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

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.

APPELLANTS' REPLY BRIEF

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PRELIMINARY STATEMENT

In their initial opening brief, Appellants Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company and The Standard Fire Insurance Company (hereinafter "Travelers") illuminated four categories of clear, reversible error embedded in the circuit court's summary judgment order. Specifically:

1. The circuit court erred by purporting to interpret and declare rights and obligations under numerous insurance policies *not in the summary judgment record*. Prior to the court's ruling, Appellees Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc. ("Starr Davis") provided the court with only two of the dozens of existing or alleged insurance policies. It asked the circuit court to rely on inadmissible counsel-prepared charts that failed to identify *any of the key language* contained in any of the absent policies. Remarkably, after the circuit court issued summary judgment rulings purportedly applicable to all policies, Starr Davis attempted to cure the deficient record by submitting policy documentation and other evidence that the circuit court *did not have when it ruled*. Starr Davis also downplayed the importance of policy language and relevant facts, in any event, by asking the circuit court to issue a set of detailed, pre-ordained judicial declarations based nearly verbatim on a *sanctions* order issued in a *different* case, involving *different* insurers, a *different* insured, and *different* policies.[1]

2. The circuit court also erred in prematurely issuing its summary judgment ruling in the face of genuinely-disputed material facts that were the subject of ongoing discovery. Travelers' Rule 56(f) affidavit demonstrated *the critical need for further discovery*, including discovery Starr Davis had blocked by raising specious claims of "privilege" regarding its

[1] Appellate review of that sanctions order has been blocked by the same circuit court, which has not ruled on a motion for reconsideration which has been pending for almost two years.

communications with its *litigation adversaries*. The court ignored the indefensible nature of the privilege claims and improperly rejected Travelers' efforts to obtain the necessary discovery.

3. In addition, the circuit court improperly refused to enforce the parties' binding, written agreement to allocate asbestos-related defense and indemnity costs via a *time on risk formula*. This agreement, which was signed by the parties and their counsel in 1985 *after* all Travelers' insurance policies had expired, *expressly directs* how certain key disputed terms in the Travelers insurance policies operate. Inexplicably, the circuit court ignored the 1985 Agreement and issued judicial declarations that *directly violate* its terms.

4. Finally, in addition to each of the above errors, the circuit court's judicial declarations are *unsupported* by, or *directly at odds* with, South Carolina law, including South Carolina Supreme Court precedent. The circuit court's summary judgment ruling includes clearly erroneous legal conclusions concerning: (i) "allocation" of damages, (ii) application of aggregate limits associated with the "completed operations" injuries as defined in the policies, (iii) the "burden of proof" associated with completed operations injuries, and (iv) the "number of occurrences" that give rise to the alleged injuries at issue here.

In its response ("Opp."), Starr Davis fails to address many of Travelers' arguments and instead resorts to misstatements and misrepresentations of the record and the law. With respect to the first three errors identified above, those misstatements and misrepresentations can be summarized as follows:

First, and most remarkably, Starr Davis asks this Court (Opp. at 16) to find that its unilateral submission of policy documentation to the circuit court after issuance of the summary judgment ruling somehow "cured" the circuit court's erroneous rendering of a ruling without all of the policy documentation. Starr Davis is wrong. The issues presented by this appeal should

be decided based on the summary judgment record before the circuit court when it ruled. Starr Davis' submission of evidence *after* the circuit court signed and docketed the summary judgment order should not be the basis for affirmance here, because the circuit court indisputably did not consider such evidence in rendering the summary judgment ruling.[2] Nor can Starr Davis fall back to the unsupported suggestion (Opp. at 4) that the circuit court could simply assume that the Travelers policies contained so-called "standard forms." Starr Davis failed to meet its obligation to come forward with any "standard forms" prior to the ruling, and Travelers had no obligation to refute the mere suggestion that such forms might apply. Equally defective is Starr Davis' argument that reference to actual policy language is unnecessary because the circuit court judge was somehow "familiar" with policy language from other cases (Opp. at 35), and because policy language does not actually matter since all coverage issues must be "construed in favor of coverage" (*id.* at 6 & 27). Judicial declarations addressing insurance coverage issues necessarily depend on the actual policy language and the relevant claim facts. *Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co*., 395 S.C. 40, 53, 717 S.E.2d 589, 594 (2011).

Second, Starr Davis' contention (Opp. at 13) that the circuit court's decision to preclude Travelers from taking additional discovery must be dismissed because it does not rise to an "abuse of discretion" ignores the overriding principle that summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery."

[2] Because Starr Davis' submission of evidence was without service on Travelers, and was made a full day after the circuit court judge signed the summary judgment order, Travelers filed a motion to strike Starr Davis' effort to place that evidence in the record on appeal. *See* Motion to Strike (filed with this Court on Nov. 9, 2021); R.p. 1102 (Mar. 4, 2021 letter to circuit court judge). As an accommodation, however, Travelers has since withdrawn that motion because it has decided not to contest Starr Davis' subsequent explanation that its failure to serve Travelers was an inadvertent oversight, and because, as explained *infra* at 6, there is a significant need for immediate resolution of all legal issues raised by this appeal.

Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). The cases cited by Starr Davis dwell on instances where the party opposing summary judgment failed to present any argument concerning the need for additional discovery until after the trial court had already granted summary judgment, *Bayle v. South Carolina Department of Transportation*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001), or where the litigants had "a full and fair opportunity to develop the record in the case," with all relevant parties having been deposed. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 346-47, 565 S.E.2d 309, 313 (Ct. App. 2002). Moreover, contrary to Starr Davis' suggestion (Opp. 4 & 17-19), Travelers did not engage in any claimed discovery speculation; it submitted a Rule 56(f) affidavit specifying highly relevant discovery that it needed before it could fully and properly respond to Starr Davis' motion. R.p. 966-70. Yet, the circuit court failed even to acknowledge the Rule 56(f) affidavit. In addition, the circuit court did not address—and Starr Davis has done nothing to refute—the evidence demonstrating that Starr Davis blocked highly relevant discovery, including by improperly claiming "privilege" as to its communications with third-party brokers and the underlying tort claimants-parties that it named as defendants, *i.e.*, its adversaries in this action. *See* Trav. Br. at 3 & 23.[3]

Third, Starr Davis does nothing more than sprinkle red herrings in an effort to avoid the legal path required by the 1985 Agreement. That agreement includes provisions—consistent with substantive South Carolina law as discussed further below—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

[3] Quizzically, Starr Davis argues (Opp. at 23) that the circuit court need not have received or considered any additional facts because the "coverage rulings stand entirely independent" of the facts, "rendering further discovery on these issues unnecessary." That is absurd. Regardless, the circuit court's ruling cites as support various facts that are *at odds* with the record evidence, and as to which additional discovery was obviously necessary to resolve. Trav. Br. at 18-19.

provide for reimbursement of certain allocated costs to Travelers. *See* R.p. 654-61 (Ex. 9). Starr Davis says (Opp. at 23-24) that the 1985 Agreement is inadmissible, but it is Starr Davis that placed the agreement in the record for summary judgment purposes. R.p. 360 (Starr Davis SJ Brief at 7, n.6). Starr Davis also tries (Opp. at 25-26) to lead this Court to believe that Travelers seeks to use the 1985 Agreement "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." That is simply untrue. Travelers does not rely on the 1985 Agreement to *construe* the pre-existing insurance policies; it seeks to *enforce* the 1985 Agreement's express terms, particularly those terms that direct how asbestos claims will be handled, and who will pay for what. Trav. Br. at 26-30.[4] As a negotiated and fully-executed contract *signed after all policies expired*, the 1985 Agreement naturally supersedes either parties' arguments as to how the prior policies might otherwise operate.[5] *Covil Corp. v. Penn. Nat'l Mut. Cas. Ins. Co*., No. 2020-001239, slip. op. at 6 (decided Jan. 5, 2022) ("*Penn. National*") ("'An insurance contract, like any other contract, may be altered by the contracting Parties . . . .'") (citations omitted); *Adamson v. Marienne Fabrics, Inc*., 301 S.C. 204, 207, 391 S.E.2d 249, 250 (1990) (finding error in the trial court's exclusion of evidence of "subsequent

[4] Starr Davis suggests (Opp. at 5 & 11) that enforcement of the 1985 Agreement was not at issue in the summary judgment briefing. This is clearly incorrect. Travelers directly raised the enforcement issue below. *See* R.p. 715-17; 725. *See also* Trav. Br. at 3.

[5] Starr Davis contends (Opp. at 24-25) that because the parties' agreement as to which years of insurance coverage exist and do not exist was set forth in one of the 1985 Agreement's "whereas" clauses, it is unenforceable. The law is otherwise. *M & M Grp., Inc. v. Holmes*, 379 S.C. 468, 476, 666 S.E.2d 262, 266 (Ct. App. 2008) (South Carolina law requires contracts to be interpreted to give effect to all of their provisions); *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 199 S.E.2d 719 (1973) (holding the intention of an instrument is determined by its language, regardless of whether such language is in a whereas clause; language in a recital clearly sets forth an agreement's purpose as a modification).

modifications" of a prior agreement); *Wilson v. Landstrom*, 281 S.C. 260, 366, 315 S.E.2d 130, 134 (1984) ("An integrated agreement may always be modified."); *Koth v. Cnty. Bd. of Educ. of Jasper Cnty*., 140 S.E. 99, 100 (S.C. 1927) (finding separate, post-contract formation agreement should have been admitted into evidence).

Travelers devotes the remainder of this reply brief to the *fourth* error point identified above—the circuit court's issuance of unsupported judicial declarations directly at odds with South Carolina law. Travelers does not make this briefing choice because of any weakness in the first three error points—as discussed above, Starr Davis failed to meet its burden of proof as to the existence, terms and conditions of the alleged policies at issue in this matter; the circuit court clearly abused its discretion by ruling prior to the completion of relevant, necessary discovery; and the circuit court blatantly failed to give effect to the clear, mandatory terms of the 1985 Agreement. While Travelers urges the Court to agree with each of these error points, the Court should also address the numerous legal defects in the circuit court's policy interpretation declarations not only to correct clear errors of law in this case, but to provide much-needed guidance on these issues given their relevance to the growing number of other cases pending before the circuit court raising these same legal issues. *See, e.g.*, *Woodson v. DLI Props. LLC*, 406 S.C. 517, 528 n.10, 753 S.E.2d 428, 434 n.10 (2014) ("While remand to the court of appeals is appropriate, in the interest of judicial economy, we address the merits of whether summary judgment in favor of Respondents was proper."); *Cabiness v. Town of James Island*, 393 S.C. 176, 188, 712 S.E.2d 416, 423 (2011) ("We realize our conclusion that Town's Petition was not sufficient is dispositive of this case. However, in the interest of judicial economy and the likely event of Town re-filing its Petition, we reach the remaining issues to provide guidance for future incorporation petitions and help alleviate the ambiguities that plagued Town's most recent

