

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Edward W. Miller, Circuit Court Judge

Gregory Muxlow and Charlotte
MuxlowAppellants,

v.

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

Of which Scottsdale Insurance Company is theRespondent.

Appellate Case No. 2022-000576

FINAL BRIEF OF RESPONDENT SCOTTSDALE INSURANCE COMPANY

s/Harriet C. Ward

s/Pamela J. Larson

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. THE TRIAL COURT PROPERLY DETERMINED THAT APPELLANTS LACKED STANDING
 - a. THE TRIAL COURT DID NOT ERR IN RELYING ON *KLECKLEY* AND *TRANCIK* TO DETERMINE THAT APPELLANTS LACKED STANDING
 - b. APPELLANTS ARE ASKING THIS COURT TO DEVIATE FROM THE INTENDED PURPOSE OF THE UNIFORM DECLARATORY JUDGMENT ACT
2. THE TRIAL COURT DID NOT DEPRIVE APPELLANTS OF THEIR SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

ADDITIONAL REASONS TO AFFIRM

1. APPELLANTS FAILED TO APPEAL THE TRIAL COURT'S FINDING THAT THEIR CLAIM IS NOT RIPE FOR ADJUDICATION
2. APPELLANT'S JUDICIAL ESTOPPEL ARGUMENT HAS NOT BEEN PRESERVED FOR APPELLATE REVIEW

FACTS

The key legal issue in this case is whether Appellants Gregory Muxlow and Charlotte Muxlow (“Appellants”) have standing to bring a declaratory judgment action against Respondent Scottsdale Insurance Company (“Respondent” or “Scottsdale”). The law on third party standing in South Carolina is clear and unambiguous, and the material facts regarding the dispute in this matter are documented in this record beyond any genuine dispute.

The Alleged Injury: Appellants, a bride and groom, contracted with Scottsdale’s insureds, Defendants South Wind Ranch Holdings, LLC, Ronald Hakala, and Ashley Black (collectively the “Insureds”) for venue rental and services related to Plaintiffs’ wedding. (R. p. 17, ¶ 13). Appellants and Christian Weinands (“Weinands”), the father of the bride, paid non-refundable deposits pursuant to the wedding venue contract. (R. p. 17, ¶¶ 13, 14). In or around July 2020, due to the COVID-19 pandemic, Appellants contacted the Insureds about postponing their wedding. (R. p. 17-18, ¶¶ 15-17). Shortly thereafter, Appellants requested new dates to reschedule the postponed wedding. (R. p. 18, ¶ 17).

Twelve days after deciding to postpone the wedding, Appellants cancelled their contracts with the Insureds. (R. p. 18, ¶ 18; p. 19, ¶ 21). Upon cancellation, Appellants requested that their non-refundable deposits be returned to them. (R. p. 19, ¶ 21). The Insureds refused to refund the non-refundable deposits. (R. p. 19, ¶ 22). On January 26, 2021, Appellants brought the Underlying Lawsuit against the Insureds. (R. p. 15-24).¹

Through the course of discovery in the Underlying Lawsuit, Appellants learned that the Insureds maintained a Commercial General Liability Policy (“the Policy”) with Scottsdale. (R. p. 38-39, ¶ 10). On August 4, 2021, Appellants sent a letter entitled “Official Notice of

¹ As of the date of the filing of Scottsdale’s Initial Brief, the underlying lawsuit remained pending before the South Carolina Circuit Court, Greenville County.

Nationwide’s Bad Faith” to Scottsdale. (R. p. 38-39, ¶ 10). On August 23, 2021, Scottsdale sent a letter to Appellants denying their claim for Scottsdale to tender a defense to its Insureds in the Underlying Lawsuit. (R. p. 39, ¶ 11).² As a result of Scottsdale’s denial letter, on August 26, 2021, Appellants filed this declaratory judgment action with the trial court. (R. p. 37-43).

The Declaratory Judgment Action: Appellants brought this declaratory judgment action against Scottsdale and the Insureds on August 26, 2021. (R. p. 37-43). Appellants sought: “a declaration that Scottsdale must provide a defense for its insured in the underlying action and pay any settlement or verdict as to its insureds,” and “a declaration that Scottsdale has acted in bad faith, and that its policy limit is now opened.” (R. p. 42, ¶¶ 3-4).

