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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge
(Common Pleas Case No. 2017-CP-40-01758)

Appellate Case No. 2019-000906

TERRI L. JOHNSON,

Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

Petition for Rehearing

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Appellant Terri L. Johnson and respectfully petitions this Court for rehearing pursuant to R. 221, SCACR.

ARGUMENT

I. To the Extent, if any, that Current Caselaw Requires that One Party Receive Summary Judgment When Cross-Motions for Summary Judgment Are Filed, that Caselaw Should Be Abandoned.

In Ms. Johnson's Opening Brief, she asked the Court to hold that she should have received summary judgment below or, alternatively, to hold that material issues of fact existed and thus the cross-motions for summary judgment should have both been denied. After all, the non-moving party—as she was in the face of Respondent State Farm Mutual Automobile Insurance Company's motion—is entitled to have all disputed issues of fact decided in its favor and to "all reasonable inferences" from the record. *E.g.*, *Summer v. Carpenter*, 328 S.C. 36, 42 (1997) (citation omitted). Indeed, "[e]ven when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493 (1994) (citation omitted). For its part, State Farm argued that applicable precedent requires that one party receive summary judgment when cross-motions are filed. [Opp. p. 8 n.1 ("Appellant filed a cross motion for summary judgment on breach of contract, thereby conceding that the issue should be decided as a matter of law. 'When cross motions for summary

judgment are filed, the issue is decided as a matter of law.'" (quoting *Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261 (2019)).

The Slip Opinion did not explicitly decide what effect, if any, the fact that cross-motions were filed should have. To the extent, if any, that it applied a rule that cross-motions for summary judgment require one party to receive summary judgment, that rule denied Ms. Johnson her right to the benefit of the inferences under *Koester*, 313 S.C. 490. Further, such a rule is inconsistent with established authority under the Federal Rules of Civil Procedure, which provided a model for our state rules. *E.g.*, *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) ("When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." (quotation omitted)). South Carolina should conform its precedent to federal precedent, overturning any contrary precedent. *Maybank v. BB&T Corp.*, 416 S.C. 541, 565 (2016) ("In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules." (citation omitted)).

II. The Court Erred in Holding that State Farm Was Entitled to Summary Judgment on the Breach-of Contract Claim.

A. State Farm Should Not Have Received Summary Judgment that the Scion Policy Had Been Cancelled.

While the Slip Opinion held that "[t]he circuit court correctly determined Stephen

canceled the Scion policy prior to Terri's car accident when he called his State Farm agent and told her to cancel the policy," [Slip Op. ¶1], the Slip Opinion failed to address the contrary evidence and arguments that Ms. Johnson advanced. Those evidence and arguments precluded affirmance.

First, unilateral cancellation requires compliance with a policy's terms. *See Wilbanks v. Prudential Prop. & Cas. Ins. Co.*, 277 S.C. 256, 258 (1982) ("[E]ither party has the right to terminate the contract by complying with the [policy's] requisite terms. The other party's consent is not necessary for an effective cancellation."); *Hicklin v. State Farm Mut. Auto. Ins. Co.*, 176 S.C. 504, 511 (1935) ("[W]hile it takes two to make a contract, in the cancellation of policies, one of the parties to the contract may end it, if the contract itself so provides." (quotation omitted)). But the Scion Policy, of which Ms. Johnson was a beneficiary, expressly required "advance notice of the date cancellation" [R. 74]. Further, any evidence of express backdating would be contradicted by the deposition testimony of Ms. Johnson, who denied any request for backdating. [R. 144 (76:3-9 ("Q… So you did not – when you made this cancelation request or when your husband made the cancelation request, he did not ask State Farm to backdate the coverage back to some earlier period in time, right? A. No.")))].

Second, any contention that Scion Policy was already cancelled as of the time of

the February 19, 2014, accident is inconsistent with the plain text of the parties' binding stipulation of fact entered pursuant to R. 43(k), SCRCP, that "[a]the time of [the February 19, 2014] accident, all premiums for the …. Scion Policy had been paid up to date." [R. 23 ¶16]. And the parties stipulated that "on February 10, 2014, the regularly scheduled payment of premiums was drafted from Plaintiff and Stephen Johnson's bank account… The payment…included the $57.26 premium for the Scion Policy," the policy State Farm says was supposedly cancelled no later than February 7, 2014. [R. 22 ¶15]. No premium could have been paid on a policy that was not in existence.

