

RECEIVED

Nov 08 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Letitia H. Verdin, Circuit Court Judge

Laura M. Saunders, Magistrate Judge

Appellate Case No. 2021-000511

Raymond A. Wedlake, as a Member of Woodington Homeowners Association, Inc. and on behalf of other similarly-situated Members of Woodington Homeowners Association, Inc.,..... Appellant,

v.

Board of Directors of Woodington Homeowners Association, Inc., comprised of Mona Craigo, Edward Decker, and Sandra LaCroix and McCabe, Trotter & Beverly, P.C., and State Farm Fire and Casualty Company..... Respondents.

**FINAL BRIEF OF RESPONDENT
STATE FARM FIRE AND CASUALTY COMPANY**

s/Jennifer E. Johnsen

Jennifer E. Johnsen (S.C. Bar No. 62983)

Natalie R. Ecker (S.C. Bar No. 103624)

Gallivan, White & Boyd, P.A.

55 Beattie Place, Suite 1200 (29601)

Post Office Box 10589

Greenville, South Carolina 29603

Telephone: (864) 271-9580

Facsimile: (864) 271-7502

Attorneys for Respondent, State Farm Fire
and Casualty Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATUTES AND RULES	iii
STATEMENT OF ISSUES ON APPEAL	1
INTRODUCTION.....	2
STATEMENT OF THE CASE.....	2
ARGUMENT.....	5
I. Appellant Is Not An Insured Under the State Farm Policy	5
II. Appellant’s Claim Against State Farm Violates South Carolina’s Direct Action Rule.....	6
III. Appellant Lacks Standing to Assert A Claim Against State Farm	7
IV. Appellant Has Failed To State A Claim For Breach of Contract	8
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

<u>Auto-Owners Ins. Co. v. Rhodes</u> , 748 S.E.2d 781 (S.C. 2013)	8
<u>Branche Builders, Inc. v. Coggins</u> , 386 S.C. 43,686 S.E.2d 200 (Ct. App. 2009) ..	8
<u>Erwin v. Universal Underwriters Ins. Co.</u> , 2007WL30288 (D.S.C. 2007).....	7
<u>Hambrick v. GMAC Mortgage Corp.</u> , 634 S.E.2d 5 (Ct. App. 2006)	5
<u>Harden v. S. Carolina State Highway Dep't</u> , 221 S.E.2d 851 (S.C. 1976)... ..	5
<u>Park v. Safeco Ins. Co. of America</u> , 251 S.C. 410, 162 S.E.2d 709, 711 (1968)	7
<u>Profl Bankers Corp. v. Floyd</u> , 331 S.E.2d 362 (Ct. App. 1985)	7
<u>Ross Development Corp. v. Fireman's Fund Ins. Co.</u> , 809 F. Supp. 2d 449 (D.S.C. 2011)	7
<u>Thibault v. Cleland</u> , 363 S.E.2d 114 (Ct. App. 1987).....	6
<u>Trancik v. USAA Ins. Co.</u> , 581 S.E.2d 858 (Ct. App. 2003)	6,8
<u>Young v. Smith</u> , 167 S.E. 669 (S.C. 1933).....	8

STATUTES AND RULES

Rule 12(b), SCRCP	5
S.C. Code §§ 36-2-210 <i>et seq</i>	7
S.C. Code § 38-55-170.....	7

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT PROPERLY GRANT RESPONDENT'S MOTION TO DISMISS ON THE GROUNDS THAT THE APPELLANT IS NOT AN INSURED UNDER THE POLICY OF INSURANCE AND, THUS, CANNOT MAINTAIN A CLAIM FOR BREACH OF CONTRACT?

INTRODUCTION

The magistrate court's grant of the motion to dismiss filed by State Farm Fire and Casualty Company (hereinafter referred to as "State Farm" or "Respondent") should be affirmed because Appellant lacks standing to assert a breach of contract claim against State Farm. While Appellant has tried to raise a host of issues on appeal, the only real issue with regard to his claims against State Farm is whether Appellant is a party to the insurance contract with State Farm – he is not. Because Appellant is not a party to the insurance contract, the magistrate court correctly granted Respondent's motion to dismiss.

