is In Conflict With Prior Decisions Of This Court.

A tenant of civil procedure long endorsed by this Court is that summary judgment should not be prematurely entered prior to a party's ability to conduct full and fair discovery:

> Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.

John Doe v. Batson, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (2001). See also, *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) ("Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery."); *Baughman v. American Tel. & Telegraph Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (same).

In the present case, it is undisputed that Penn National had no opportunity to conduct any discovery prior to Covil's moving for summary judgment. This action was filed on February

28, 2020 (R.pp. 18-22), and Penn National filed its Answer on March 30, 2020. (R.pp. 23-33) Just twenty-three (23) days later, on April 22, 2020, Covil moved for summary judgment. (R.pp. 34-161) Penn National clearly had no opportunity to engage in any discovery during this short window of time, let alone engage in full and fair discovery of the issues in this case.

This deprivation of Penn National's ability to conduct discovery is even more flagrant because Covil's motion for summary judgment was supported by documents that were never produced to Penn National in discovery, were unauthenticated, and were not accompanied by an affidavit.[3] The documents attached to Covil's motion for summary judgment consisted of: uncertified copies of what Covil alleged to be the policies of insurance issued by Penn National R.pp. 44-55); the Amended Complaint filed in the Rollins Lawsuit (R.pp. 59-112); an unsworn three-page excerpt from the deposition of Robert Ashworth (taken in a different lawsuit) (R.pp. 113-16); an unsworn twelve-page excerpt from the deposition of Mr. Rollins (also taken in a different lawsuit) (R.pp. 117-20); an unsigned, partial Subcontract Agreement between Bowater Carolina Company and Covil (R.pp. 121-25); unverified, unsigned, and unidentified handwritten notes (R.pp. 126-27); an unverified and unauthenticated interoffice memo from Bowater Carolina Company to Covil (R.p. 128); and a copy of an article from the Spring 1971 edition of the Nebraska Law Review (R.pp. 129-61). Again, none of these documents were previously produced by Covil in this case.

In addition, it is undisputed that Penn National had no opportunity to be involved in

[3] In response to Covil's motion for summary judgment, Penn National argued that the Circuit Court should not enter summary judgment based on the record before it. (R.p. 183) On appeal, Penn National again argued that Rule 56 required that summary judgment only be entered on the basis of "… pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits …" Rule 56, SCRCP. Because no such evidence had been presented to the Circuit Court, the entry of summary judgment was inappropriate. The Court of Appeals wrongfully found that Penn National had somehow not preserved this issue for appellate review. (App. p. 687)

the litigation of the Rollins Lawsuit. As indicated above, Covil did not provide notice to Penn National of the Rollins Lawsuit until nine months after the Rollins Lawsuit had been served on Covil. By that time, all discovery had been completed in that case, including Mr. Rollins' deposition. Penn National attempted to obtain this information from defense counsel in the Rollins Lawsuit. However, Penn National had only been informed of the Rollins Lawsuit less than three (3) months prior to Covil's filing of its motion for summary judgment in this case.

As this incontrovertible timeline shows, Penn National had no opportunity to obtain information either through discovery in the present case or the Rollins Lawsuit regarding Mr. Rollins' exposure to asbestos, the dates on which Mr. Rollins was exposed to asbestos, whether any of the asbestos to which Mr. Rollins was exposed occurred during the Penn National Policies, and if so, whether coverage for that exposure was excluded by the exclusions contained in the Penn National Policies, including the products hazard exclusion and the completed operations exclusion.

The Court of Appeals held that because Penn National failed to submit a Rule 56(f) affidavit indicating the discovery it needed to conduct, Covil's motion was not premature as a matter of law. The Court of Appeals' decision is in conflict with this Court's decision in *Baughman v. American Tel. & Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) and *John Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001).

In *Baughman*, numerous plaintiffs brought a lawsuit for personal injuries caused by pollution from a refinery operated by the defendants. After two years of discovery, including the taking of approximately 300 depositions, the defendants moved for partial summary judgment. 306 S.C. at 104-05, 410 S.E.2d at 539-40. As one of the bases for opposing the motion, the plaintiffs argued that the motion was premature. This Court agreed and reversed

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

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

Id. at 112-13, 410 S.E.2d at 544. Importantly, this Court noted that the plaintiffs did not file a Rule 56(f) affidavit indicating what additional discovery was needed. However, this Court did not mandate that strict compliance was required before it could find that the defendants' motion was premature: "Although Plaintiffs did not file an affidavit invoking [Rule 56(f)], other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the court." *Id.* at 112 n.4, 410 S.E.2d at 544 n.4.

