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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jean Hoefer Toal, Circuit Court Judge

Case No. 2020-CP-40-01226
Appellate Case No. 2022-000366

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

Respondent,

v.

Pennsylvania National Mutual Insurance Company,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals properly found Penn National's purported late notice defense failed where Penn National had sufficient notice of the action and attended mediation with a willingness to contribute toward settlement?

2. Whether the Court of Appeals properly affirmed the circuit court's grant of partial summary judgment where the Receiver's motion was sufficiently supported by evidence that was before the Court without objection from Penn National and the motion was not premature?

3. Whether the Court of Appeals properly found Penn National failed to meet its burden to prove a policy exclusion applied to bar coverage to Covil where the underlying injury occurred *before* Covil completed its work installing insulation materials at the Bowater Paper Mill ("Bowater") in Catawba, South Carolina?

COUNTER-STATEMENT OF THE CASE

Petitioner Pennsylvania National Mutual Insurance Company ("Penn National") insured Covil Corporation ("Covil") against suits seeking the recovery of damages for bodily injury during the period of two Penn National policies issued to Covil between 1986 and 1988. The Penn National policies exclude coverage for damages for bodily injury within either the "products hazard" or the "completed operations hazard." It has been understood for decades that the risk insured by the "products hazard" and the "completed operations hazard" excluded from the Penn National policies is "the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than the product or completed work itself." Roger C. Henderson, *Insurance Protection For Products Liability And Completed Operations – What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971). The Penn National policies therefore cover Covil against the possibility that its goods, products or work will cause third-party bodily injury or property damage *before* Covil "relinquished" its products or *before* Covil "completed" its work.

David Rollins ("Rollins") sued Covil through its Court-appointed Receiver, Peter D. Protopapas, in 2019 for contributing to his mesothelioma. The evidence adduced in the asbestos

litigation established that Rollins was exposed to asbestos attributed to Covil *before* Covil completed its work installing insulation materials at Bowater. The Receiver therefore requested that Penn National attend a court-ordered mediation so that it could settle the *Rollins* lawsuit. Penn National *attended* the mediation but *refused* to fund the *Rollins* settlement based on its policy exclusions for products and completed operations. The Receiver settled *Rollins* and paid the settlement amount.

The Receiver thereafter sued Penn National for breach of contract. He moved for partial summary judgment based on the evidence in the record, including the complaint in the underlying *Rollins* action, deposition testimony from the asbestos litigation, Covil's Bowater contract, Covil's Bowater payment records, and one of the two Penn National policies. Penn National opposed the Receiver's motion and requested additional time to conduct discovery. It did not, however, submit the required Rule 56(f), SCRCP, affidavit to support its purported need to engage in fact-finding before the circuit court ruled on the Receiver's motion. Nor did it explain how any further discovery was likely to return evidence creating a fact issue to defeat summary judgment. Finally, Penn National did not object to any evidence submitted by the Receiver in support of his motion.

The circuit court granted the Receiver's motion for partial summary judgment, finding Penn National could not meet its burden to show the "products hazard" or the "completed operations hazard" barred coverage for the *Rollins* settlement. The circuit court also held that Penn National failed to meet its burden to support its "late notice" defense, particularly since Penn National attended the mediation session that resulted in the *Rollins* settlement. The circuit court did not, however, rule on Penn National's purported need to conduct discovery necessary to oppose the Receiver's motion.

Penn National sought reconsideration of the circuit court's order granting the Receiver's motion and filed an appeal of the circuit court's order granting the Receiver's motion for partial summary judgment while its motion for reconsideration was pending. The circuit court subsequently denied Penn National's motion for reconsideration, holding that its ruling on the Receiver's motion was not premature because Penn National did not require discovery and because Penn National did not submit a Rule 56(f), SCRCP, affidavit in support of its request for additional time. Penn National did not appeal the circuit court's order denying reconsideration.

After briefing and oral argument, the Court of Appeals issued an opinion on January 5, 2022, affirming the circuit court's decision. (Op.). The Court of Appeals found that Penn National's argument that Covil's motion for partial summary judgment lacked support because Covil did not include affidavits or authenticated documents was not preserved for appellate review. (Op. at 4). As to Penn National's argument that the motion for partial summary judgment was premature, the Court of Appeals found the argument meritless because: (1) Penn National did not participate in discovery in the six months between when Covil initiated the action and the circuit court granted partial summary judgment; (2) Penn National did not demonstrate that further discovery would uncover additional relevant evidence; and (3) Penn National failed to comply with Rule 56(f) of the South Carolina Rules of Civil Procedure. (Op. at 4–6). The Court of Appeals agreed that Penn National waived any late notice defense when it attended the *Rollins* mediation with a willingness to contribute toward settlement. (Op. at 7–8). Finally, the Court of Appeals held that Penn National did not establish the applicability of either the products hazard exclusion or the completed operations hazard exclusion. (Op. at 7–11).

