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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2019-CP-40-06243
Appellate Case No. 2021-000648

Peter D. Protopapas, as Receiver for Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc., Plaintiffs/Respondents,

v.

Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company; The Standard Fire Insurance Company; St. Paul Fire and Marine Insurance Company; The Employers' Fire Insurance Company; Southeastern Agency Group and M.I.A. Company, Inc., individually and as successors to or f/k/a Merrimon Insurance Agency, Inc.; Robert E. Aspray; Nell Ashworth, individually and as personal representative of the Estate of Robert J. Ashworth; Betty C. D'Amico, individually and as Executor of the Estate of Julian D'Amico, Jr.; Kayla Keith, individually and as the personal representative of the Estate of Jerry W. Archer, Sr.; Richard L. Knight II, as personal representative of the Estate of Teddy L. Knight, Sr., and Linda Knight, individually; David D. Rollins; James W. Smith and Frances R. Smith; and Linda J. White, individually and as personal representative of the Estate of Lubert R. White, Jr., Defendants,

of which

Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company and The Standard Fire Insurance Company are the Appellants.

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COUNTER-STATEMENT OF ISSUES ON APPEAL

This appeal arises from a case brought by Respondent Peter D. Protopapas, court-appointed Receiver for Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. (together, "Starr Davis"), against Appellants Travelers Casualty and Surety Company f/k/a The Aetna Casualty & Surety Company ("Aetna") and The Standard Fire Insurance Company ("Standard Fire") (together, "Travelers"). The Circuit Court granted Starr Davis's motion for partial summary judgment declaring the existence and terms of a series of commercial general liability ("CGL") policies issued by Travelers to Starr Davis between 1946 and 1985.

1. In a case involving missing copies of the parties' insurance policies, did the Circuit Court properly grant partial summary judgment declaring the existence and terms of the missing policies, where there were no genuinely disputed issues of material fact as to the existence of the policies and their terms based upon examples of standard form policies and the absence of contrary evidence that policies other than the standard form policies were issued?

2. Where the parties entered into an interim claims handling agreement in 1985 in which the parties agreed that the 1985 agreement would be inadmissible in any litigation to interpret the terms of the parties' insurance policies, did the Circuit Court properly find the interim agreement immaterial to a motion for partial summary judgment declaring the existence and terms of the parties' insurance policies?

3. Where the Circuit Court has found that asbestos claims against a defunct corporation that has no continuing operations are neither products nor completed operations claims under the Supreme Court's decision in *Crossmann Communities of N.C., Inc. v. Harleysville Mutual Insurance Co*., 395 S.C. 40, 48, 717 S.E.2d 589, 593 (2011), did the Circuit Court properly interpret the parties' insurance policies to provide for "all sums" allocation under policy language providing coverage for "all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence"?

4. Where the Circuit Court determined that the parties' insurance policies imposed aggregate limits on coverage for bodily injury arising from Starr Davis's "completed operations," did the Circuit Court properly interpret the "completed operations hazard" to apply only when

a plaintiff was exposed to asbestos after Starr Davis completed its installation or removal operations at the site of the exposure?

5. Did the Circuit Court properly determine, in light of the well-established rule that insurance policies are construed in favor of coverage and that exclusions of coverage are construed against the insurer, that where the parties' insurance policies subject claims arising from Starr Davis's "completed operations" to aggregate limits but do not place aggregate limits on claims arising from Starr Davis's ongoing operations, it was the insurer's burden to prove that a given claim falls within the coverage-limited "completed operations" hazard of the policies?

6. Where the parties' insurance policies provided full separate limits of liability for each "occurrence" triggering coverage under the policies, and "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially similar conditions, that results in bodily injury during the policy period," did the Circuit Court properly determine that claims arising from Starr Davis's insulation contracting operations resulted from multiple "occurrences"?

SUMMARY OF THE ARGUMENT

This appeal arises from one of a series of similar asbestos-related insurance coverage disputes that have been transferred for consistent adjudication by the Honorable Jean H. Toal in her capacity as the Chief Judge for Administrative Purposes over all asbestos litigation filed within the state court system. In this case, Respondent Peter D. Protopapas, acting as the court-appointed receiver for the defunct Starr Davis, sought a judicial declaration that insurer Travelers owes Starr Davis a defense and indemnification for its asbestos-related liabilities under standard CGL policies. As it has in other cases, Travelers has tried to skirt its responsibilities by bogging down the case in needless discovery and by raising meritless arguments that have been repeatedly rejected. This interlocutory appeal from Chief Justice Toal's order granting Starr Davis's motion for partial summary judgment reflects more of the same delay tactics and identifies no error in the order.

Starr Davis began business operations as an insulation contractor in the 1940s in South Carolina. Over the course of the next forty years, the company became a major regional insulation contractor—installing, removing, replacing, and repairing insulation, including at times asbestos-containing insulation. It is undisputed that over the course of the company's existence, Starr Davis purchased significant amounts of liability insurance from Travelers' predecessor companies, Aetna and Standard Fire. The Receiver, acting for Starr Davis, sued Travelers to obtain coverage for asbestos-related injury cases filed against Starr Davis in 2018.

Travelers admits that over the years it destroyed its records of many of Starr Davis's historic insurance policies, and Starr Davis's own records were not retained after Starr Davis became defunct. To solve this problem, Starr Davis was forced to extract from Travelers copies of its standard CGL policies and other evidence of the specific policies that were issued to Starr Davis. Painstaking policy reconstruction based on the documents produced by Travelers revealed

a forty-year uninterrupted relationship, from January 1, 1946 to April 30, 1986, during which Travelers insured Starr Davis for asbestos-related bodily injury suits and claims.

Accordingly, based on the evidence produced by Travelers, the Receiver moved for partial summary judgment declaring the existence and relevant terms of the policies. The Receiver also sought declarations interpreting key policy provisions to determine Starr Davis's rights as a policyholder under South Carolina law. Travelers does not dispute that Starr Davis is its insured. Travelers does not dispute the accuracy of the information Starr Davis submitted with the motion. Travelers does not dispute that the examples of standard insurance policies Starr Davis submitted are competent evidence of the terms of its missing policies, and that Starr Davis's policies most likely followed the standard policy terms. Travelers submitted no evidence suggesting that anything other than standard policy terms were issued to Starr Davis. In the absence of any evidence in opposition to Starr Davis's motion, Chief Justice Toal granted the motion.

On appeal, Travelers now raises a meandering hodge-podge of arguments against Chief Justice Toal's order and reasons for granting the motion, none of which have merit.

First, Travelers argues primarily that Chief Justice Toal should not have granted summary judgment because fact discovery was incomplete at the time. Travelers' speculation that unspecified discovery *might* have turned up unspecified evidence that *might* have produced an unspecified fact dispute does not defeat summary judgment. Travelers fails to explain how discovery could alter the outcome of the motion. Chief Justice Toal's ruling should be affirmed.

Second, as a subset of its discovery argument, Travelers also argues that more discovery was needed because there potentially were disputed fact issues relating to choice of law and to the injuries of the asbestos claimants who have sued Starr Davis. Both arguments are pure misdirection. No choice of law analysis was necessary to decide the motion because Travelers has

never identified any actual, relevant conflict between the laws of South Carolina and any other state. Hypothetical choice of law debates do not defeat summary judgment. The facts of the claimants' underlying suits against Starr Davis are similarly immaterial to the narrow issues presented by the motion. Whether and how the insurance policies may interact with the facts of particular asbestos claimants' cases will be decided on a case-by-case basis in the context of the asbestos plaintiffs' suits against Starr Davis.