Similarly, in *Batson*, the plaintiff did not file a Rule 56(f) affidavit when opposing the defendant's motion for summary judgment. 345 S.C. at 319, 548 S.E.2d at 856. This Court did not find that the failure to file a Rule 56(f) affidavit was determinative. Instead, this Court held that the entry of summary judgment was premature, overruling both the Circuit Court and the Court of Appeals, because the plaintiff did not have a full and fair opportunity to complete discovery. In deciding whether the dispositive motion was premature, the court looked only at the two factors listed by this Court in the *Baughman* decision and held that the plaintiff should have been permitted to complete discovery before a consideration of the defendant's motion for summary judgment. *Id.* at 322, 548 S.E.2d at 857.

In the present case, the Court of Appeals appeared to consider the *Baughman* factors. First, it did not find that Penn National was dilatory in engaging in discovery. (App. p. 688) Second, the Court of Appeals also articulated what discovery Penn National had argued was needed in this case: "[Penn National] argues that the additional discovery was needed to support the issues raised in this appeal: late notice and the applicability of exclusion in the policies." (*Id.*) Ultimately, however, the Court of Appeals held that the entry of summary judgment was not premature based solely on Penn National's failure to submit a Rule 56(f) affidavit:

> However, as found by the circuit court, Penn failed to submit a Rule 56(f) affidavit setting forth the discovery it needed to conduct. Thus, we find no reversible error.

(*Id.*)

By holding that Covil's motion for summary judgment was not premature, the Court of Appeals rejected this Court's mandate that parties be allowed full and fair discovery prior to the entry of summary judgment, and held that strict compliance with Rule 56(f) was required. In so doing, the Court of Appeals' decision is in conflict with prior decisions of this Court, specifically *Baughman* and *Batson*. Penn National respectfully requests that this Court grant its Petition for Writ of Certiorari to review the Court of Appeals' decision.

3. The Court Of Appeals Decided Novel Questions Of Law When It Held That The Products Hazard Exclusion And The Completed Operations Exclusion Did Not Operate To Preclude Coverage For The Product Liability Claims Asserted Against Covil In The Rollins Lawsuit As A Matter Of Law.

As a defense to coverage for the Rollins Lawsuit, Penn National also contended that two exclusions contained in the Penn National Policies, specifically the products hazard exclusion and the completed operations exclusion, precluded coverage. This Court has not previously addressed the interpretation of these two exclusions with regard to claims of products liability based on asbestos exposure. Accordingly, this case presents novel questions of insurance

construction law that should be reviewed by this Court.

It is well established by this Court that the allegations of a complaint dictate the coverage obligations of an insurer:

> It is well settled that an insurer's duty to defend is based on the allegations of the underlying complaint. A liability insurer must defend any suit alleging bodily injury or property damage seeking damages payable under the terms of the policy. However, an insurer has no duty to defend an insured where the damage was caused for a reason unambiguously excluded under the policy.

B.L.G. Enterprises, 334 S.C. at 535, 514 S.E.2d at 330 (internal citations omitted).

The allegations in the Rollins Lawsuit established that Covil was being sued in its capacity as a "Product Defendant:"

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

(R.p. 70) The Rollins Lawsuit defined what it meant by designating a defendant as a "Product Defendant:"

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

(R.p. 63) Based on these designations, the plaintiff in the Rollins Lawsuit then asserted claims, designated as either products liability claims or premises liability claims. (R.pp. 90-108) Because Covil was identified as a Product Defendant, only products liability claims were asserted against it.

Unlike other policies which specifically provided coverage for bodily injury claims

included within the products hazard, the Penn National Policies specifically excluded such claims:

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

(R.pp. 452, 491) The Penn National Policies defined "products hazard" 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;

(R.pp. 458, 504)

This Court has established the canons of insurance policy construction to be utilized in interpreting the extent of coverage provided in a policy of insurance:

> Insurance policies are subject to the general rules of contract construction. This Court must give policy language its plain, ordinary and popular meaning. When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. The court's duty is limited to the interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness or failure of the parties to guard their interests carefully.