Penn National filed a Petition for Rehearing on January 28, 2022, and the Court of Appeals denied rehearing on February 23, 2022. (Pet. for Rehearing; Or. Denying Rehearing). Penn

National filed the instant Petition for Writ of Certiorari on March 28, 2022. As discussed herein, Penn National attempts to couch these issues as novel questions of law or conflicting with existing law to obtain certiorari; however, a review of South Carolina law shows the Court of Appeals' decision properly applied controlling South Carolina law. Covil submits the instant Return to the Court and requests the Court deny certiorari.

III. STATEMENT OF FACTS

A. Current Status of Covil Corporation

From the time of its original formation in or about 1954, Covil was engaged in work at various industrial facilities across South Carolina and elsewhere. Covil's operations involved the installation, removal and disturbance of insulation materials, typically supplied, required or acquired by other parties. At certain times, insulation materials contained asbestos, and Covil's operations are alleged to have resulted in bodily injury to individuals in South Carolina and elsewhere. In 1991, Covil's business failed, and it ceased operations. Thereafter, in 1993, the State of South Carolina rescinded Covil's corporate charter for failing to file the appropriate documentation with the Secretary of State.

Despite Covil's failure as a going concern and its subsequent forfeiture of its corporate charter, Covil continued to be sued in numerous asbestos cases. In the fall of 2018, Covil defaulted on two mesothelioma asbestos cases pending in South Carolina.[1] On November 2, 2018, Chief Justice Jean Hoefer Toal (Ret.), serving as the state's asbestos judge, appointed Peter D. Protopapas to serve as a Receiver (the "Receiver") for Covil to manage its affairs according to South Carolina law. Among other things, the Order empowers the Receiver "with the power and

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[1] *See James Michael Hill v. Advance Auto Parts, Inc. et al.*, November 2, 2018 Order Granting Default Judgment, C/A No. 2018-CP-40-04680 (Richland Cty. Ct. Comm. Pleas); *Denver D. Taylor et al. v. Air & Liquid Sys. Corp., et al.*, November 2, 2018 Order Granting Default Judgment, C/A No. 2018-CP-40-04940 (Richland Cty. Ct. Comm. Pleas).

authority to fully administer all assets" of Covil. (R. p. 56). This order "is inclusive of, but not limited to, the right and obligation to administer any insurance assets of Covil Corporation as well as any claims related to the actions or failure to act of Covil's insurance carriers." (*Id.*).

B. The *Rollins* Action

David D. Rollins sued Covil, and others, in the case styled *David D. Rollins v. Air & Liquid Systems Corp.*, C/A No. 2019-CP-25-00118, pending in Hampton County, South Carolina (the "*Rollins* Action"). Rollins alleged that he suffered from mesothelioma as a result of exposure to asbestos. (R. pp. 62–63, 66). He was diagnosed with mesothelioma on or around January 17, 2019. (R. p. 87). Rollins produced a pathology report in support of his allegation of asbestos-related disease. (R. pp. 111–12).

Among other things, Rollins alleged "take home" exposure to asbestos via his stepfather, Robert J. Ashworth ("Ashworth"), with whom he lived between 1980 and 1991. (R. pp. 87–88, 120). Ashworth returned home from work covered in dust from working at plants with asbestos. (R. pp. 87–88, 119). The dust filled the family home and family vehicles. (R. p. 119). Rollins recalled that Ashworth worked as a pipefitter welder supervisor at numerous facilities, including Bowater. (R. pp. 118–19). Ashworth performed pipe, pump and boiler work at Bowater between 1986 and 1988. (R. pp. 114–16). Ashworth died of asbestos-related cancer in November 2018. (R. p. 118).

Covil performed insulation work at Bowater when Ashworth worked at the facility. (R. pp. 114–15, 126–27). On February 26, 1986, Covil entered a subcontract with BE&K Construction Company, denominated as "Contract No. 4192-F-6410," to "[f]urnish all supervision, labor, equipment and tools, materials (except as noted), and incidentals required to supply and install all insulation on required piping systems" at Bowater. (R. p. 121–25). The contract required Covil to

maintain at least $1,000,000 in liability insurance coverage to respond to claims seeking the recovery of damages for bodily injury and property damage during Covil's work. (*Id.*). Covil worked on the Bowater pipe insulation project at least between March 11, 1986, and January 25, 1987. (R. p. 126–27). Covil was paid more than $1.2 million for this work. (R. p. 128).

C. The Penn National Coverage

Penn National issued two successive primary comprehensive general liability insurance policies to Covil. (R. pp. 44–55). The policies were written on standard forms. (*Id.*).

Penn National issued the first policy for the March 31, 1986 to March 31, 1987 period (the "Relevant Policy") and the second policy for the March 31, 1987 to March 31, 1988 period. (R. pp. 47, 53). Both policies provide $1,000,000 in coverage for claims seeking the recovery of damages against Covil for bodily injury and property damage "per occurrence" and in the aggregate. (R. pp. 44–55). Covil's procurement of the Penn National policies therefore satisfied the insurance requirements of Contract No. 4192-F-6410, which governed Covil's work at Bowater. (R. pp. 121–25).