Third, Travelers contends that Chief Justice Toal "refus[ed] to consider and give effect" to a 1985 interim claims handling agreement (the "Interim Claims Handling Agreement") between Starr Davis and Travelers. (App. Br. at 26.) Not so. Chief Justice Toal considered the Interim Claims Handling Agreement and found it immaterial because the parties expressly agreed that it would be inadmissible in any litigation to interpret the meaning of the historic policies. Whether Travelers or Starr Davis may have separately enforceable rights under the Interim Claims Handling Agreement is an independent question that was not presented by the motion and provides no grounds for reversal.

Fourth, Travelers raises a host of arguments against Chief Justice Toal's declarations of Starr Davis's general rights under the policies and interpretations of the policies' terms.

Travelers disagrees with Chief Justice Toal's holding that "[w]hile product liability or completed operations losses are subject to allocation on a 'time-on-the-risk' pro rata allocation method, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any 'time-on-the-risk' allocation scheme." (R. p. 12, Order at 11.) Instead, in the context of a claim in which injury allegedly occurred during ongoing operations, Chief Justice Toal interpreted the policies to require "all sums" allocation. (R. p. 31–32, Order at 30–31.) Travelers argues this ruling contradicts *Crossmann*, but as Chief Justice Toal—a member of the *Crossmann* panel—

correctly held, *Crossmann* does not speak to a claim involving injury caused by ongoing operations, asserted against a defunct insured without the financial ability to absorb a share of the losses. Chief Justice Toal's interpretation is correct and should not be disturbed.

Travelers also disagrees with Chief Justice Toal's interpretation that the policies' "'completed operations hazard' . . . , and the corresponding aggregate limits of liability, apply *only* when a plaintiff is exposed to asbestos attributed to Starr Davis *after* Starr Davis completed its installation or removal operations or work done at a particular jobsite[.]" (R. p. 11, Order at 10.) Travelers argues that even if a plaintiff alleges exposure to asbestos while Starr Davis's operations at a site were ongoing, subsequent injuries from that exposure should be characterized as "completed operations" claims (and therefore subject to aggregate limits). Chief Justice Toal's interpretation that injuries arising from *ongoing operations* cannot be regarded as a "completed operations" claim is the only commonsense interpretation of the policy and should be affirmed.

Travelers further argues that Chief Justice Toal erred in finding that, "[a]s to any individual asbestos lawsuit, it is Travelers' burden to prove that the suit seeks the recovery of damages that are subject to the aggregate limits of liability applicable to the 'completed operations hazard' or 'products hazard' provisions in its policies." (R. p. 11–12, Order at 10–11.) Chief Justice Toal's placement of the burden of proving this coverage limitation comports with the language of the policies and with the well-established rule that insurance policies are construed in favor of coverage and against the insurer where a coverage exclusion is sought. Travelers asserts no grounds for reversal of this sound determination.

Travelers finally argues that Chief Justice Toal's interpretation that "'operations[]' claims against Starr Davis have resulted from multiple 'occurrences' under the Travelers policies, thus entitling Starr Davis to multiple 'per occurrence' limits of liability" misconstrued the policy

language and was precluded by fact issues. (R. p. 12, Order at 11.) Travelers mischaracterizes Chief Justice Toal's interpretation, which merely determined that *if* claims arise from Starr Davis's ongoing operations, then such claims would not constitute a "single" occurrence. Chief Justice Toal's interpretation of the policy language was not applied to the facts as to any particular asbestos case, and so no fact issues precluded partial summary judgment.

Chief Justice Toal's policy interpretations are consistent with her other rulings across multiple asbestos-related insurance coverage cases involving virtually identical policies and should not be disturbed. For these reasons and those set out more fully below, Chief Justice Toal's order granting partial summary judgment to Starr Davis should be affirmed in its entirety.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Starr Davis operated for over four decades as a regional insulation supplier and contractor across the Southeast. Starr Davis was formed in South Carolina in or about 1946. (R. p. 359, Renewed Supplemental MSJ at 6.) It installed, removed, replaced, and repaired insulation—including, at times, asbestos-containing insulation—in a variety of industrial facilities in South Carolina, North Carolina, Georgia, Alabama, Virginia, and Tennessee. (R. p. 359, Renewed Supplemental MSJ at 6.)

During its operations, Starr Davis purchased commercial general liability insurance from Aetna and Standard Fire, both now part of Travelers. Aetna issued primary coverage that was renewed annually on an uninterrupted basis from January 1, 1946 through April 30, 1986. (R. pp. 415–48, 662–65, 670–76, Renewed Supplemental MSJ Exhibits 4, 10, 11, 14.) Standard Fire issued primary policies to Starr Davis Co. and Starr Davis of South Carolina that covered annual periods from January 7, 1974 through May 1, 1980. (R. pp. 449–514, 668–83, Renewed

Supplemental MSJ Exhibits 5, 13, 14, 15.) Both insurers provided for defense costs and indemnity coverage for asbestos-related bodily injury suits.

Starr Davis's operations have allegedly resulted in bodily injury to South Carolina citizens from exposure to asbestos. The State of South Carolina rescinded Starr Davis Company, Inc.'s corporate charter in 1996. It rescinded Starr Davis Company of S.C., Inc.'s corporate charter in 1997 for failure to file the appropriate documentation with the Secretary of State; nevertheless, Starr Davis remained an entity with the capacity to sue and be sued. (R. p. 413–14, Renewed Supplemental MSJ at Exhibit 3.)

In 2018, certain asbestos plaintiffs filed personal injury actions against Starr Davis. After Starr Davis failed to answer, the plaintiffs petitioned the Circuit Court to appoint a receiver to take control of and administer Starr Davis's assets, including any available insurance coverage for asbestos claims. (R. p. 1890–94, Motion to Appoint Receiver for Starr Davis.) Chief Justice Toal appointed Peter Protopapas as the Receiver for Starr Davis on February 22, 2019. (R. p. 68–70, Starr Davis Receiver Order.)

II. PROCEDURAL HISTORY

Following the Receiver's appointment, Starr Davis brought an action against Travelers and other insurers to recover its insurance responsive to asbestos plaintiffs' lawsuits. (R. p. 51–70, Complaint.) Starr Davis asked the Circuit Court to declare the existence of decades' worth of CGL policies issued by Travelers during Starr Davis's operations as an insulation contractor and distributor. (R. p. 60–63, Complaint ¶¶ 38–49.) Starr Davis also sought a declaration of Travelers' duty to defend Starr Davis in the asbestos suits, along with further declarations affirming Starr Davis's rights as a policyholder under South Carolina law. (R. p. 60–63, 65–66, Complaint ¶¶ 38–49, 66–68.)

In discovery, Travelers produced reams of documents showing four decades' worth of uninterrupted CGL policies issued to Starr Davis by Travelers' predecessor companies, Aetna and Standard Fire. (R. p. 1099–1869, 1916–21; Notice of Filing Exhibits.) These documents included underwriting records, asbestos litigation records, correspondence with Starr Davis and its defense counsel, and copies of the policies themselves. These documents also set out each policy's per-occurrence and aggregate limits. (R. p. 1099–1869, 1916–21; Notice of Filing Exhibits.)

Armed with this evidence, Starr Davis filed a motion for partial summary judgment declaring the existence and terms of the policies and Starr Davis's rights under the policies according to South Carolina law. (R. p. 316–30, Motion for Partial Summary Judgment.) Before the Circuit Court heard the motion, Starr Davis filed a supplemental motion on June 23, 2020 to address additional information supplied by Travelers, and a renewed supplemental motion on August 21, 2020 after amending its complaint. (R. pp. 332–683, Supplemental MSJ; Renewed Supplemental MSJ.) These motions together sought declarations and partial summary judgment that Travelers had issued commercial general liability coverage to Starr Davis from 1946 through 1986 with separate annual limits on a per-occurrence basis for each policy period. (R. pp. 362–66, Renewed Supplemental MSJ at 9–13.)