B.L.G. Enterprises, 334 S.C. at 535, 514 S.E.2d at 330 (internal citations and quotations omitted). According to the plain language contained in the Penn National Policies, claims of bodily injury are excluded from coverage if: (1) the bodily injury arises out of the named insured's products; (2) the bodily injury occurs away from the named insured's premises; and (3) physical possession of such products has been relinquished by the named insured to others.

The Rollins Lawsuit does not allege the specific circumstances and/or any dates that

Mr. Rollins might have been exposed to asbestos fibers from Covil's products. (R.pp. 59-112) In its motion for summary judgment, Covil alleged, without any supporting affidavits, that Covil was retained to supply materials and install piping insulation at a facility at which Mr. Rollins' stepfather worked. (R.p. 35) The Rollins Complaint indicated that Mr. Rollins was exposed to "take-home" asbestos fibers in the dust attached to his stepfather's clothes and person when he came home from work. (R.p. 88)

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

Despite this straightforward interpretation of the products hazard exclusion, the Court of Appeals added the requirement that the "injury is caused by the insured's completed work" before the products hazard exclusion applied to bar coverage. (App. pp. 691-93) This requirement – that Covil's operations at the facility where take-home asbestos fibers originated had to have been completed before the products hazard exclusion applied to exclude coverage for such exposure – is simply not present in the policy language. By holding that this additional

element was required before the products hazard exclusion applied, the Court of Appeals failed to comply with the canons of insurance policy construction established by this Court.

In addition to the products hazard exclusion, the Penn National Policies also contained a completed operations exclusion which excluded from coverage all bodily injury claims included within the "completed operations hazard." The Penn National Policies defined "completed operations hazard" as:

> "**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. …

(R.pp. 458, 504)

Based on the plain language contained in the Penn National Policies, the completed operations hazard exclusion applies to claims: (1) arising out of Covil's operations; (2) after such operations are completed (as further described in the Policies' definition); and (3) if the bodily injury occurs away from Covil's premises. At least one other court has found that claims arising from exposure to asbestos that occurred during an insured's operations and

continued thereafter are included within the completed operations hazard. *In re Wallace & Gale Co.*, 385 F.3d 820, 833-34 (4th Cir. 2004). Using this interpretation, the liability alleged against Covil in the Rollins Lawsuit would also be excluded under the completed operations hazard exclusion contained in the Penn National Policies.

This Court, however, has not interpreted either the products hazard exclusion or the completed operations hazard exclusion in any context, including in the context of asbestos products liability litigation. This is a novel question of law. Penn National respectfully requests that this Court grant its petition for writ of certiorari to review the Court of Appeals' decision.

CONCLUSION

This Court has established tenets regarding the interpretation of insurance policy provisions, determining insurer's coverage obligations, and the proper procedure before allowing a drastic remedy such as summary judgment to be entered. The Court of Appeals' decision in the present case deviated from these standards when it found that summary judgment was properly entered a mere twenty-three days after an Answer was filed, that a breach of a policy's notice condition was waived despite a non-waiver agreement, and that certain exclusions were to be interpreted contrary to their plain language. Additionally, the Court of Appeals addressed novel questions of law including whether an insurer's participation in a mediation waived the insured's compliance with the policy's notice provision and the interpretation of products hazard and completed operations hazard exclusions in the context of asbestos product liability claims. For these reasons, Petitioner Penn National respectfully requests that this Court grant its Petition for Writ of Certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

GOLDBERG SEGALLA LLP

By: /s/ David G. Harris, II

David G. Harris, II
S.C. Bar No.: 12047
Email: DHarris@goldbergsegalla.com
Brady A. Yntema (*admitted pro hac vice*)
Email: BYntema@goldbergsegalla.com
David L. Brown
Email: DBrown@goldbergsegalla.com
701 Green Valley Road, Suite 310
Greensboro, NC 27408
Telephone No.: 336-419-4910
Attorney for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Opinion No. 5888 (S.C. Ct. App. Filed Jan. 5, 2022)

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

v.

Pennsylvania National Mutual Casualty Insurance Company, Petitioner.