Scottsdale and the Insureds each filed a Motion to Dismiss Appellant’s claims. (R. p. 51-52);(R. p. 53-54). Both Motions were heard by the trial court on January 10, 2022. (R. p. 1-9).

Motion to Dismiss Hearing: At the January 10, 2022 hearing, the Insureds and Scottsdale argued that Appellants, as third parties to the contract between Scottsdale and the Insureds, lacked standing to bring this declaratory judgment action. (R. p. 65, line 21; p. 71-72; p. 17-18; p. 81, lines 1-17). Appellants argued that they had standing because they were an “interested party” to the Policy based on their alleged injury in the Underlying Lawsuit. (R. p. 72, lines 2-6; p. 73, lines 3-5; p. 74-75).

After hearing the arguments from counsel, the trial court held that Appellants lacked standing to bring this declaratory judgment action. First, the trial court found that Appellants “are unaffected by [the] contract” between Scottsdale and the Insured. (R. p. 74, line 2). Second, the trial court reasoned that the Appellants’ claims were not ripe for adjudication in this action because any interest Appellants may have in the Policy had not been decided yet and that the

² Scottsdale notes that the Request to Tender a Defense at issue in this case was made by the Appellants, *not* Scottsdale’s insureds.

Appellants might not have an interest “if a jury says [the Insureds] don’t owe [Appellants] the money” in the Underlying Lawsuit. (R. p. 79, lines 12-14). Third, the trial court found that Appellants had no reason to file a claim on the Policy and that “the only people who are interested in whether or not the insurance company does the defense [in the Underlying Lawsuit] are the Defendants[:] the individual Defendants, and the Ranch.” (R. p. 79, lines 19-22). Fourth, the trial court found that Appellant’s reading of the Declaratory Judgment Act’s language referring to “any interested party” was an “incredible stretch;” (R. p. 74, lines 6-7) and, that Appellants’ interpretation of the Declaratory Judgment Act would effectively “throw out privity of contract.” (R. p. 83, lines 16-23).

At the conclusion of the hearing, the trial court directed Defendant South Wind to prepare the proposed order. (R. p. 83, lines 24-25; p. 84, lines 5-6). The trial court explained that the court’s holding was to dismiss Appellants’ claims without prejudice, and that if Appellants prevailed in the underlying lawsuit, the trial court’s holding “would not impact what happens down the road.” (R. p. 84, lines 18-23). Rather, the trial court clarified, that Appellants’ declaratory judgment action was “not a controversy that’s ripe for a decision at this time.” (R. p. 84, lines 23-24).

The Order: On February 4, 2022, the trial court entered an order dismissing, without prejudice, Appellant’s claim for declaratory judgment in this matter. (R. p. 1-9). The court found (1) direct claims brought by third parties are prohibited; (2) Appellants, as third parties to the contract, lacked standing to bring this declaratory judgment action; (3) Appellants’ claims were not ripe for judicial determination; and (4) Appellants’ interpretation of the Declaratory Judgment Act was too broad. (R. p. 1-9). The court also found that Appellants’ interpretation of

the Declaratory Judgment Act would effectively eliminate the requirement of contractual privity.

(R. p. 7, n. 2).

STANDARD OF REVIEW

“Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action.” *Doe v. Marion*, 361 S.C. 463, 468, 605 S.E.2d 556, 559 (Ct. App. 2004), *aff’d*, 373 S.C. 390, 645 S.E.2d 245 (2007) (citing *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct.App.2003), *cert. denied*). “The trial courts grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law.” *Id.* (citing *Tatum v. Medical Univ. of South Carolina*, 346 S.C. 194, 552 S.E.2d 18 (2001). “Upon review, the appellate tribunal applies the same standard of review that was implemented by the trial court.” *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001) (citing *O’Laughlin v. Windham*, 330 S.C. 379, 382, 498 S.E.2d 689, 691 (Ct.App.1998).