Third, the Slip Opinion did not acknowledge that State Farm's own post-accident business records admitted that the Scion policy was in effect on the date of the accident. [R. 103 (State Farm's claims notes entry of 07-30-2014 indicating that Ms. Johnson had "3 pol[icie]s" with combined "250k uim" coverage and entry of 04-09-2015 (indicating Ms. Johnson has "avail uim—250k (2x100/300, plus 50/100))")].

Any of those facts alone, and certainly in combination with the delay in providing a refund and acknowledgment, easily amount to at least "a mere scintilla of evidence" necessary to defeat summary judgment, *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330 (2009), as to when cancellation occurred. The Court should, therefore, revise the Slip Opinion to hold that State Farm was not entitled to summary

judgment on the cancellation issue.

B. State Farm Could Not Receive Summary Judgment on a Supposed Lack of Insurable Interest.

Believing that the cancellation issue was already dispositive, the Slip Opinion did not reach the alternate ground for summary judgment below: a supposed lack of insurable interest. [Slip Op. ¶1 n.1]. As shown above, the cancellation issue was not dispositive for State Farm. As such, the Court should have proceeded to the alternate ground and also found it unavailing for State Farm.

South Carolina, like other states, requires an insured to have an insurable interest before obtaining an insurance policy. *E.g.*, *Am. Mut. Fire Ins. Co. v. Passmore*, 275 S.C. 618, 621 (1981) (citation omitted). The requirement stems from the public policy against gambling. *See, e.g.*, *Hedrick v. Kelley*, 734 S.W.2d 529, 533 (Mo. Ct. App. 1987) ("[T]he public policy requiring an insurable interest is based upon disapproval of wagering contracts."). Given the narrow public policy at issue, the law takes an expansive view of insurable interests: "The insurable interest required does not depend upon the named insured having either a legal or equitable interest in the property, but it is enough that the insured may be held liable for damages to its operation and use." *Passmor*e, 275 S.C. at 620-21 (quotation omitted).

At the time of the accident, Mr. Johnson was still a titled owner of the vehicle because the certificate of title was not formally issued out of Mr. Johnson's name

and into State Farm's name until April 4, 2014. *Compare* [R. 106 (showing title to Stephen Johnson issued 07-13-2012)], *with* [R. 102 (showing title issued to State Farm on 04/04/2014)]. The certificate of title in his name made him an owner of the Scion as a matter of law for several purposes. *See* S.C. Code § 56-19-10(21) ("'Owner' means a person, other than a lienholder, having the property in ***or title to a vehicle***. The term includes a person entitled to the use and possession of a vehicle subject to a security interest in another person but excludes a lessee under a lease not intended as security." (emphasis added)). He was, therefore, required to keep insurance on the vehicle until he no longer was an owner. S.C. Code § 56-10-10 ("Every owner of a motor vehicle required to be registered in this State shall maintain the security required by Section 56-10-20 with respect to each motor vehicle owned by him throughout the period the registration is in effect."). He also would have been liable for damages during its transport to the scrap yard. S.C. Code § 56-5-4230 ("Any person driving or moving any vehicle…upon any highway or highway structure shall be liable for all damages which such highway or structure may sustain as a result of any illegal operation, driving or moving of such vehicles…. Whenever such driver is not the owner of such vehicle…, but is so operating, the owner and driver shall be jointly and severally liable for any such damage."). And he would have (if State Farm had filed for bankruptcy, for example), been liable for any

storage fees at the repair shop for the vehicle. *See* S.C. Code § 29-15-10(D) (providing for storage liens to be satisfied by sale of vehicle with excess returned to the "owner of the vehicle or entitled lienholder"); S.C. Code § 56-5-5635 (providing for storage liens when impoundment of vehicle is requested at direction of law enforcement and requiring notice to "the owner and lienholder of the vehicle" before execution of the storage lien).

