STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

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SC Court of Appeals

C.A. 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. .... 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.

<u>APPELLANTS' BRIEF</u>

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STATEMENT OF ISSUES ON APPEAL

This is an appeal of an order granting partial summary judgment for Respondents, Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. (together, "Starr Davis") against two Travelers Indemnity Company subsidiaries, The Aetna Casualty and Surety Company ("Aetna") and The Standard Fire Insurance Company ("Standard Fire") (together, "Travelers"). The issues for appellate review are as follows:

1. Whether the circuit court erred by utilizing summary judgment to declare insurance policy rights and obligations without actually relying on the insurance policies themselves and despite the existence of facts as to which Travelers demonstrated (i) a genuine dispute, (ii) the lack of any evidentiary support, and/or (iii) the legitimate need for additional discovery.

2. Whether the circuit court erred by declaring insurance policy rights and obligations that directly contradict the parties' binding, post-policy contract, specifically a claims-handling agreement the parties negotiated and executed after the insurance policies expired.

3. Whether the circuit court erred by declaring insurance policy rights and obligations that are contrary to applicable law.

STATEMENT OF THE CASE

This case involves a dispute over the application of numerous commercial liability insurance policies allegedly issued by Travelers to Starr Davis prior to 1985. Many of the alleged policies are missing, while a significant number of other policies are incomplete. Largely because of this circumstance, in 1985, after the policies had expired and Starr Davis had begun to be sued by asbestos claimants, the parties negotiated and executed a claims handling agreement ("1985 Agreement") that controls several aspects of how the policies apply to such

claims, as well as determines the span of years over which the Travelers policies were issued and when Starr Davis had coverage from other insurers or was self-insured. R. p. 658-61 (Ex. 9).

At the heart of this appeal is whether the circuit court erred in declaring rights and obligations under the alleged insurance policies by way of summary judgment. The circuit court entered these declarations despite only two (incomplete) policies being put into the record by Starr Davis, and without holding Starr Davis to its burden of proving the existence, terms and conditions of the other alleged policies. It also granted partial summary judgment despite the presence of numerous additional, genuinely disputed material facts, lack of evidentiary support, and the clear need for additional discovery. In addition, it chose to ignore completely the terms of the 1985 Agreement, which expressly contradict certain of the declarations. Finally, and in any event, many of the declarations are inconsistent with the law the circuit court purported to apply (South Carolina law), with the errors being based, in large part, on the court having relied nearly verbatim on an inapplicable, non-final discovery-related sanctions order entered in a separate tort case involving different parties and different insurance policies.

* * * * *

Starr Davis, through its receiver, Peter D. Protopapas ("Receiver"), filed its original Complaint on November 6, 2019. R. p. 53 (Compl.). The Complaint named as defendants Travelers and several other insurance companies, as well as Starr Davis' former insurance broker, Merrimon Insurance Agency Inc., and a few asbestos claimants, some of whom were identified as North Carolina residents. R. p. 54-55 (*Id.* ¶¶ 4-8, 11, 15). The case was removed to federal court, but was subsequently remanded. R. p. 38 (Remand Order).

A First Amended Complaint—the operative pleading here—was filed on August 6, 2020. R. p. 73 (First Am. Compl.). It seeks in part a judicial declaration that Travelers and the other

insurer-defendants are required to defend Starr Davis with respect to asbestos claims. It also seeks various additional judicial declarations interpreting the insurer-defendants' indemnity obligations. R. p. 79-83 (*Id.* at Second and Third Cause of Action).

Travelers filed an Answer along with Cross-Claims asserting the right to indemnification and contribution. R. p. 97 (Travelers Answer). Travelers also filed Counterclaims whereby it seeks judicial declarations regarding the parties' rights and responsibilities under the alleged insurance policies, including how certain of those rights and obligations are superseded by the 1985 Agreement. R. p. 112-17 (*Id.* at 18-23). That Agreement specifies the years for which Starr Davis agreed that Travelers did (and did not) provide insurance coverage for asbestos claims, the method by which defense and indemnity payments made under the insurance policies are to be allocated between the parties, and that Starr Davis is required to reimburse Travelers for certain payments. R. p. 115-17; 654-56 (*Id.* at 19-21; Ex. 9).

Starr Davis and Travelers served written discovery requests on one another. R. p. 708; 777-823 (Travelers Opp. at 8 & Exs. C-G). Travelers challenged Starr Davis' discovery responses as incomplete and evasive, and further contested, among other things, Starr Davis' claim of "privilege" as to its communications with Merrimon (a broker) and the underlying asbestos claimants (Starr Davis' litigation adversaries). R. p. 824-60 (Exs. H & I - deficiency letters). Starr Davis' deficient responses created the need for further discovery, including with regard to Starr Davis' revelation it had secretly destroyed relevant evidence. *See* R. p. 876; 935 (Exs. K & Q).

Fully aware of the significant disputed factual issues and the need for further discovery, Starr Davis nevertheless pressed for a summary judgment hearing. In fact, Starr Davis had initially moved for partial summary judgment against Travelers on February 28, 2020, just a few

months after filing its original Complaint. R. p. 316 (Original PSJ Mot.). In its Motion, Starr Davis asked the circuit court to "adopt . . . in full" as its summary judgment order a discovery-related sanctions order entered in a different case, involving different insurers, a different insured (Covil Corporation), based in a different state, and different policies (hereinafter, "Covil Sanctions Order"). R. p. 318 (*Id.* at 3). Starr Davis revised its motion on June 23, 2020 (R. p. 332 (6/23/20 Brief)), and again on August 21, 2020 (8/21/20 Brief ("SD Br.")). The last revision is the "operative" motion ("Motion") for purposes of this appeal. R. p. 355 (SD Br. at 2).

In its Motion, Starr Davis reiterated its request that the circuit court "adopt in full its prior holdings" in the Covil Sanctions Order and hold that "the law of South Carolina as set forth in [that order] applies to the policies issued to Starr Davis." R. p. 367; 373 (*Id.* at 14 & 20). Starr Davis attached to its Motion only two of the Travelers insurance policies allegedly issued to Starr Davis, both of which were incomplete. R. p. 415-514 (Exs. 4 & 5). As for numerous other alleged Travelers policies, Starr Davis attempted to rely on self-serving, inadmissible "charts" created by its counsel that summarized certain terms of numerous contested policies. R. p. 662-83 (Exs. 10-15). Based on this inadmissible, incomplete, and disputed information, Starr Davis asked the circuit court to "declare the essential terms and conditions" of the policies, including all policies that are "missing or incomplete." R. p. 80; 357-59; 415-514; 662-83 (FAC at 8; SD Br. at 4-5 & n.5, and Exs. 4, 5, and 10-15).

Travelers filed its opposition on January 21, 2021. R. p. 700 (Opp.). It pointed out that the Motion was premature given the contested, incomplete and ongoing discovery; that genuine issues of fact existed regarding the alleged policies; that the 1985 Agreement precluded certain of the declarations sought; that the Covil Sanctions Order, which Starr Davis had asked the circuit court to simply adopt, was based on an inapplicable discovery-related sanctions order

issued in a case to which Travelers was not a party; and that many of the declarations sought by Starr Davis were legally unsupportable. *See* R. p. 702-4 (*Id*. at 2-4). Travelers included a Rule 56(f), SCRCP, declaration describing the numerous factual issues on which discovery was needed to allow it to respond properly and fully to the Motion. R. p. 702-3; 968-70 (*Id.* at 2-3 & Ex. Z).

Despite the existence of factual disputes and the clear need for further discovery, and without regard to the terms of the 1985 Agreement, the circuit court granted the Motion during a hearing held on January 25, 2021. R. p. 202-3 (Hr'g Tr. at 58-59). Starr Davis was thereafter directed by the circuit court to draft and submit a proposed order to the circuit court; Travelers objected to that lengthy draft order on February 8, 2021. R. p. 1020-27 (Proposed Order; Objections). Starr Davis then submitted a revised proposed order, to which Travelers objected on February 22, 2021.[1] R. p. 1059-61 (Revised Proposed Order; Objections thereto). The circuit court signed the revised proposed order on March 3, 2021, adopting nearly verbatim what Starr Davis' counsel wrote as the opinion of the court ("Order"). R. p. 1-34 (Order); *cf.* R. p. 1028-58 (Revised Proposed Order). Travelers timely moved for reconsideration of the Order, and Starr Davis filed a response in opposition. R. p. 1870-80 (Mot. for Reconsideration and Opp.). The circuit court denied the motion for reconsideration on May 19, 2021. R. p. 35 (Order). Travelers timely filed its notice of appeal on June 18, 2021. R. p. 1881 (Notice).

STANDARD OF REVIEW

When, as here, the circuit court grants summary judgment on a question of law, the Court of Appeals reviews the circuit court's ruling de novo. *See Stoneledge at Lake Keowee Owners'*

[1] Travelers included with its objections a comparison of the original proposed order and revised proposed order, which highlighted the fact that Starr Davis simply deleted citations to the Covil Sanctions Order, but did not otherwise alter the circuit court's adoption of that order. R. p. 1062 (attach. to Objections).

Ass'n v. Clear View Constr., 413 S.C. 615, 620, 776 S.E.2d 426, 429 (Ct. App. 2015) (citing *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008)). No deference is accorded the circuit court's decision. *See Mangal v. State*, 421 S.C. 85, 91, 805 S.E.2d 568, 571 & n.4 (2017) ("[A]ppellate courts review questions of law de novo, with no deference to trial courts."). The Court of Appeals thus applies the same standard which governs the trial court under Rule 56(c), SCRCP, *i.e.*, summary judgment is only proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Englert, Inc. v. LeafGuard USA, Inc.*, 377 S.C. 129, 659 S.E.2d 496 (2008).

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted). "[E]very benefit of the doubt" is given to the party opposing summary judgment. *See Watters v. Terminix Service, Inc.*, 376 S.C. 632, 635, 658 S.E.2d 110, 112 (Ct. App. 2008). Thus, "[a]t the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a [factfinder] for summary judgment to be denied." *Hill v. York Cnty. Sheriff's Dep't*, 313 S.C. 303, 308, 437 S.E.2d 179, 182 (Ct. App. 1993).

Summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). *See also Durkin v. Hansen*, 313 S.C. 343, 346, 437 S.E.2d 550, 552 (Ct. App. 1993) (summary judgment is appropriate "only when the pleadings, depositions, interrogatory answers, admissions, and affidavits show that there is no genuine issue of material fact"). Thus, where discovery is ongoing and evidence is likely to exist that is necessary to the non-moving party's

opposition, any consideration of summary judgment should be postponed until that evidence can be marshalled for the court's review. *See Schmidt v. Courtney*, 357 S.C. 310, 319, 327, 592 S.E.2d 326, 331, 335 (2003) (noting that "[b]ecause summary judgment is a drastic remedy, it must not be granted until the opposing party has had a 'full and fair opportunity to complete discovery,'" and finding trial court erred in granting summary judgment because additional discovery was needed) (citations omitted). Moreover, "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id*. at 319, 592 S.E.2d at 331 (collecting cases). Thus, "[e]ven when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.* at 320, 592 S.E.2d at 331 (collecting cases).