ARGUMENTS

I. THE TRIAL COURT'S ORDER SHOULD NOT BE DISTURBED BECAUSE APPELLANTS HAVE FAILED TO APPEAL THE TRIAL COURT'S FINDING THAT APPELLANTS' CLAIM IS NOT RIPE FOR ADJUDICATION

It is well settled that issues raised on appeal must be argued in the appellate brief or are otherwise deemed waived. *See* Rule 208(b)(1)(B), SCACR (requiring the appellant's brief contain a statement of the issues presented for review; and "[t]he statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *see also Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 54 n. 4, 677 S.E.2d 32, 36 n. 4 (Ct. App. 2009) (explaining that issues preserved in the lower court will be waived on appeal when not argued in the appellate brief); *see also Barr v. Barr*, 287 S.C. 13, 336 S.E.2d 481 (Ct. Appl 1985).

This Court should not disturb the trial court's order because Appellants have failed to appeal the trial court's holding that Appellants' claim was not ripe for adjudication. Here, Appellants Statement of Issues on Appeal cites to four issues, the rulings which they challenge on appeal. (Appellants Br., p. 1). Thus, the issues on appeal are:

1. Whether the trial court erred in relying upon *Kleckley* in dismissing a case that did not involve third-party insurance bad faith
2. 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
3. Whether a declaratory judgment action may proceed while a tort action is pending
4. Whether the trial court violated the appellants' seventh amendment right to a jury trial

Id. These issues are silent as to the trial court’s ruling that Appellants’ declaratory judgment action is not ripe. *See R*, p. 6.

At first glance, Appellant’s issue number three: “Whether a declaratory judgment action may proceed while a tort action is pending” appears that it is a broad statement which *may* be an attempt to address the trial court’s ruling on Appellants’ lack of ripeness; however, the arguments within the brief only address the trial court’s ruling that Appellants lacked standing—not that Appellants’ claims are not ripe for adjudication. (Appellants’ Br., p. 9-11). In fact, Appellants Initial Brief is completely silent as to the issue of ripeness. To the extent that Appellants Statement of Issue on Appeal number three is an attempt to appeal the trial court’s order as to the issue of ripeness, the Court may disregard it pursuant to SCACR Rule 208(b)(1)(B), because Appellants have made a broad statement.

The doctrine of justiciability encompasses both ripeness and standing; nonetheless, standing and ripeness are completely different legal concepts. *See Jowers v. South Carolina Dept. of Health and Environmental Control* 423 S.C. 343, 354, 815 S.E.2d 446, 451 (2018) (explaining that standing requires a personal stake in the litigation, while ripeness involves a question of whether an issue is contingent, hypothetical, or abstract); *see also S. Bank & Tr. Co. v. Harrison Sales Co.*, 285 S.C. 50, 51–52, 328 S.E.2d 66, 67 (1985)(“A declaratory judgment action must involve an actual, justiciable controversy. A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.”)(internal citations omitted).

Here, Appellants have only appealed the trial court’s order that they lacked standing. Accordingly, this Court may properly affirm the Order on the ripeness issue alone. Appellants

have abandoned that issue on appeal, and the trial court's finding on ripeness alone justifies the dismissal without prejudice.

II. APPELLANTS CANNOT BRING THIS LAWSUIT BECAUSE THEY DO NOT HAVE PROPER STANDING

The trial court in this action properly determined that Appellants did not have standing to bring their claim. A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing. *Sloan v. Sch. Dist. of Greenville County*, 342 S.C. 515, 518, 537 S.E.2d 299, 301 (Ct. App. 2000). To have standing, a party must have a personal stake in the subject matter of a lawsuit. *Newman v. Richland County Hist. Preserv. Com'n*, 325 S.C. 79, 82, 480 S.E.2d 72,74 (1997). Because Appellants are third parties to the insurance contract between Scottsdale and the Insureds, the trial court properly determined that Appellants lacked standing to bring this declaratory judgment action.

A. A declaratory judgment action, as with any other cause of action, requires that a plaintiff have standing before a court may address the merits of the case.