Both Penn National policies exclude coverage for claims seeking the recovery of damages for bodily injury or property damage within either the "products hazard" or "completed operations hazard." Penn National had not produced complete copies of the policies at the time Covil filed its motion for partial summary judgment in the circuit court.[2]

Nevertheless, a standard definition[3] of a "products hazard" exclusion used by insurers in the 1980s included the following verbiage pertinent to the issues on appeal:

> [B]odily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto,

[2] Penn National submitted the policy materials as an exhibit to its memorandum in opposition to the Receiver's motion for partial summary judgment. (R. pp. 423–514).

[3] Penn National admitted this standard definition mirrors the definition in the Penn National policies. (R. p. 179).

> but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others . . . .

A standard definition[4] of a "completed operations hazard" exclusion used by insurers in the 1980s included the following verbiage pertinent to the issues on appeal:

> [B]odily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured . . . .

Penn National denied coverage for the *Rollins* action based on the "products hazard" and "completed operations hazard" exclusions found in its policies.

D. The *Rollins* Settlement

Penn National received notice of the *Rollins* action in January 2020 and attended the court-ordered mediation in *Rollins* on February 25, 2020, in Charleston. The Receiver requested $50,000 to settle *Rollins*—a fraction of the $1,000,000 bodily injury limits of liability afforded to Covil by the Relevant Policy. Penn National, however, refused to commit to pay that amount to resolve the pending litigation. The Receiver thereafter settled *Rollins* without Penn National's assistance.

E. The Circuit Court Action

The Receiver filed the instant action styled *Covil Corporation v. Pennsylvania National Mutual Insurance Co*., in the Court of Common Pleas for the Fifth Judicial Circuit against Penn National on February 28, 2020 (the "Coverage Action"). The complaint alleges that Penn National breached its insurance contract with Covil when, as noted above, Penn National attended the court-ordered mediation in *Rollins* yet declined to contribute any dollar amount toward settlement even

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[4] Penn National admitted this standard definition mirrors the definition in the Penn National policies. (R. p. 179).

though the $50,000 request was well within the limits of the Relevant Policy it issued to Covil. (R. pp. 21–22).

The Receiver moved for partial summary judgment in the Coverage Action on April 22, 2020 (the "Motion"). He asserted coverage for the settlement of the *Rollins* action was not barred by either the "products hazard" exclusion or the "completed operations hazard" exclusion in the Relevant Policy. (R. pp. 41–42). The Motion sought only to establish Penn National's liability under the Relevant Policy. (R. pp. 40–43). It did not seek to establish the amount Penn National was required to pay.

F. Chief Justice Toal's Ruling On Partial Summary Judgment

Chief Justice Toal began her ruling on the Motion ("the Order") by noting that the "principal dispute between Covil and Penn National is whether an exclusion in the Penn National Policy applies to bar coverage for the *Rollins* action." (R. p. 5). There was no dispute that Rollins suffered from bodily injury during the period of the Relevant Policy. (R. p. 4). Chief Justice Toal then quoted venerable South Carolina Supreme Court authority holding that "[i]nsurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." (R. p. 5–6 (quoting *Owners Ins. Co. v. Clayton,* 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2004))). Chief Justice Toal found Penn National could not meet its burden to show that the exclusions in the Relevant Policy for "products hazard" or "completed operations hazard" bodily injury damages barred coverage for the *Rollins* settlement:

> [T]he evidence from the *Rollins* action demonstrates that while Mr. Rollins' stepfather, Robert Ashworth, performed pipefitting work at the Bowater facility between 1986 and 1987, Covil employees also were at the site at the same time performing insulation work. Covil's operations at the Bowater facility were not complete at the time that Mr. Ashworth worked at Bowater—they were ongoing, and happening simultaneously with, Mr. Ashworth's work.

(R. pp. 6–7).

Chief Justice Toal easily disposed of Penn National's "late notice" defense based on its involvement in the *Rollins* action *and* its participation in the court-ordered mediation that produced the settlement:

> Penn National admits that "a representative of Penn National attended the mediation and expressed a willingness to contribute toward settlement on behalf of Covil." Penn National engaged the same defense counsel as all other Covil insurers to defend Covil's interests for Penn National in the *Rollins* action and other Covil asbestos personal injury claims. It had access to all of the same materials as the insurers that elected to resolve the *Rollins* action at mediation. Yet, Penn National alone states that "Penn National was not in a position to contribute the amount requested by Covil at the mediation."
>
> Penn National had access to all available information related to the *Rollins* action, attended the *Rollins* mediation with a "willingness to contribute toward settlement," and then made the deliberate decision not to resolve *Rollins*, presumably because it believe[d] that its policy exclusion barred coverage. Penn National's deliberate choice to decline to settle the *Rollins* action within its policy limit is not equivalent to the late notice defenses established in the cases it cites. Penn National's alleged late notice of the *Rollins* action is not a valid defense to breach of its insurance contract with Covil.

(internal citations omitted) (R. p. 10).

Therefore, Chief Justice Toal granted the Receiver's motion for partial summary judgment, holding that Penn National breached its insurance contract with Covil. (R. p. 11). She subsequently denied Penn National's motion for reconsideration. (R. pp. 13–17).