STATEMENT OF FACTS

Both of the Starr Davis entities were based in Greensboro, North Carolina. R. p. 1904 (Ex. T); R. p. 74 (FAC ¶¶ 2-3). A Greensboro address is included on the Travelers policies as Starr Davis' main office. R. p. 417; 451; 751; 762 (Exs. 4 & 5; Exs. A & B – policies). Starr Davis' broker, Merrimon, was also based in North Carolina. R. p. 1902; 1903; 75 (Ex. S at TRAV-SD_007970; Ex. T; FAC ¶ 8). Nothing in the record indicates that any Starr Davis policies were underwritten or issued outside of North Carolina.

Promotional materials produced by Starr Davis highlight its numerous projects in North Carolina. R. p. 522-44; 553-76 (Exs. 6 & 7 – attach. to subpoenas to Travelers). Travelers' underwriting documentation [redacted]

[redacted]. R. p. 1904 (Ex. T).

Starr Davis allegedly supplied, installed, replaced, repaired, removed, and/or used insulation materials, including at times asbestos-containing products. R. p. 91 (FAC ¶ 19). But

historical records indicate that [redacted]

[redacted] R. p. 1897; 1904; 1909; 1914 (Exs. R-V). Those records also explain that [redacted] R. p. 1905 (Ex. T). Other historical documents report that [redacted]. R. p. 1897; 1909 (Exs. R & U). Starr Davis also informed Travelers that [redacted] R. p. 1897; 1905; 1914 (Exs. R, T & V).

In or around 1980, [redacted]. R. p. 1900-02 (Ex. S). [redacted]. *Id.* [redacted] *Id.* But Merrimon never located or provided Travelers with any pre-1975 policies. *See* R. p. 935 (Ex. Q, Myers Aff.).

By the mid-1980s, "a dispute [arose] with regard to the responsibility of providing for the defense and disposition of Starr Davis' asbestos claims," such that Starr Davis and Travelers negotiated and signed the 1985 Agreement "to provide for the effective management of [those claims]." R. p. 658 (Ex. 9). In that Agreement, the parties stipulated and agreed that Travelers only provided insurance coverage to Starr Davis from January 1, 1959 to June 30, 1985. *Id.* Starr Davis expressly acknowledged in the Agreement that it "has been insured by *other* insurers

or has been *self-insured* for the remainder of its existence." *Id*. (emphasis added). The 1985 Agreement also specified how Starr Davis's asbestos liabilities would be allocated and shared for both defense and indemnity under the alleged policies. R. p. 659-60 (*Id.* ¶¶ 3-5). Specifically, the Agreement provided that Travelers would defend Starr Davis where any portion of alleged asbestos exposure fell within a period of a Travelers policy that had not been exhausted by payment of indemnity, but that Travelers' liability for the cost of defense would be limited based on an allocation formula that compares the number of years of alleged exposure during Travelers' coverage periods to the total number of years of alleged exposure. R. p. 659-60 (*Id*. ¶ 3). And Starr Davis confirmed that this allocation formula would apply to Travelers' "liability for the cost of disposition of the asbestos claims." R. p. 660 (*Id*. ¶ 4).

The 1985 Agreement provided that it could not be used in court "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 (*Id*. ¶ 1). The Agreement did *not*, however, prohibit or restrict its use for any other reason, including the most obvious purpose—a legal action to enforce its terms. R. p. 658 (1985 Agreement). The Agreement further provided that it "may be terminated by either party hereto upon the giving of 90 days' written notice to the other party." R. p. 660 (*id.* ¶ 6). Starr Davis has not offered any evidence whatsoever that the Agreement has ever been terminated, and Travelers is not aware of any such evidence. *See* R. p. 716; 874 (Opp. at 16; Ex. K, at No. 9).[2]

Starr Davis filed for bankruptcy protection in 1993, but the bankruptcy petition was eventually dismissed, after which Starr Davis dissolved in 1996-97. R. p. 77 (FAC ¶¶ 20-21).

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[2] Ironically, the Receiver's discovery responses stated that Starr Davis is not currently in a position to state whether or not the 1985 Agreement remains in force, in part, because "[d]iscovery is ongoing." R. p. 874 (Ex. K at 9).

As was revealed in preliminary discovery in this action, George Gibson, Starr Davis' former Chief Financial Officer, destroyed substantially all of Starr Davis's records, without any notice to Travelers, in 1999. R. p. 866; 889 (Ex. K & L - Starr Davis' Suppl. Discovery Resp.). Similarly, Starr Davis' broker, Merrimon, did not retain the originals or copies of any Starr Davis policies. R. p. 935 (Ex. Q, Myers Aff. ¶¶ 5-8).

Mr. Protopapas was appointed Receiver for Starr Davis in February 2019, after new asbestos personal injury complaints began to be filed against Starr Davis. R. p. 77 (FAC ¶ 23). Shortly thereafter, in May and June, 2019, Travelers sent the Receiver, at his request, copies of all insurance policy documentation it could locate that reflected policies potentially issued to Starr Davis by Travelers' predecessor companies, Aetna and Standard Fire. R. p. 959-65 (Exs. X & Y). Travelers also provided the Receiver with the 1985 Agreement. R. p. 654-61 (Ex. 9). Subject to a reservation of rights, Travelers has been defending Starr Davis against asbestos claims tendered by the Receiver to Travelers, and has paid all defense and indemnity amounts incurred to date in connection with those claims. R. p. 103; 166; 173 (Answer to FAC ¶ 42; Hr'g Tr. at 22 & 29). Starr Davis has not followed the allocation rules to which it agreed in the 1985 Agreement, however, and has not reimbursed Travelers for any defense or indemnity amounts as required by the Agreement.

ARGUMENT

In its Motion, Starr Davis asked the circuit court to ignore disputed facts, rely on entirely unsupported facts, sidestep the clear need for further discovery, and issue declarations regarding the parties' obligations under policies allegedly issued by Travelers to Starr Davis in a vacuum, without reference to the actual policy language or evidence of how and when the claimants' injuries occurred. Starr Davis also asked the court to disregard the terms of the 1985 Agreement. Finally, Starr Davis urged the circuit court to render declarations that are contrary to the terms of

the policies and applicable law by "adopting in full" a non-final, heavily-flawed "discovery sanctions" order issued *in a tort case* to which neither Travelers nor Starr Davis were parties and as to which no appellate review has been permitted to date.

Unfortunately, the circuit court agreed to Starr Davis' requests and thereby made factual findings and issued declarations that must be reversed by this Court.

I. THE CIRCUIT COURT ERRED BY ENTERING PARTIAL SUMMARY JUDGMENT DESPITE THE EXISTENCE OF GENUINELY DISPUTED MATERIAL FACTS, THE LACK OF SUPPORTING ADMISSIBLE EVIDENCE, AND THE NEED TO COMPLETE RELEVANT DISCOVERY.

The circuit court committed reversible error by choosing to interpret and declare rights and obligations under the alleged Travelers policies without Starr Davis having met its burden of establishing the existence, terms and conditions of the alleged policies and based on material facts that were genuinely contradicted by the existing record, lacked any admissible supporting evidence, and/or required further discovery.

A. The Circuit Court Ignored Starr Davis' Failure to Establish the Existence, Terms and Conditions of the Alleged Policies and Issued Declarations Without Regard to All of the Actual Policy Language.

In a striking example of refusing to follow Rule 56, SCRCP, the circuit court rendered insurance-related declaratory judgments without even looking at the policies it chose to interpret. The circuit court decision erroneously states that the court had been "presented with sufficient policy evidence . . . to reach conclusions concerning the existence and scope of the Travelers policies issued to Starr Davis." R. p. 13 (Order at 12). In fact, Starr Davis put into the summary judgment record copies of only *two* policies, both of which are incomplete.[3] R. p. 415-514 (Exs.

[3] Starr Davis told the circuit court that it provided the two (admittedly incomplete) policies only as support for a vague reference to the nature of Starr Davis' operations. R. p. 359 (SD Br. at 6, n.5). It did not ask the circuit court to rely on either policy as support for the declarations it sought. And while Travelers also put two policies into the summary judgment record, it was unable to certify the completeness of those policies. R. p. 750; 761 (Exs. A & B).

4 & 5). The only other documents offered by Starr Davis to "prove" the more than 20 other alleged policies at issue were inadmissible "summary charts" prepared by Starr Davis' own counsel. *See* R. p. 364; 662-683 (SD Br. at 11; Exs. 10-15). The court openly acknowledged that its factual findings were "based on [this] compilation of policy dates, insurer, policy number, and occurrence and aggregate limits" (R. p. 14 (Order at 13)), for which there was no underlying evidentiary support in the record.

The circuit court's approach violated a basic tenet of insurance law that the interpretation of insurance policies must begin "with the language of the policies themselves." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 52-53, 717 S.E.2d 589, 595 (2011). Where policies are missing or incomplete, the insured must prove their material terms because "*absent the actual terms of the policy, it is impossible for a trial court to declare a party's rights and duties under the policy*." 1 Steven Plitt & Jordan Ross Plitt, *Practical Tools for Handling Insurance Cases* § 1:29 (2020 update) (emphasis added). In fact, policy reconstruction expert testimony is usually required to prove a lost or missing policy. *See id.*

Starr Davis' failure to provide the circuit court with copies of the policies, secondary policy evidence, and/or fact or expert witness testimony concerning those alleged policies, is fatal to its Motion insofar as it seeks a declaration of rights and obligations under those other policies,[4] and the circuit court erred in relying on incomplete, erroneous and contested charts prepared by counsel. *See, e.g.*, Rule 1006, SCRE (allowing a court to consider "charts" and "summaries" only if "the underlying data are admissible into evidence" and the proponent makes the originals or duplicates of such the underlying data available); *Zemp Const. Co. v. Harmon*

[4] Here, as noted above, Starr Davis put only two of the referenced policies in the record, admitted that even those policies are "incomplete," and acknowledged that no one has been able to locate originals or copies of many of the alleged policies at issue. R. p. 359-61 (SD Br. at 6-8).

Bros. Const. Co., 225 S.C. 361, 368, 82 S.E.2d 531, 534 (1954) (acknowledging "the rule which permits the introduction of a summary of analysis of voluminous or complicated records, themselves properly in evidence, or made available to the adverse party," and finding error in a trial court's admission of a summary where only some of the documentation was in evidence); *Crowley v. Spivey*, 285 S.C. 397, 412, 329 S.E.2d 744, 783 (Ct. App. 1985) ("A summary of voluminous records . . . is admissible if the records themselves are properly in evidence.") (citation omitted); *H. Kim v. Kim Gang, Inc.*, Case No. 12 Civ. 6344, 2014 WL 2081775, at *4 (S.D.N.Y. May 12, 2014) ("[I]nsofar as the charts constitute a summary to prove the contents of underlying documents that defendants apparently failed to preserve (assuming they ever existed), they cannot satisfy the requirements of Rule 1006 . . . ."); *see also Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) (holding that a court "may not base necessary findings of fact and conclusions of law solely on counsel's statements of fact or arguments"); *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) (holding that "materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence").

Moreover, the summary charts, even if admissible, do not provide the information necessary to support the expansive rulings issued by the circuit court. The charts contain only the name of the issuing insurers, the named insureds, policy numbers, and limits; they lack any information whatsoever regarding the coverage terms that are the subject of the court's numerous interpretative declarations. The circuit court simply chose to accept Starr Davis' counsel's unilateral and unsupported allegation that the policies listed in its summary charts "cover all asbestos-related suits asserted against [Starr Davis]." R. p. 362-64 (SD Br. at 9-11).[5]

[5] The occasional references by Starr Davis and/or the circuit court to policy language put before the court in the *Covil* matter, which again involved *different* insurers and *different* policies in a *different* state, obviously has no relevance to interpretation of the policies issued to Starr Davis.