petition."); *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) (addressing the merits of an otherwise-moot appeal "[f]or the sake of judicial economy"); *see also Prince v. Beaufort Mem. Hosp*., 392 S.C. 599, 606, 709 S.E.2d 122, 126 (Ct. App. 2011) ("[T]he appellate court's instructions circumscribe the trial court's authority on remand. The trial court's duty is to follow the instructions it received from the appellate court." (citation omitted)).

ARGUMENT

With respect to the circuit court's erroneous judicial declarations, Starr Davis' main opposition point (Opp. at 7) is that the declarations should "not be disturbed" because they are "consistent with [the circuit court's] other rulings across multiple asbestos-related insurance coverage cases." *See also id*. at 11 ("These declarations were consistent with the Circuit Court's previous policy interpretation rulings in prior asbestos litigation involving similar insurance policies."). This argument is not only misleading, it is a major overstatement. The prior circuit ruling on which Starr Davis and the circuit court relied is a single sanction order issued in a different case, involving different insurers, a different insured, and different policies, where the circuit court applied a different standard of review and drew adverse policy construction inferences against the insurer as a sanction for perceived mediation and discovery violations. *See* R.p. 392-93 (Ex. 2 at 13-14). The circuit court's summary judgment ruling does not cite to any other "previous policy interpretation rulings" it has made. In addition to Starr Davis' obvious overstatement, the fact remains that the legal standard applicable to summary judgment motions, where the circuit court is required to review all evidence in the light most favorable to the non-movant, is a far cry from the discovery sanction standard that, unfortunately, appears to have motivated the circuit court's ruling here.[6]

[6] Starr Davis' admission that the circuit court intends to issue rulings based on its own "previous policy interpretation rulings" highlights the need for immediate attention to the circuit court's

As demonstrated in Travelers' opening brief and emphasized below, Starr Davis seeks to avoid clear policy language in order to circumvent long-held South Carolina contract principles.

A. The Circuit Court's "Allocation" Ruling Directly Contradicts Binding South Carolina Supreme Court Precedent.

The first error made by the circuit court involves its allocation declaration, whereby it seeks to eviscerate the South Carolina Supreme Court's *Crossmann* decision. Even a cursory review of the circuit court's ruling reveals that it is directly at odds with the clear directives contained in *Crossmann*. Perhaps that is why Starr Davis devotes less than two pages of its brief to defending the circuit court's allocation declaration. In that sparse treatment, Starr Davis grossly misrepresents *Crossmann's* holding and fails to respond to the multiple, dispositive supporting points raised in Travelers' initial opening brief.

Operations Injuries: Starr Davis' primary opposition argument (Opp. at 28) is that *Crossmann* did not expressly discuss every conceivable type of progressive injury, and therefore its adoption of time-on-risk allocation does not apply to any type of progressive injury not explicitly discussed. The breadth of the unanimous *Crossmann* opinion refutes this myopic, self-serving position. The *Crossmann* Court fully embraced time-on-risk allocation. As importantly, it *expressly rejected* any "all sums" allocation approach because it "ignores critical language limiting the insurer's obligation to pay to sums that are attributable to property damage that occurred during the policy period." 395 S.C. at 60, 62, 717 S.E.2d at 599, 601 (citations omitted). Given that the Supreme Court made clear that the "critical language" ([redacted]) does not permit use of an "all sums" allocation

erroneous declarations. Given the likelihood of ongoing, contrary rulings by this single circuit court judge, this Court must address those rulings now before more legal damage is done.

approach, there is no room to adopt that approach when it would be more convenient for Starr Davis. *Crossmann* says that the language of the policy simply does not allow it.

Despite the Supreme Court's unequivocal rejection of the "all sums" allocation approach, and notwithstanding the circuit court's statement that it was "mindful" of the *Crossmann* ruling, the circuit court simply declared that "the language of the policies typically requires the insurers to pay 'all sums'—meaning everything—for which the insured is legally obligated to pay if a claimant sustains bodily injury during the period of the policy." R.p. 31 (Order at 30). The circuit court's decision to use this reasoning to manufacture an "all sums" exception found nowhere in *Crossmann* is directly at odds with the South Carolina Supreme Court's outright refusal, after careful analysis, to embrace any aspect of that approach.