Further, applying the policies' terms in a manner consistent with the Circuit Court's prior rulings in similar cases interpreting standard CGL policies, Starr Davis asked the Circuit Court to declare that:

- The policies require Travelers to pay or reimburse Starr Davis's defense costs in asbestos suits;
- All Starr Davis policies in effect from a plaintiff's first asbestos exposure through the plaintiff's disease or death cover the plaintiff's claim unless coverage is specifically excluded;

- The “completed operations hazard” under the policies, and the corresponding aggregate limits, apply only when a plaintiff’s exposure occurred after Starr Davis completed its installation or removal operations at the site of exposure;

- The burden of proving limitations or exclusions on coverage under the policies falls on Travelers, as the insurer;

- As to any individual asbestos suit, the burden falls on Travelers to establish that the claim falls within the “completed operations” hazard of the policies and the corresponding aggregate limits;

- Claims arising from Starr Davis’s contracting, or “operations,” are considered individual “occurrences” under the policies;

- Travelers is obligated to pay “operations” claims in full up to its “per occurrence” limits of liability under the policies;

- Where multiple primary policies provide coverage in the same policy year and respond to the same claim, Starr Davis may select one or both of the policies to respond to the claim and “stack” the limits of the policies; and

- “Operations” claims against Starr Davis, unlike “products” or “completed operations” claims, are not subject to a time-on-the-risk allocation scheme under South Carolina law.

(R. pp. 364–66, Renewed Supplemental MSJ at 11–13.) In response, Travelers argued primarily that summary judgment was premature because Travelers needed further discovery. (R. pp. 700–03, Opposition at 1–3.)

Travelers also argued that Starr Davis had relinquished any rights under any pre-1959 policies in the Interim Claims Handling Agreement with Aetna (a company subsequently acquired by Travelers), and further argued that the Interim Claims Handling Agreement substantially altered Starr Davis’s rights to reimbursement under the policies. Travelers’ arguments ignored the Interim Claims Handling Agreement’s clear statement that the agreement could not be offered into evidence to support a party’s arguments regarding the meaning, intent, or construction of the policies. (R. p. 715–17, Opposition at 15–17.) Specifically, the Interim Claims Handling Agreement states: **“Neither this Interim Agreement nor any part thereof shall be offered in**

evidence or used for any purpose in any court of law as support for the position being asserted by either party hereto in connection with the meaning, intent or construction of any insurance policy or policies issued by [Travelers] or purchased by Starr Davis." (R. p. 659, Interim Claims Handling Agreement at 2 (emphasis added).)

The Circuit Court held a hearing to address the parties' key arguments. (R. p. 144–229, Jan. 25, 2021 Hr'g Tr.) On March 4, 2021, the Circuit Court granted Starr Davis's motion, finding no genuine dispute that Travelers had issued forty years of policies to Starr Davis. (R. p. 14–17, Order at 13–16.)

The Circuit Court rejected Travelers' arguments that further discovery was necessary to declare the terms of the policies. (R. pp. 13–14, 20–21, Order at 12–13, 19–20.) The Circuit Court also found that the Interim Claims Handling Agreement between Aetna and Starr Davis was inadmissible by its own terms and could not be considered for the purpose of declaring the existence, meaning, or application of the relevant policies. (R. pp. 7–8, 13, 22, Order at 6–7, 12, 21.) The Circuit Court further rejected Travelers' argument that the Interim Claims Handling Agreement somehow negated the existence of the pre-1959 policies, or required time-on-the-risk allocation for operations claims contrary to the standard language of Travelers' CGL policies. Whether and to what extent the Interim Claims Handling Agreement may be enforceable or apply to particular coverage scenarios was not before the Circuit Court on Starr Davis's motion for summary judgment and was not decided.

Finally, having declared the terms of the Starr Davis policies, the Circuit Court granted Starr Davis's request to declare its legal rights under those policies under South Carolina law. (R. pp. 22–33, Order at 21–32.) These declarations were consistent with the Circuit Court's

previous policy interpretation rulings in prior asbestos litigation involving similar insurance policies.

Starr Davis's motion included, among other things, demonstrative charts prepared by Starr Davis's counsel identifying the Starr Davis policies by policy number, policy period, per-occurrence limits, and aggregate limits. (R. pp. 670–83, Renewed Supplemental MSJ Exhibits 14, 15.) These charts, which were intended to aid the Circuit Court by summarizing Starr Davis's extensive evidence, were based on documents produced by Travelers. The charts identified each Travelers document by bates number. (R. pp. 670–83, Renewed Supplemental MSJ Exhibits 14, 15.) Travelers objected to the use of these exhibits because they did not include the source documents that were identified in the summary charts. For the sake of completeness, Starr Davis thereafter filed a Notice of Filing in which it attached the underlying documents under seal to supplement the summary judgment record. (R. p. 1099–1869, 1916–21, Notice of Filing.) The documents attached to Starr Davis's supplemental filing included thirty-six policy forms, historical correspondence from Aetna to Starr Davis in which the insurer admitted the existence and limits of many of the policies, and certain other internal Travelers records that Travelers had produced in discovery evidencing the policy numbers, periods, and limits of the remaining Starr Davis policies. (R. pp. 1099–1869, 1916–21, Notice of Filing.)

Travelers thereafter moved for reconsideration, reiterating its opposition arguments. (R. pp. 1870–74, Mtn. for Reconsideration.) Travelers' motion failed to acknowledge the documents that Starr Davis had submitted with its March 4, 2021 Notice of Filing, and again argued that the summary chart exhibits to Starr Davis's motion were inadmissible. (R. p. 1872, Mtn. for Reconsideration at 3.)

Starr Davis opposed Travelers' motion for reconsideration and argued that, in fact, it had "submitted a substantial amount of evidence" of the policies, that Travelers did not dispute the accuracy of any of the evidence in support of the motion, and that Travelers had submitted no contrary evidence. (R. p. 1876, Opp. to Reconsideration at 2.) Starr Davis also argued that Travelers had failed to explain how further discovery could reasonably be expected to change the outcome of the motion given that all of the material evidence comes from Travelers' own records. (R. pp. 1877–78, Opp. to Reconsideration at 3–4.) Starr Davis further argued that the Circuit Court correctly determined that any fact issues raised by Travelers were immaterial, and that interpreting policies consistent with prior cases does not mean the order was improperly "based on" those cases. (R. pp. 1878–80, Opp. to Reconsideration at 4–6.)

The Circuit Court denied Travelers' motion for reconsideration on May 19, 2021. (R. p. 35–37, Order Denying Motion for Reconsideration.) This appeal followed.

STANDARD OF REVIEW

Appellate courts review a grant of partial summary judgment de novo. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006) ("When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court."). Summary judgment is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

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

Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). Chief Justice Toal correctly held that Travelers failed to meet its burden of showing specific facts demonstrating a genuine issue for trial.

This Court reviews whether the Circuit Court erred in finding additional discovery unnecessary for summary judgment under an abuse of discretion standard. *See Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 347, 565 S.E.2d 309, 343 (Ct. App. 2002) (finding "no abuse of discretion in the trial court's finding that discovery was complete for the purposes of summary judgment"); *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) ("The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion.").