Here, because Starr Davis did not provide the circuit court with copies of the vast majority of the policies and/or secondary evidence of those policies—evidence which, to the extent it even exists, was in Starr Davis' possession but it chose to withhold—the circuit court was in no position to declare how the terms and conditions of those policies apply. This is particularly true given that the policies at issue spanned at least a 26-year period (1959-85), and likely changed significantly over that time span.[6] Even if Starr Davis had put into evidence copies of each partial policy that had been located, as well as any secondary evidence of missing policies, the circuit court was required to actually analyze, based on that evidence, whether Starr Davis met its burden of sufficiently proving the existence, terms and conditions of the missing or incomplete policies. *See Fuller v. Eastern Fire & Cas. Co*., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962) (in a breach of contract action, "the burden [is] upon the [insured] to prove the contract, its breach, and the damages caused by such breach").

Under South Carolina law, such proof must consist of *clear and convincing* evidence. *See Estate of Mason v. Mason*, 289 S.C. 273, 277, 346 S.E.2d 28, 31 (Ct. App. 1986); *Troy Cemetery Ass'n v. Davis*, 223 S.C. 305, 312-14, 75 S.E.2d 458, 461-62 (1953). *See also In re Herring's Will*, 198 S.E.2d 737, 740 (N.C. Ct. App. 1973). As other courts have explained in

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To the extent the circuit court relied on such language, its rulings were clear error and must be overturned. Moreover, the circuit court's reference to there being no evidence to contradict the court's declarations (R. p. 13 (Order at 12)) shows the gravity of the error here. Travelers established that discovery was incomplete, including because the discovery responses provided by Starr Davis on many topics directly relevant to Starr Davis' partial summary judgment motion were evasive and/or misleading. *See* R. p. 824-44 (Ex. H – deficiency letter). In addition, the suggestion that Starr Davis engaged in a "painstaking policy reconstruction" exercise is not only inadmissible, it ignores the fact that Starr Davis and Traveler had undertaken policy searches and come to a binding contractual agreement—the 1985 Agreement—concerning the years for which coverage existed and how asbestos-related costs would be allocated. *See* R. p. 658 (Ex. 9).

[6] *See Morton Int'l, Inc. v. Gen. Acc. Ins. Co. of Am*., 629 A.2d 831, 849 (N.J. 1993) (discussing changes in standard CGL policy language over time, including significant revisions in 1966 and 1973).

similar contexts, this is a very exacting standard. In *Klopman v. Zurich American Insurance Co*., 233 F. App'x 256, 260 (4th Cir. 2007), for example, the court explained that under Maryland law, proof of the existence and terms and conditions of the policies there must be "clear and positive" proof which is so "convincing" that it "leaves no reasonable doubt." *Id*. at 258-59 (citations omitted). Likewise, in *In re The Wallace & Gale Co.,* 275 B.R. 223, 230 (D. Md. 2002), *vacated in part on other grounds*, 284 B.R. 557 (D. Md. 2002), *aff'd in part*, 385 F.3d 820 (4th Cir. 2004), the Fourth Circuit affirmed that, "[t]he burden of proof is by a preponderance of the evidence . . . , except insofar as lost policies are concerned," as to which "the proponent must establish the fact of loss and the terms and conditions of the policies by 'clear and positive' evidence." (citation omitted). Indeed, the Fourth Circuit has noted the existence of a heightened burden of proof for nearly 100 years, concluding under West Virginia law that, "[i]t is incumbent upon one seeking to establish a lost instrument to prove it by evidence of the clearest and most satisfactory character." *Gill v. Colton*, 12 F.2d 531, 534 (4th Cir. 1926). Other courts throughout the country agree.[7] *See also Amica Mut. Ins. Co. v.*

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[7] *See, e.g., Harrow Prods., Inc. v. Liberty Mut. Ins. Co*., 64 F.3d 1015, 1021 (6th Cir. 1995) (a party trying to prove the terms of a policy without a copy of the policy or a reasonable facsimile "certainly faces a formidable burden" and an "inability to describe the terms of . . . coverage is fatal"); *Coregis Ins. Co. v. City of Harrisburg*, 401 F. Supp. 2d 398, 403-04 (M.D. Pa. 2005) (applying a "clear and convincing" standard and rejecting the insured's argument to "carve out a new, reduced standard of proof exclusively in the context of lost commercial insurance policies"); *Boyce Thompson Inst. For Plant Research v. INA*, 751 F. Supp. 1137, 1140 (S.D.N.Y. 1990) ("Because lost insurance instruments are a common problem, a party seeking to recover upon a lost instrument must prove its former existence, execution, delivery and contents by clear, satisfactory and convincing evidence.") (citations omitted); *Metlife Cap. Corp. v. Westchester Fire Ins. Co,* 224 F. Supp. 2d 374, 384 (D.P.R. 2002) (the proponent of a missing policy "bears the heavy burden of establishing the existence as well as the terms and conditions of the policy by clear and convincing, or at least, strong and conclusive evidence"); *New York v. Union Fork & Hoe Co.*, No. 90-CV-688, 1992 WL 107363, at *4 (N.D.N.Y. May 8, 1992) (at the summary judgment stage, "clear and convincing evidence is not enough; [the insured] must establish the existence and terms of the policy beyond factual dispute").

Kingston Oil Supply Corp., 134 A.D.3d 750, 752 (N.Y. App. Div. 2d Dep't. 2015) ("[T]he more important the document [is] to the resolution of the ultimate issue in the case, the stricter becomes the requirement of the evidentiary foundation.") (citation omitted).[8]

Contrary to these established principles, the circuit court imposed assumed terms on Travelers, and then announced declarations regarding matters of policy interpretation without Starr Davis carrying its burden of proof as to policy existence, terms and conditions of most of those policies. Where, as here, there is no clear and convincing admissible evidence regarding the material terms and conditions of most of the alleged policies, there is simply no way for a court to declare the scope of coverage. *See Jefferson-Pilot Fire & Cas. Ins. Co. v. Sunbelt Beer Distributors, Inc.*, 839 F. Supp. 376, 378 (D.S.C. 1993) ("[T]o determine coverage, a court in a declaratory judgment action should compare the complaint in the underlying action with the language of the policy to see whether the complaint alleges any facts that could possibly bring the action within the coverage of the policy."); *Hartford Cas. Ins. Co. v. Gelshenen*, 387 F. Supp. 3d 634, 638 (W.D.N.C. 2019) (in deciding whether an insurer had a duty to defend, court must apply "comparison test" and "read the policies and the underlying pleading side-by-side to determine whether the events as alleged are covered or excluded by the policy terms"); *Metlife Cap. Corp.*, 224 F. Supp. 2d at 387 ("Absent proof of or reference to the specific language, the Court can make no determinations as to what duties [the insurer] may have owed [the insured] under the policy. With so many uncertainties, the Court is unwilling to interpret a policy whose

[8] *See also Sylvania Elec. Prods., Inc. v. Flanagan*, 352 F.2d 1005, 1008 (1st Cir. 1965) (stating that the "best evidence rule should not be applied as a mere technicality," and "where the missing original writings in dispute are the very foundation of the claim . . . more strictness in proof is required than where the writings are only involved collaterally.").

terms have not been established.").[9] *See also Morrison v. Kemper Ins. Co.*, No. 82568, 2003 WL 22413651 (Ohio Ct. App. Oct. 23, 2003) ("The entire dispute revolves around the terms of an insurance policy which is not included in the record. Without the policy language, the court could not declare the parties' rights and obligations thereunder. Accordingly, we reverse and remand for further proceedings.").

Finally, in an effort to avoid analyzing the actual policies, the circuit court chose to conclude, without citation to any supporting documentation, that "[t]here is no evidence, or any other indication, that the Travelers policies were issued on anything other than standard policy forms used during the pertinent time periods." R. p. 10 (Order at 9). But the circuit court neither cites nor attaches any "standard forms," nor did Starr Davis submit or make reference in its Motion to the contents of any such "forms." In any event, setting aside the lack of any admissible evidence, so-called "standard forms" do not provide reliable evidence as to the terms and conditions of alleged policies, as is aptly demonstrated by reference to the (few) policies that are part of the summary judgment record. For example, the two policies submitted by Starr Davis, which it concedes are "incomplete" (R. p. 359; 364 (SD Br. at 6 & n.5 and 11 & n.9)), include R. p. 416; 450 (Exs. 4 & 5). Those same policies include

[9] The circuit court made a passing reference to there allegedly being "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). None of that supposed "evidence" was submitted as part of the summary judgment briefing. But if had been submitted, it would have only created a genuine issue of material fact concerning the existence, terms or conditions of any given policy.

. *See, e.g.*, R. p. 441-46; 477-87 (Ex. 4 at TRAVELERS DOC MGMT Pages 26-31 & Ex. 5 at TRAV_SD_004733-004743).

At bottom, Starr Davis affirmatively chose not to submit the required evidence of the actual policy language, nor did it seek to prove all material terms via submission of fact or expert declarations or depositions. Issuance of policy interpretation declarations without policies is clear error. The circuit court's Order must be reversed.

B. The Circuit Court Ignored the Paucity of Evidence and Contradictory Allegations Regarding the Nature of Starr Davis' Business, as well as the Lack of Evidence Concerning When, Where and How the Claimants Were Injured.

Beyond basing its Order on incomplete, missing and non-existent insurance policies, the circuit court also accepted Starr Davis' factual assertion—again unsupported by any admissible evidence—that Starr Davis "was not an insulation manufacturer or supplier. It was a contractor." R. p. 367; 3 (SD Br. at 14; Order at 2). In addition, the circuit court deemed "undisputed" Starr Davis' factual proposition—also unsupported by any admissible evidence—that "[a]t pertinent times, insulation materials [handled by Starr Davis] contained asbestos," and Starr Davis' operations "resulted in bodily injury to South Carolina citizens." R. p. 6 (Order at 5).

These factual findings not only lack any evidentiary support, they were directly contradicted by admissible evidence. As previewed above, Travelers provided the circuit court with contemporaneous documentation demonstrating that . *See, e.g.*, R. p. 1897 (Ex. R). In addition, Travelers submitted documentary evidence that the

[REDACTED]. R. p. 1897; 1909; 1914 (Exs. R, U & V).[10] Travelers also informed the circuit court that when Travelers served discovery on Starr Davis designed to confirm the nature of Starr Davis' historical activities, Starr Davis refused to respond. *See, e.g.*, R. p. 829-30; 850; 878 (Ex. H at 5-6; Ex. I at 5; Ex. K. at 13).

Thus, at the time of the circuit court's partial summary judgment ruling, the only admissible evidence of the factual nature of Starr Davis' asbestos-related activities was *entirely inconsistent* with the circuit court's contrary and unsupported factual findings. Equally contested was the circuit court's unsupported assumption that the underlying claimants suffered bodily injury during any given policy period by virtue of exposure to ongoing Starr Davis operations, as opposed to suffering bodily injury during any given policy period after Starr Davis operations involving asbestos were complete or by exposure to its products. The record does not support that assumption and, if anything, suggests that most claims arise out of exposure to Starr Davis products and/or that, [REDACTED], any bodily injury suffered by claimants would have taken place after any relevant Starr Davis operations involving asbestos were completed.

