THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Anderson County
Court of Common Pleas

Alexander S. Macaulay
Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 2013-UP-084 (S.C. Ct. App. Filed Feb. 20, 2013)

Denise F. Bowen..Petitioner,

vs.

State Farm Mutual Automobile
Insurance Company..Respondent.

RESPONDENT'S RETURN TO THE PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This matter is before the Court on a Petition for a Writ of Certiorari. Respondent, State Farm Mutual Automobile Insurance Company, respectfully requests that the Court deny the Petition. The per curiam decision rendered by the Court of Appeals is supported by sound legal precedent and long-standing rules regarding the preservation of issues for appellate review. Moreover, no novel questions of law have been preserved for review, there was no dissent in the Court of Appeals, the Court of Appeals' decision does not conflict with a prior decision of this Court, and no substantial constitutional issues or federal questions are involved in the appeal. In short, Petitioner has offered no special and important reason why this Court should exercise its discretionary review.

QUESTIONS PRESENTED FOR REVIEW

I. **Did the Court of Appeals err or deny Petitioner due process of law in rendering its per curiam opinion due to any alleged undue brevity or failure to offer sufficient reasons supporting its affirmance of the circuit court's ruling?**

II. **Did the Court of Appeals err in holding that the specific "public policy" issue brought before it, as framed by Petitioner, was not properly preserved for appeal?**

STATEMENT OF THE CASE

On June 18, 2010, the Petitioner, Denise F. Bowen, ("Petitioner" or "Bowen") initiated this matter by filing a Summons and Complaint in the Anderson County Court of Common Pleas, seeking declaratory judgment. (App. p. 17-19). In her Complaint, Petitioner contended she was a resident relative with her father, Larry Thrasher ("Thrasher"), on January 16, 2010, when she was involved in an automobile accident. She therefore sought a ruling from the circuit court establishing she was entitled to

recover underinsured motorist benefits under an insurance policy issued by the Respondent, State Farm Mutual Automobile Insurance Company ("State Farm"), to Thrasher.[1] On or about July 13, 2010, in order to properly identify State Farm, Petitioner filed an Amended Summons and Complaint[2] seeking the same declaratory relief. (App. p. 21-23).

In response to Petitioner's Amended Complaint, State Farm filed an Answer, denying Bowen was entitled to any underinsured motorist benefits under Thrasher's policy and asserting multiple affirmative defenses. (App. p. 24-27). State Farm further asserted its own Counterclaim therein, seeking a judicial declaration that the policy at issue provided no coverage to Petitioner, who was not a resident relative of her father and, therefore, was not an insured under the terms of the policy. (App. p. 27). Bowen filed a Reply to the Counterclaim on September 22, 2010. (App. p. 28).

On October 28, 2010, Petitioner filed a Motion for Summary Judgment, seeking judgment as a matter of law. (App. p. 29). On November 19, 2010, State Farm also filed a Motion for Summary Judgment seeking dismissal of Petitioner's Amended Complaint as a matter of law and entry of judgment in its favor. (App. p. 30-31). A hearing on the cross-motions for summary judgment was held before the Honorable Alexander S. Macaulay in the Anderson County Court of Common Pleas on March 10, 2010. After considering initial memoranda of law in support of the cross-motions for summary judgment submitted by both parties, arguments of counsel, and supplemental memoranda

[1] While Petitioner had purchased and maintained her own automobile insurance policy, issued by Travelers for her personal vehicle, Petitioner's policy did not provide for underinsured motorist coverage.

[2] Although Petitioner's Amended Summons and Complaint still did not correctly identify State Farm, the caption was corrected upon motion made by Bowen and granted on November 18, 2010. The Consent Order filed by the lower court on November 19, 2010, amended the caption to reflect State Farm Mutual Automobile Insurance Company as the proper party to the action. (App. p. 15).

submitted by the parties at the request of the court[3], the lower court granted State Farm's motion for summary judgment. Judge Macaulay executed the Order Granting Summary Judgment to State Farm Mutual Automobile Insurance Company on October 14, 2011, which was subsequently filed on October 17, 2011. (App. p.3-13).

