THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2022-000576

Gregory Muxlow and Charlotte Muxlow.....Appellants,

v.

Scottsdale Insurance Company, South Wind Ranch Holdings, LLC, Ronald Hakala and Ashley Black.....Respondents.

INITIAL BRIEF OF APPELLANTS

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s/*Joshua T. Hawkins*
Joshua T. Hawkins, S.C. Bar #78470
Helena L. Jedziniak, S.C. Bar #100825
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
josh@hjllcsc.com
helena@hjllcsc.com
Attorneys for Appellants

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STATEMENT OF THE CASE

This is an appeal of a trial court's dismissal of a declaratory judgment action. After the appellants filed a tort action, they discovered an insurance policy which provides coverage for the causes of action set forth in the tort action. The insurer, Scottsdale Insurance Company, refused to provide a defense or to agree to indemnify the defendants in the tort action. The appellants therefore filed a declaratory judgment action to determine the rights and obligations of the parties. The trial court granted the respondents' motions to dismiss. The appellants timely filed a Rule 59(e) motion, which the trial court denied. The appellants then timely filed a notice of appeal of the trial court's order.

FACTS

In 2019, the appellants visited South Wind Ranch, toured the venue, met with staff, and booked the venue for the planned wedding of Charlotte Wienands and Gregory Muxlow. The appellants secured their date by paying a deposit and later agreed to pay additional fees to Ashley Black in exchange for her wedding planning services. After COVID-19 prevented Muxlow's wedding as planned, the appellants contacted South Wind Ranch to discuss the possibility of rescheduling their event. Black told the appellants that they would be able to move their wedding to a new date and that she would reach out to provide potential dates. The appellants attempted to contact Black multiple times over the following weeks but were unable to reach her. When the appellants were finally able to speak with Black, they learned that South Wind Ranch had unilaterally doubled the cost of the wedding to be rescheduled for the following year. South Wind Ranch refused to resolve the issue with the appellants or to refund their deposit, even though the venue had failed to perform any services and mislead the appellants.

After repeated attempts to resolve the dispute, South Wind Ranch ultimately threatened the appellants with its legal team. As a result, the appellants filed suit against South Wind Ranch for, *inter alia*, the venue's deception, its unlawful retention of the appellants' funds, and its attempt to profit from the pandemic. South Wind Ranch filed a motion to dismiss, alleging, among other things, that the case was purely contractual. The trial court denied South Wind Ranch's motion to dismiss and allowed all claims to proceed since the appellants stated facts to support their claims, none of which is pure breach of contract.

While litigating the underlying action, the appellants learned that South Wind Ranch is insured by Scottsdale Insurance Company for acts of negligence. South Wind Ranch submitted the claim to Scottsdale, which refused to defend and indemnify its insured, despite the applicable

policy providing coverage for alleged acts of negligence. Because Scottsdale's refusal to defend South Wind Ranch directly affects the appellants, the appellants filed a declaratory judgment action against Scottsdale and its insureds pursuant to *S.C. Code* § 15-53-20. South Wind Ranch and Scottsdale filed motions to dismiss, which the trial court granted without prejudice, stating that the appellants could bring a declaratory judgment action at a later date if they obtained a verdict against the defendants in the underlying action. This frustrated the purpose of establishing a duty to defend during the time Scottsdale had a duty to defend the tort action. The appellants filed a motion to alter or amend the verdict, which the trial court denied. The appellants then filed this appeal.

ARGUMENTS

I. WHETHER THE TRIAL COURT ERRED IN RELYING UPON *KLECKLEY* IN DISMISSING A CASE THAT DID NOT INVOLVE THIRD-PARTY INSURANCE BAD FAITH.

a. *Kleckley* and *Tranick* are third-party bad faith cases, they are completely unrelated to declaratory judgment actions, and the trial court incorrectly relied on those cases in adopting the respondents' proposed order.

The respondents relied on a number of cases in their motions to dismiss and in South Wind Ranch's proposed order, which was adopted by the trial court, which have nothing to do with declaratory judgment actions. *Kleckley v. Northwestern Vat'l Cas. Co.*, 526 S.E.2d 218 (2000) and *Tranick v. USAA Ins. Co.*, 581 S.E.2d 858 (Ct.App.2003) are cases concerning third-party insurance bad faith claims. At the hearing, South Wind Ranch confirmed that it relied on *Kleckley* in its motion to dismiss. (Hearing Trans. p. 6). The appellants confirmed at the hearing that they had not filed an action for third-party bad faith or any of the causes of action governed by *Kleckley* or *Gaskins v. Southern Farm Bureau Cas.*, 581 S.E.2d 169 (Sup.Ct. 2003). [1] (Hearing Trans. pp. 8, 11).