The circuit court's contested factual findings concerning Starr Davis' historical business activities were the justification for a number of the court's judicial declarations. This is because for any particular Travelers policy period, whether or not an asbestos claimant suffered bodily injury from exposure to asbestos fibers during a Starr Davis asbestos-related operation during that policy period, as opposed to being exposed to asbestos fibers released from a Starr Davis

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[10] The need for discovery regarding when Starr Davis stopped handling asbestos is obvious inasmuch as injuries based on alleged exposure to asbestos after such time could not be "operations" claims. In addition, if it is shown [REDACTED]. This underscores the need for further discovery and the inappropriateness of a summary judgment ruling on policy interpretation issues at this stage of the litigation.

product or suffering bodily injury during a policy period after a relevant Starr Davis operation involving asbestos was completed, determines whether the liability associated with that injury is "capped" by aggregate limits. In addition, and as is also discussed below, according to the circuit court, this same determination gives rise to a supposed "exception" to the requirement that Starr Davis' liability be pro-rated. In effect, the circuit court's adoption of disputed, unsupported and untested factual findings is what allowed it to rule erroneously that Travelers has unaggregated liability for virtually *all* Starr Davis asbestos claims.

No matter how much the circuit court wished to quickly rid itself of complex insurance coverage issues, it was not entitled to bypass the South Carolina Rules of Civil Procedure. Rule 56, SCRCPS, and the cases interpreting it are clear: in determining whether any triable issue of fact exists, so as to preclude summary judgment, "the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party," with "every benefit of the doubt" given to the party opposing summary judgment. *Quail Hill*, 387 S.C. at 235, 692 S.E.2d at 505 (emphasis added); *Watters*, 376 S.C. at 635, 658 S.E.2d at 112. *See also Hill*, 313 S.C. at 308, 437 S.E.2d at 182 (at summary judgment phase, nonmoving party need only submit "a scintilla of evidence warranting determination by a [factfinder] for summary judgment to be denied").[11]

[11] The circuit court's adoption of the Covil Sanctions Order caused it to apply a very different standard. The Covil Sanctions Order was based on a finding of spoliation, such that "an appropriate sanction" should be issued "to deter such conduct in the future and attempt to re-level the now uneven evidentiary playing field." R. p. 392 (Ex. 2 at 13). That sanction involved drawing "an inference . . . that the destroyed or lost evidence would have been adverse to [the insurer]." R. p. 393 (*Id*. at 14). It was in the context of such adverse inferences that the court then chose to issue wide-ranging declarations regarding the interpretation of various insurance coverage issues under South Carolina law. In essence, the declarations were a *penalty*. Starr Davis' request that the court "adopt in full" the declarations from the Covil Sanctions Order disregards the very different standard to be applied in addressing a summary judgment motion, and it improperly shifts the burden of proving the contents of policies from the insured, as

Here, the circuit court simply ignored the evidence that . It also ignored the evidence that . Instead, the circuit court chose to simply make a factual determination on summary judgment, without any evidentiary support, that most of Starr Davis' business was asbestos-related contracting work; that many of the asbestos claimants who have or will ever sue Starr Davis were exposed to Starr Davis personnel while they were performing asbestos-related operations; and that it makes no difference if the claimant's bodily injury . Relying on these one-sided, disputed findings, the circuit court rushed to judgment and focused its declarations on "operations" coverage. This "endless coverage" ruling cannot stand, because facts matter to insurance coverage indemnity obligations, and the facts here are vigorously contested.

C. The Circuit Court Erred in Issuing a Choice-of-Law Ruling with No Analysis, including No Consideration of the Lack of Evidence to Determine Which State's Law Should Apply and Despite Awareness of Starr Davis' Misleading Representations as to Relevant Facts.

Travelers' primary argument before the circuit court relevant to choice-of-law was that relevant discovery was pending and must be completed to allow the court to conduct a proper choice-of-law analysis, as discussed below. At the appropriate juncture, Travelers would have provided information on the extent to which the laws of the potentially relevant states varied, including pointing out differences between the law of South Carolina and North Carolina. In any

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required by law, to Travelers. Moreover, no such penalty is warranted here, where the destruction by Travelers was pursuant to a standing corporate document retention policy and prior to the notice of the asbestos claims (unlike Starr Davis' destruction of its own files in 1999). In any event, the parties reached a negotiated agreement as to the years in which Travelers would—and which years it would not—be allocated costs associated with the asbestos claims. *See* R. p. 1900-01; 659-60 (Ex. S; Ex. 9). Accordingly, the court's admonishment of Travelers here (*see, e.g.*, R. p. 8 (Order at 7)) is completely unwarranted.

event, even if the court ultimately determined that the laws of those states are the same on issues addressed in the court's declarations, as it suggests may be the case (R. p. 19-20 (Order at 18-19)), the Order would still need to be overturned on the ground that the declarations are inconsistent with applicable law, as discussed *infra* in Section III.

Rather than produce in discovery information relevant to which state's law must be applied to the insurance policies allegedly issued by Travelers, Starr Davis asked the circuit court to simply apply South Carolina law in this matter because the court did so in a *different* case involving a *different* insured, in a *different* state, *different* insurers, and *different* policies. R. p. 356 (SD Br. at 3). Specifically, Starr Davis asserted that, "[i]n its role as the Receivership Court for [Covil Corporation], . . . this Court has considered certain similar insurance coverage issues, and has determined that South Carolina law governs the construction of South Carolina-issued insurance policies." *Id.*

Unfortunately, the circuit court agreed, despite the fact that the policies at issue in the present matter are *not* "South Carolina-issued insurance policies." Although discovery is far from complete, significant admissible evidence was provided by Travelers to the circuit court demonstrating that the policies were, in fact, issued in North Carolina. As discussed above, they were issued to the Starr Davis entities at their Greensboro, North Carolina address, through the efforts of a broker who was also based in Greensboro. *See supra*, at 7.

Starr Davis sought to obfuscate the significant admissible evidence of extensive North Carolina contacts relevant to a proper choice-of-law analysis.[12] Travelers, in opposing the

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[12] For example, Starr Davis incorrectly stated that it was a former South Carolina corporation, with no mention of the undisputed fact that one of the Starr Davis entities was incorporated in North Carolina, or [redacted]
[redacted]. R. p. 356 (SD Br. at 3; *compare* R. p. 74 (FAC ¶ 2); *see also* R. p. 1904 (Ex. T). Starr Davis added to its misimpression by aligning itself with Covil Corporation, which it described as

Motion, pointed to evidence of Starr Davis' significant North Carolina contacts and stressed the need for further discovery, noting that "the issue of whether South Carolina or North Carolina law applies is very much an open issue on which discovery is needed." R. p. 705-6 (Opp. at 5-6). Travelers identified discovery directly relevant to Starr Davis' Motion that it sought from both Starr Davis and its broker, which those parties had refused to provide. *See* R. p. 709; 824-860 (*Id.* at 9 and Exs. H & I). For example, when asked to describe its "business history and/or business activities from 1946 to the present," Starr Davis provided the following incomplete, erroneous and misleading response: "Starr Davis was formed in South Carolina in 1949. The state of South Carolina rescinded Starr Davis Company, Inc.'s corporate charter in 1997, for failure to file the appropriate documentation with the South Carolina Secretary of State. The Receiver was appointed on February 21, 2019." R. p. 830 (Ex. H, deficiency letter, at 6).

In addition, when asked to identify how, when, and where each of the named asbestos claimants was injured by Starr Davis' conduct, Starr Davis improperly objected on the basis of "the attorney-client privilege and/or the work product doctrine," despite the fact that it can claim no legitimate privilege with respect to these critically-important facts. R. p. 832 (*Id.* at 8). And when asked specifically to identify which state's law applies to the interpretation of the policies at issue and to provide all facts supporting its response, it refused to identify those facts; it merely offered its self-serving conclusion that "South Carolina law applies to the interpretation of the liability insurance policies Travelers issued to Starr Davis." R. p. 835 (*Id*. at 11).

"another" South Carolina company. R. p. 356 (Br. at 3). Starr Davis also focused exclusively (and vaguely) on claims involving "bodily injury to South Carolina citizens," even though it acknowledged that Starr Davis' contracting work occurred in North Carolina, Tennessee, Georgia, Alabama and Virginia. R. p. 359 (*Id*. at 6). Starr Davis also failed to acknowledge that its First Amended Complaint identifies as defendants North Carolina citizens who have asserted asbestos-related bodily injury claims against Starr Davis. R. p. 75-76 (FAC ¶¶ 11 & 15).

Efforts by Travelers to persuade Starr Davis to amend such clearly deficient and misleading discovery responses were not productive and did not result in the production of the requested information. *See* R. p. 845-60 (Ex. I – second deficiency letter). For example, Starr Davis amended its discovery responses concerning choice-of-law by simply adding a reference to its brief in support of its partial summary judgment motion, which did not contain any choice-of-law analysis. R. p. 885 (Ex. K, at p. 20). *See also* R. p. 354-73 (SD Br.).

The circuit court ignored the need for further discovery, but adopted a choice-of-law rationale not briefed by the parties, stating that "South Carolina law applies to matters before South Carolina courts unless a material difference exists between the law of South Carolina and the law of another state." R. p. 19 (Order at 18). This reasoning puts the cart before the horse, inasmuch as the initial inquiry should focus on the facts relating to the *potential* application of the laws of other states, and whether the policies at issue cover "property, lives, or interests" in South Carolina, as well as where the contracts were formed. *See Sangamo Weston, Inc. v. Nat'l Sur. Corp*., 307 S.C. 143, 414 S.E.2d 127 (1992). Here, the circuit court chose affirmatively to forego this highly relevant factual inquiry. R. p. 19-20 (Order at 18-19).[13]

In insurance coverage disputes, the governing choice-of-law rule applied by South Carolina courts has been *lex loci contractus*, which requires application of the law of the state where the contract was formed. *See Bowman v. Continental Ins. Co*., 229 F.3d 1141 (4th Cir. 2000) (Table), 2000 WL 1173992, at *2; *Yeager v. Md. Cas. Co*., 868 F. Supp. 141, 144 n.5 (D.S.C. 1994) (citations omitted). This rule was modified by statute in 1947, now codified as

[13] By contrast, in the Covil matter, the same circuit judge acknowledged the need to conduct a choice-of-law analysis and discussed facts demonstrating contacts with South Carolina, including Covil's installation and removal of insulation in various industrial facilities across South Carolina, as well as bodily injury to South Carolina citizens. R. p. 381 (Ex. 2 at 2).