Starr Davis' effort (Opp. at 27) to create from whole cloth a purported exception to time-on-risk allocation whenever so-called "operations" injuries may be involved has no basis in the policy language at issue and would drastically undermine the ruling in *Crossmann*. Nothing in *Crossmann* leaves open the possibility that its interpretation of clear policy language applies to only a subset of progressive injuries. To the contrary, *Crossmann* addresses progressive injury cases *in general*, including *asbestos bodily injury claims in particular*—referring generally to "long-term exposure to asbestos fibers"—which clearly encompasses asbestos-related injuries of any kind. 395 S.C. at 51-52 n.8, 717 S.E.2d at 595 n.8. When discussing these types of claims, the Supreme Court neither created nor suggested any exceptions to the time-on-risk rule. Nor have other courts interpreted *Crossmann* to adopt such exceptions. *See Zurich Am. Ins. Co. v. Covil Corp.*, No. 1:18-CV-932, 2020 WL 4483236 (M.D.N.C. Aug. 4, 2020). This is because the South Carolina Supreme Court made clear its unequivocal rejection of the "all sums"

approach, and did not approve of—or leave room for—contrived exceptions based on esoteric discussions of one kind of progressive injury as compared to any other.[7]

While the Supreme Court noted that courts addressing allocation may take into consideration "the circumstances of a particular case," it specifically warned courts that they "must 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." *Crossmann*, 395 S.C. at 65- 66, 717 S.E.2d at 602-03. There is simply no way to square the circuit court's exception with what *Crossmann* instructs.

Post-1986 Years: The circuit court also agreed, again erroneously, with Starr Davis' request to create a second, broad exception to time-on-risk allocation. It declared that time-on-risk allocation does not apply "to policy years after 1986, when Starr Davis does not have any available or responsive coverage." R.p. 32 (Order at 31). The circuit court's adoption of this additional unauthorized exception reveals the degree to which *Crossmann* is being ignored. In *Crossmann,* the Court *expressly* considered and *rejected* the argument that damages should not be allocated to years when insurance coverage did not exist, does not apply, or was not available for purchase. Specifically, after noting that a few courts outside of South Carolina have created an "unavailability" exception to the "time on risk" allocation rule, *Crossmann* held that "[a]lterations" based on lack of insurance in certain injury years "would exceed the trial court's authority, as the effect is to shift losses from one policy period to another in order to create

[7] Starr Davis seeks to distinguish (Opp. at 28) the *Covil* decision's adoption of time-on-risk allocation because it involved a so-called "products" claim, apparently conceding that the *Crossmann* (pro rata allocation) ruling applies to both "completed operations" claims and "products" claims and that the exception it proposes applies *only* to "operations" claims, although it fails to provide any legitimate distinction. Starr Davis' concession reveals its argument for what it is—an ad hoc, non-contractual effort to simply avoid *Crossmann*.

coverage where none was purchased," thereby "effectively provid[ing] 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 (citation omitted). Again, there is simply no way to square this with the circuit court's endorsement of Starr Davis's requested "exception."

Insolvent Policyholders: *Crossmann* also made clear that the insolvency of a policyholder cannot alter an insurer's obligations, *i.e.*, an insurer cannot be required (based on the changed financial status of the insured) to accept a risk or obligation beyond the injury years for which it assumed and for which it received premiums. *Id*. If there were any doubt regarding the South Carolina Supreme Court's resolve on this point, it was put to rest in *Harleysville Group Ins. v. Heritage Communities, Inc*., 420 S.C. 321, 803 S.E.2d 288 (2017)—cited in Appellants' opening brief (Trav. Br. at 36), but ignored in Starr Davis' response—where the Court affirmed that the insurer would bear only a pro rata, time-based portion of the progressive damages at issue in that case, despite the fact 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. Moreover, the Fourth Circuit, relying on state law principles wholly consistent with South Carolina law, has also rejected the argument that an insured's insolvency can provide a basis for courts to deviate from pro rata allocation. *See In re Wallace & Gale Co*., 385 F.3d 820, 833 (4th Cir. 2004) (holding that the insolvency of a policyholder does not change the insurer's obligations under its insurance contract and explaining that "it is neither equitable nor fair to require an insurance company to pay for coverage during a period for which no effective coverage is in force").

Yet here, as with its other efforts to gut time-on-risk allocation, Starr Davis asked (Opp. at 27-28) the circuit court to completely ignore the teaching of *Crossmann* and *Harleysville Group* by adopting an insolvent policyholder exception. And the circuit court obliged by ruling

that allocation of loss to an insolvent insured is somehow "inequitable." R.p. 32 (Order at 31). Any effort to explain this declaration in light of *Crossmann* and its progeny would be foolish—the circuit court simply decided to engage in an end run around *stare decisis*.

Improper Use of Equity: As noted above, the circuit court expressly relied on "equity" to justify its efforts to eviscerate *Crossmann*. But reliance on equitable grounds to contravene clear contract rights is not permitted. Under South Carolina law, a court cannot enlarge an insurer's contractual obligations by judicial construction. *See, e.g.*, *S.C. 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 F.2d 1022, 1025-26 (4th Cir. 1983) ("[E]quitable 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.").

As explained above, "it is neither equitable nor fair to require an insurance company to pay for coverage during a period for which no effective coverage is in force." *Wallace & Gale*, 385 F.3d at 833. And the South Carolina Supreme Court has made clear that regardless of the "circumstances of a particular case," courts "must 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." 395 S.C. at 65- 66, 717 S.E.2d at 602-03.

This Court should therefore expressly overrule the circuit court's effort to avoid binding South Carolina allocation precedent in order to achieve a particular result. Specifically, it should declare that the time-on-risk allocation rule adopted in *Crossmann* (i) applies to all progressive

injury claims, with no so-called exception for certain types of injuries, and (ii) pertains to all years of injury, regardless of the lack of applicable insurance coverage and/or the insolvency of the insured. An insurer's contract rights and obligations, as written in the policy, cannot be altered via ad hoc exceptions that ignore the critical policy language limiting the insurer's obligation to pay to sums attributable to damage that occurred during the policy period.[8]

B. The Circuit Court's "Completed Operations" Declaration Disregards Clear Policy Language and Detailed, Persuasive Authority.