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT

A. Starr Davis Demonstrated The Existence Of The Policies And Their Terms With Admissible Evidence.

Travelers does not dispute that it insured Starr Davis for decades, nor does it genuinely dispute that the terms of the Starr Davis policies followed the standard CGL forms. Travelers submitted no evidence that even suggested that Starr Davis had negotiated different policy terms, nor that Starr Davis's policies were ever subject to any relevant endorsement. Accordingly, based on the evidence before the Circuit Court on Starr Davis's motion, Chief Justice Toal found "sufficient secondary evidence, including partial or incomplete policies, to provide the existence of a multi-decade relationship between Travelers and Starr Davis." (R. p. 8, Order at 7.)

As Travelers admits, this evidence includes, at a minimum, the Interim Claims Handling Agreement between Travelers and Starr Davis, which is undisputed evidence of "the existence of the insurance policies" "from 1959 to 1985." (R. pp. 8, 170, Order at 7; Jan. 25, 2021 Hrg. Tr. at 26:12–14.) It also includes incomplete copies of two standard contemporaneous CGL policies

produced by Travelers. (App. Br. at 11.) And, it also includes significant information about the policies issued to Starr Davis, none of which Travelers has ever disputed.

Despite all this, and despite that Travelers has never actually disputed either the existence or terms of the policies, Travelers' main argument on appeal is that partial summary judgment should be reversed because Starr Davis did not attach certain supporting documents to the coverage charts that it submitted in support of its Motion. (App. Br. at 11–18, 20; R. pp. 662–69, Renewed Supplemental MSJ Exhibits 10–13.) This argument should be summarily rejected. The evidence before the Circuit Court was more than sufficient to conclude as a matter of law that Starr Davis is entitled to coverage and the terms of that coverage, and Travelers has never seriously called that conclusion into question.

Even assuming that the evidence submitted with the original motion were insufficient (it was not), Travelers ignores that on March 4, 2021, Starr Davis filed the underlying documents under seal with the Court. (R. pp. 1099–1869, 1916–21, Notice of Filing.) As Starr Davis's Notice of Filing states, these documents were:

> produced by the Travelers Defendants in this action and address the arguments raised at pages 14-18 of their Response in Opposition to Starr Davis' Renewed Motion for Partial Summary Judgment [regarding missing documents] . . . and their supplemental briefing on these arguments.

(R. p. 1100, Notice of Filing at 1 (citations omitted).)

Eight days later, Travelers moved for reconsideration of the Order and argued that the evidence before the Court on the motion for summary judgment was insufficient. (R. p. 1871, Motion for Reconsideration at 2.) When the Circuit Court denied reconsideration on May 19, 2021, the full wealth of evidence supporting Starr Davis's motion had been in the record for over two months—any potential error that could have existed in connection with the evidence before the Court on the original motion is therefore clearly harmless. The Circuit Court reviewed all of

the evidence, including the evidence Travelers contends is missing, evaluated its order on the motion for summary judgment, and decided to adhere to its original ruling.

There is no genuine dispute over the authenticity or admissibility of the documents before the Circuit Court on reconsideration, all of which were produced by Travelers. Nor is there any genuine dispute that these documents are competent evidence of the existence of Starr Davis's policies with Travelers. Travelers does not dispute that Starr Davis identified these documents by bates number before summary judgment, clearly informing the Circuit Court and Travelers of the evidence supporting Starr Davis's summary charts.[1] Indeed, Travelers addressed none of these issues in its Motion for Reconsideration, but instead simply re-asserted that the underlying documents were not before the Court. Any potential error in the Circuit Court's grant of summary judgment was therefore cured upon reconsideration,[2] and Travelers cannot show there is a genuine issue of material fact that warrants reversal.

B. Travelers Failed To Carry Its Evidentiary Burden.

After Starr Davis presented substantial evidence of the existence, terms, and conditions of its policies with Travelers between 1946 and 1985, the burden fell on Travelers to produce admissible contrary evidence demonstrating a genuine issue of material fact that precluded summary judgment. *Regions Bank*, 354 S.C.at 660, 582 S.E.2d at 438 (Ct. App. 2003). Travelers failed to do so.

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[1] For this reason, and because Travelers had ample opportunity to review and address these documents in its Motion for Reconsideration, Travelers was not prejudiced by any lack of opportunity to rebut Starr Davis's arguments based on the documents, which were produced by Travelers.

[2] Moreover, the presence of the underlying documents in the record on Motion for Reconsideration demonstrates that reversal and remand with instructions to reconsider the motion for summary judgment in light of the underlying documents would merely waste judicial resources—the Circuit Court would reach precisely the same decision on remand that it reached on summary judgment.

Travelers argues that Starr Davis's examples of standard form insurance policies were insufficient to establish the terms of coverage for other policy periods where the specific policies were missing. (App. Br. at 17.) It further asserts that standard policy forms cannot demonstrate the terms of the missing policies and that other endorsements or modifications might have existed for the policies at issue. (*Id.*) Travelers' arguments are wrong, and the Circuit Court properly rejected them.

First, exemplar policies based on standard forms are widely recognized by courts across the country as strong, admissible evidence of the terms of the insured's other policies. *E.g.*, *Danaher Corp. v. Travelers Indem. Co.*, 414 F. Supp. 3d 436, 464 (S.D.N.Y. 2019) ("[A]bsent any evidence from Travelers sufficient to support any contrary conclusion," unrebutted specimen policy evidence "may be used to establish, even under the stricter clear and convincing evidentiary standard, that the terms of lost policies would have been the same as those contained in policies from adjacent years or in form policies from the relevant periods."); *Travelers Indem. Co. v. Rogers Cartage Co.*, 98 N.E.3d 524, 530 (Ill. Ct. App. 2017) ("Travelers has not offered any affirmative evidence to rebut, undercut, or discount Rogers's evidence that the disputed CGL policies contained the same coverage and endorsements as the bookend policies and specimen policies.").

There is no genuine dispute that Starr Davis's policies with Travelers were written using the standard forms. Courts routinely recognize that CGL policies are highly standardized. For example, in *Crossmann*, the South Carolina Supreme Court broadly declared the law of South Carolina in reference to the "standard CGL policy" with language materially identical to the Starr Davis policies. 395 S.C. at 48, 717 S.E.2d at 593 (using the phrase "standard CGL polic[ies]" nine

times, including that the language at issue, "or language that is substantially the same, is typical of a standard CGL policy").

Similarly, there is no genuine dispute as to whether the policies included other endorsements that could have modified the terms material to this case. To establish such a dispute, Travelers would at least have had to produce evidence that such endorsements existed, which Travelers failed to do. Instead, Travelers merely argues that it was *possible* that such an endorsement *might* exist. (App. Br. at 17.) Unadorned speculation is not admissible evidence and provides no basis to find a disputed issue of material fact. *See* Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

Travelers had ample opportunity to demonstrate the existence of a material fact issue. That Travelers failed to produce any such evidence is strong evidence that no such documents exist, and is dispositive on summary judgment.

C. No Choice Of Law Issue Precluded Summary Judgment.

Travelers argues that summary judgment should have been denied because there *potentially* were material disputed fact issues going to the choice of law that could have been revealed by more fulsome discovery. (App. Br. at 21.) This argument fails for two main reasons.