STATEMENT OF THE CASE

The genesis of this lawsuit and the multiple other lawsuits plaintiff has filed against the Woodington Homeowners Association Board of Directors, stem from a 2016 dispute Appellant had with the Woodington Homeowners Association ("WHOA") Architectural Committee over a sailboat that plaintiff had painted on his garage door. Appellant filed a lawsuit against the WHOA Board titled: *Raymond A. Wedlake, individually and derivatively, on behalf of all Members of The Woodington Homeowners' Association, Inc., v. Benjamin Acord, William Craigo, Denis Esteve, and Brian James in their capacity as the current Board of Directors of the Woodington Homeowners' Association, Inc., and Association Management Group SC, Inc., C.A. No.: 2017-CP-23-06301*. (R. pp. 46-62). On May 29, 2018, following Appellant's presentation of his case at trial, the Honorable Judge Simmons issued an Order granting the WHOA Board's motion for an involuntary non-suit under rule 41(b) and dismissed Appellant's case. (R. pp. 4-14). Appellant's lawsuit was for a declaratory judgment as it pertained to the interpretation of the WHOA bylaws. (R. pp. 46-62). Appellant also sought nominal damages and attorney's fees. (R. p. 61). Following Appellant's presentation of his evidence at the trial of this case, the Court

granted defendants' motion to dismiss Appellant's case. (R. pp. 4-14). Appellant appealed the Court's decision, and this matter is currently pending in the Court of Appeals. The WHOA board retained the services of the law firm of McCabe, Trotter & Beverly, P.C. to represent them in that action. The WHOA Board in that action is still being represented by the law firm of McCabe, Trotter & Beverly, P.C. ("MTB") in the pending appeal of that action.

In April 2018, the WHOA elected its 2018 Board, in which Chris Edwards, Chip Koshis, Denis Esteve, William Craigo, and Mike Keels were duly elected. On July 13, 2018, the 2018 WHOA Board received a legal bill from MTB in the amount of \$53,684.50 for legal services rendered in the defense of plaintiff's lawsuit against the 2017 WHOA Board. (R. pp. 415-445).

On July 14, 2018, Appellant filed a defamation lawsuit against individual WHOA board members, Kristine Lynch and Dawn Vonderbecke, in the Greenville County Court of Common Pleas, titled: *Raymond A. Wedlake, as a Member of the Woodington Homeowners' Association, Inc. vs. Kristine Lynch and Dawn Vonderbecke and John Does & Jane Does numbers 1-10 and Doe Legal Entities numbers 1-10, C.A. No.: 2018-CP-23-03758*. The Clarkson Walsh Coulter law firm defended the individually named defendants in that case.

On January 24, 2019, the Annual Meeting of the WHOA was held. (R. pp. 718-720). The annual WHOA budget was presented in detail by the Treasurer, Denis Esteve. (R. pp. 718-720). The budget included line items matching the additional funds to be collected by an approved Payment Plan and corresponding payments of Legal Fees. (R. pp. 718-720). The Budget was passed by verbal vote of those in attendance. (R. pp. 718-720). It is believed that Appellant was the only WHOA member present who voted against the proposed budget. (R. pp. 718-720).

On January 17, 2019, Appellant filed a complaint against the WHOA Board that consisted of Christopher Edwards, Charles Koshis, Denis Esteve, Michael Keels and William

Craig in their capacity as Board of Directors of the Woodington Homeowners' Association, Inc., Case No. 2019-CP-23-00269.