The circuit court's declaration regarding "Completed Operations" is also directly at odds with South Carolina law. This declaration was sought by Starr Davis in an effort to avoid the aggregate limits of liability applicable to all damages associated with injuries that fall within the "Completed Operations" hazard, as defined in the policies. That definition provides that [redacted]. *See*, *e.g.*, R.p. 421 (Ex. 4 at 6). The import of this critical contract definition is that once a claimant's progressive damages are allocated to injury years via the *Crossmann* time-on-risk rule, the amount allocated to each specific policy period is subject to the aggregate limit applicable to that policy period if that policy incepted after the injury-causing operation had finished. By contrast, if the injury-causing operation was still ongoing during that particular policy period, the time-on-risk amount allocated to that policy period is not subject the aggregate limit; it is paid subject to the "per occurrence" limit.

[8] If the 1985 Agreement is enforced, as it must be, its time-on-risk provisions accomplish exactly what *Crossmann* requires. Specifically, the parties agreed that Travelers' share of liability would be limited to the percentage of costs that the number of years of alleged exposure during Travelers' coverage periods bears to the total number of years of alleged asbestos exposure, up to the exhaustion of aggregate limits. R.p. 659-60 (Ex. 9, ¶¶ 3-5). Thus, whether this Court applies *Crossmann* or enforces the 1985 Agreement, the result is the same—time on risk allocation.

At Starr Davis' request, the circuit court adopted a "Completed Operations" declaration directly at odds with the policy language at issue. The circuit court declared that an injury during a particular policy period may be characterized as a "Completed Operations" injury *only* if *all* of the claimant's asbestos-related injury, including injury prior to the policy period in question, occurred after the injury-causing operations were completed. R.p. 24-27 (Order at 23-26). Starr Davis says (Opp. at 6) that this view is the "only commonsense interpretation" of the policy.

Notwithstanding its self-serving view of "commonsense," Starr Davis' argument fails because it is not grounded in the policy language itself. That language makes clear that whether bodily injury is categorized as an aggregated "Completed Operations" injury, or an injury that falls outside that hazard (and is therefore unaffected by aggregate limits), necessarily depends on the specific policy period at issue and the policyholder's contracting activities during that same specific time period. This is because the policies cover only "bodily injury," which is defined as "[redacted]." *See, e.g.*, R.p. 421 (Ex. 4 at 6) (emphasis added). Thus, as confirmed by *Crossmann*, for any given policy, the only injury that matters, for purposes of determining an insurer's obligations, is the injury that occurs during that policy period, not progressive injury that may have taken place before or after that policy period. Having narrowed the focus to the injury during the policy period, the policies then expressly define that injury as falling within the aggregated "Completed Operations" hazard "[redacted]." *Id.*

Thus, when read together, as they must be, the definition of the "Completed Operations" injury includes only the injury "occur[ing] during the policy period." Whether bodily injury during any particular policy period is categorized as an aggregated "Completed Operations"

injury therefore depends on its timing in relation to whether the injury-causing contracting activities that injured the specific claimant at hand had ceased before the start of the specific policy period under consideration.

The Fourth Circuit dealt with this precise issue in *Wallace & Gale* nearly twenty years ago. Specifically, the court explained that, "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 [the insured's] operations." *See Wallace & Gale*, 385 F.3d at 834. The Fourth Circuit has since addressed the issue again and re-confirmed its interpretation, relying on the "clear and controlling" policy language. *See Gen. Ins. Co. of America v. U.S. Fire Ins. 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").

The practical connection between the *Crossmann* and *Wallace & Gale* rulings can be seen by way of example. Assume a claimant was exposed to asbestos fibers released during an insured's asbestos-related insulation installation operation that began in 1970 and ended in 1973. Further assume that the claimant sustained injuries that were progressive in nature—*i.e*., injuries that developed gradually from 1970 onward in stages until manifestation of those injuries in 2015—with each year of subsequent, progressive injury potentially triggering a series of insurance policies issued over that same time period. As the *Crossmann* court confirmed, each individual insurer on the risk during the entire progressive injury period is responsible only for the portion of the claimant's damages assignable to the portion of the injury that occurred during the specific time-on-risk period its policy covered, as a percentage of all years of progressive injury. *See infra*, Section A. And as *Wallace & Gale* teaches, whether the damages amount

allocated to that specific policy period is subject to that policy's aggregate limit of liability depends on whether the injury-causing operation was "complete" before the policy incepted.