The respondents, and then the trial court, also relied on other cases completely unrelated to declaratory judgment actions in dismissing the appellants' case. *Prof'l Bankers Corp. v. Floyd*, 285 S.C. 607, 612, 331 S.E.2d 362, 364- 65 (Ct. App. 1985) is a case involving a contract dispute. *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004), *Power v. McNair*, 255 S.C. 150, 153, 177 S.E.2d 551, 553 (1970), and *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (Ct. App. 2002) involve privity of contracts, a concept not referenced by the Uniform Declaratory Judgments Act ("UDJA"). In cases involving both the act and privity of contract,

[1] *Gaskins* held that a plaintiff may sue an insurer for fraud but must show the fraud is material.

courts have ruled that individuals without privity of contract can file declaratory judgment actions when they are affected. See *Sloan v. Greenville Co.*, 590 S.E.2d 338 (2003). This is, of course, consistent with the plain language of the UDJA. Because the trial court adopted a proposed order that relied on cases that have nothing to do with declaratory judgment actions, the Appellate Court should reverse the trial court's order.

b. The trial court did not liberally construe the UDJA as required by the statute.

The trial court's ruling contradicts the holding in *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). The appellants properly pled their declaratory judgment action under the statute and set forth facts that show they are affected as contemplated by the statute. The trial court's dismissal is not only at odds with *Stiles*, but also at odds with the statutory language of the UDJA.

The UDJA provides, in relevant part, that "courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not relief is or could be claimed."[2] *S.C. Code Ann.* § 15-53-20. The statute "is to be liberally construed and administered." *S.C. Code Ann.* § 15-53-130. The trial court's adoption of the respondents' proposed order violated the requirement that the UDJA be liberally construed to allow parties like the appellants, who are "affected," to seek a declaration of coverage.

"It is well established that a declaration of parties' rights under an insurance policy is an appropriate use of the declaratory judgment mechanism." *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998). "Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the complaint." *City of Hartsville v. SC Municipal Insurance*, 677 S.E.2d 574 (heard March 4, 2009, re-filed May

[2] See Hearing Trans. p.10

18, 2009) (citing *C.D. Walters Constr. Co. v. Fireman's Ins. Co. of Newark, N.J.*, 281 S.C. 593, 316 S.E.2d 709 (Ct.App.1984)). See also *Ellett Bros., Inc. v. U.S. Fid. & Guar. Co.*, 275 F.3d 384, 387-88 (4th Cir. 2001) (citing *R.A. Earnhardt Textile Mack Div., Inc. v. S.C. Ins. Co.*, 277 S.C. 88, 90, 282 S.E.2d 856, 857 (1981)).

"If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend." *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct.App.1994) (citing *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 471, 265 S.E.2d 38, 40 (1980)). In an intervention context, the Fourth Circuit has recognized that an intervenor who has separate litigation against an insured has a "significantly protectable interest" in "a dispute between an insurer and its insured even when the intervenor's interest is contingent on the outcome of other litigation." *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991). The appellants' interests are affected by the determination of coverage, and they have a "significantly protectable interest" in whether Scottsdale discharges its duty to defend and indemnify South Wind Ranch.

Because both coverage and whether Scottsdale discharges its duty to South Wind Ranch directly and significantly affects the appellants, they have a "stake in the subject matter" of this action, and the appellants have a right to file a declaratory judgment action pursuant to the plain language of the statute. *Newman v. Richland County Hist. Preserv. Comm'n*, 480 S.E.2d (1997). The complaint in the tort action contains allegations of negligence, violation of the South Carolina Unfair Trade Practices Act, and breach of contract accompanied by fraudulent act. These claims create a "possibility of coverage." *Isle of Palms*. After the appellants filed the tort action, South Wind Ranch turned the claim over to Scottsdale. Scottsdale's refusal to provide coverage to South

Wind Ranch in bad faith directly affects the appellants, who seek recovery from South Wind Ranch.

II. WHETHER SCOTTSDALE IS JUDICIALLY ESTOPPED FROM TAKING THE POSITION THAT LACK OF PRIVITY DEPRIVES THE APPELLANTS OF THEIR RIGHT TO BRING A DECLARATORY JUDGMENT BECAUSE IT HAS REPEATEDLY TAKEN AN OPPOSITE POSITION IN LITIGATION.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 592 S.E.2d 629 (Sup.Ct. 2004). "The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries." *Hayne Federal Credit Union v. Bailey*, 489 S.E.2d 472, 327 S.C. 242, 251 (S.C. 1997) (citing 31 C.J.S. *Estoppel & Waiver* § 139, at 593 (1996)).