ARGUMENT

I. The Court of Appeals properly found that Penn National failed to establish late notice where it attended mediation with a willingness to contribute toward settlement and made a voluntary choice not to contribute to settlement due to its mistaken belief that policy exclusions applied to bar coverage

The Court of Appeals and circuit court did not err in finding Penn National failed to meet its burden of proving the applicability of a "late notice" defense. First, Penn National has failed

to show it received untimely notice. Second, Penn National has failed to show it was substantially prejudiced by any late notice. Although Penn National attempts to classify this issue as a novel question of law, a review of the decisions below and the case law applicable to this issue show that the circuit courts correctly applied controlling South Carolina law to determine Penn National failed to prove its late notice defense. Certiorari should be denied.

"Although exclusions in an insurance policy are construed against the insurer, . . . insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition." *B.L.G. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535–36, 514 S.E.2d 327, 330 (1999). Notice clauses are an approved means for an insurer to limit its liability. The Receiver is aware of the fact that "[c]ommon sense dictates that the insurer must have notice of a claim or lawsuit in order to properly investigate and defend against it, and these clauses ensure that the insurer receives notice by imposing this obligation on the insured." *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 266, 831 S.E.2d 406, 408 (2019). Here, however, the Receiver provided ample notice to Penn National of the *Rollins* action. Penn National's argument to the contrary is without merit.

The burden of proof as to whether an insured failed to comply with the notice provision in an insurance contract rests entirely with the insurer. *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994). Even if an insurer does not receive timely notice, the insurer must also show substantial prejudice to the insurer's rights. *Id.* at 12, 446 S.E.2d at 421. "A vast majority of jurisdictions now follow the modern trend and have adopted the notice-prejudice rule." *Century Sur. Co. v. Hipner, LLC*, 377 P.3d 784, 788 (Wyo. 2016). "The function of the notice requirements is simply to prevent the insurer from being prejudiced, not to provide a technical escape hatch by which to deny coverage in the absence of prejudice nor to evade the fundamental

protective purpose of the insurance contract . . . ." *State ex rel. Div. of Admin., Office of Risk Mgmt. v. Nat'l Union Fire Ins. Co. of La.*, 56 So. 3d 1236, 1246 (La. Ct. App. 2011). Here, the circuit court and Court of Appeals rightly saw through Penn National's attempted "escape hatch" argument. Respectfully, this Court, like the circuit court and Court of Appeals, should reject Penn National's argument to avoid coverage.

Reduced to its essence, Penn National's "late notice" defense is that it should be relieved from liability for the *Rollins* settlement because it received untimely notice of a lawsuit *that settled in connection with a mediation that its representatives prepared for and attended*. Chief Justice Toal correctly recognized this fact and noted in her order granting partial summary judgment that Penn National is not actually pursuing a "late notice" defense. (R. p. 10). Penn National had sufficient notice of the court-ordered mediation for its representative to attend, with an apparent "willingness to contribute toward settlement." (R. p. 10, 169). It then decided not to contribute any amount to the settlement in disregard of the evidence indicating coverage was required under the Relevant Policy. As Chief Justice Toal also noted in the Order, "Penn National's deliberate choice to decline to settle the *Rollins* action within its policy limit is not equivalent to the late notice defenses established in the cases it cites." (R. p. 10). Penn National chose not to contribute to the *Rollins* settlement because it erroneously believed that coverage for the *Rollins* settlement did not exist under the Relevant Policy.

The evidence in this case establishes Penn National was not provided late notice. Moreover, Penn National cannot show it was substantially prejudiced by the timing of the notice. Penn National argues it is automatically excused from the substantial prejudice requirement under the facts of this case because the rights of innocent third parties are not at issue. (Pet. Br., p. 11). Penn National's argument that it is not required to even show substantial prejudice is unavailing

and contrary to the law and public policy of our State. (App. Br., p. 11); *Jessco, Inc. v. Builders Mut. Ins. Co.*, 472 F. App'x 225, 230 (4th Cir. 2012) ("Under South Carolina law, however, recovery under the Policy is barred only if BMIC proves that it was substantially prejudiced by the late notice."); *Neumayer*, 427 S.C. at 272, 831 S.E.2d at 411 (providing the policy behind the laws concerning notice clauses is not meant to provide a "technical escape-hatch" for the insurer to deny coverage).

Nevertheless, contrary to Penn National's assertion, the rights of innocent third parties are plainly implicated. Covil had a valid insurance policy with Penn National and coverage was due. Because of Penn National's refusal to participate in the *Rollins* settlement, the Receiver was forced to use Covil's limited funds to settle the case. The use of these funds, which should not have been tapped into in the first place, depleted the assets of an already-dissolved corporation attempting to defend numerous lawsuits. Because Covil has less money to defend and satisfy its liabilities to other innocent claimants with valid claims against Covil, the rights of innocent third parties are clearly impacted.

Furthermore, Penn National's claims that it was substantially prejudiced by the timing of Receiver's notice are entirely without merit. Penn National attended the mediation with the very same materials provided to the other insurers. As the Court of Appeals noted, Penn National hired the same defense counsel as other insurers and had access to the same information as other insurers. (Op. at 6). Penn National's conclusory complaints of substantial prejudice fail to enumerate a single thing it would have done differently. Therefore, Penn National cannot prove substantial prejudice.