To be entitled to declaratory relief, the pleadings must demonstrate a justiciable controversy. *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); *Holden v. Cribb*, 349 S.C. 132 561 S.E.2d 634 (Ct. Appl 2002). A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing. Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right *See Michael P. v. Greenville Cnty. Dep't of Soc. Servs.*, 385 S.C. 407, 415, 684 S.E.2d 211, 215 (Ct. App. 2009). To have standing, a party must have a personal stake in the subject matter of a lawsuit. *See Newman v. Richland County Hist. Preserv. Comm'n*, 325 S.C. 79, 82, 480 S.E.2d 72, 74 (1997). "Generally, a third person not

in privity of contract with the contracting parties does not have a right to enforce the contract.” *Johnson v. Sam English Grading, Inc.*, 412 S.C. 433, 448, 772 S.E.2d 544, 552 (Ct. App. 2015).

Here, the trial court properly determined that Appellants lacked standing to bring this declaratory judgment action against Scottsdale, because Appellants are not in privity of contract with Scottsdale. (R. p. 4-6). As third parties to the insurance contract, the court correctly dismissed Appellants’ declaratory judgment claim.

B. The trial court properly interpreted *Kleckley* and *Trancik* because Appellants sought a declaration that Scottsdale acted in bad faith.

Contrary to Appellants’ position, the trial court properly relied upon *Kleckley* and *Trancik* to determine that Appellants lack standing. Both opinions firmly refute Appellants’ argument and reaffirm that one who is not in privity of contract has no right to seek enforcement of that contract. *See Kleckley v. Northwestern Nat’l Cas. Co.*, 338 S.C. 131, 135-136, 526 S.E.2d 218, 220 (2000) (“[a] tort action for an insurer’s bad faith refusal to pay benefits does not extend to third parties who are not named insureds.”); *see also Trancik v. USAA Ins. Co.*, 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003) (“South Carolina contract law carries a presumption that an individual who is not a party to a contract lacks privity to enforce it.”) (internal citations omitted).

Because the relief sought by Appellants was, in part, to determine whether Scottsdale acted in bad faith, both *Kleckley* and *Trancik* were properly applied by the trial court when it determined that Appellants, as third parties to the insurance contract between Scottsdale and South Wind Ranch, lacked standing to bring this action.

Even if Appellants’ relief had not been a declaration regarding Scottsdale’s alleged bad faith, the trial court properly applied both *Kleckley* and *Trancik* because both cases addressed the common underlying theme at issue in the present matter—a third party attempting to interject

themselves into a contract. While it is true that *Kleckly and Trancik* were brought as bad faith actions, the rationale remains the same: one who is not a party to a contract may not seek to enforce the terms of that contract. Because Appellants are not a party to the insurance contract between the Insureds and Scottsdale, the trial court properly found that Appellants lack standing to bring the present declaratory judgment.

Appellants offer only one case support their argument: *Sloan v. Greenville Co.*, 590 S.E.2d 338 (Ct. App. 2003); however, Appellants do not articulate *why Sloan* should be applied. (Appellants' Br., p. 6). Notably, *Sloan* is meaningfully distinguishable from the present matter. *Sloan* was a declaratory judgment action brought by a taxpayer to challenge a county ordinance. *Id.* There, the court held that *Sloan* had taxpayer standing because he paid taxes in that county and was subject to the county ordinances. *Id.* 356 S.C. at 347, 590 S.E.2d at 548-49. By contrast, the present matter does not involve taxes, nor does it involve a governmental entity. Instead, the present matter involves private parties seeking a declaration regarding a contract for insurance between Scottsdale and the Insureds. Here, Appellants were not a party to the insurance contract for which they seek a declaration, did not pay for the insurance contract, and have no standing to contest the contract between Scottsdale and its insureds.

Because Appellant's standing argument asks this Court to apply the rationale of a case wholly unrelated to the issue at hand, this Court should not disturb the trial court's holding that Appellants lack standing to interject themselves into a contract in which they had no interest.

C. Appellants' reading of the Declaratory Judgment Act is incorrect because Appellants' interpretation would take the Act far beyond its intended bounds.