Scottsdale routinely files declaratory judgment actions against third parties to insurance contracts to avoid defending claims and paying damages. See *Scottsdale Ins. Co. v. Flowers*, 513 F. 3d 546 (6th Cir. 2008); *Scottsdale Ins. Co. v. Roumph*, 211 F.3d 964 (6th Cir. 2000); *Scottsdale Ins. Co. v. Travis*, 68 SW3d 72 (Tex. Ct.App., 5th Dist. 2001).[3] As a result, it should not now be allowed to take a position that is in complete contradiction to the position taken in such suits, as doing so would harm the integrity of the judicial system. It should also be noted that in the tort action, negligence, and other causes of action triggering Scottsdale's duty to defend and indemnify have already survived a motion to dismiss. This means that in addition to Scottsdale taking a position in complete opposition to its position in cases it has filed naming third parties like the

[3] Both South Wind Ranch and Scottsdale filed motions to dismiss. The trial court adopted the proposed order submitted by South Wind Ranch because the Court instructed South Wind Ranch to prepare a proposed order. (Hearing Trans. p. 25)

appellants in declaratory judgment actions, Scottsdale has based its decision to deny coverage on a contention that the tort action is purely for breach of contract, when the trial court has ruled that the negligence and other causes of action go forward. Breach of contract is not even alleged in the tort action.

III. WHETHER A DECLARATORY JUDGMENT ACTION MAY PROCEED WHILE A TORT ACTION IS PENDING.

"Declaratory judgment actions seeking determination of insurance coverage issues are routinely allowed to proceed even while the underlying litigation regarding liability is ongoing." *State Farm Fire & Cas. Co. v. Wade*, No. 12-CV-0148-CVE-PJC, 2012 WL 2524859 (N.D. Okla. June 29, 2012) (citing *State Farm Fire & Casualty Co. v. Mhoon*, 31 F.3d 979 (10th Cir.1994) ("we see no reason why the declaratory judgment action should not have proceeded" while the underlying action was ongoing); *Hartford Fire Ins. Co. v. Gandy Dancer*, LLC, No. CIV–10–0137 JB/RHS, 2011 WL 1336523 (D.N.M. Mar. 30, 2011)). "In an insurance coverage action, the necessary and interested parties are the insurer, insured, and claimants." *Hudson Specialty Ins. Co. v. Magio's Inc.*, Case No. 18-80299-CIVCOHN/MATTHEWMAN, 2018 WL 8259544, at *3 (S.D. Fla. June 14, 2018) (unpublished)(quoting *Tower Ins. Co. of New York v. Aledith Enterprises, Inc.*, 12-22689-CIV, 2013 WL12064483, at *2 (S.D. Fla. Sept. 30, 2013).

The cases cited above make it crystal clear that in a declaratory judgment action related to coverage, the insured, the claimant, and the insurer are all necessary parties. That means each one of them has standing to bring a declaratory judgment action, and South Wind Ranch's and Scottsdale's arguments that the appellants' case should be dismissed for lack of standing is flatly wrong. Scottsdale and South Wind Ranch relied heavily on standing and made it clear at the hearing that standing was the basis of their motion, arguing they "just don't think [the appellants have] standing." (Hearing Trans. p. 12). The trial court based its ruling on standing, stating "I'm

going to declare that you don't have standing at this point." (Hearing Trans. p. 23). Since "the necessary and interested parties are the insurer, the insured, and the claimants" in a declaratory judgment action, the appellants, as "claimants" have a right and standing to bring a declaratory judgment action. *Hudson Specialty Ins. Co.*[4]

In a federal context, the Fourth Circuit has "frequently approved the use of federal declaratory judgment actions to resolve disputes over liability insurance coverage, even in advance of judgment against the insured on the underlying claim for which coverage is sought." *Auto-Owners Ins. Co. v. Madison at Park W. Prop. Owners Ass'n, Inc.*, 834 F. Supp. 2d 437, 442 (D.S.C. 2011) (quoting *Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 375–76 (4th Cir. 1994) (citing cases, *abrogated in part on other grounds by Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995)); see also *State Farm Fire & Cas. Ins. Co. v. Sproull*, 329 F. Supp. 3d 238, 243 (D.S.C. 2018). The Fourth Circuit ruled in *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488 (4th Cir. 1998) that a "declaration of parties' rights under an insurance policy is an appropriate use of the declaratory judgment mechanism." The Fourth Circuit's logic in *Auto-Owners Ins. Co.* and other cases is consistent with South Carolina law and provides further support for reversal of the trial court's dismissal of this action.