First, Travelers fails to identify any potentially relevant conflict between the law of South Carolina and the law of North Carolina that would require a choice of law analysis. Both below and again on appeal, Travelers fails to identify any potential issue for which a choice of law analysis would even be necessary, let alone how choice of law is relevant to the issues presented

on summary judgment. Where, as here, no conflict of law exists, the law of the forum state applies. *See, e.g.*, Eugene F. Scoles & Peter Hay, *Conflict of Laws* 17 (1984) ("A 'false conflict' exists when the potentially applicable laws do not differ[.]"); *Lucker Mfg. v. The Home Ins. Co.*, 23 F.3d 808, 813 (3d Cir. 1994) ("Where there is no difference between the laws of the forum state and those of the foreign jurisdiction, there is a 'false conflict' and the court need not decide the choice of law issue." (quoting *In re Complaint of Bankers Trust Co.*, 752 F.2d 874, 882 (3d Cir. 1993))); *Burnside v. Simpson Paper Co.*, 864 P.2d 937, 942 (Wash. 1994) (explaining that absent conflict the "forum may apply its own law").

Second, Travelers fails to identify the discovery it purportedly requires and fails to explain how that discovery might produce a choice of law problem. Speculation is insufficient to defeat summary judgment, and that is all Travelers has to offer. Indeed, the most Travelers can say is that "[a]t the appropriate juncture, Travelers would have provided information on the extent to which the laws of the potentially relevant states varied, including pointing out the differences between the law of South Carolina and North Carolina." (App. Br. at 21.) That is manifestly insufficient. No discovery is needed to research the law of another state to identify a relevant conflict of law. The "appropriate juncture" for Travelers to make its showing was in opposition to Starr Davis's motion. Travelers failed to do so.

Sangamo Weston, Inc. v. National Surety Corp. does not support Travelers' position. 307 S.C. 143, 414 S.E.2d 127 (1992). In *Sangamo Weston*, the potentially relevant states were never identified in the record. *Id.* at 48, 414 S.E.2d at 130 ("[U]ntil the states with interest are identified, it is impossible for this court to determine whether a conflict question even exists."). By contrast,

Travelers repeatedly identified the state whose law it believes *might* apply in this case.[3] But, having argued that North Carolina law *might* apply, Travelers failed to meet its burden of showing even a single conflict with South Carolina law, nor how the outcome of the motion would have been different had the law of North Carolina been applied instead. Accordingly, the Circuit Court properly applied South Carolina law to resolve Starr Davis's motion. (R. pp. 19–20, Order at 18–19.)

D. Travelers Misstates the Burden of Proof.

Travelers also argues that the Circuit Court erred because it should have required Starr Davis to prove the existence of the lost policies by clear and convincing evidence, rather than under the usual preponderance of the evidence standard. (App. Br. at 14.) There is no basis for imposing a heightened standard of proof here. *See Drayton v. Indus. Life & Health Ins. Co.*, 205 S.C. 98, 31 S.E.2d 148, 151 (1944) (proof of missing insurance policy and its terms permitted with circumstantial evidence). Even if there were, it would make no difference to the Court's analysis on summary judgment because Travelers failed to produce even a scintilla of material evidence in opposition to Starr Davis's motion. *See Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009) (confirming scintilla of material evidence standard).

First, the preponderance standard presumptively applies in all civil cases, and is only altered where a statute so provides or some public policy reason exists for the imposition of a heightened burden. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991) ("Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private

[3] Travelers also suggests that Alabama, Georgia, Tennessee, or Virginia law might apply to the policies, but fails to identify any relevant conflicts between the law of those states and the law of South Carolina. (App. Br. at 22 n.12.)

litigants unless 'particularly important individual interests or rights are at stake.'") (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389–90 (1983)). Neither condition exists here: no statute imposes a heightened burden of proof in cases involving missing insurance policies, nor does any South Carolina precedent hold that a heightened burden should be imposed for policy reasons.

Travelers cites no South Carolina case—and research reveals none—that holds that the existence or terms of a missing insurance policy must be proved by anything other than the preponderance of the evidence. Lacking on-point authority, Travelers cites two inapposite probate cases—only one of which is from South Carolina—which hold that a lost will must be proven by the clear and convincing standard. (App. Br. at 14 (citing *Estate of Mason v. Mason*, 289 S.C. 273, 346 S.E.2d 28, 31 (Ct. App. 1986); *In re Herring's Will*, 198 S.E.2d 737, 740 (N.C. Ct. App. 1973)).) The clear and convincing standard applies to disputes over the existence of a will because the law presumes that if a will existed but cannot be found, the testator destroyed the will with the intent to revoke it. *Estate of Mason v. Mason*, 289 S.C. 273, 277, 346 S.E.2d 28, 31 (Ct. App. 1986). The proponent of the missing will therefore has the burden of rebutting the presumption with clear and convincing evidence. *Id.* No such presumption applies to the existence of a missing insurance contract, so there is no reason to impose a heightened standard of proof.

Travelers' only other South Carolina authority, to the extent relevant at all, is contrary to its position. There, the court held that in a dispute over land, a party may prove ownership by evidence other than the missing deed or receipt, and does *not* have to meet a higher standard than a preponderance of the evidence. *Troy Cemetery Ass'n v. Davis*, 223 S.C. 305, 313–14, 75 S.E.2d

458, 461–62 (1953) ("No greater degree of proof was required of appellant than that resting upon a plaintiff in the ordinary civil case.").[4]

Second, no disputed issues of material fact that preclude summary judgment exist under *any potentially applicable standard*. In *Hancock*, 673 S.E.2d at 803, 381 S.C. at 330–31, our Supreme Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Id.* "[I]n cases requiring a heightened burden of proof or in cases applying federal law," such as cases under a "clear and convincing evidence" standard, the "non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." *Id.* Here, as set out above, Starr Davis supported its motion with admissible evidence of the existence and terms of the insurance policies in the form of standard policy forms, historical correspondence in which the insurer admitted to the existence and limits of many of the policies, and internal Travelers records produced in discovery evidencing the policy numbers, periods, and limits of the remaining Starr Davis policies. (R. p. 1100, Notice of Filing at 1.) In response, Travelers produced *nothing* to controvert Starr Davis's showing that the policies exist and contained the standard CGL terms.

Travelers' failure to produce even a scintilla of evidence in opposition to the motion is dispositive, and the judgment below should be affirmed in its entirety.

[4] Travelers' citation to *In re Wallace & Gale Co.* provides no more support; *Wallace & Gale* addresses Maryland law, not South Carolina law. 275 B.R. 223, 230 (D. Md. 2002). Also, as the *Wallace & Gale* court noted, "It is not certain [Maryland's 'clear and positive'] standard is the equivalent of 'clear and convincing evidence[.]'" *Id.* at 230 n.6.

E. No Discovery Was Needed About Underlying Asbestos Suits Against Starr Davis Because The Facts Of Those Cases Are Immaterial To The Motion.

Chief Justice Toal did not abuse discretion in finding that further discovery about the underlying cases brought by asbestos claimants against Starr Davis was unnecessary, and that any fact questions raised by Travelers are immaterial to the issues decided in the Order. (R. p. 20, Order at 19.) *See Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001); *Robertson v. First Nat'l Union Bank*, 350 S.C. 339, 347, 565 S.E.2d 309, 313 (Ct. App. 2002). Travelers emphasizes two issues relating to Starr Davis's historic operations that it incorrectly argues should have precluded summary judgment. First, it asserts that [redacted] (App. Br. at 18.) Second, Travelers asserts that [redacted] (*Id.*) These issues, Travelers contends, required further discovery before the Circuit Court could properly declare the parties' rights and obligations under the Starr Davis policies.