As properly determined by the trial court, Appellants do not have statutory standing to bring this declaratory judgment action because Appellants read the Declaratory Judgment Act ("the Act") too broadly. (R. p. 6-7). The Act provides "[w]hen declaratory relief is sought all

persons shall be made parties who have or claim any interest which would be affected by the declaration.” S.C. Code Ann. § 15-53-80. However, as the trial court correctly pointed out, “[d]espite the Act’s broad language, it has its limits.” (R. Order, p. 5)(quoting *Sunset Cay, LLC*, 357 S.C. at 423, 593 S.E.2d at 466 (2004)). “The Act should not be used to address abstract matters and where an adjudication would not settle the rights of the parties or would be advisory in nature, such an action would be beyond the intended purpose and scope of the Act.” *Id.*

Appellants are not “affected by the declaration” because they are third parties to the contract who have not proven that they are entitled a judgment against the Insureds. For Appellants to establish that they are “affected by the declaration,” Appellants first need to obtain a judgment against the Insureds or establish that the Insureds will not be able to pay such a judgment. *Id.* at p. 7; *see e.g. Garrison Prop. & Cas. Ins. Co. v. Cothran*, No. 2:15-CV-4379-PMD, 2016 WL 3753219, at *3 (D.S.C. July 14, 2016) (granting a Motion to Dismiss by finding that the declaratory judgment case was premature since there was no judgment in the underlying claim). Instead, Appellants are seeking a premature declaration without establishing that they are affected by the same declaration they seek.

Similarly, Appellants do not have statutory standing to bring this declaratory judgment action because the declaration sought is both abstract and advisory rather than determinative. *See Sunset Cay, LLC*, 357 S.C. at 423, 593 S.E.2d at 466 (an adjudication that would not settle the legal rights of the parties would only be advisory in nature and therefore, would be beyond the intended purpose and scope of the declaratory judgment act); *see also Power v. McNair*, 255 S.C. 150, 177 S.E.2d 551 (1970)(an adjudication which would settle no legal rights of the parties would be only advisory and; therefore, beyond the intended purpose and scope of a declaratory judgment).

Here, Appellants ask this court to apply *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995), to determine that they have standing, because Appellants contend they fall within the Act's contemplated meaning of an affected person; however, *Stiles* is meaningfully distinguishable from the present matter. In *Stiles*, the South Carolina Supreme Court dealt with a situation of whether a defendant sought to maintain an action against a Plaintiff's attorney. *Id.* 318 S.C. at 298, 457 S.E.2d at 601. There, the Court determined an attorney does not have absolute immunity from suit; but the Court also reaffirmed that the defendant and Plaintiff's attorney needed an *independent duty* to sustain a viable action. *Id.* 318 S.C. at 300, 457 S.E.2d at 602. In short, because there was no relationship or independent duty between the defendant and Plaintiff's attorney in *Stiles*, the Supreme Court affirmed the trial court's dismissal. *Id.* Similarly, Appellants in the present matter do not maintain *any* relationship with Scottsdale. Because there is no relationship, there is no independent duty owed between Appellants and Scottsdale. Therefore, under *Stiles*, this Court should affirm the trial court's dismissal of Appellant's claims.

i. The cases Appellants rely on to establish they are interested parties are meaningfully distinguishable.

The trial court's decision should be affirmed because Appellants rely on law that is meaningfully distinguishable it: (1) only involves disputes between an insured and insurer; (2) applies federal law, which is substantively different than South Carolina law; and (3) involves declaratory judgments brought *by the insurer*, rather than a third party to the contract. *See* Appellants' Br., p. 6.

First, Appellants request the court to consider *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 494 (4th Cir. 1998)), which is Fourth Circuit case arising out of Maryland. *Kapiloff* is meaningfully distinguishable from this case because it only involved a declaratory judgment

action between an insured and insurer—the parties to the contract. It did not involve a third-party bringing an action against an insurer.