There is no need to litigate the underlying action to a verdict, only to have another battle after the verdict about coverage. That appears to be the primary reason the legislature made explicitly clear that "*all* persons *shall* be made parties *who have or claim* any interest which would be affected by the declaration" and that the statute "*shall* be construed liberally." *S.C. Code Ann.* §§ 15-53-80 and 15-53-130, respectively (emphasis added). The statute makes no mention of a

[4] The appellants, or "claimants," also named the other two necessary parties – Scottsdale, "the insurer" and South Wind Ranch, "the insured."

requirement that a party be a party to a contract or an insured under the policy at issue. The UDJA exists for the very purpose of determining coverage and eliminating uncertainty.

IV. WHETHER THE TRIAL COURT VIOLATED THE APPELLANTS' SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

The South Carolina Constitution, United States Constitution, and the UDJA each gives the appellants a right to a jury trial. "The right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..." U.S. CONST. amend. VII. The UDJA contains a provision stating that, "all existing rights to jury trials are hereby preserved" with respect to declaratory judgment actions. *S.C. Code Ann.* § 15-53-90. The United States Supreme Court has "...considered the applicability of the constitutional right to a jury trial in actions enforcing statutory rights 'as a matter too obvious to be doubted.'" *Curtis v. Loether*, 415 U.S. 189 (1974) quoting *Parsons v. Bedford*, 3 Pet. 433 (1830). See also *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) and *Hepner v. United States*, 213 U.S. 103 (1909).

Dismissal also violates the Equal Protection Clause. Insurance companies, including Scottdale, are allowed to bring declaratory judgment actions all the time which name claimants like the appellants, and affect those claimants as contemplated by the UDJA. If the trial court's dismissal stands, it means the appellants are being treated differently than other contemplated parties to declaratory judgment actions – insurance companies – which are allowed to bring declaratory judgment actions in similar scenarios.

CONCLUSION

For the foregoing reasons, the appellants respectfully request that the Appellate Court reverse the Circuit Court's dismissal of the appellant's declaratory judgment action.

Respectfully submitted,

s/ Joshua T. Hawkins
Joshua T. Hawkins, S.C. Bar #78470
Helena L. Jedziniak, S.C. Bar #100825
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
josh@hjllcsc.com
helena@hjllcsc.com
Attorneys for Appellant

Greenville, South Carolina

August 5, 2022

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Scottsdale Insurance Company, South Wind Ranch Holdings, LLC, Ronald Hakala and Ashley Black, Defendants

Of which Scottsdale Insurance Company is the .....Respondent.

Appellate Case No. 2022-000576

PROOF OF SERVICE

I certify that on this date, August 5, 2022, I filed the foregoing Appellants' Initial Brief and Designation of Matter with the South Carolina Court of Appeals via U.S. Certified mail to 1220 Senate Street, Columbia, SC, and via electronic filing to ctappfilings@sccourts.org and served a copy on Respondents by depositing a copy in the United States Mail, sent Certified Return Receipt Requested, with proper postage affixed, addressed to the attorneys of record below:

(see addressees and signature block on following page)

Harriet Condon Ward
Womble Bond Dickinson, LLP
P.O. Box 999
Charleston, SC 29402
Attorney for Respondent Scottsdale Insurance Company

Jay Anthony,
Anthony Law, LLC
650 E Washington Street
Greenville, South Carolina 29601
Attorney for Respondents South Wind Ranch, Ashley Black, and Ronald Hakala

s/Joshua T. Hawkins
Hawkins & Jedziniak, LLC
Joshua T. Hawkins, SC Bar #78470
Helena L. Jedziniak, SC Bar #100825
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142
josh@hjllcsc.com
helena@hjllcsc.com
Attorneys for Appellant

Greenville, SC

August 5, 2022

Hawkins & Jedziniak, LLC

Joshua T. Hawkins
josh@hjllcsc.com

Helena L. Jedziniak *
helena@hjllcsc.com
** also licensed in North Carolina*

1225 South Church Street, Greenville, SC 29605
P: (864) 275-8142 ▪ F: (864) 752-0911 ▪ www.hjllcsc.com

August 5, 2022

--via U.S. Certified Mail and electronic mail: ctappfilings@sccourts.org--
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *Gregory Muxlow and Charlotte Muxlow v. Scottsdale Insurance Company*
Appellate Case No.: 2022-000576

Dear Ms. Kitchings:

Please find enclosed for filing and service, Appellant's Initial Brief and Designation of Matter, along with Proof of Service of the same.

With this mailing, we are serving counsel for the respondents. Should the Court need anything further, please do not hesitate to let us know.

Sincerely,

Monica Brody
Certified Paralegal

Enclosures

CC:
Harriet Condon Ward
Womble Bond Dickinson, LLP
P.O. Box 999
Charleston, SC 29402

Jay Anthony
Anthony Law, LLC
650 E. Washington St.
Greenville, SC 29601

Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, SC 29605

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1220 SENATE STREET
COLUMBIA, SC 29201

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