On March 23, 2019, Appellant filed a lawsuit against the 2019 WHOA Board entitled: *Raymond Wedlake, as a Member of the Woodington Homeowners' Association, Inc. v. Scott Bashor, William Craig, Christopher Edwards, Denis Esteve and Charles Koshis in their capacity as members of the current Board of Directors of Woodington Homeowners' Association, Inc., CA No.: 2019-CP-23-01501*. (R. pp. 63-135). The lawsuit claimed that the defendants breached their fiduciary duty to the WHOA by first accepting the invoice for legal services rendered by MTB and further violated their fiduciary duty by counting the ballots that had been sent out to the community in October of 2018 (ballots pertaining to indemnification and payment plan for legal fees) that were not returned by WHOA members as proxy "Yes" votes in favor of the proposed plan. (R. pp. 63-72). These are the same claims that plaintiff has brought before the Magistrate's Court in this lawsuit in an attempt to re-litigate the issues that have already been decided in previous actions.

State Farm Fire and Casualty Company ("State Farm") is the liability insurer for WHOA. (R. p. 354). Upon the filing of this lawsuit (R. pp. 136-186), State Farm agreed to provide the HOA Board with a defense in this action under a reservation of rights. (R. pp. 354-355). Appellant subsequently filed the amended complaint in this action. (R. pp. 189-202). In the amended complaint, Appellant amended his allegations against WHOA in an attempt, based on Appellant's interpretation of the State Farm policy, to remove any potential insurance coverage afforded WHOA. (R. pp. 189-202). Likewise, in the amended complaint, Appellant asserted a breach of contract claim against State Farm for providing a defense to WHOA on the grounds

that the amended complaint allegedly no longer triggered coverage under the State Farm policy. (R. pp. 189-202).

Following the filing of the amended complaint, on October 20, 2020, Respondent moved to dismiss the claims against State Farm on the grounds that Appellant lacks standing to assert a breach of contract claim against State Farm. (R. pp. 27-36 and 671-682). That motion was granted by the magistrate court by order dated December 28, 2020. (R. pp. 27-36 and 671-682). Appellant now appeals that ruling.

ARGUMENT

I. Standard of Review

Rule 12(b)(6) of the South Carolina Rules of Civil Procedure tests the legal sufficiency of a complaint, and a court should grant a 12(b)(6) motion to dismiss “when the defendant demonstrates the plaintiffs ‘failure to state facts sufficient to constitute a cause of action’ in the pleadings filed with the court,” Hambrick v. GMAC Mortgage Corp., 634 S.E.2d 5, 7 (S.C. Ct. App. 2006) (quoting rule). In addition, Rule 12(b)(1) requires dismissal of an action if the court “lack[s] jurisdiction over the subject matter.” See Harden v. S. Carolina State Highway Dep’t, 221 S.E.2d 851, 853 (S.C. 1976) (“The jurisdiction of a court or of a particular judge over the subject matter of a proceeding depends upon the authority granted by the Constitution and laws of the state and is fundamental.”).

II. Appellant Is Not An Insured Under the State Farm Policy

State Farm issued a policy of insurance to the Woodington Homeowners Association, Inc. (R. pp. 35-36). The only named insured on the policy is the Woodington Homeowners Association, Inc. With respect to named insureds that are corporations, the State Farm policy also includes as insureds the named insured’s executive officers and directors, but only with

respect to their duties in those roles. Appellant is neither the named insured nor is he one of the named insured's executive officers or directors. As such, Appellant is not an insured under the State Farm policy. (R. pp. 35-36).

Appellant contends that as a resident of Woodington he is a member of the WHOA and, thus, is a policyholder. To the contrary, the policyholder is Woodington Homeowners Association, Inc. – a corporation. (R. pp. 35-36). Just as a gym membership to the YMCA does not make the gym member a party to every contract entered into by the YMCA, Appellant's membership in the WHOA does not make him a party to the WHOA's insurance contract. Appellant is not a party to the insurance contract and cannot make claims thereunder.