In our example, the damage amounts allocated per *Crossmann* to the 1970, 1971, 1972 and 1973 policy periods would not be subject to the "Completed Operations" aggregate limit, because the injury-causing operation was still ongoing. But the damage amounts allocated to policy periods after 1973 would be subject to the aggregate limit, because the portion of the injury that occurred during those policy periods—which is the only injury those policies can potentially cover per *Crossmann*—took place after the insulation installation operation had ceased. This is precisely what the clear and controlling language of the polices requires.[9]

This interpretation was also embraced in *Plant Insulation Co. v. Fireman's Fund Insurance Co.*, No. CGC06448618, 2013 WL 3286410 (Cal. Super. Ct. Apr. 08, 2013), where the court explained that, in the context of long-tail injuries, specifically asbestos claims, "it is the timing of the bodily injury during the policy period that determines whether the completed operations hazard applies." *Id*. at *11. The court rejected the same initial "source" argument raised by Starr Davis, holding that "[t]he source or cause of the injury is irrelevant to the analysis," explaining that the flaw in the argument (also made by Starr Davis here) is that "it completely ignores the definition of 'bodily injury' in the policies," which is fully incorporated into the definition of the completed operations hazard and must be given effect. *Id*. at *6.

The court made clear that its ruling with respect to the completed operations hazard "applies with equal force to the products hazard," explaining: "The plain and unambiguous policy language makes the timing of the bodily injury during the policy the operative event that

[9] Starr Davis' hypothetical involving a "construction accident" (Opp. at 29-30) does not involve progressive injury and is inapposite.

controls the application of the products hazard, not the source or cause. The source or cause of the bodily injury during the policy period is simply irrelevant to the analysis." *Id.* at 12. *See also Schrillo Co. v. Hartford Acc. & Indemn. Co*., 181 Cal. App. 3d 766, 777-78 (1986) ("The term 'products hazard' is defined in the policy jackets along with the definition of 'bodily injury' and 'occurrence' and *in clear language is tied to 'bodily injury' . . . which in turn, [is] expressly defined as injuries occurring within the policy period*. We see no ambiguity here which would provide coverage for injuries occurring outside the policy period.") (emphasis added).

Starr Davis asks (Opp. at 32) this Court to ignore all of these cases because it views them as somehow inconsistent with South Carolina law. But nowhere does Starr Davis explain how the law applied in those cases is in any way different from South Carolina law. Indeed, as explained above, the *Wallace & Gale* decision is not only entirely consistent with South Carolina Supreme Court precedent, it dovetails with it. In particular, in *Crossmann*, the Supreme Court emphasized that because coverage applies "'**only if** … [t]he 'bodily injury' or 'property damage' occur[red] during the policy period,'" it follows that "the insurance **does not apply** to . . . damage that did not occur during the policy period." *Crossmann*, 395 S.C. at 62, 717 S.E.2d at 600. That basic principle was fundamental to the *Wallace & Gale* holding.

Starr Davis also offers no reason why this Court should not look to the Fourth Circuit cases for guidance, or the Maryland law those cases interpreted. In fact, other courts in South Carolina have had no concerns looking to Maryland law in the insurance context.[10]

[10] *See, e.g*., *Henderson v. Allied Signal, Inc*., 373 S.C. 179, 185, 644 S.E.2d 724, 727 (2007) ("In determining whether [asbestos] exposure is actionable, we adopt the 'frequency, regularity, and proximity test' set forth in *Lohrmann v. Pittsburgh Corning Corp*., 782 F.2d 1156, 1162 (4th Cir.1986) [(applying Maryland law)]"); *McDonald v. State Farm Mut. Auto. Ins. Co*., 287 S.C. 40, 44–45, 336 S.E.2d 492, 495 (Ct. App. 1985) ("We reach the same result for the same reason" as the Court of Appeals of Maryland, which "concluded that the exclusion which the insurance company added to the policy was invalid because it was not authorized by the statute.").

Moreover, although Starr Davis bases its "Completed Operations" argument on Travelers' alleged lack of support for its position under South Carolina law, Starr Davis ironically relies (Opp. at 30) on a 50-year old Nebraska Law Review article and a handful of non-South Carolina cases that have cited it. But that article sheds no light on the question here: where progressive injury that takes place over many years, including in policy periods that incept long after the injury-causing operation has been completed, does the injury in the post-operation policy periods fall within the completed operations hazard? The answer is "yes," as the cases discussed above confirm. In any event, the result here is dictated by the plain and unambiguous policy language; cases such as *Wallace & Gale* and *Plant Insulation* merely confirmed that the unambiguous language means what it says and should be enforced as such.

This Court's very recent decision in *Penn. National* is entirely consistent with the case law cited above. In that case, the policyholder (Covil) sought coverage under a *single* insurance policy issued by Pennsylvania National for a single policy year: March 31, 1986 to March 31, 1987. *Penn. Nat'l*, slip op. at 11. The evidence showed that the asbestos claimant was exposed to asbestos fibers released by Covil while it was performing asbestos-related work *during that same policy period*, specifically March 11, 1986 to January 25, 1987. *Id.* As a result, the "completed operations" definition was not satisfied, because the *only* policy period at issue in the case was the very same period when the injury-causing work was ongoing.

Critically, the case did *not* present the question of whether an insurance policy that may have been issued *in the following year*, *i.e.*, March 31, 1987 to March 31, 1988, after Covil's injury-causing work had ceased but while the claimant's injury continued to progress, would apply on an aggregated, "completed operations" basis. If that question had been presented, *as it squarely is here*, this Court has revealed that it would turn to the key holding in *Wallace & Gale,*

which this Court quoted as follows: "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, as stated, the aggregate limits would not apply to those policies in effect at the time of the exposure during Wallace & Gale's operations." *Penn. Nat'l*, slip op. at 10-11 (citing *Wallace & Gale*, 385 F.3d at 834). In contrast, despite the clear language in the multiple Travelers policies at issue here—the same language at issue in *Wallace & Gale*—the circuit court turned directly away from *Wallace & Gale* and simply excluded from the definition of completed operations injuries *all* progressive injuries that occur in *subsequent* policy periods, *i.e.*, even if those policy periods incept after the operation is complete and despite clear language in the policies that bodily injury means injury "which occurs during the policy period."