PROOF OF SERVICE

Pursuant to S.C. App. Ct. R. 242 I certify that I have served the Petition for Writ of Certiorari and Appendix Volumes I and II on Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas, by electronic mail addressed to its attorney of record, Jescelyn Tillman Spitz, Rickard & Protopapas, LLC, 1329 Blanding Street, Columbia, SC 29201. Pursuant to The Supreme Court of South Carolina Order dated 2020-03-20 § (g)(3), service was effected using AIS E-mail address, a copy was sent to jspitz@rplegalgroup.com

Pursuant to S.C. App. Ct. R. 242, I certify that I have served the Petition for Writ of Certiorari and Appendix Volumes I and II on Covil Corporation, by and through its duly appointed Receiver, Peter D. Protopapas, by electronic mail addressed to its attorneys of record, G. Murrell Smith, Jr. and Jonathan M. Robinson, Smith Robinson Holler Dubose and Morgan, LLC, 2725 Devine Street, Columbia, SC 29205. Pursuant to The Supreme Court of South Carolina Order dated 2020-03-20 § (g)(3), service was effected using AIS E-mail address, a copy was sent to murrell@smithrobinsonlaw.com and jon@smithrobinsonlaw.com.

February 25, 2022.

/s/ David G. Harris II

David G. Harris, II (S.C. State Bar No: 101951)
Brady A. Yntema, *admitted pro hac vice*
N.C. State Bar No: 25771
David L. Brown (N.C. State Bar No: 18942)
GOLDBERG SEGALLA LLP
701 Green Valley Road, Suite 310
Greensboro, NC 27408
(336) 419-4900
dharris@goldbergsegalla.com
byntema@goldbergsegalla.com
dbrown@goldbergsegalla.com
Attorneys for Appellant Pennsylvania National Mutual Casual Insurance Company

From: Smith, Dale R.
Sent: Friday, March 25, 2022 5:00 PM
To: Jescelyn Spitz; murrell@smithrobinsonlaw.com; Jon Robinson; brad.nes@morganlewis.com; Peter Protopapas; 'Shanon Peake'; 'Lindsay Valek'; Edwards, Brady
Cc: Yntema, Brady A.; Harris, David G.; Brown, David L.
Subject: Re: Covil v. Penn National - Petition for Writ of Certiorari
Attachments: Petition for Writ of Certiorari to Supreme Court.pdf; Proof of Service of Writ and Appendix.pdf

Dear Counsel,

I am attaching our Petition for Writ of Certiorari, Appendix Volumes I and II and Proof of Service we are sending electronically to the Supreme Court of South Carolina today for filing.

The Appendix can be accessed at the following link: https://goldbergsegalla.sharefile.com/d-sd2be5dd20f5f462a806e4dfcfbdf8b9c.

Thanks,

Dale R. Smith | **Paralegal**

701 Green Valley Road | Suite 310 | Greensboro, NC 27408
MAIL PO Box 727, Buffalo, NY 14201
DIRECT 336.419.4930 | **EXT** 4930 | **FAX** 336.419.4950
dsmith@goldbergsegalla.com
goldbergsegalla.com

GOLDBERG SEGALLA

California | Connecticut | Florida | Illinois | Maryland | Missouri
New Jersey | New York | North Carolina | Pennsylvania

GOLDBERG SEGALLA

Dale R. Smith | Paralegal
Direct 336.419.4930 | dsmith@goldbergsegalla.com

March 25, 2022

Via Email & Federal Express

Attn: Patricia A. Howard, Clerk
Supreme Court of South Carolina
1231 Gervais Street
Columbia, SC 29201
Supctfilings@sccourts.org

Re: ***Covil Corporation v. Penn National***
Appellate Case No: 2020-001239
Opinion No. 5888 (S.C. Ct. App. Filed Jan. 5, 2022)

Dear Ms. Howard:

I am submitting the following documents electronically for filing in the above-referenced matter:

1. Petition for Writ of Certiorari;
2. Appendix Volumes I and II; and
3. Proof of Service.

I am also placing the filing fee of $250.00 for the Petition for Writ of Certiorari in the mail today for delivery via Federal Express on Monday, March 28, 2022.

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

With kindest regards, I am

Sincerely,

GOLDBERG SEGALLA LLP

Dale R. Smith

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*)
Jenny Abbott Kitchings, Clerk of SC COA (*w/encls via Email*)