III. Appellant's Claim against State Farm Violates South Carolina's Direct Action Rule

Appellant cannot state a claim for relief against State Farm because Appellant is a third-party claimant with no present rights under the State Farm policy. South Carolina courts have long held that third party claimants cannot sue an insurance carrier directly, absent a judgment against the insured or a statutory mandate.

The rule prohibiting direct actions against insurers is well established in South Carolina. "Under the common law, no privity of contract exists between an injured person and the tortfeasor's liability insurer, and the injured person has no right of action at law against the insurer." Trancik v. USAA Ins. Co., 581 S.E.2d 858, 861 (S.C. Ct. App. 2003) (citing Major v. Nat'l Indem. Co., 229 S.E.2d 849, 850 (S.C. 1976) (finding no common law or statutory right to bring a direct action against an insurer)); Thibault v. Cleland, 363 S.E.2d 114, 115 (S.C. Ct. App. 1987). As one court explained:

Third-party-liability insurance contracts are generally indemnity contracts whereby the insurer, or the first party, agrees to pay the insured, or the second party, the amount of any damages the insured may become legally liable to pay a third party.... Thus, the third party, or the incidental beneficiary, does not have

a contractual relationship with the insurer and cannot maintain an action against the insurer for breach of the insurance contract.

Trancik, 581 S.E.2d at 861. Accordingly, in the absence of a statutory mandate allowing otherwise, a third party claimant can only pursue an action directly against an insurer after it has obtained an unsatisfied judgment against the insured. See Ross Development Corp. v. Fireman's Fund Ins. Co., 809 F. Supp. 2d 449, 456 (D.S.C. 2011) (citing cases whereby a judgment creditor of an insured pursued a claim against an insurer).

Here, while Appellant now makes arguments to the contrary, Appellant does not allege in the amended complaint that he is an insured under the State Farm policy, nor could he, since Appellant is merely a third-party claimant. (R. pp. 189-202). Although Appellant has filed suit against State Farm's insured, WHOA, Appellant does not have a judicial determination of liability against WHOA. Moreover, there is no statutory mandate that would permit Appellant to bring a direct action against State Farm.¹ Therefore, since Appellant cannot state a claim for relief against State Farm, the magistrate court properly dismissed State Farm from this action. See Park v. Safeco Ins. Co. of America, 251 S.C. 410, 162 S.E.2d 709, 711 (1968); see also Erwin v. Universal Underwriters Ins. Co., 2007 WL 30288 (D.S.C. 2007) (holding that injured motorcyclist lacked standing to pursue claims against tortfeasor's insurer without obtaining judgment against tortfeasor).

IV. Appellant Lacks Standing to Assert a Claim against State Farm

In addition, State Farm was properly dismissed from this action because Appellant lacks standing to assert a breach of contract claim against State Farm.

¹ In his brief, Appellant cites S.C. Code §§ 36-2-210 *et seq* and § 38-55-170 as giving him standing as a beneficiary. However, those statutes deal with the Uniform Commercial Code (S.C. Code §§ 36-2-210 *et seq*) and criminal penalties for insurance fraud (S.C. Code § 38-55-170) and, thus, are not applicable to this matter.

Under South Carolina law, “an action on a contract must be brought by the party in whom the legal interest is vested, and this legal interest is ordinarily vested only in the promisee or promisor. Consequently, they or those in privity with them are generally the only persons who can sue on the contract.” Profl Bankers Corp. v. Floyd, 331 S.E.2d 362, 364-65 (S.C. Ct. App. 1985). As discussed *supra*, third-party claimants are not in privity of contract with an insured with respect to that insured's insurance policy. See Trancik, 581 S.E.2d at 861; Auto-Owners Ins. Co. v. Rhodes, 748 S.E.2d 781, 788 (S.C. 2013) (“no privity of contract exists between an insurance company and a third party who may benefit from indemnification unless the insurance contract specifically lists the third party as a beneficiary”) (citing Young v. Smith, 167 S.E. 669 (S.C. 1933)). Therefore, a third-party claimant lacks standing to bring a suit based on an alleged breach of the insurance contract.