Travelers fails to explain how these facts are material. The Circuit Court correctly understood that Starr Davis's motion "ask[ed] this Court **to declare the applicable *rules*** to determine whether any particular asbestos case against Starr Davis involves 'operations injuries,' 'product hazard injuries,' or 'completed operations hazard injuries.'" (R. pp. 20–21, Order at 19–20 (emphasis added).) Consequently, the Circuit Court properly held that there was "nothing germane about the facts asserted by Travelers as a ground to defer ruling, especially since cases continue to be asserted against Starr Davis and this Court has been asked to make rulings regarding the responsiveness of the policies to actual lawsuits." (R. p. 20, Order at 19.)

Starr Davis requested no declarations regarding whether it was an insulation supplier or contractor. Nor did it request any declarations regarding its handling of asbestos [redacted]. Any fact issues that exist on these topics will be decided on a case-by-case basis in suits by asbestos plaintiffs against Starr Davis. The Circuit Court's coverage rulings stand entirely independent of those facts, rendering further discovery on these issues unnecessary. The Circuit Court, therefore, did not err in granting summary judgment.

II. THE 1985 INTERIM CLAIMS HANDLING AGREEMENT IS IMMATERIAL TO THE ISSUES PRESENTED IN THE MOTION.

Travelers contends that the motion should not have been granted because Chief Justice Toal "refused to consider and give effect" to a 1985 Interim Claims Handling Agreement between Starr Davis and Travelers. In fact, Chief Justice Toal considered the Interim Claims Handling Agreement and correctly found it was immaterial.

The motion asked for partial summary judgment declaring the existence and terms of Starr Davis's historic insurance policies with Travelers. The Interim Claims Handling Agreement is immaterial to those issues because the Starr Davis policies and their terms exist independently of the Interim Claims Handling Agreement. Indeed, the parties expressly agreed that the Interim Claims Handling Agreement would be inadmissible in any litigation to interpret the meaning of the historic policies. Whether Travelers or Starr Davis may have enforceable rights under the Interim Claims Handling Agreement is an independent question that was not presented in Starr Davis's motion. Even if the Interim Claims Handling Agreement were material, Travelers' arguments are mistaken as explained below.

A. The Interim Claims Handling Agreement Does Not Negate The Existence Of The Starr Davis Policies.

Starr Davis relinquished no rights under its pre-1959 Travelers policies in the 1985 Interim Claims Handling Agreement, which appears to address a dispute over Aetna's defense obligations to Starr Davis, states that Aetna would undertake the defense of Starr Davis in certain asbestos cases and prescribes certain allocations of defense and indemnity costs with respect to those claims. (R. p. 654–61, Renewed Supplemental MSJ Ex. 9.)

Travelers wrongly claims that Starr Davis "agreed that Travelers coverage existed for Starr Davis only from 1959-1985," thereby waiving any rights under those policies and precluding summary judgment on their existence and terms. (App. Br. at 28.) Travelers' argument fails as a matter of South Carolina law, which defines waiver as "a voluntary and intentional abandonment or relinquishment of a known right. Waiver requires a party to have known of a right and known that the right was being abandoned." *Sanford v. S.C. State Ethics Comm'n*, 385 S.C. 483, 496–97, 685 S.E.2d 600, 607 (2009) (cleaned up). It is clear from the face of the Interim Claims Handling Agreement that Starr Davis waived no rights under the 1946–58 policies.

The preamble to the Interim Claims Handling Agreement states, "WHEREAS, Aetna has afforded products liability/completed operations coverage to Starr Davis from January 1, 1959 to June 30, 1985 and Starr Davis has been insured by other insurers or has been self-insured for the remainder of its existence[.]" (R. p. 658, Interim Claims Handling Agreement at 1.) Travelers argues that this mere recital—not an operative term—constitutes an agreement that no other policies exist, including the 1946–58 policies soundly proven by other evidence. (App. Br. at 26, 28.) The language of the preamble does not support that presumption, even if it could be considered.

Nothing in the recital indicates the voluntary and intentional abandonment or relinquishment by Starr Davis of its known rights under earlier policies. At most, it reflects that the signatory for Starr Davis was not aware of the company's rights under the policies preceding 1959. No intent to renounce more than a decade's worth of coverage can possibly be inferred from this recital, which was wholly incidental to the operative terms of the agreement.

B. The Interim Claims Handling Agreement Does Not Require Time-On-The-Risk Allocation.

Travelers argues that the agreement "resolved disputes about whether and how to allocate asbestos-related liabilities (for both defense and indemnity)," requiring "pro rata, time-on-the risk allocation of asbestos claims tendered by Starr Davis under the alleged policies," and requiring Starr Davis "to reimburse [Travelers] for the expense of any portion of [liability for alleged asbestos] exposure occurring in a period of [Travelers'] policies that have been exhausted by the payment of indemnity." (App. Br. at 26–27.) That is neither the purpose nor the intent of the agreement, as the language of the agreement itself makes clear.

The Interim Claims Handling Agreement clearly states: **"Neither this Interim Agreement nor any part thereof shall be offered in evidence or used for any purpose in any court of law as support for the position being asserted by either party hereto in connection with the meaning, intent or construction of any insurance policy or policies issued by [Travelers] or purchased by Starr Davis."** (R. p. 659, Interim Claims Handling Agreement at 2.) Travelers attempts to resolve this contradiction by claiming that it seeks to "enforce the terms" of the agreement, not to offer it in connection with the intent, meaning, or construction of the policies. (App. Br. at 27.) That is a distinction without a difference.[5] The Circuit Court issued declarations

[5] Travelers asserts that "the most obvious purpose" of the Interim Claims Handling Agreement was "a legal action to enforce its terms." (App. Br. at 9.) That purpose is hardly "obvious," but even

based on the meaning and construction of the Starr Davis policies, and Travelers offered the Interim Claims Handling Agreement as rebuttal evidence. That action is impermissible under the plain terms of the Interim Claims Handling Agreement.

Finally, Travelers argues that Chief Justice Toal's order granting partial summary judgment somehow violates the Interim Claims Handling Agreement's requirement that Starr Davis reimburse Travelers for "expenses associated with asbestos-related injury that took place" outside the Travelers policy periods. (App. Br. at 28.) The parties' rights and obligations with respect to reimbursement are determined by the underlying Starr Davis policies, as interpreted by the Circuit Court. Once again, Travelers' argument is an impermissible attempt to use the Interim Claims Handling Agreement as evidence of the meaning, intent, or construction of the Starr Davis policies. The Circuit Court gave proper effect to the Interim Claims Handling Agreement by rejecting Travelers' argument. (R. p. 22, Order at 21 ("As respects contract interpretation issues, the Motion seeks to resolve disputes between the parties concerning the meaning, intent and the construction of the Travelers policies. The Interim Agreement is irrelevant to the contract interpretation issues raised in the Motion.").)

III. THE CIRCUIT COURT'S COVERAGE DECLARATIONS CORRECTLY APPLY SOUTH CAROLINA LAW.

After declaring the existence and terms of the Starr Davis policies, the Circuit Court issued several declarations interpreting those policy terms under South Carolina law. Travelers challenges four of these declarations on appeal. In each instance, the Circuit Court's interpretation was grounded in the universally accepted principle that insurance policies are construed in favor

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accepting the assertion for purposes of argument, Starr Davis's motion for summary judgment was not a "legal action to enforce" the Interim Claims Handling Agreement.

of coverage, and exclusions of coverage are construed against the insurer. *M & M Corp. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010).