On November 14, 2011, Petitioner timely served a Notice of Appeal from the Order entered by the lower court. The Notice of Appeal was filed with the Court of Appeals on November 15, 2011. Oral argument was held before the South Carolina Court of Appeals, pursuant to which it issued a per curiam opinion affirming the decision of the circuit court. (App. p. 244-246). In the per curiam opinion, the Court of Appeals affirmed the circuit court's order granting summary judgment to Respondent as a matter of law on the grounds that (1) the circuit court properly analyzed the resident relative factors in granting summary judgment in favor of State Farm, (2) the circuit court correctly interpreted the term "resides" in construing the policy language, and (3) Petitioner failed to preserve for review an issue framed by Petitioner, not seeking review by the Court of Appeals of an error made by the circuit court, but rather regarding whether the State Farm policy violated South Carolina public policy. The Court of Appeals' opinion succinctly set forth each of the issues pending before the Court, the ruling made by the Court, and a citation of the authorities supporting each ruling. (See id.).

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[3] At the hearing on the cross-motions for summary judgment, held on March 10, 2011, the circuit court raised the specific issue of whether there was any applicable South Carolina case law establishing whether a person could be found to be a resident of multiple households for purposes of insurance coverage and offered to accept supplemental briefing on the issue by both parties.

In response, Petitioner served a Petition for Rehearing on or about March 4, 2013 (App. p. 247-253), which was denied by the Court of Appeals by its Order entered March 20, 2013. (App. p. 254). Petitioner now petitions this Court for a Writ of Certiorari.

ARGUMENT

I. THE COURT OF APPEALS PREPARED AND ISSUED ITS PER CURIAM OPINION IN FULL COMPLIANCE WITH RULE 220 OF THE SOUTH CAROLINA APPELLATE COURT RULES AND, THEREFORE, DID NOT DENY PETITIONER DUE PROCESS OF LAW.

Although Petitioner takes issue with the brevity[4] of the per curiam opinion rendered by the South Carolina Court of Appeals, the Court adequately set forth each point or issue to be decided on appeal, together with the appropriate citation of authority supporting its affirmance, which is all the Court was required to do. Rule 220(a) of the South Carolina Appellate Court Rules provides that an appellate court may issue memorandum opinions that are of no precedential value and that will not be published in the official reports, as here. In issuing either a published opinion or memorandum opinion, Rule 220(b), SCACR, requires that the appellate court set forth in writing each point distinctly stated in the case and necessary to the decision on appeal, together with the reason for the court's decision. The court does not, however, have to address any point that is manifestly without merit. See Rule 220(b)(2), SCACR.

[4] Petitioner particularly takes issue with an alleged failure by the Court of Appeals to more thoroughly address what Petitioner has labeled as an "erroneous finding of fact," to wit, that Petitioner did not reside with her father on the date of the accident. This characterization, however, confuses the distinction between the undisputed facts contained within the record on appeal and the ultimate conclusion that the lower court was tasked to reach based on the application of well-settled precedent to the undisputed facts. In other words, while Petitioner argues it was a "fact," based on the undisputed record, that Petitioner was *living with* her father when she was involved in an automobile accident, whether or not Petitioner was living with or was a resident relative of her father, concepts that are intertwined and inseparable, was the precise point or issue to be conclusively decided by the lower court based on the facts. Given that, the South Carolina Court of Appeals reviewed the application by the lower court of the "resident relative factors" adopted in South Carolina to the undisputed facts bearing on where Petitioner was living and agreed with the circuit court on the issue, holding Petitioner was not living with and, hence, was not a resident relative of, her father.