In addition to asking this Court to disregard the clear and controlling policy language, Starr Davis also asks the Court to ignore the record evidence. *See* Opp. at 22-23. That evidence reflects that (i) [redacted] R.p. 1897; 1909; 1914. This evidence was placed properly before the circuit court as part of summary judgment briefing. It strongly suggests that [redacted]. Yet the circuit court completely ignored these facts, allowed Starr Davis to affirmatively block related discovery, *see* R.p. 829-30; 838-39; 850; 856, and chose to simply adopt, nearly verbatim, unsupported conclusions in an unrelated Sanctions Order: "[T]he asbestos insulation operations suits against Starr Davis are not repetitive products liability suits alleging exposure to asbestos from the same defective product.

Instead, these suits allege that Starr Davis' operations exposed workers and other bystanders to asbestos." R.p. 30 (Order at 29). *Cf*. R.p. 372 (Starr Davis SJ Br. at 19 (quoting this exact language from the Covil Sanctions Order and asking the circuit court to "apply this ruling to the insurance policies Travelers issued to Starr Davis")).

This wholesale adoption of factual conclusions from a ruling in a different case was completely inappropriate, particularly given the relevance of case-specific facts to this issue. The ruling is all the more inappropriate here because Starr Davis provided the circuit court with no evidence whatsoever concerning the nature of the underlying claims.

The circuit court's declarations regarding the "Completed Operations" issue must be reversed. This Court should declare that the *Wallace & Gale* ruling on "Completed Operations" is entirely consistent with South Carolina law; thus, if exposure to an injurious condition began during an insured's operations and continued after operations were completed, the aggregate limits of the policies in effect at the time of the initial exposure during the insured's operations would not apply, but the aggregate limits of insurance policies which came into effect thereafter would apply.

C. The Circuit Court's Burden of Proof Declaration is Contrary to South Carolina Law and Impractical.

Starr Davis also misstates (Opp. at 32) the law concerning which party bears the burden of proving whether an injury falls within the "completed operations" hazard and is, therefore, subject to a policy's aggregate limits. Starr Davis contends that the circuit court correctly placed the burden of proof on Travelers, because "the imposition of aggregate limits is no less a limitation or denial of coverage than an exclusion." *Id*. Starr Davis now asks this Court to bless this new, all-encompassing rule.

Starr Davis' novel rule cannot be adopted here because it is directly contrary to South Carolina law. Policyholders bear the burden of proving the application of the core terms of coverage, and all policy limits of liability (including aggregate limits) are unquestionably core terms of coverage. *See Fuller v. E. Fire & Cas. Ins. 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"); *Gaskins v. Firemen's Ins. Co. of Newark, N.J.*, 206 S.C. 213, 217, 33 S.E.2d 498, 499 (1945) (describing the "necessary terms" of an insurance policy as "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).

Starr Davis conveniently ignores that the policies in the record expressly set forth a list of exclusions, but "completed operations" injuries are not identified as exclusions in the applicable coverages. *See, e.g.,* R.p. 424-25; 461-62 1132-33; 1236-37; 1411-12; (Exs. 4 & 5). *See Harleysville*, 420 S.C. at 340, 346, 803 S.E.2d at 299, 302 (noting that insurance policies contain specific provisions relating to "policy exclusions" and holding that the insurer bears the burden of establishing the applicability of those "exclusions"). The limits of liability—either aggregates or per occurrence limits—also cannot be found in the "exclusions" section. These terms are simply not exclusions.[11]

Starr Davis also completely ignores *National Union Fire Insurance Co. of Pittsburgh, PA, v. Porter Hayden Co*., No. CCB-03-3408, 2012 WL 734170, at *2 (D. Md. Mar. 6, 2012), cited and discussed at length by Travelers in its opening brief (Trav. Br. at 43-44). There, the

[11] The Court of Appeals' recent ruling in *Penn. National* is distinguishable because what was at issue in that case was in fact an endorsement entitled "Exclusion" that precluded coverage for injuries arising from completed operations. *Penn. Nat'l*, slip op. at 7.

court addressed this precise issue and 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." *Porter Hayden*, 2012 WL 734170, at *2. Nothing in South Carolina law compels a different conclusion, inasmuch as South Carolina law puts the burden on the insured to prove the applicability of all terms and conditions of coverage, other than exclusions, and as discussed above, has recognized that the applicable amount of insurance is one of those essential terms. *See Fuller*, 240 S.C. at 89, 124 S.E.2d at 610; *Gaskins*, 206 S.C. at 217, 33 S.E.2d at 499.

Starr Davis makes a unique, last ditch argument on this issue—it says (Opp. at 33) that it should not be required to prove "negative propositions," *i.e.*, that a particular asbestos claim is not a "products" claim or a "completed operations" claim. It cites a 137-year old case in support, which stands for the general proposition that "[a] party is not required to prove a negative." *Id.* (citing *Whaley v. Bartlett*, 42 S.C. 454, 473, 20 S.E. 745, 753 (1894)). Oddly, Starr Davis seems to imply from this that despite the rule it cites, Travelers should be required to prove a negative—the absence of ongoing injury-causing operations during its policy periods.