A. The Circuit Court Correctly Interpreted The Policies' Allocation Provisions.

The Circuit Court held that "[w]hile product liability or completed operations losses are subject to allocation on a 'time-on-the-risk' pro rata allocation method, in light of its non-operating defunct status, no loss may be allocated to Starr Davis as part of any 'time-on-the-risk' allocation scheme." (R. p. 12, Order at 11.) Instead, in the limited context of operations claims, the Court interpreted the Starr Davis policies to require "all sums" allocation, particularly since Starr Davis is defunct and has no ability to pay a pro rata share of defense costs or settlement expenses. (R. p. 31–32, Order at 30–31.) Travelers contends that the Circuit Court violated the precedent established by *Crossmann*—pro rata/"time-on-the-risk" allocation as the general rule in South Carolina that necessarily applies to all cases. (App. Br. at 31–37 (citing *Crossmann*, 395 S.C. 40, 717 S.E.2d 589).)

The Circuit Court correctly distinguished *Crossmann*. "The Court remains quite mindful of the South Carolina Supreme Court's decision in *Crossmann* . . . , and notes that it speaks generally to allocation of loss in a continuing construction property loss case, but does not address the particular circumstances presented by this Receivership[.]" (R. p. 31, Order at 30.) Chief Justice Toal, having served on the *Crossmann* panel and joined the opinion in full, was fully familiar with *Crossmann* and its holdings. The Circuit Court's opinion did not rely on *Crossmann*'s statement that "trial courts employing the 'time-on-the-risk' approach may alter the default formula set forth above where a strict application would be unduly burdensome or otherwise inappropriate under the circumstances of a particular case." *Crossmann*, 395 S.C. at 66, 717 S.E.2d at 602. Instead, Chief Justice Toal found that *Crossmann* applies to some aspects of

Starr Davis's coverage but is inapplicable to others. In particular, because *Crossmann* does not speak to operations claims, the question of allocation for this limited subset of claims against Starr Davis is not resolved by *Crossmann*.

For this reason, the Circuit Court also did not err in "interpret[ing] *Crossmann* such that allocation of loss will not be made to policy years after 1986, when Starr Davis does not have any available or responsive coverage." (R. p. 32, Order at 31 (also noting that "[a]llocation of loss from a judgment or settlement to an insured which cannot pay any portion of the judgment or settlement—especially when there is abundant insurance to pay for the loss but for a judicially-created allocation formula—is unproductive, as well as inequitable").) Travelers incorrectly contends that "Starr Davis's Receiver raised and lost this exact argument in recent North Carolina litigation" in a case involving another defunct insured, Covil Corporation. (App. Br. at 36.) That dispute arose from a *products* case, not an operations case. *See Covil Corp. v. U.S. Fid. & Guar. Co.*, No. 18-CV-00932, 2020 WL 4483236, at *8 (M.D.N.C. Aug. 4, 2020). Unlike here, there was no dispute that *Crossmann* generally applied. Furthermore, Travelers fails to cite any post-*Crossmann* case in which a South Carolina court applied the "time-on-the-risk" allocation formula to operations claims. Accordingly, the Circuit Court did not err in its declarations regarding allocation of loss under the Starr Davis policies.

B. The Circuit Court Correctly Interpreted "Completed Operations Hazard."

The Circuit Court correctly held that the "completed operations hazard" set out in the policies "appl[ies] *only* when a plaintiff is exposed to asbestos attributed to Starr Davis *after* Starr Davis completed its installation or removal operations or work at a particular jobsite." (R. p. 11, Order at 10.) That declaration is entirely consistent with the language of the Starr Davis policies offered into evidence by Starr Davis. (R. p. 421, Renewed Supplemental MSJ Ex. 4 at 6.)

Reading the whole definitions of "completed operations hazard" and "bodily injury" together, the completed operations hazard limits coverage for [redacted] (R. p. 421, Supplemental MSJ Ex. 4 at 6 (emphasis added).) This "but only if" language is a limitation on the applicability of the completed operations hazard. The language states that the completed operations hazard applies only if "*the*" bodily injury happens after the operations are completed. It cannot be read to provide that the hazard is invoked if *some* "bodily injury" happens after the operations are completed.

Travelers fails to explain how, under this policy language, an injury beginning with exposure during Starr Davis's installation or removal work transmutes into a separate injury that occurs only *after* Starr Davis's operations are completed. A continuous injury beginning during Starr Davis's operations at a site remains the same injury from the date of exposure onward; it does not become a separate injury at the beginning of a new policy period.

For example, if a construction accident during an insured's contracting work resulted in both immediate injury and protracted symptoms that persist after the contracting job is completed, it would be unreasonable to argue that some of the damages resulting from such an accident fell within the "completed operations" hazard; the injury was caused by the insured's ongoing operations, not its completed operations. The "completed operations hazard" applies only if "the" bodily injury—meaning *all* of it—happens after the operations are completed. If tortious injury were "caused" at least in part by Starr Davis's ongoing work (i.e., if a plaintiff inhaled asbestos fibers during the work), then "the" injury that brought the plaintiff to court did not happen after the operations were completed. Some of "the" injury happened during Starr Davis's work. That removes the resulting tort claim for damages from the "completed operations hazard."

Travelers contends that the timing of the injury alone determines coverage, not the cause of injury, but that construction has no foundation in the text of the policies. The Circuit Court thus correctly held that "[t]here is nothing in the definition of 'completed operations' that focused on the *inception* date of a policy." (R. p. at 27, Order at 26.) "No contract interpretative rule justifies applying one approach to claims of instantaneous injury resulting from an accident, and a different approach to claims of long-term injury resulting from injurious exposures to toxic conditions." (R. p. 27, Order at 26.)

Indeed, it has been understood for decades that the risk insured by a CGL policy's "completed operations hazard" is "the possibility that the . . . work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the . . . completed work itself[.]" Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971). Starr Davis's policies therefore provided coverage against the possibility that its work would cause third-party bodily injury *before* it "relinquished" or "completed" its work. Travelers argues that the Circuit Court's reference to Dean Henderson's article "constructed a generalized theory, found nowhere in the case law" (App. Br. at 41), ignoring that Henderson's seminal exploration of the "products hazard" and the "completed operations hazard" in liability insurance policies has been directly cited by more than 100 courts throughout the country for its insight on liability coverage. *See, e.g.*, *Boyer Metal Fab, Inc. v. Md. Cas. Co.*, 750 P.2d 1195, 1197 n.2 (Or. Ct. App. 1988) (citing Henderson for the proposition that "the purpose of the product hazard and completed operations hazard coverage is to insure against the risk that the product or work, if defective, will cause bodily injury or damage to property of others after it leaves the insured's hands."); *W. Emp'rs Ins. Co. v. Arciero & Sons, Inc.*, 146 Cal. App. 3d 1027, 1031 (Ct. App. 1983); *Friestad v.*

Travelers Indem. Co., 393 A.2d 1212, 1215 n.5 (Pa. Super. Ct. 1978) ("It is only after [the insured] has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage."). Many other courts have affirmed the principles behind Dean Henderson's analysis. *See, e.g.*, *B & R Farm Servs., Inc. v. Farm Bureau Mut. Ins. Co.*, 483 N.E.2d 1076, 1077 (Ind. 1985); *CPS Chemical Co. v. Cont'l Ins. Co.,* 489 A.2d 1265, 1270 (N.J. Super. Ct. Law Div. 1984), *reversed on other grounds by* 495 A.2d 886 (N.J. Super. Ct. App. Div. 1985) ("Commentators are in *complete agreement* that [the completed operations hazard] refers to accidents *caused by defective workmanship which arise after completion of work* by the insured on construction or service contracts." (emphases added)).