Penn National's arguments that waiver was raised by the Court of Appeals for the first time on appeal (Pet. Br. 15) fails because an appellate court may affirm a circuit court's decision based

on any ground appearing in the record. *See Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987). Further, the Court of Appeals correctly construed the circuit court's decision as applying the doctrine of waiver. (Op. at 6).

Penn National's argument that the Court of Appeals erred because Covil failed to plead waiver also fails. As discussed in *Lawrimore v. Am. Health & Life Ins. Co.*, 276 S.C. 112, 114, 276 S.E.2d 296, 297 (1981), "strict use of the word 'waiver' in the pleading is not required if the pleading alleges the facts that constitute a waiver." At all times before the courts below, Covil has asserted that Penn National breached its contract by failing to contribute toward the *Rollins* settlement and has insisted that Penn National's notice defense fails.

The Receiver only seeks from Penn National the settlement amount he incurred in *Rollins*. He incurred this expense after Penn National received notice of the litigation. He incurred this expense in connection with a mediation that Penn National attended. He incurred this expense in connection with a settlement that Penn National could have funded subject to a reservation of rights on coverage issues. Penn National chose, with open eyes, not to pay the *Rollins* settlement. It has no "late notice" defense. The Court should deny certiorari.

II. The Court of Appeals properly found that Covil's Motion for Partial Summary Judgment was not premature where Penn National did not engage in discovery during the five months preceding the order, did not show discovery would uncover any additional relevant evidence, and failed to submit the required Rule 56(f) affidavit

Penn National misconstrues the Court of Appeals' ruling and incorrectly asserts that the Court of Appeals solely relied on the fact that Penn National failed to file a Rule 56(f) affidavit to find that the motion for partial summary judgment was not premature. (Pet. Br. at 16).

In support of its finding that summary judgment was not premature, the Court of Appeals also noted that Penn National did not pursue any discovery "between the filing of this action in February 2020 and the filing of the court's order granting partial summary judgment in August

2020." (Op. at 5). Penn National's argument that twenty-three days elapsed between the filing of Penn National's answer and the filing for partial summary judgment is a red herring which was properly discounted by the courts below.[5] (Pet. Br. 17). Penn National fails to mention that the motion for partial summary judgment was pending for four months before being ruled on by the circuit court. As the Court of Appeals stated, "Penn did not cite to any discovery it attempted to undertake during the pendency of the action between February 2020, when the action was filed, and August 2020, when the circuit court ruled on Covil's motion for partial summary judgment." (Op. at 6). Thus, Penn National's argument that it did not have any opportunity to conduct discovery is incorrect. Penn National had almost six months from the initiation of the action to when the circuit court issued its ruling. *See Middleborough Horiz. Prop. Regime Council of Co–Owners v. Montedison S.p.A.*, 320 S.C. 470, 479–80, 465 S.E.2d 765, 771 (Ct. App. 1995) (affirming summary judgment where appellants "advance[d] no good reason why four months was insufficient time under the facts of this case to develop documentation in opposition to the motion for summary judgment").

The Court of Appeals also found that Penn National failed to demonstrate that discovery would uncover additional, relevant evidence in this matter. (Op. at 5). Instead, Penn National relied on conclusory and self-serving arguments that it needed to do more discovery without specifying what evidence it was likely to discover, needed to discover, or currently sought through outstanding discovery requests. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991) (explaining the nonmoving party must demonstrate that further discovery

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[5] This argument is meritless as Rule 56(a) of the South Carolina Rules of Civil Procedure allows a party to "at any time after the expiration of 30 days from the commencement of the action . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part" of the case. The Receiver commenced this action on February 28, 2020, and moved for partial summary judgment over 50 days later, on April 22, 2020. (R. pp. 18–22, 34–161).

will likely uncover additional relevant evidence "and that they are not merely engaged in a 'fishing expedition'" (quoting *Bixler v. J.C. Penney Co.*, 376 N.W.2d 209 (Minn. 1985))). Penn National has failed to suggest its bald, conclusory requests for further discovery would amount to anything other than a fishing expedition and an unnecessary delay.

This is because Penn National cannot show that allowing it to conduct discovery on its own *affirmative defenses* on policy exclusions and a condition to coverage would lead to any additional relevant evidence. Insurance coverage litigation is based on the evidence developed in the underlying liability action from which a coverage determination is sought. *See, e.g.*, *Ex parte: Builders Mut. Ins. Co.*, 431 S.C. 93, 109, 847 S.E.2d 87, 95 (2020) (explaining the primary source of evidence in a coverage dispute is the record from the underlying proceeding).

The ability of Penn National and the Receiver to conduct discovery against each other in the Coverage Action yielding "answers to interrogatories" and "admissions on file" could not and would not change the nature of the testimonial and documentary evidence adduced in the *Rollins* action and upon which the Receiver based his motion for partial summary judgment. That evidence existed before the Receiver filed the Coverage Action, and Penn National had access to it. It is the very evidence upon which the Receiver settled *Rollins*, and upon which the Receiver demanded that Penn National fund the *Rollins* settlement. The nature and manner of Rollins' injurious exposure to asbestos attributed to Covil is detailed in the deposition testimony adduced in the *Rollins* action. The nature of Covil's work at Bowater is described in documents produced in the underlying litigation.