This simplistic counting exercise ignores the main point. Starr Davis is in the best position to make each factual showing, in particular with regard to whether and when its operations occurred. *See Porter Hayden*, 2012 WL 734170, at *2 ("The court will not require the Insurers to demonstrate the absence of ongoing operations during the policy periods," as the insured is "in the best position to make this showing"). The Fourth Circuit recently agreed with this sensible conclusion in the asbestos context. *See Gen. Ins. Co. of Am.*, 886 F.3d at 356 (affirming 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"). At bottom, the insured is the one that knows what it did and when, and it can gather the evidence most easily as to whether an injury falls within or outside of the Completed Operations hazard definition. Starr Davis has no response to this bottom line conclusion.

This Court should reject the circuit court's declaration that Travelers has the burden to prove the applicability *vel non* of policy hazard categories and policy limits, which are core policy terms. Instead, this Court should declare that the burden of proving whether an injury is a "Completed Operations" injury with respect to any particular policy, and is thus subject to aggregate limits, falls on Starr Davis.

D. The Circuit Court Erred in Failing to Consider Policy Language or Facts Relevant to the Assessment of the Number of Occurrences

The remaining declarative issue—regarding the "number of occurrences" giving rise to the asbestos claims at issue here—stands on a different footing. The circuit court declared that the underlying suits against Starr Davis are not based on exposure to asbestos from the same defective product, but from operations, which it states should be treated as involving multiple "occurrences." R.p. 30 (Order at 29). If affirmed, this declaration means that the damages associated with each asbestos claimant may be subject to unending per occurrence policy limits, as opposed to a single per occurrence limit for all claimants. This declaration must be remanded for further discovery and proceedings, because the declaration is based on an entirely inadequate factual record, and Starr Davis has failed to address differences in the relevant policy language.

The circuit court based its declaration on so-called "typical" policy language (R.p. 29 (Order at 28)), wherein the number of occurrences from which a series of injuries arise can only be determined by reference to certain contemporaneous facts—specifically, facts that establish whether the claimants' injuries arose from "substantially similar conditions." *See also* R.p. 759; 776; 425; 462 (Exs. A & B; Exs. 4 & 5) ("[redacted]

[redacted]

[redacted]") (emphasis added). When this language is present, the number of occurrences issue is generally decided by use of a fact-based "cause test," which "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 that all of the asbestos claims at issue arose from a single occurrence, specifically 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 applied it in a case involving "the distribution of inherently defective goods," finding that injuries to multiple claimants at different times as a result of "placing a defective product into the stream of commerce" arose from "one occurrence." *Owners Ins. Co. v. Salmonsen*, 366 S.C. 336, 338–39, 622 S.E.2d 525, 526 (2005). In that case, all claims were deemed to be subject to a single per occurrence limit of liability, not a separate per occurrence limit applicable to each claimant or site. *Id*. at 339, 622 S.E.2d at 526.

In the present matter, the circuit court did not engage in any fact-based analysis of the cause of the injuries and, in fact, did not consider any admissible claim-specific evidence. Instead, it simply made sweeping factual statements, without any citation to the record and at odds with the record evidence, to the effect that (1) all underlying claims against Starr Davis arose from its installation, disturbance and/or removal of asbestos-containing materials; and (2) "[t]he evidence against Starr Davis is different in each one of these types of cases . . . . " R.p. 30 (Order at 29). But the supposed "evidence" is cited nowhere, and cannot be found in the record, because Starr Davis opted not to include any underlying asbestos complaints, nor did it place in the record evidence of Starr Davis' decision to get into the asbestos business. Instead, Starr

Davis affirmatively argues (Opp. 34-35) that the circuit court was free to rule without reviewing the relevant facts. Specifically, Starr Davis contends (*id*. at 34) that the circuit court need not have considered evidence regarding Starr Davis' business activities or the facts of any particular underlying asbestos case because the circuit court "did not purport to apply the policy terms to the facts of any particular case." This argument cannot possibly help Starr Davis' position here because the record shows that Travelers placed before the circuit court evidence that most of the claims appear to have arisen from "substantially the same general conditions" (Trav. Br. at 47-49) and the circuit court simply ignored that evidence (*see* R.p. 29-30 (Order at 28-30)). Moreover, the Declaratory Judgment Act "is not properly invoked for an advisory opinion to be put on ice by the plaintiff for use if the defendants or the applicant reach the occasion which might demand it, nor is the Act a license to fish in this judicial pond for legal advice . . . ." *Orr v. Clyburn*, 277 S.C. 536, 542, 290 S.E.2d 804, 807 (1982).

The Court should reverse and remand for additional proceedings with regard to the number-of-occurrences issue, since a summary judgment ruling is inappropriate when further discovery is needed, the relevant facts must be presented and material factual issues must be resolved in light of the actual policy language. *See* Jean Hoefer Toal, *Appellate Practice in South Carolina* 246 (3d ed. 2016) (citing *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008)).

CONCLUSION

For all of the reasons set forth above, the Court should reverse the summary judgment order of the circuit court, issue corrected judicial declarations, and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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PROOF OF SERVICE

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