S.C. Code Ann. § 38-61-10, which provides that "[a]ll contracts of insurance on property, lives, or interests in this State are to be considered made in the State and all contracts of insurance the application for which are taken within the State are considered to have been made within this State and are subject to the laws of this State." However, courts have confirmed that *lex loci contractus* continues to apply in those cases where § 38-61-10 is inapplicable. *See Heslin–Kim v. Cigna Grp. Ins.*, 377 F. Supp. 2d. 527, 531 n.6 (D.S.C. 2005) (noting that "[i]f § 38-61-10 does not apply to an insurance coverage dispute, the court must then determine choice of law through the doctrine of *lex loci contractus*").[14]

Here, the summary judgment record simply does not include the facts needed to determine whether § 38-61-10 applies and/or to determine which state's law should apply if the statute does not apply. For example, Starr Davis offered no admissible evidence that exposure to asbestos occurred at a South Carolina location and/or whether the claimants at issue were South Carolina citizens *at the time of the alleged exposure.*

On this record, the circuit court clearly erred in granting summary judgment. *See Sangamo Weston*, 307 S.C. at 148, 414 S.E.2d at 130 (Toal, C.J.) (concluding that "discovery has not progressed to the point that where [sic] it can be determined where the contracts were formed" and that "[t]his court will not issue advisory opinions and cannot alter precedent based

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[14] As a result, § 38-61-10 does not automatically supplant the traditional doctrine of *lex loci contractus* in every case. *See, e.g., Bowman*, 2000 WL 1173992, at *3 (finding that § 38–61–10 was not applicable to an insurance coverage dispute because the insured's sole connection with South Carolina was the automobile accident that gave rise to the suit); *Yeager*, 868 F. Supp. at 144, n.5 (finding that § 38–61–10 was not applicable to an insurance coverage dispute where the plaintiff's connection to South Carolina lacked a "degree of permanency" and was "not significant enough to trigger application of § 38-61-10"); *Unisun Ins. Co. v. Hertz Rental Co.*, 312 S.C. 549, 552, 436 S.E.2d 182, 184, n.1 (Ct. App. 1993) (applying *lex loci contractus* and stating that "we do not conceive [§ 38-61-10] to require a different result, since, at the time the contract was made, the property and interests insured were in the State of New York").

on questions presented in the abstract"). That error was exacerbated by Starr Davis' unsupported factual misrepresentations and omissions directly relevant to this analysis. The Order was clearly premature, and the circuit court should have deferred ruling until the completion of relevant discovery.

II. THE CIRCUIT COURT ERRED BY REFUSING TO CONSIDER AND GIVE EFFECT TO THE 1985 AGREEMENT, WHEREIN STARR DAVIS AGREED WHICH TRAVELERS POLICIES DID AND DID NOT EXIST, HOW THOSE POLICIES WOULD APPLY TO ASBESTOS CLAIMS, AND WHEN TRAVELERS WOULD BE REIMBURSED.

Another significant error committed by the circuit court was its refusal to consider and enforce the 1985 Agreement, a clear and binding agreement signed by Starr Davis that has been in place for more than 35 years. That Agreement, executed by the parties after the alleged Travelers policies expired, includes provisions that resolve any dispute about the time period during which Travelers issued policies to Starr Davis; require pro rata, time-on-the risk allocation of asbestos claims tendered by Starr Davis under the alleged policies; and provide for reimbursement of certain allocated costs to Travelers. The circuit court chose to completely ignore these binding terms. *See, e.g.*, R. p. 8; 22 (Order at 7 & 21). This was clear error.

A. The 1985 Agreement.

The 1985 Agreement recites the background for its existence. As explained above, it states that "a dispute" had arisen regarding responsibility for "the defense and disposition of Starr Davis' asbestos claims. . . . " R. p. 658 (Ex. 9). To resolve this dispute, the parties agreed the dates for which Travelers issued Starr Davis liability insurance coverage—January 1, 1959 to June 30, 1985—and Starr Davis acknowledged that it "has been insured by *other* insurers or has been *self-insured* for the remainder of its existence." R. p. 658 (Ex. 9, at 3rd Whereas clause) (emphasis added).

The 1985 Agreement also resolved disputes about whether and how to allocate asbestos-related liabilities (for both defense and indemnity) under the 1959-1985 Travelers policies. *Id.* Specifically, as noted above, it provides that Travelers' share of such liability would be limited to the percentage of costs that the number of years of alleged exposure during Traveler' coverage periods bears to the total number of years of alleged asbestos exposure, up to the exhaustion of aggregate policy limits. R. p. 659-60 (*Id.* ¶¶ 3-5). In addition, the 1985 Agreement requires Starr Davis "to reimburse [Travelers] for the expense for any portion of [liability for alleged asbestos] exposure occurring in a period of [Travelers'] policies that have been exhausted by the payment of indemnity." R. p. 659-60 (*Id*. ¶ 3). Finally, the 1985 Agreement states that it will remain in force unless terminated by either party with 90 days' notice. R. p. 660 (*id.* ¶[6). As the summary judgment record reflects, there is no evidence that either party has ever terminated the Agreement (R. p. 167 (Hr'g Tr. at 23)). As a result, it remains in full force and effect today.

B. The Circuit Court Rulings Violate the 1985 Agreement.

The circuit court not only ignored Travelers' right to enforce the 1985 Agreement, it went so far as to criticize Travelers for even referring to the Agreement. R. p. 8 (Order at 7). The circuit court's stated concern was based on the fact that the Agreement cannot be used "in connection with [a party's effort to establish] the meaning, intent or construction of any insurance policy or policies." R. p. 7-8 (*Id*. at 6-7). *See also* R. p. 659 (Ex. 9 ¶ 1). But as is crystal clear from the summary judgment briefs and oral argument, Travelers has never sought to use the Agreement as evidence of the alleged policies' "meaning, intent or construction."[15] R. p.

[15] The fact that the 1985 Agreement was not intended to—and could not—be used to interpret policy terms is also made clear by the section of the Agreement that states, "[a]ll of the provisions, terms and conditions of the insurance policies . . . not specifically altered by this Interim Agreement shall remain in full force and effect." R. p. 661 (Ex. 9 ¶ 7).

716; 198-200 (Opp. at 16, n.7; Hr'g Tr. at 54-56). To the contrary, Travelers sought to *enforce* the terms of the 1985 Agreement, which was negotiated and executed to resolve insurance-related disputes that arose *after* the alleged Travelers policies expired. R. p. 659 (Ex. 9 at p. 1).

The circuit court's decision to ignore the 1985 Agreement paved the way for several declarations which clearly violate the Agreement's express terms. For example, although Starr Davis agreed that Travelers coverage existed for Starr Davis only from 1959-1985, the circuit court nevertheless declared that there was an "uninterrupted relationship between the parties from January 1, 1946 to April 30, 1986." R. p. 8 (Order at 7). By way of further example, the 1985 Agreement states unequivocally that asbestos-related liabilities must be pro-rated over "the total number of years of alleged exposure." R. p. 659-60 (Ex. 9 ¶¶ 3-4). Yet, the circuit court's partial summary judgment declarations seek to do an "end-run" around this requirement by manufacturing an "exception" to this pro-rata allocation requirement for "operations claims"; for such claims, the circuit court held that "the policies in effect during the conduct of the operations will apply on an 'all sums' basis." R. p. 31-32 (Order at 30-31).

Finally, the 1985 Agreement requires that to the extent Travelers funds defense or indemnity expenses associated with asbestos-related injury that took place prior to 1959 or after 1985, *i.e.*, time periods during which Starr Davis agreed Travelers did *not* provide any insurance coverage, Starr Davis will reimburse Travelers for those payments. Again, the circuit court simply disregarded this contractual requirement. It declared instead that Travelers is obligated to pay *all* defense and indemnity for all past, present and future asbestos claims, regardless of injury dates, without any right to reimbursement. R. p. 32 (Order at 31). All of these rulings directly contradict the 1985 Agreement—an independent contract negotiated and executed specifically to *resolve* these very legal issues.

The circuit court did not even try to explain why the 1985 Agreement could not be used to prove and enforce the parties' bargained-for agreements.[16] The refusal to enforce a binding contract violates the basic principle of South Carolina or North Carolina law that "[a] court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *S.C. Dep't. of Transp. v. M & T Enters. of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) (citation omitted); *cf. North Carolina v. Philip Morris USA Inc*., 685 S.E.2d 85, 91 (N.C. 2009) ("[W]hen the terms of a contract are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written and enforced as the parties have made it.") (internal citations omitted).[17]

Here, the parties expressly chose to modify their earlier contracts (the existing and alleged insurance policies) with regard to the issues addressed in the 1985 Agreement. *See* R. p. 661 (Ex. 9 ¶ 7) (stating that "[a]ll of the provisions, terms and conditions of the insurance

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[16] *See also Safford v. St. Tammany Parish Fire Protection Dist. No. 1*, No. Civ. A. 02-0055, 2003 WL 1873907, at *3 (E.D. La. Apr.11, 2003) (court found that limitations within a document restricting its use in some manner "reduces its probative value, but it does not necessitate its exclusion"). Oddly, while the circuit court chastised Travelers for so much as mentioning the 1985 Agreement, it had no objection to Starr Davis' reliance on the Agreement "as evidence of the existence of the insurance policies," calling that "an appropriate use" of the Agreement. R. p. 8 (Order at 7). Equally odd is the fact that the circuit court did not explain how Starr Davis' use of the Agreement differs from Travelers' use to establish the parties' compromise concerning the span of years over which Travelers coverage was and was not provided. Nor did the court consider that Starr Davis opened the door for further use of the 1985 Agreement by inserting it into the partial summary judgment record. *See* R. p. 654-56 (Ex. 9). *See Brady v. Wal-Mart Stores, Inc*., 455 F. Supp. 2d 157, 181-82 (E.D.N.Y. 2006) (court found that a defendant's reliance on a document to support its own position "invite[d] a response" and that it "cannot complain about the natural consequences of their decision now"), *aff'd*, 531 F.3d 127 (2d Cir. 2008).

[17] Even if relevant, there is no evidence that the 1985 Agreement was unwise or unreasonable. Nor can it be said that Starr Davis' outside counsel failed to guard its rights when negotiating it.

policies . . . not specifically altered by this Interim Agreement shall remain in full force and effect"). In such a circumstance, the later contract controls. *See, e.g.*, *Rao v. Intern. Licensing Indus. Merchandisers' Ass'n*, No. 652955/2012, 2015 WL 4467751, at *6 (N.Y. Sup. Ct. July 20, 2015) ("The modification of a contract results in the establishment of a new agreement between the parties which pro tanto supplants the affected provisions of the original agreement while leaving the balance of it intact. When the language of the original contract and subsequent modification conflict, the new terms control.") (internal citations omitted).[18]

In short, the 1985 Agreement is a binding agreement between the parties, negotiated separately from and after the issuance of any insurance policies allegedly issued by Travelers to Starr Davis. The Agreement has never been terminated and remains in effect today. It was not offered into evidence for summary judgment purposes to influence the "meaning, intent or construction" of any Travelers' insurance policies. Travelers simply asked the circuit court to enforce its terms and not issue the contrary declarations sought by Starr Davis. The circuit court clearly erred in refusing to consider and enforce the 1985 Agreement, and by issuing declarations that directly contradict its terms. Those declarations must be reversed.

[18] Nor does the appointment of a Receiver affect the parties' contractual rights and obligations. *See Carwile v. Metropolitan Life Ins. Co*., 136 S.C. 179, 134 S.E. 285, 290 (1926) (stating that "the appointment of a receiver works no metamorphosis in the title or interest to or in the assets of the insolvent; the receiver takes possession of them as the arm of the court, subject to all existing liens and encumbrances, having due regard to the legal and equitable rights of the parties") (citation omitted). The Receiver cannot "change any existing contractual relation or create any new contractual relation or right of action thereon, and a receiver can do nothing to impair a contract as between the parties thereto." *Nat'l Cash Register Co. v. Burns*, 217 S.C. 310, 314, 60 S.E.2d 615, 617 (1950) (citation omitted). *See also Jeffcoat v. Morris*, 300 S.C. 526, 528, 389 S.E.2d 159, 160 (Ct. App. 1989) ("A receiver holds the property coming into his hands by the same right and title as the person for whose property he is receiver and becomes merely the assignee of the insolvent having exactly the same rights.") (citations omitted), *overruled on other grounds by United Carolina Bank v. Caroprop, Ltd.*, 316 S.C. 1, 446 S.E.3d 415 (1994).