Consequently, Penn National's stated need to engage in discovery in the Coverage Action to determine the applicability of the products hazard exclusion and completed operations hazard exclusion in its Policies was properly recognized by the courts below as nothing more than an

improper delay tactic. All of that evidence was adduced in the *Rollins* Action and has been available to Penn National.

Penn National's apparent desire to conduct discovery in the Coverage Action to support its late notice defense was also correctly discounted by the courts below. Penn National was prepared and attended the mediation that produced the settlement in *Rollins*. It knows that it did not fund the settlement. It knows why it chose not to fund the settlement. It does not need to obtain discovery from the Receiver to find this out. Further, Penn National submitted evidence to the circuit court in opposition to the Receiver's motion and in support of its "late notice" defense, such as a January 2020 email sent on behalf of the Receiver to Penn National, filings in the *Rollins* Action, and correspondence between the Receiver and Penn National about *Rollins* and the *Rollins* mediation. The Receiver did not dispute that notice occurred in January 2020, and Penn National already possessed all of the evidence it needed to make its "late notice" argument prior to the circuit court's adjudication of the Receiver's motion for partial summary judgment. This argument fails.

In short, all of the documents relevant to the Receiver's motion were *historical* in nature, such as the insurance policies, the Bowater contract, and a list of labor costs showing when Covil performed much of its work at the site. This evidence was attached as exhibits to the Receiver's motion. Additionally, the Receiver has no personal knowledge of Covil's work at Bowater thirty-four years ago; thus, he could not possibly supply Penn National with any other pertinent facts. Penn National received copies of the discovery materials in *Rollins*. All of the *Ashworth*[6] materials were available to it, as well. Penn National could have relied on these materials in support of its

[6] Ashworth brought a suit in the Delaware Superior Court for his asbestos-related cancer. *See Robert Ashworth and Nell Ashworth v. Air & Liquid Sys. Corp. et al.*, C/A No. N17C-04-003 ADB (Del. Sup. Ct.).

opposition to the Receiver's motion. In fact, Penn National did just that by submitting 14 exhibits.

Moreover, the Receiver's motion for partial summary judgment solely concerned matters—policy exclusions and the Receiver's alleged failure to provide timely notice of the *Rollins* Action—upon which Penn National has the burden of proof. Discovery from the Receiver in the Coverage Action is not relevant to those issues. The evidence necessary for Chief Justice Toal to rule on whether Penn National could meet its burden of proof as a matter of law on affirmative defenses to its liability to pay the *Rollins* settlement arose solely in the *Rollins* action.

Finally, the Court of Appeals did not err in finding that Penn National needed to submit an affidavit pursuant to Rule 56(f) outlining why it needed additional time for discovery. *See Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001) ("Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery."); Rule 56(f), SCRCP ("Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just."). Although a Rule 56(f) affidavit may not be a hardened requirement, it was definitely within the circuit court's discretion to find one necessary under the facts of this case. To be sure—and contrary to Penn National's conclusory assertion—the need for further *relevant* discovery was never made known to the circuit court.

The Court of Appeals also properly found Penn National's newly raised objection to the evidence submitted in support of Covil's Motion was not preserved. Penn National asserts that it preserved this issue by arguing that the circuit court "should not enter summary judgment based on the record before it." (Pet. Br. at 17). It cites to the following sentence in its Memorandum of

Law in Opposition to Covil's Motion for Partial Summary Judgment: "Covil's Motion for Partial Summary Judgment should be denied based on the record before the Court." (R. p. 183). This general sentence is not adequate to preserve their arguments that (1) Covil should have submitted a Rule 56(f) affidavit in support of its Motion and (2) the circuit court should not consider the documents Covil submitted because they were unauthenticated. Instead, this sentence simply implies that Penn National did not believe that the evidence submitted to the circuit court was enough to support summary judgment in the case. At no point in time did Penn National make any objections to the documents submitted or argue that the circuit court should not consider them. As the Court of Appeals properly found, Penn National argued for the first time in its briefing to the Court of Appeals that the circuit court erred in relying on the documents attached to the Receiver's Motion to grant partial summary judgment. (App. Br., pp. 12–14). Throughout its briefing to the Court of Appeals and this Court, Penn National referred to the evidence submitted by the Receiver as unverified, unsubstantiated, and unsworn. (App. Br., pp. 3–4, 18, 33–34, 39; Pet. Br., pp. 3, 9, 17). Penn National did not object to these documents, raise any argument that the court should not consider them, or raise any argument that the Receiver's motion was not sufficiently supported. *See State v. Stone*, 376 S.C. 32, 36, 655 S.E.2d 487, 489 (2007) ("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."). Accordingly, the Court of Appeals properly found this argument was not preserved for appellate review.[7] *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic

[7] Covil also submits that Penn National is precluded from asserting arguments related to discovery and the timing of the Receiver's motion on appeal because it did not file a notice of appeal from the circuit court's September 21, 2020 Order denying its motion for reconsideration. While Penn National raised this argument to the circuit court in its memorandum in opposition to the Receiver's motion for partial summary judgment, the circuit court did not rule on the issue in the Order from which appeal was actually taken. The Order on appeal found Penn National did not meet its burden to show a policy exclusion applied and did not meet its burden in proving the validity of its late notice defense. (R. pp. 4–11). Penn National re-raised its argument that

that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Thus, the Court should deny certiorari.