Petitioner evidently reads the above mandates of Rule 220(b), SCACR, to require substantially more detail and discussion of the law as applied to the undisputed facts of the case than has already been set forth by the Court of Appeals. Petitioner's position, however, overstates the burden or requirement on South Carolina appellate courts in the issuance of its decisions. Contrary to Petitioner's contentions, the Appellate Court Rules do not mandate a regurgitation or lengthy discussion of the facts, particularly where the appellate court agrees with the factual findings made by the lower court and where those factual findings are supported in the record, as they are in this case. In fact, only where an appellate court chooses to find facts in accordance with its own view of the evidence must the court then distinctly set forth its own findings of fact in addition to the reason(s) for its decision, which findings must be supported by the record. See Dearybury v. Dearybury, 351 S.C. 278, 283-84, 569 S.E.2d 367, 370-71 (2002); Carpenter v. Burr, 381 S.C. 494, 501, 673 S.E.2d 818, 822 (Ct. App. 2009). An appellate court is not, however, required to make independent findings of fact where the decision of the lower court is fair and reasonable based on the facts set forth in the record. See id., 351 S.C. at 284, 569 S.E.2d at 371 (declining to make independent findings of fact where the decision of the lower court was "fair and reasonable based on the facts set forth in the record"). Hence, because the Court of Appeals agreed with both the lower court's recitation and analysis of the undisputed facts, and did not make any independent findings of fact that may have necessitated a discussion of the evidence in the record to support its affirmance, the Court of Appeals met its obligation to the parties herein.

Not only was additional discussion by the Court of Appeals unnecessary given its agreement with the circuit court, but the specific format utilized by the Court of Appeals

in issuing is memorandum opinion, in which the Court set forth each issue and cited the cases supporting its decision, has been expressly adopted and authorized for use by Order of the South Carolina Supreme Court. See In re Memorandum Decisions by Court of Appeals, 322 S.C. 53, 471 S.E.2d 456 (1993). The aforementioned Order provides that the format normally used by the Supreme Court in its memorandum opinions, which entails setting forth each issue and citing the case or cases supporting its decision on each issue, is sufficient for the Court of Appeals to satisfy the statutory requirement under S.C. Code. Ann. §14-8-250 that the Court give reasons for deciding each issue raised in an appeal. Hence, the Court of Appeals has fully complied with the Appellate Court Rules and statutory law in distinctly outlining each of the points raised by Petitioner on appeal, noting either its agreement with the trial court or Petitioner's failure to have properly preserved the issue, and setting forth the case law supporting the Court's holding as to each point raised.

Because no error was committed by the Court of Appeals in the preparation and issuance of its per curiam opinion and it did not, therefore, in any way deny Petitioner due process of law, Respondent respectfully requests this Court deny the Petition for a Writ of Certiorari.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE SPECIFIC "PUBLIC POLICY" ISSUE RAISED BEFORE IT, AS FRAMED BY PETITIONER, WAS NOT PROPERLY PRESERVED FOR APPEAL.

In both the last three paragraphs appearing on page 6 of the Petition for a Writ of Certiorari and the second issue presented in support of the Petition, Petitioner contends the Court of Appeals erred in holding Petitioner failed to preserve for review her contention that the State Farm insurance policy violated South Carolina public policy.

This holding by the Court of Appeals was directed to the final issue set forth and framed by Petitioner in her Statement of Issues on Appeal. (App. p. 189). Contrary to the previous issues raised by Petitioner in her Statement of Issues on Appeal, all of which were directed to whether the circuit court committed any error in granting summary judgment in favor of Respondent, the last issue was not directed to any alleged error made the court. Rather, that issue, as stated by Petitioner, was whether "State Farm's policy violate[d] South Carolina public policy by attempting to limit coverage of family members to those who reside 'primarily' with the named insured." (See id.). While Petitioner had made some references to South Carolina public policy in her briefing to the lower court, the specific issue of whether the State Farm policy's definition of relative as someone residing "primarily" with the insured is too restrictive or violates public policy was *not* addressed. Rather, Petitioner, in her position before the circuit court, contended only that South Carolina public policy provides that policy provisions regarding resident relatives be interpreted broadly so as to provide coverage to potential insureds and that exclusionary and restrictive interpretations of resident relative policy provisions are disfavored. (App. p. 38-39). Those statements were encompassed within a discussion of the definition of what constitutes a "household," and, in particular, Petitioner's contention that she resided in both her father's trailer and her own trailer on the same parcel of land. (App. p. 38-39). Petitioner asserted the two trailers comprised a single dwelling and that she, her father, and her husband were a "family unit." She did not address policy language defining "relative."