III. THE CIRCUIT COURT ERRED BY ISSUING DECLARATIONS THAT ARE CONTRARY TO SOUTH CAROLINA LAW.

Even if this Court were to overlook the circuit court's entry of partial summary judgment in the face of genuinely disputed facts, lack of any evidentiary support, and clear need for further discovery, and that court's refusal to enforce the 1985 Agreement, the Order should still be reversed because various declarations issued by the circuit court are contrary to the law it sought to apply—the law of South Carolina.[19]

A. The Circuit Court's Announcement of an Exception to Pro Rata Allocation Is an Affront to Binding South Carolina Supreme Court Precedent.

The most obvious disregard of South Carolina law here involves the issue of allocation—*i.e.*, how to apportion costs between an insured and its various insurers in cases involving progressive injury over a period of years. The South Carolina Supreme Court has squarely adopted the pro rata allocation approach, ruling that a judgment or settlement for an injury progressing over multiple years should be allocated proportionately to each triggered policy year based on the relative amount of time each policy was on the risk as compared to all years over which the injury took place. *See Crossmann*, 395 S.C. 40 at 59-60 & 63-64, 717 S.E.2d at 599 & 601. Specifically, it applied a formula to determine an insurer's share of covered losses, consisting of "a numerator representing the number of years an insurer provided coverage and a denominator representing the total number of years during which the damage progressed," and it explained that "[t]his fraction is multiplied by the total amount the policyholder has become liable to pay as damages for the entire progressive injury." *Id*. at 65, 717 S.E.2d. at 602. The

[19] Travelers maintains that the circuit court failed to conduct a proper choice-of-law analysis and challenges the court's premature decision to apply South Carolina law prior to the completion of relevant discovery. Travelers nevertheless addresses the circuit court's assessment of South Carolina law to demonstrate why the holdings of that court should be reversed.

Court reasoned that this "'time on risk' approach best conforms to the terms of a standard CGL policy and to the parties' objectively reasonable expectations." *Id*. at 50, 717 S.E.2d at 594.

In so ruling, the Court expressly rejected the "all sums" or "joint and several" allocation approach followed by the circuit court, pursuant to which a minority of courts outside of South Carolina have allowed a policyholder to select any triggered policy year to pay all defense and indemnity costs in full, up to the policy limits, even if most of the loss occurred outside of that policy period. *Id.* at 50-51, 717 S.E.2d at 599. Analyzing the exact same policy language found in the Travelers policies that are in the record, the *Crossmann* Court found that "all sums" allocation "ignores critical language limiting the insurer's obligation to pay to sums that are attributable to . . . damage that occurred during the policy period" and criticized that approach as "creat[ing] a false equivalence between an insured who has purchased insurance coverage continuously for many years and an insured who has purchased only one year of insurance coverage." *Id*. at 60 & 63, 717 S.E.2d at 599 & 601 (citations omitted).

In an effort to avoid the Supreme Court's clear rejection of the "all sums" approach, Starr Davis suggested that the circuit court create two "exceptions" to pro rata allocation, neither of which has any support in South Carolina law. First, it asked the circuit court to declare that the pro rata rule set forth in *Crossmann* somehow does not apply to "premises/operations claims." R. p. 372 (SD Br. at 19). Second, it requested that the circuit court declare 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. 373 (*Id.* at 20). Starr Davis argued that in both of these circumstances, the Travelers policies must apply on an "'all sums' basis," *i.e*., it can pick any particular Travelers policy to pay the entire multi-year asbestos injury loss, even if most of that injury did not occur during the chosen Travelers policy period. R. p. 372-73 (*Id*. at 19-20).

Despite finding no support in South Carolina law, the circuit court agreed to declare these unsupported exceptions.

As an initial matter, and as discussed above, these exceptions directly contradict the parties' binding 1985 Agreement, in which Starr Davis promised that asbestos-related liabilities would be allocated pro rata, by time-on-the-risk, over "the total number of years of alleged exposure." *See* R. p. 359-60 (Ex. 9 ¶¶ 3-4). There are no exceptions. But even if there were, the many factual issues identified above preclude entry of partial summary judgment on this issue.

Setting aside these obvious hurdles for the sake of argument, however, what is crystal clear is that the South Carolina Supreme Court has never adopted either exception urged by Starr Davis. Indeed, although the circuit court says it was "quite mindful" of the *Crossmann* decision (R. p. 31 (Order at 30)), the South Carolina Supreme Court's opinion in that case left no room for the out-of-thin-air exceptions announced by the circuit court.

The circuit court initially attempts to justify its exceptions by limiting *Crossmann* to progressive construction "property" losses. R. p. 31 (*Id.*). This ignores what the Supreme Court explicitly says in *Crossmann*—that time-on-the-risk, pro rata allocation applies to "progressive injury" cases in general, *including asbestos bodily injury claims in particular*. *Crossmann*, 395 S.C. at 51-52 & n.8, 717 S.E.2d at 595. This can be seen from the Court's definition of "progressive injury," which included any "injury that results from an event or set of conditions that occurs repeatedly or continuously over time, *such as long-term exposure to asbestos fibers* or the continual intrusion of water into a building." *Id*. at n.8 (emphasis added).[20]

[20] The circuit court acknowledged that "[e]xposure to asbestos results in progressive injury spanning many years, thereby triggering coverage under multiple policies." R. p. 31 (Order at 30).

The circuit court also appears to rely on *dicta,* specifically the *Crossmann* Court's suggestion that some alteration of the default formula could be warranted "where a strict application would be unduly burdensome or otherwise inappropriate under the circumstances of a particular case." *Id.* at 66, 717 S.E.2d at 602. But the *Crossmann* Court made clear that any such alteration could *not* involve adoption of the "all sums" approach, because it warned any lower court wishing to make any alteration to "remain faithful to the premise that each insurer is responsible only for a pro rata portion of the total loss, and each pro rata portion must be defined by the insurer's time on the risk." *Id*. at 65- 66, 717 S.E.2d at 602-03. Here, there was no evidentiary showing of inappropriateness or burden, no doubt because pro rata allocation from the date of first exposure to the date of disease manifestation is relatively straightforward in asbestos personal injury cases. Regardless, there is absolutely nothing in *Crossmann* that would allow for the abandonment of pro rata allocation and adoption of the rejected "all sums" approach simply because an injury might be categorized as arising from "operations" as opposed to falling within some other injury category, such as "products" or "completed operations."

In addition, the circuit court's declaration 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), was directly addressed and rejected by *Crossmann.* The Supreme Court explained that while some courts have created an "unavailability" exception to the "time on risk" rule, "[a]lterations of this kind would exceed the trial court's authority, as the effect is to shift losses from one policy period to another in order to create coverage where none was purchased." 395 S.C. at 66 n.16, 717 S.E.2d at 602 n.16.[21] For the circuit court to "interpret[]" *Crossmann* to

[21] This explanation is consistent with the general principle in South Carolina that a court cannot enlarge an insurer's obligations by judicial construction. *See, e.g.*, *South Carolina Ins. Co. v. White*, 301 S.C. 133, 137, 390 S.E.2d 471, 747 (1990). *See also Fried v. N. River Ins. Co*., 710

allow for an exception that the Supreme Court explicitly rejected (R. p. 32 (Order at 31)) is indefensible.

The circuit court also inappropriately sought to justify its exceptions to the pro rata allocation scheme adopted in *Crossmann* by pointing to Starr Davis' "defunct" status. The *Crossmann* Court, however, made clear that lower courts cannot "shift losses from one policy period to another in order to create coverage where none was purchased," as that would "effectively provide[] insurance where insurers made the calculated decision not to assume risk and not to accept premiums." 395 S.C. at 66 n.16, 717 S.E.2d at 602 n.16. And the Fourth Circuit, relying on state law principles consistent with South Carolina law, has expressly rejected this argument in nearly identical circumstances. *See Wallace & Gale*, 385 F.3d at 832 (ruling that the insolvency of a policyholder does not change the insurer's obligations under its insurance contract); *Penn. Nat'l Mut. Cas. Ins. Co. v. Roberts*, 668 F.3d 106, 116 (4th Cir. 2012) (explaining that an injured party's inability to recover his/her entire tort judgment from an insolvent insured "does not allow us to ignore" pro rata allocation "to hold an insurance company to a contractual provision to which it never agreed . . . . ").[22]

F.2d 1022, 1025-26 (4th Cir. 1983) ("equitable considerations will not be employed to rewrite the terms of [an insurance] policy") (citation omitted); *Breed v Ins. Co. of N. Am*., 385 N.E.2d 1280, 1283 (1978) ("This court may not make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation," since "[e]quitable considerations will not allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against.").

[22] The circuit court's attempt to rely on notions of "equity" to justify its rejection of pro rata allocation R. p. 32 (Order at 31) ignores that *Crossmann* was based on policy language, like the policy language here, that confines the insurer's obligation to damages resulting from losses "during the policy period," with the Court finding that pro rata allocation was consistent with this language, while the "all sums" approach was at odds with it. *See* 395 S.C. at 52, 717 S.E. 2d at 595.

Notably, Starr Davis' Receiver raised and lost this exact argument in recent North Carolina litigation, where he asserted, as here, that the default pro rata rule in *Crossmann* should not apply because a different company for which he also acts as Receiver—Covil Corporation—is defunct and lacks the funds to absorb any asbestos liabilities. *See Zurich Am. Ins. Co. v. Covil Corp*., No. 1:18-CV-932, 2020 WL 4483236, at *11 (M.D.N.C. Aug. 4, 2020). The court criticized the Receiver for "seek[ing] to relitigate *Crossmann.*" *Id.* at *10. Tellingly, the court observed that "[t]]he *Crossmann* court understood that an insured company might lack insurance for certain periods of time; [but] rather than impose that financial risk on its insurers . . . the South Carolina Supreme Court explicitly gave the insured the responsibility for whatever portion of the total loss is attributed to those uninsured years." *Id*. at *10-11. Equally important, the court added that while *Crossmann* affords some flexibility in its default allocation formula, "the flexibility applies to the formula itself, not the overall approach in allocating risk," which "must remain within the bounds of a pro rata/"time on the risk" approach. *Id.* at *11.

If there were any doubt regarding the South Carolina Supreme Court's resolve to maintain pro allocation as the law of South Carolina regardless of an insured's solvency, it was put to rest in *Harleysville Group Ins*. *v. Heritage Communities, Inc*., 420 S.C. 321, 803 S.E.2d 288 (2017). There, the Court affirmed the findings of a Special Referee that the insurer would bear only a pro rata portion of the progressive damages at issue in that case, based on its time on the risk, despite the express finding that the insured had gone out of business and was insolvent. *Id*., at 330, 348 & n.4, 803 S.E.2d at 293, 303 & n.4.

Finally, it is worth noting that the majority of courts nationwide have flatly rejected the "all sums" approach and adopted the pro rata, time-on-the-risk allocation approach instead. *See* Restatement of the Law of Liability Insurance § 41 cmt. C (Am. Law Inst. 2019) ("a clear

majority of the jurisdictions that have addressed the question have adopted the pro rata approach"). Indeed, the trend towards pro rata allocation has accelerated dramatically in recent years. Since 2003, ten state supreme courts have adopted pro rata, time-on-the risk allocation and rejected the "all sums" approach.[23] Not one has created an "operations" exception.

The circuit court's declarations of law regarding allocation were clear error, because they contradict the parties' binding 1985 Agreement and violate the allocation principles set forth in binding South Carolina Supreme Court precedent. The declarations must be reversed.

B. The Circuit Court's "Completed Operations" Ruling Disregards the Policy Language Located Thus Far and Has Been Rejected by Other Courts.