III. The Court of Appeals properly found Penn National failed to establish the applicability of the products hazard or completed operations hazard exclusions in the Policy

Penn National failed in the courts below to show the existence of triable issues as to the applicability of either the products hazard or completed operations hazard exclusions in its Policy. It is well-established that "[i]nsurance policy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability." *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2004).

Penn National's petition fares no better.

First, Penn National ignores the burden of proof and proceeds as if it and Covil have equal burdens in connection with Penn National's appeal. They do not. Penn National continues to have the burden to show that at least one exclusion in the Policy bars coverage for the Rollins settlement. Its petition does not discuss this fundamental issue. Penn National therefore has waived arguments concerning its supposed satisfaction of its burden to establish the applicability of either the

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summary judgment was premature because it needed additional discovery in its motion to reconsider. (R. p. 557). In denying reconsideration, the circuit court found summary judgment was not premature because Penn National did not need additional discovery and did not submit a Rule 56(f), SCRCP, affidavit to support its argument. (R. p. 16). As the issue was not ruled upon by the circuit court until the unappealed Order Denying Reconsideration, Penn National's arguments regarding the timing of summary judgment and its need for additional discovery are not properly before this Court. *See Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *must* file [a Rule 59(e), SCRCP] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."); *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); *In re GNC Corp.*, 789 F.3d 505, 512 (4th Cir. 2015) (granting a motion to dismiss an appeal where a party timely filed a notice of appeal of an order but failed to file either "an amended notice of appeal or a new notice of appeal within 30 days of the entry of" the order denying their Rule 60 motion).

products hazard or completed operations hazard to the Rollins settlement. *Jackson v. Bi-Lo Stores, Inc*., 313 S.C. 272, 277, 437 S.E.2d 168, 171 (1993) (arguments not made in an initial appellate brief are waived).

Second, Penn National asserts that "the allegations of the complaint dictate the coverage obligations of the insurer." (Pet. Br. at 21). That statement is incorrect for two reasons. An insurer's duty to defend is *not* confined to the allegations in a complaint. Instead, the duty to defend "*may also be determined* by facts outside of the complaint that are known by the insurer." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 657, 661 S.E.2d 791, 798 (2008) (emphasis added). Further, Penn National's duty to *indemnify* Covil for the Rollins settlement is not based on the complaint but is triggered upon "the final outcome of a lawsuit against the insured." 14 Couch on Ins. § 200.1 (Dec. 2021 update). Consequently, the *evidence* adduced in the underlying litigation—e.g., the documents and deposition testimony Covil used to support its motion for partial summary judgment—is the content upon which Penn National's *duty to indemnify* Covil for the Rollins settlement is assessed.

Third, Penn National conflates Covil's identification as a "Product Defendant" in the Rollins complaint with the products hazard exclusion in its Policy. (Pet. at 21). It asserts that "[b]ecause Covil was identified as a Product Defendant, only product liability claims were asserted against it." *Id*. Even assuming this is true, it is immaterial to the availability of coverage under the Policy. "Products liability" is a legal theory of recovery pursued by an injured plaintiff against a defendant. Among other things, it dictates the injured plaintiff's proof burdens and potentially recoverable damages. It has nothing to do with insurance coverage for the claim:

> The issue of whether a particular claim falls within the coverage afforded by a liability policy is not affected by the form of the legal proceeding. Accordingly, the legal theory asserted by the claimant is immaterial to the determination of whether the risk is covered. To illustrate, a claim for bodily injury is not removed from the

> coverage afforded by a liability policy simply because the claimant's action for damages was asserted under federal civil rights law.

9 Couch on Ins. § 126:3 (Dec. 2021 update).

The exclusion upon which Penn National relies is the "products hazard" exclusion. It is not a "products liability" exclusion, although Penn National certainly could have written the exclusion in that manner if it so chose. The potential applicability of the products hazard exclusion is not based on whether the Rollins sought recovery against Covil for "products liability." Instead, the products hazard exclusion applies if Rollins sought recovery of damages for bodily injury "arising out of" Covil's products "*but only if* the bodily injury . . . occurs away from premises owned or rented" by Covil "and after physical possession of such products has been relinquished to others." (Pet. at 22 (emphasis added)). The products hazard exclusion in the Policy therefore is *narrower* than the "products liability" legal theory of recovery. Applicability of the exclusion is ultimately based on "where" a plaintiff is injured by Covil's products (*away from* Covil's premises) and "when" a plaintiff is injured by Covil's products (*after possession* of the products is *relinquished* to others). Whether Rollins labeled Covil a "Product Defendant" or a "Premises Defendant" in his complaint is immaterial to this inquiry.