Not only did Petitioner fail to challenge the specific policy language defining a relative as someone residing primarily with the insured, but the Order issued by the lower

court also in no way addressed that specific policy language and whether it somehow violated public policy. In fact, there are no references to public policy at all within the Order issued by the lower court. (App. p. 3-13). Had Petitioner believed her briefing to the lower court fairly encompassed that issue and that the lower court failed to address it, it was incumbent upon Petitioner to have brought that fact to the attention of the lower court to allow it the opportunity to rectify any failure to have considered the point.

The very purpose of an appeal is to determine whether the judge erroneously acted or failed to act. See Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 454-55, 211 S.E.2d 243, 244 (1975). A losing party must first try to convince the lower court it has ruled wrongly and then, *if that effort fails*, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must *both* present her issues and arguments to the lower court *and* obtain a ruling before an appellate court will review those issues and arguments. See, e.g., Smith v. Phillips, 318 S.C. 453, 455, 458 S.E.2d 427, 429 (1995) (appellate court generally will not address an issue unless it was *raised to and ruled upon* by the trial court); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (same); Sumter Building & Loan Ass'n v. Winn, 45 S.C. 381, 23 S.E. 29, 31 (1895) (same). In the event a losing party *has* raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment to preserve the issue for appellate review. See, e.g., Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993); see also Rules 52(b) and 59(e), SCRCP.

Here, not only did Petitioner ever state in her briefing to the lower court that she took issue with defining a relative as someone residing *primarily with* the insured, but the lower court certainly did not address that aspect of the policy language on public policy grounds or otherwise. While Petitioner would like to now convince this Court that the issue of whether a person may be a resident of two households or not somehow encompasses an analysis under public policy tenets of the alleged limitation effected by use of the word "primary" in defining relatives, it is more than evident that whether a person may be a resident of two households under South Carolina law and whether policy language limiting a relative to a person residing primarily with the insured violates public policy are distinct issues. Since only the former was raised to and ruled upon by the lower court[5], Petitioner failed to preserve the latter issue for review by the Court of Appeals. Hence, there was no impropriety or denial of due process to Petitioner by the Appellate Court's rejection of the issue, and Respondent respectfully requests this Court deny discretionary review.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent, State Farm Mutual Automobile Insurance Company, respectfully requests that the Petition for a Writ of Certiorari be denied.

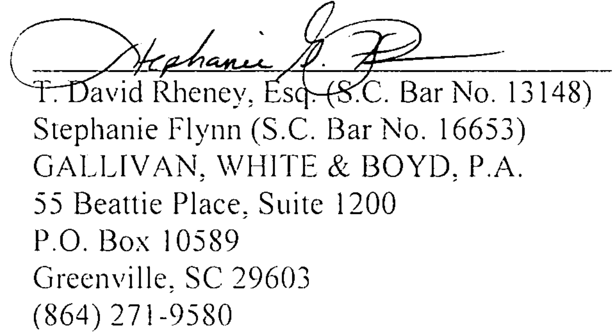
(Signatures appear on following page)

[5] While Petitioner obviously contends, now and in the pen ultimate section of Petitioner's Brief to the Court of Appeals, it is her position that a person may "reside" in more than one household and that the two trailers in which she and her father lived on the same parcel of land constituted the same household or family residential lot, she has not articulated any specific error made by the Court of Appeals in its holding in the second enumerated portion of its Opinion that the trial court correctly reviewed the term "resides."

Respectfully submitted,

May 29, 2013

Greenville, SC



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PROOF OF SERVICE

The undersigned hereby certifies that on the 29th day of May, 2013, a copy of Respondent's Return to the Petition for a Writ of Certiorari was placed in an envelope with sufficient postage prepaid, and mailed to counsel for Appellant as follows:

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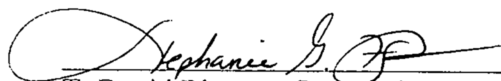
(Signatures appear on following page)

May 29, 2013

Greenville, SC



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