As discussed above, whether an injury is categorized as an "operations" injury or some other type of injury, such as a "products" or "completed operations" injury, has no bearing on the application of pro rata, time on the risk allocation; but injury categorization is relevant to other aspects of the policies and this appeal. Most relevant here is the fact that if bodily injury falls within the "products" or "completed operations" category, as defined by the policies, the associated coverage under the policy is subject to an aggregate limit of liability, *i.e.*, the insurer's liability is capped at a certain amount for indemnity purposes no matter how many injuries,

[23] *Rossello v. Zurich Am. Ins. Co*., 226 A.3d 444, at 457 (Md. 2020); *Crossmann*, 395 S.C. at 66, 717 S.E.2d at 603; *Dutton-Lainson Co. v. Cont'l Ins. Co*., 778 N.W.2d 433, 444-45 (Neb. 2010); *Boston Gas Co. v. Century Indem. Co.,* 910 N.E.2d 290, 306 (Mass. 2009); *S. Silica of La., Inc. v. La. Ins. Guar. Ass'n,* 979 So. 2d 460, 466 (La. 2008); *Towns v. N. Sec. Ins. Co*., 964 A.2d 1150, 1166-67 (Vt. 2008); *EnergyNorth Nat. Gas Inc. v. Certain Underwriters at Lloyd's*, 934 A.2d 517, 521-27 (N.H. 2007); *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830, 842 (Ky. 2005); *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co*., 71 P.3d 1097, 1133-34 (Kan. 2003); *Sec. Ins. Co. of Hartford v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107, 116-122 (Conn. 2003). In that same time period, only one state supreme court has adopted the minority all sums approach. *Plastics Eng'g Co. v. Liberty Mut. Ins. Co*., 759 N.W.2d 613, 625-27 (Wis. 2009).

occurrences, claims or claimants are involved.[24] As a result, whether the bodily injury in any given policy period falls within or outside the "products" or "completed operations" hazard of a particular policy is a critical question inasmuch as it determines whether that policy's aggregate limit applies to the bodily injury in that policy period, or instead whether a per occurrence policy limit applies.

In an effort to categorize claims as "operations" claims and to access unaggregated coverage, Starr Davis argues that the timing of injury and the timing of policy inception have no bearing on whether the injury during a particular policy period falls within "completed operation" category. Tellingly, however, Starr Davis neglects to provide support for its assertions by reference to the relevant policy language or in the form of evidence relating to the nature of the underlying claims.

The reason for Starr Davis' reluctance to refer to the policy language is clear—the policy language (to the extent it has been established) clearly undermines its argument. The policies define the [redacted]. In relevant part, [redacted]

[redacted]

[redacted] *See, e.g.*, R. p. 421 (Ex. 4 at 6). [redacted]

[redacted]

[redacted] *Id.* Critically,

[redacted]

[24] Albeit incomplete, the two Travelers policies submitted to the circuit court by Starr Davis provide that [redacted] R. p. 425; 462 (Ex. 4 at 10; Ex. 5 at 13).

[REDACTED] *See, e.g.*, R. p. 421 (*Id.*). Reading these definitions together, as the Court must,[25] bodily injury falls within the "products" or "completed operations" hazard of each Travelers policy, and is therefore subject to an aggregate limit, (i) if the bodily injury during that policy period occurred because of exposure to a product *after* Starr Davis had relinquished physical possession of the asbestos-containing product, or (ii) if the bodily injury that happened during a given policy period so as to trigger that policy period occurred *after* Starr Davis had completed the relevant asbestos-related operation from which that bodily injury arose.

Thus, whether bodily injury is categorized as an aggregated "completed operations" injury or an unaggregated "operations" injury depends on its *timing* in relation to the policy period and the policyholder's sales or contracting activities. This is the exact conclusion reached by the Fourth Circuit in *Wallace & Gale*. In that seminal case, the court, relying on insurance law principles fully consistent with South Carolina law, held that application of the completed operations hazard clause in the context of multi-year asbestos injuries depended exclusively on the timing of the injury in relation to the completion of the insured's operations, explaining:

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

Wallace & Gale, 385 F.3d at 834. This conclusion was recently confirmed in *General Insurance Co. of America v. U.S. Fire Insurance Co*., 886 F.3d 346, 355 (4th Cir 2018) (seeing "no reason to depart from *Wallace & Gale*'s clear and controlling interpretation of the completed operations hazard" and concluding "that the district court correctly declared that any bodily injury claim

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[25] *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (contracts "will be interpreted so as to give effect to all of their provisions, if practical") (citing 17A Am. Jur. 2d Contracts § 385 (1991)).

based on an injury that occurred during [an] operation that completed prior to the start of a policy falls within the completed-operations hazard of that policy").

And a state appellate court reached the same result in *Plant Insulation Co. v Fireman's Fund Insurance Co*., No. CGC06448618, 2013 WL 3286410, at *5 (Cal. Super. Ct. Apr. 08, 2013). The court summarized the parties' positions as follows:

> According to Plant, the completed operations and product hazard provisions apply only where the source or cause of the injury occurs after the operations have been completed or possession of the products relinquished. In contrast, the insurers contend that the policies unambiguously provide that the completed operations hazard and products hazard provisions apply where the bodily injury in a given policy period occurs after the operations have been completed or possession of the product has been relinquished. In other words, according to the insurers, the determinative factor is the timing of the injury rather than the source or cause of it.

Id., at *3. After analyzing the policy language, the court agreed with the insurers, concluding that, by fully incorporating the definition of bodily injury into the definition of the completed operations hazard, the unambiguous policy language provides that a claim for bodily injury falls within the completed operations hazard "where the *bodily injury during the policy period* occurs after [the insured's] operations have been completed or abandoned." *Id*. at *5. The court readily exposed the flaw in the insured's argument: "it completely ignores the definition of 'bodily injury' in the policies." *Id*. at *6. The court explained that, in the context of long-tail injuries, such as asbestos claims, "what matters is the timing of the bodily injury during a given policy period." *Id*. The court later reiterated that "it is the timing of the bodily injury during the policy period that determines whether the completed operations hazard applies. The source or cause of the injury is irrelevant to the analysis." *Id*. at *11.

These rulings give effect to the clear and unambiguous policy language and are fully consistent with South Carolina law on contract construction, which, as noted above, "begins with the language of the policies themselves." *Crossmann*, 395 S.C. at 52-53, 717 S.E.2d at 595.

The circuit court's partial summary judgment ruling completely ignores everything discussed above. The circuit court did not analyze the policy language, nor did it consider the actual facts, including timing facts, of the injury suffered by anyone who has made an asbestos claim against Starr Davis. The circuit court also dismissed the clear caselaw. Instead, the circuit court issued a sweeping declaration that nearly *all* asbestos-related injuries alleged against Starr Davis—past, present and future—fall outside the "completed operations" hazard and thus will not be subject to the aggregate limit of liability. This declaration is the bootstrap that allows Starr Davis to capitalize on the circuit court's improper declaration, discussed above, that the pro rata allocation demanded by *Crossmann* is somehow subject to an exception for "operations" injuries, *i.e.*, injuries that fall outside the "completed operations" hazard. Employing this bootstrap, Starr Davis will be able to contend that nearly *all* of the past, present and future asbestos claims it faces are amenable to "all sums" allocation, and thus must be paid solely by Travelers, even if some of the asbestos claimants' injuries also occurred before the Travelers policies incepted, or after they expired.

At Starr Davis' suggestion, the circuit court came to its "completed operations" conclusion by looking *outside* the policies to dictionary definitions of the term "hazard" and a 1971 Nebraska law review article. *See* R. p. 24; 26 (Order at 23 & 25). In so doing, it constructed a generalized theory, found nowhere in the case law, that the "source" of a claimant's harm must be used to categorize injuries, not the timing language contained in the policies (R. p. 25-26 (*Id*. at 24-25)). This is the very same "source" argument directly rejected in

Plant Insulation. Revealing just how far it strayed from the applicable policy language, the circuit court made the remarkable statement that "[t]here is nothing in the definition of 'completed operations' that focuses on the inception date of a policy." R. p. 27 (*Id*. at 26).

As is made clear by the actual policy language quoted above, however, the circuit court is simply wrong. As explained above, *timing is everything* when deciding whether an injury falls within or outside the aggregated "completed operations" category. Contrary to the circuit court's assertion, *Wallace & Gale* did not adopt the view that operations claims are somehow transmuted into completed operations claims where there is continuing injury post-dating completion of the installation." R. p. 25 (*Id.* at 24). Rather, *Wallace & Gale* made clear that courts must assess, "on a case-by-case basis" the timing of injury in relation to the policy period(s). 385 F.3d at 826 (agreeing with the district court's conclusion that "[i]f initial exposure is shown to have occurred after operations were concluded or if exposure that began during operations continued after operations were complete, then the aggregate limits of any policy that came into effect after operations were complete will apply") (citation omitted).

Also fully relevant to the "completed operations" issue, but ignored by the circuit court, is the fact that historical documents submitted by Travelers indicate that [redacted]

[redacted]

[redacted]. R. p. 1897; 1909; 1914 (Exs. R, U & V). Based on this evidence, which was placed before the circuit court as part of the summary judgment briefing, [redacted] can only fall into the "completed operations" hazard and therefore are subject to aggregate limits. Yet the circuit court completely ignored this fact. The declarations must be reversed.

C. The Circuit Court's Burden of Proof Analysis is Contrary to South Carolina Law and Common Sense.

In South Carolina, the policyholder bears the burden of establishing the existence, terms and conditions of any policy under which it seeks coverage, after which the burden of establishing policy *exclusions* falls on the insurer. *See Fuller*, 240 S.C. at 89, 124 S.E.2d at 610 (in a breach of contract action, "the burden [is] upon the [insured] to prove the contract, its breach, and the damages caused by such breach"); *Harleysville*, 420 S.C. at 346, 803 S.E.2d 302 (noting that the insurer bears the burden of establishing the applicability of policy exclusions). Starr Davis argued, and the circuit simply accepted, that whether an injury falls within the "completed operations" hazard definition, and is therefore subject to an aggregate limit, is a fact that Travelers must prove. Starr Davis included only two sentences on this issue in its summary judgment brief, simply asserting that the burden of proof ruling contained in the Covil Sanctions Order "applies equally in this case." R. p. 371 (SD Br. at 18). The circuit court accepted this assertion, holding that "Travelers bears the burden of proving . . . the application of aggregate limits to particular suits and the 'exhaustion' of the aggregate limits of liability in their policies." R. p. 27 (Order at 26).

This precise issue was addressed in *National Union Fire Ins. Co. of Pittsburgh, PA, v. Porter Hayden Co*., No. CCB-03-3408, 2012 WL 734170, at *2 (D. Md. Mar. 6, 2012). There, the court considered which party—the insured or the insurer—had the burden of proof with regard to whether an injury fell within or outside the "completed operations" hazard. The court noted that (as in South Carolina), "the [policyholder] has the burden of proving every fact essential to his or her right to recover." *Id*. (citation omitted). The court then explicitly found that the policyholder "bears the burden of showing when the operations hazard applied to a claim," because "[c]lassification of a claim . . . is a matter of showing *entitlement* to coverage—

not a defense or limitation thereto." *Id.* (emphasis in original). The court reasoned that because the policyholder had argued that it was "conducting operations that resulted in the release of asbestos fibers (such as 'tie-in' operations or asbestos removal operations) during the relevant policy periods, the burden was on [the policyholder] to prove that" fact, because it was "of course" in the best position to do so. *Id*. The court specifically declined to require the insurers to demonstrate the absence of ongoing operations during their policy periods. *See id*. The Fourth Circuit has agreed. When considering *Porter Hayden* in a later asbestos coverage action, the court affirmed a district court ruling that the insured "bears the burden of proving that a bodily injury arose from asbestos exposure during [an] operation that was ongoing *during* the policy's policy period." *Gen. Ins. Co. of Am.*, 886 F.3d at 356 (emphasis in original).