Fourth, Penn National asserts that "it is clear that the products hazard exclusion applied to bar coverage" for the settlement because (i) Rollins' injury arose out of Covil's products, (ii) the injury occurred away from Covil's premises and (iii) "the exposure to Mr. Rollins is alleged to be 'take home' exposure," meaning that "physical possession of Covil's products was relinquished at the time of exposure." (Pet. at 23).

As the Court of Appeals noted, Penn National's position is that "because Rollins alleged exposure due to 'take-home' exposure, physical possession of Covil's products must necessarily have been relinquished" at the time of his exposure. (Op. at 8). Penn National's argument

disregards *decades-old* caselaw, cited by the circuit court and the Court of Appeals below, holding that "physical possession" of products used on a construction project is relinquished for purposes of the products hazard *only* when the insured no longer has control over the jobsite:

> Regardless of the involvement of the insured's products, so long as an accident occurs on the insured's business premises or away from his premises, but while he has the jobsite under his control, the premises operations clause obtains and coverage is afforded thereunder. It is only after he has relinquished control of a jobsite that the products hazard or completed operations hazard exclusions will operate to deny coverage.

Friestad v. Travelers Indemnity Co., 393 A.2d 1212, 1215 n. 5 (Pa. Super. Ct. 1978); see Op. at 9.

This analysis makes abundant sense. A contractor insured does not "relinquish possession," for example, over every nail used at a construction site the moment it hammers those nails into pieces of wood. The insured can modify or revise its work at the site until it "turns over" the project to the owner upon conclusion. Covil therefore did not "relinquish possession" of its products *as they were installed* at Bowater, before Rollins' stepfather transported asbestos dust to the family home after leaving work each day. Covil only "relinquished possession" of the products when the Bowater project ended on January 25, 1987, *after* Rollins was exposed repeatedly to Bowater asbestos dust via his stepfather's clothing. (Op. at 11). The Court of Appeal's decision is in line with longstanding authority, such as *Friestad*, and need not be reviewed by this Court:

> [W]e find Covil had neither placed a product into the stream of commerce nor relinquished possession of the product while installing it at the Bowater jobsite during the policy period when Rollins' stepfather was exposed to asbestos; thus, Penn could not establish the applicability of the products hazard exclusion.

(Op. at 9–10).

Fifth, Penn National's frequently cited foreign authority, *In re Wallace & Gale Company*, 385 F.3d 820 (4th Cir. 2004), does not establish that the completed operations exclusion in the

Policy bars coverage for the Rollins settlement even if the decision accurately articulates South Carolina law.[8]

Wallace & Gale holds that a plaintiff's exposure to asbestos "which occurred while Wallace & Gale was still conducting operations was not [within the completed operations hazard] for policies in effect *at that time* even if the exposure extended beyond the operations of Wallace & Gale." *Id.* at 834 (emphasis added).[9] It holds that a plaintiff's injurious exposure to asbestos *before* the inception of an insurer's policy is *within* the completed operations hazard. *Id.* (the completed operations hazard, and the resulting aggregate limits of liability, applies to damages for bodily injury covered under a policy that "came into effect" *after* the plaintiff's exposure to asbestos concluded).

Covil's contracting work at Bowater occurred between March 11, 1986, and January 25, 1987. (Op. at 11). The Policy was in effect between March 31, 1986, and March 31, 1987. (Op. at 4). Rollins was exposed to asbestos while Covil was "still conducting operations" at Bowater *during the period of the Policy*. *Id.* ("There is no dispute that the exposure to asbestos alleged in *Rollins* occurred while Covil was performing operations at the Bowater Paper Mill during the period of Penn's policy number 515 5028 537, which was effective March 31, 1986, to March 31, 1987"). Consequently, the Court of Appeal's decision is correct and is consistent with *Wallace & Gale*:

> Covil's work was performed under the subcontract, which was entered into on February 26, 1986, and performed between March 11, 1986, and January 25, 1987.

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[8] Covil has asserted in other contexts that *Wallace & Gale*, a Fourth Circuit decision making an "*Erie*-guess" concerning Maryland law, is contrary to South Carolina law. This Court need not wrestle with this issue because, as shown below, the Court of Appeals' decision is not inconsistent with *Wallace & Gale*.

[9] *Wallace & Gale* construed policies that *covered* the insured's liability to pay damages for bodily injury within the completed operations hazard. The insureds had the burden of proof to establish coverage. By contrast, the Policy *excludes* coverage for those losses. Penn National has the burden of proof, as discussed above, to show that coverage is excluded.

> The policy at issue provided coverage during this period. We find because Rollins was exposed to asbestos during the period of the contract coverage, the completed operations exclusion did not apply.

(Op. at 11).

The Petition fails to establish any substantive insurance law grounds for this Court's review of the Court of Appeals' decision. The decision is correct and squarely in line with longstanding authority on the application of the products hazard and completed operations hazard in standard general liability insurance policies. Certiorari should be denied.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the previous briefs, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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