Other commentators agree with Dean Henderson's analysis. "The natural reading of the words of the CGL policy suggests that tort claims arising from a policyholder's installation and construction activity are general liability claims and do not become 'completed operations' claims merely because the construction activity comes to a conclusion sometime after the events that give rise to tort liability." Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 Conn. Ins. L.J. 349, 385 (2006) (surveying the language and drafting history of the standard CGL policy). "The ***source*** of the injury determines whether the loss is within coverage," not *when* the injury occurs. *Id.* at 368 (emphasis added).

Lacking support for its position under South Carolina law, Travelers relies on the Fourth Circuit's "*Erie* guess" at *Maryland* law in *In re Wallace & Gale Co.*, 385 F.3d 820 (4th Cir. 2004), and the unpublished decision of a California *trial court* in *Plant Insulation Co. v. Fireman's Fund Insurance Co.*, No. CGC06448618, 2013 WL 3286410 (Cal. Super. Ct. Apr. 08, 2013). These cases have no bearing on South Carolina law. The Circuit Court reached the right interpretation of the Starr Davis policy language and correctly applied South Carolina law.

C. Travelers Bears The Burden To Prove A Coverage Limitation.

The Starr Davis policies provide coverage for "all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence[.]" (R. p. 424, Renewed Supplemental MSJ Ex. 4 at 9.) In other words, as relevant to this dispute, the policies provide coverage to Starr Davis for bodily injury within the policy period. An asbestos plaintiff's allegation of bodily injury within the policy period falls within the coverage terms. Once that occurs, the insurer is presumptively liable for "all sums which the insured shall become legally obligated to pay," and the insurer necessarily bears the burden to overcome that presumption by proving that an exclusion or limitation of coverage applies. *See Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2004) (citing *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 252 S.E.2d 565 (1979)); *see also Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144, 781 S.E.2d 137, 141 (2015).

Here, the Circuit Court correctly placed the burden to prove that a claim should be considered a "completed operations" claim—and therefore subject to a policy's aggregate limits—on Travelers, because the imposition of aggregate limits is no less a limitation or denial of coverage than an exclusion. (R. p. 27–29, Order at 26–28.); *Clayton*, 614 S.E.2d at 614, 364 S.C. at 560 ("Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability."). As commenters have observed, "[e]ven if a coverage-limiting provision in a policy is not denominated as an 'exclusion,' if an insurer is relying on language in a definition, condition, or other portion of a policy to defeat or reduce coverage, the provision is treated as an exclusion, it is narrowly construed against the insurer in favor of coverage, and the insurer must successfully shoulder the burden of persuasion on the issue." Stempel, *supra*, at 359–60. The Circuit Court relied on multiple precedents in accord. (R. p. 27–28, Order at 26–27.)

The reason for this allocation of the burden of proof is amply demonstrated by Travelers' arguments here. If Travelers' burden allocation were adopted, Starr Davis would have to prove two negative propositions to obtain the full amount of its coverage—that: (1) a particular asbestos claim is ***not*** a "products" claim; and (2), that it is ***not*** a "completed operations" claim. The law generally does not require parties to prove negative propositions. *See generally*, *Whaley v. Bartlett*, 42 S.C. 454, 473, 20 S.E. 745, 753 (1894) ("A party is not required to prove a negative[.]"). This is especially so in the insurance context, where all inferences are drawn in favor of the insured. (*See* R. pp. 28–29, Order at 27–28.) The Circuit Court's allocation of the burden broke no new ground.

Travelers argues that this straightforward application of settled law would somehow push "South Carolina law down the ultimate slippery slope," but hyperbolic rhetoric and tenuous hypotheticals are no substitute for legal reasoning. (App. Br. 45–46.) The Circuit Court's determination that the insurer should bear the burden to prove that a limitation applies where the insured otherwise has shown an occurrence within the policy terms—whether in the form of an exclusion or an aggregate limit—is a faithful application of longstanding legal principles governing the relations between insureds and insurers and should be affirmed.

D. The Circuit Court Correctly Interpreted the Term "Occurrence."

The Circuit Court held that under South Carolina law, "[t]he asbestos insulation contracting, or 'operations,' claims against Starr Davis have resulted from multiple 'occurrences' under the Travelers policies, thus entitling Starr Davis to multiple 'per occurrence' limits of liability to satisfy its asbestos liabilities[.]" (R. p. 12, Order at 11.) Travelers argues that this declaration was improper because it was "based exclusively on the Covil Sanctions Order" and because Starr Davis allegedly "failed to provide the circuit court with any admissible evidence of whether any particular asbestos claimant was exposed to a Starr Davis operation, as distinct from

a Starr Davis 'completed operation' or a Starr Davis 'product.'" (App. Br. at 46–47.) Both arguments are incorrect.

First, the Circuit Court did not "base" its interpretation of the policy language on the *Covil* sanctions order. (R. p. 29–31, Order at 28–30.) It is true that the Circuit Court reached the same policy interpretations here that it had reached in the *Covil* case, but that is because the relevant policy language is the *same*, as even Travelers admits. (App. Br. at 49 (stating that "occurrence" is defined in both policies as

The Circuit Court did not err by interpreting the same policy language the same way in another case. That is what courts are supposed to do.

Second, Travelers argues that the Circuit Court's interpretation of the term "occurrence" should be reversed because the record lacked evidence establishing how much of Starr Davis's work involved insulation contracting versus insulation sales and distribution. (App. Br. at 48–49.) This argument makes no sense, because for the limited purposes of the motion for partial summary judgment, the Circuit Court did not purport to apply the policy terms to the facts of any particular case. As discussed above, the facts of any individual claim determine whether it constitutes an "operations" or "products/completed operations" claim under the Starr Davis policies. The Circuit Court made no determination as to any individual claim. Thus, any fact issue over how *much* of Starr Davis's work involved contracting is immaterial to the Order.

Finally, Travelers presumes without basis that the Circuit Court "declin[ed] to consider the specific policy language at issue" because the Circuit Court did not quote the policy directly in its "number of occurrences" analysis. (App. Br. at 49.) Chief Justice Toal is intimately familiar with the policy language at issue, from this case and countless others. Moreover, Travelers notes no

meaningful distinction between the Starr Davis policy language and the definition of "occurrence" cited by the Circuit Court. (R. p. 29, Order at 28 (citing *Crossmann*, 395 S.C. at 47–48, 717 S.E.2d at 592–93).) Once again, Travelers fails to identify any reason to assign error to the Circuit Court's reasoning.

CONCLUSION

For the foregoing reasons, the Circuit Court's order granting Starr Davis's motion for partial summary judgment should be affirmed in all respects.

(Signature page follows)

Respectfully submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2019-CP-40-06243
Appellate Case No. 2021-000648

Peter D. Protopapas, as Receiver for Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc., Plaintiffs/Respondents,

v.

Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company; The Standard Fire Insurance Company; St. Paul Fire and Marine Insurance Company; The Employers' Fire Insurance Company; Southeastern Agency Group and M.I.A. Company, Inc., individually and as successors to or f/k/a Merrimon Insurance Agency, Inc.; Robert E. Aspray; Nell Ashworth, individually and as personal representative of the Estate of Robert J. Ashworth; Betty C. D'Amico, individually and as Executor of the Estate of Julian D'Amico, Jr.; Kayla Keith, individually and as the personal representative of the Estate of Jerry W. Archer, Sr.; Richard L. Knight II, as personal representative of the Estate of Teddy L. Knight, Sr., and Linda Knight, individually; David D. Rollins; James W. Smith and Frances R. Smith; and Linda J. White, individually and as personal representative of the Estate of Lubert R. White, Jr., Defendants,

of which

Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company and The Standard Fire Insurance Company are the Appellants.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that this brief complies with the provisions of Rule 211(b), SCACR.

(Signature page follows)

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