Appellant is merely a third-party claimant who is not a party to -- nor in privity with a party to -- the insurance contract between State Farm and WHOA. In the absence of a sufficient interest in the State Farm policy, Appellant lacks standing under South Carolina law to pursue a cause of action against State Farm on the policy. Accordingly, State Farm was properly dismissed from this action.

V. Appellant has failed to state a claim for breach of contract.

In South Carolina, the elements of a breach of contract claim are: (1) the existence of a contract; (2) its breach; and (3) damages caused by such breach. Branche Builders, Inc. v. Coggins, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). Here, Appellant cannot point to any provision of the contract that State Farm has breached nor can he show any damages flowing therefrom. The purported “breach” claimed by the Appellant was generated by the very pleading in which he added State Farm as a party and asserted the breach of contract claim. Appellant

amended his complaint to remove certain allegations which he believed formed the basis of State Farm's decision to defend the WHOA Board and, in the same amended complaint, added State Farm as a defendant and alleged that it breached the insurance contract by providing a defense based on his contemporaneously amended pleadings. It goes without saying that State Farm cannot breach of contract based on allegations which had yet to be made and to which it was not aware.

Moreover, Appellant has not alleged that he sustained any damages flowing from State Farm's purported breach of contract. Rather, Appellant only alleges that State Farm is contractually bound not to provide coverage for the WHOA Board and, thus, not to continue to pay its defense counsel. If Appellant's position is correct and State Farm has no duty to defend the WHOA Board, then the only entity damaged by its decision to do so is State Farm – not Appellant.

It is clear and apparent that Appellant has sustained no damages as a result of any conduct on behalf of State Farm. Appellant merely seeks to deprive the WHOA Board of legal representation. Appellant pursued this lawsuit initially because the WHOA Board retained its own legal counsel and, for good reason, paid its legal counsel. When State Farm agreed to provide a defense for which the WHOA Board would not have to pay, Appellant now alleges that the WHOA Board cannot do that either. This is not a matter of breaching an insurance contract. Rather, it is simply a matter of trying to prevent the WHOA Board from having an attorney to defend themselves in a long line of lawsuits filed by Appellant.

CONCLUSION

For the foregoing reasons, State Farm requests that the Court deny the appeal and affirm the decision of the magistrate court.

s/Jennifer E. Johnsen

Jennifer E. Johnsen (S.C. Bar No. 62983)

Natalie R. Ecker (S.C. Bar No. 103624)

Gallivan, White & Boyd, P.A.

55 Beattie Place, Suite 1200 (29601)

Post Office Box 10589

Greenville, South Carolina 29603

Telephone: (864) 271-9580

Facsimile: (864) 271-7502

Attorneys for Respondent, State Farm Fire and
Casualty Company

Greenville, South Carolina

November 8, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Nov 08 2021

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
The Honorable Letitia H. Verdin, Circuit Court Judge

Laura M. Saunders, Magistrate Judge

Appellate Case No. 2021-000511

Raymond A. Wedlake, as a Member of Woodington Homeowners Association,
Inc. and on behalf of other similarly-situated Members of Woodington
Homeowners Association, Inc.,..... Appellant,

v.

Board of Directors of Woodington Homeowners Association, Inc., comprised of
Mona Craigo, Edward Decker, and Sandra LaCroix and McCabe, Trotter &
Beverly, P.C., and State Farm Fire and Casualty
Company..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b) of the SCACR.

s/Jennifer E. Johnsen

Jennifer E. Johnsen (S.C. Bar No. 62983)

Natalie R. Ecker (S.C. Bar No. 103624)

Gallivan, White & Boyd, P.A.

55 Beattie Place, Suite 1200 (29601)

Post Office Box 10589

Greenville, South Carolina 29603

Telephone: (864) 271-9580

Facsimile: (864) 271-7502

Attorneys for Respondent, State Farm Fire and
Casualty Company