Further, regardless as to any other evidence in the record, the fact that the certificate of title still listed him as the owner is at least "a mere scintilla of evidence"—all that is required to defeat summary judgment, *Hancock*, 381 S.C. at 330—that he was in fact the true owner on the date of the accident. *See* S.C. Code § 56-19-320 ("A certificate of title issued by the Department of Motor Vehicles is prima facie evidence of the facts appearing on it.").

To whatever extent Mr. Johnson did not have any rights at all in the Scion at the time of the accident, such a fact still should not render the insurance policy void.

First, the Johnsons clearly have an insurable interest in themselves. While UIM may be required to be offered in connection with an auto liability policy, nothing in South Carolina prohibits a party from agreeing to indemnify an auto-less person who is injured by an underinsured driver. Indeed, precedents from the Supreme Court routinely have repeatedly affirmed that UIM is "personal [to] and portable" with the

insured. *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 396 (2012) (noting "South Carolina's well-settled public policy that UIM coverage is personal and portable").

Second, unlike the insured in *Nationwide Mut. Ins. Co. v. Smith,* 376 S.C. 60 (Ct. App. 2007), who lacked an insurable interest "at the time the contract for insurance was made," thus rendering the policy "void from its inception," *id.* at 69 (citation omitted), everyone agrees that the Johnsons had an insurable interest in the Scion at the time the policy was written. Indeed, State Farm had already paid one claim on it. Given the insurable interest at the outset, the policy rationale behind the insurance-interest requirement is lacking. "When the reason for [a] rule ceases, the rule ceases." *Penning v. Reid*, 167 S.C. 263, 289 (1932) (quoting from circuit court decision that was affirmed ordered to be reported). *See also Kelley*, 734 S.W.2d at 533 ("There is and can be no claim that mother or daughter was gambling. The term insurable interest should be broadly construed in situations such as this where… the overall evidence indicates the policy was obtained in good faith."). Consequently, the circuit court below should not have deemed *Smith* controlling.

Smith, is however, not controlling for additional reasons. Its holding that an insurable interest in an auto is a precondition for uninsured motorist coverage ("UM") is only persuasive authority where, as here, UIM is involved and should thus be

limited to its facts. But more fundamentally, the majority opinion rested its holding that UM requires an insurable interest in an auto on the belief that "in South Carolina all automobile insurance policies are statutorily required to contain UM coverage." *Smith*, 376 S.C. 66. Our Supreme Court has, however, held otherwise in the context of UIM, like at issue here. *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 621-22 (2013) ("UIM is not mandatory coverage.").[1]

Accordingly, the insurable-interest issue also did not entitle State Farm to summary judgment below.

III. The Court Erred in Holding that State Farm Was Entitled to Summary Judgment on the Bad-Faith Claim.

Insurance companies owe a common-law and statutory duty to process insurance claims in good faith. *See, e.g.*, S.C. Code § 38-59-20(8) (defining as improper claims practice, among other things, an insurance company's "unreasonable delay in paying or an unreasonable failure to pay or settle in full claims…arising under coverages provided by its policies); *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340 (1983) ("[I]f an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can

[1] To whatever extent that the Court should nonetheless find *Smith* controlling, Ms. Johnson respectfully submits that the cases was wrongly decided, for the reasons set forth above and for the reason set forth in Judge Anderson's dissent in that case.

recover consequential damages in a tort action.").

The Panel Opinion held ruled that State Farm was entitled to summary judgment as to common-law bad faith (Count II) and statutory bad faith (Count III) because the valid cancellation of the insurance policy gave State Farm reasonable grounds existed for denying coverage. [Slip Op. ¶2]. As indicated above, however, at least a genuine issue of fact exists as to the effective date of any cancellation of the Scion Policy. Consequently, summary judgment for State Farm on bad faith was not appropriate.

CONCLUSION

This Court should grant Panel rehearing and vacate or reverse the judgment below.

Dated this 4th day of August, 2022.

Respectfully submitted,

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