The circuit court's contrary ruling is not supported by South Carolina caselaw. The reason is simple—a hazard definition is not an "exclusion." Clearly aware of this fact, Starr Davis drafted the Order for the circuit court so that it included the argument that it is an insurer's burden to prove not only exclusions, but also any "limitations" on coverage. As support, Starr Davis' counsel included in the Order isolated and distinguishable cases from outside of South Carolina that use the phrase "exclusions and limitations" in reference to the insurer's burden of proof. None of those cases address the burden of proof with regard to the question of aggregate limits. *See Ins. Co. of N. Am. v. Kayser-Roth Corp*., 770 A.2d 403 (R.I. 2001) (holding that the insured does not carry the burden of proving the soundness of the primary carrier's decision to pay); *Koppers Co. v. Aetna Cas. & Sur. Co*., 98 F.3d 1440, 1446 (3d Cir. 1996) (predicting that the Pennsylvania Supreme Court would hold that the fortuity requirement – which it noted is not mentioned within the terms of the policies – functions as an exclusion).

By contrast, the South Carolina cases cited in the circuit court's Order refer only to policy "exclusions" and do not contain language supporting the circuit court's novel expansion to any so-called "limitations." *See Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 144–48, 781 S.E.2d 137, 141–44 (2015) ("Insurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability.") (citation omitted); *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560 614 S.E.2d 611, 614 (2004) (same); *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 465, 252 S.E.2d 565, 568 (1979) ("[T]he insurer bears the burden of establishing the exclusion."). It is undisputed that the completed operations hazard definition and associated aggregate limit of liability are not "exclusions." *See, e.g.*, R. p. 421; 424-25 (Ex. 4 at 6 (definitions) & 9-10 (description/listing of "Exclusions").

There is grave legal danger in the circuit court's after-the-fact attempt to expand the insurer's burden of proof from "exclusions" to any contract provision considered a "limitation." This is because nearly every term in every insurance policy acts to confine the relatively broad initial insuring clause in some form or fashion. Indeed, the amount of insurance, *i.e.*, the various limits of liability, are terms present in all commercial general liability policies; without those limits a policy would necessarily be incomplete. *See Gaskins v. Firemen's Ins. Co. of Newark, N.J.*, 206 S.C. 213, 217, 33 S.E.2d 498, 499 (1945) ("All parties must agree upon the necessary terms, including those in relation to the subject matter insured, the risk insured against, the commencement and duration of the risk, *the amount of insurance*, and the premium to be paid.") (emphasis added).

Indeed, if affirmed, the circuit court's Order will push South Carolina law down the ultimate slippery slope. For example, a policyholder could argue that who is a "named insured" acts to "limit" coverage to that person or entity, such that the insurer must bear the burden of

establishing who is (or is not) insured. Similarly, a policyholder could argue that the applicable policy period is a "limitation" on coverage, since it necessarily does not include periods outside of the policy period. Yet, it cannot seriously be contended that the insured can avoid having to prove these and all other terms, as opposed to exclusions. *See Gaskins*, 206 S.C. at 217, 33 S.E.2d at 499. The amount of insurance available under a given policy—the issue before the Court here—is a basic term of coverage, it is not an exclusion, and is not listed in the exclusions section of the policy. *See* R. p. 424-25 (Ex. 4 at 9-10).

Nothing in South Carolina law compels a conclusion different from the one reached in *Porter Hayden*, inasmuch South Carolina law puts the burden on the policyholder to establish the terms and conditions of coverage and has recognized that the amount of insurance is one of those essential terms. *See Gaskins*, 206 S.C. at 217, 33 S.E.2d at 499. It necessarily follows that the policyholder bears the burden of establishing inapplicability of an aggregate limit and/or facts that may render a claim not subject to such limit. The circuit court's declaration on the burden of proof should be reversed.

D. The Circuit Court Failed to Consider Policy Language or Facts Relevant to the Assessment of the Number of Occurrences Issue.

In the insurance coverage context, the number of "occurrences" that give rise to a policyholder's liability is another important issue. Simply stated, judicial decisions regarding the number of occurrences can result in the application of a single "per-occurrence" limit to a group of claimants, or it can result in application of multiple such limits. This can have a significant impact on the amount an insurer must pay.

Starr Davis argued before the circuit court that, as a matter of law, a separate per-occurrence limit applies to the liability associated with each and every asbestos claimant. R. p. 362-64; 371-72 (SD Br. at 9-11 & 18-19). Starr Davis' argument was based exclusively on the

Covil Sanctions Order, in which the circuit court, without evidence, made specific findings regarding the nature of *Covil's business activities,* including a determination that the asbestos-related suits against Covil were "not repetitive products liability suits" and, instead, involved allegations that "Covil's operations exposed workers and other bystanders to asbestos." R. p. 372 (*Id*. at 19). Based on this Covil-specific finding, the court ruled that the cause of Covil's asbestos-related liabilities was tied to its operations—which the court described as involving "the installation and removal of insulation in various industrial facilities across South Carolina." *See* R. p. 381 (Ex. 2 at 2). The court held that this circumstance gave rise to multiple occurrences, entitling Covil to multiple "per occurrence" limits of liability to resolve each separate claim. R. p. 397 (*Id*. at 18).

In this case, Starr Davis has also not provided the circuit court with any admissible evidence whatsoever regarding the nature of Starr Davis' asbestos-related business activities at issue in the underlying asbestos litigation. Indeed, Starr Davis flatly refused to respond to Travelers' discovery requests that sought this information. *See, e.g*., R. p. 829-30; 850; 878 (Ex. H at 5-6; Ex. I at 5; Ex. K. at13). Starr Davis also 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."

But Travelers did provide the circuit court with admissible historical information concerning Starr Davis's asbestos-related activities. As discussed above, Travelers submitted evidence that [redacted]. R. p. 1897; 1904; 1909; 1914 (Exs. R-U). In addition, Travelers gave the circuit court evidence that [redacted]. R. p. 1897; 1909; 1914 (Exs. R, U & V). These facts clearly support a

factual finding that to the extent the asbestos claimants were injured by Starr Davis, those injuries arose from Starr Davis' products or completed operations.

This factual background is critical to the number of occurrences analysis. The number of occurrences is generally decided by use of the "cause test." That test "asks if there was but one proximate, uninterrupted and continuing cause which resulted in all of the injuries and damage." *Liberty Mut. Ins. Co v. Treesdale, Inc*., 418 F.3d 330, 334 (3d Cir. 2005) (affirming the district court's conclusion that all of the asbestos claims at issue arose from a single occurrence, the decision to become involved in the asbestos business). Although the South Carolina Supreme Court has not considered whether to apply the "cause test" in the asbestos context, it has characterized that test as the majority view and, in a case involving "the distribution of inherently defective goods," held that injuries resulting to multiple claimants at different times and places as a result of "placing a defective product into the stream of commerce is *one occurrence*." *Owners Ins. Co. v. Salmonsen*, 366 S.C. 336, 338–39, 622 S.E.2d 525, 526 (2005).

Here, the circuit court simply ignored the fact that the historical evidence indicates that [redacted], and there is nothing in the summary judgment record to support the circuit court's unsubstantiated statements that the Starr Davis-related evidence is substantially similar to the Covil-related evidence. *See* R. p. 30 (Order at 29). But even if there had been contrary evidence placed in the record by Starr Davis, that evidence would simply give rise to the existence of a genuine dispute, which in turn would foreclose entry of summary judgment.

It was clear error for the circuit court to simply parrot the Covil-specific findings from the Covil Sanctions Order in support of a multiple occurrences result with respect to Starr Davis. Once fully developed, the number of occurrences facts relating to Starr Davis are likely to be

different from Covil to the extent such facts are ever likewise developed. The admissible evidence submitted to the circuit court foreshadows that Starr Davis was, in fact, primarily a seller and distributor of asbestos-containing products. As a result, the circuit court wrongly distinguished cases that reached a single occurrence result in the context of "products" cases. *See* R. p. 29-30 (Order at 28-29). The admissible evidence also showed that [redacted] [redacted] [redacted]. Consequently, the circuit court was wrong to determine that most asbestos claimants, many exposed for the first time [redacted], were somehow injured by Starr Davis "operations." And at this stage of the litigation, Travelers—as the nonmovant below—is entitled to all favorable presumptions related to this question of fact, a point that the circuit court got exactly backwards when making its factual assumptions and conclusions.

Finally, the circuit court also erred in declining to consider the specific policy language at issue. Rather than cite to language in the Travelers policies, the circuit court relied on what it described as a "typical[]" definition of the term "occurrence." R. p. 29 (*Id*. at 28). But the actual policy language at issue here specifies that "*all bodily injury* . . . arising out of continuous or repeated exposure to *substantially the same general conditions* shall be considered as arising out of *one occurrence*." R. p. 759; 776; 425; 462 (Exs. A & B; Exs. 4 & 5) (emphasis added). This language clearly requires that the circuit court consider the Starr Davis-specific facts to determine whether the claimants were exposed to "substantially the same general conditions," and if so, to deem all of those injuries as arising from a single occurrence. Numerous courts have construed this language to reach a single occurrence finding in the mass tort context. *See, e.g.*, *Treesdale*, 418 F.3d at 335; *Owens-Illinois v. Aetna Cas & Sur. Co.*, 597 F. Supp. 1515, 1527 (D.D.C. 1984).

In sum, the circuit court ignored relevant policy language, did not employ the proper legal test, adopted unsupported findings from another matter as facts that do not apply to Starr Davis, and ignored the Starr Davis-related facts submitted by Travelers. The court's summary judgment declaration that each asbestos claimant's injuries arise from a separate occurrence must therefore be reversed, so that proper discovery can be completed, the correct facts considered, the required analysis employed, and the correct law applied. *See, e.g.*, *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co*., No. 83–3347, 1987 WL 10107, at *4 (D.D.C. Mar. 30, 1987) ("any finding as to the number of occurrences would, on the present record, be premature.").[26]

CONCLUSION

The circuit court erred by granting Starr Davis partial summary judgment based on material facts that were genuinely dispute, lacked evidentiary support, and/or were the subject of necessary discovery. It also erred by declaring insurance policy rights and obligations that directly contradict the terms of the 1985 Agreement. Finally, those same declarations constitute error because they are inconsistent with applicable law.

Each error is an independent basis to reverse the circuit court's ruling. Travelers respectfully requests that this Court grant this appeal, reverse the Order of the circuit court, and remand for further proceedings.

[26] The circuit court closes its discussion of the number-of-occurrences issue by stating that "Travelers has not provided a persuasive argument as to why the Court should come to a different conclusion [than what it held in the Covil matter]." R. p. 31 (Order at 30). Travelers respectfully submits that the circuit court has the burden backwards. Starr Davis, the movant below, did not provide a persuasive argument—supported by any admissible evidence—to show why the clearly distinguishable Covil Sanctions Order should be adopted here as a matter of law.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certify that this Appellants' Brief complies with Rule 211(b), SCACR.

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