Second, Appellants ask this Court to adopt the Fourth Circuit’s rationale in *Teaque v. Bakker*, 931 F.2d 259 (4th Cir. 1991). *Teaque* was a federal district court action from the Western District of North Carolina; wherein, a declaratory judgment action was *filed by the insurer* against its insured. *Teaque v. Bakker*, 931 F.2d 259, 260 (4th Cir. 1991). A third-party then filed a motion to intervene into the insurer’s declaratory judgment action, citing that they had a significantly protectable interest in the outcome of the declaratory judgment action. *Id.* 931 F.2d at 261 (4th Cir. 1991). The Fourth Circuit used Rule 24(a)(2) Fed. R. Civ. P. to determine that the third-party intervenor had a protectable interest. *Id.*

Teaque is markedly different from the present matter. First, it was a federal court action, initiated in North Carolina, wholly unrelated to South Carolina state court. The *Teaque* court interpreted Fed. R. Civ. P. Rule 24(a)(2) to reach its conclusion. Rule 24(a)(2) is substantially different from the Act that Appellants are asking this Court to interpret. Rule 24 outlines an intervenor’s right to intervene in an *already existing* action. In *Teaque*, the intervention was aimed at a declaratory judgment action *brought by the insurer against the insured*, unlike the instant case, in which Appellants brought a completely new action directly against Scottsdale. This court should not adopt the *Teaque* rationale because *Teaque* is procedurally and fundamentally different than the present matter.

While distinguishable from the present case, the South Carolina Federal District, Florence Division, in the matter of *Affordable Home Improvements*, recently held that a third party to an insurance contract did meet the requirement for standing in a declaratory judgment action. *Am. S. Ins. Co. v. Affordable Home Improvements*, No. 4:17-CV-02366-RBH, 2018 WL

2087229, (D.S.C. May 4, 2018). There, the court reasoned that because the third party and the insurer were both parties to the underlying tort action, the third party had an interest in the outcome of the simultaneous declaratory judgment action. *Id.* at *3. Notably, in that case, the insurer also brought a declaratory judgment action to determine their rights under the relevant insurance policy and named the third-party as a defendant in the declaratory judgment action. *Id.* at *4. There, the court found that by naming the third-party in the declaratory judgment action, the insurer contemplated that the third-party had an interest in the declaratory judgment. *Id.* This case, likewise, is unpersuasive because Scottsdale is not a named party in the underlying tort action, and Scottsdale did not bring this declaratory judgment action nor did Scottsdale name Appellants as a party to this declaratory judgment action. Instead, Appellants are attempting to interject themselves into the contract and create a controversy between two contracting parties without any reasonable basis or cognizable injury that would otherwise afford them a declaration for the relief that they seek in this matter.

ii. The trial court was correct in determining that the proposed action by Appellants would run contrary to established South Carolina law.

Should this Court adopt the rationale Appellants propose, the result would entitle any potential third-party plaintiff in this State to bring declaratory judgments against an insurer without first establishing that they have been entitled to damages from the insured. (R. p. 84, lines 19-23) (“you’re basically asking me to throw out privity of contract. [The interpretation of the] [d]eclaratory judgment statute that you’re referring to would just do away with privity of contract, which I do not believe the legislature intended to do.”); *See also* R. p. 7, n. 2. The trial court was correct in determining that such practice would run contrary to South Carolina state and federal cases that require a third party to obtain a judgment before proceeding against a tortfeasor’s insurer. *Wilkins v. State Farm Mut. Ins. Co.*, No. C/A 3:06-334-CMC, 2008 WL

2690240, at *7 (D.S.C. July 1, 2008); *NEMLORP, LLC v. Travelers Indem. Co.*, No. 2:10-CV-144-RMG, 2012 WL 13005322, at *8 (D.S.C. Feb. 9, 2012); *Garrison Prop. & Cas. Ins. Co. v. Cothran*, No. 2:15-CV-4379-PMD, 2016 WL 3753219, at *3 (D.S.C. July 14, 2016) (granting a Motion to Dismiss by finding that the declaratory judgment case was premature since there was no judgment in the Underlying Lawsuit).

The trial court was correct in expressing that “to read the Act as Plaintiff proposes would effectively do away with privity of contract.” The trial court’s rationale is consistent with South Carolina case law. *Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 742 S.E.2d 371 (2013)(To fall within the intended purpose and scope of the Declaratory Judgments Act, the parties must seek adjudication of a *justiciable* controversy).

Appellants have not established that they are entitled to a declaratory judgment, because they have failed to bring a justiciable controversy. To hold otherwise would besiege the South Carolina circuit courts with otherwise unmeritorious declaratory judgment actions, further adding to the backlog of pending civil court actions. This result should be avoided at all costs in the interest of upholding the intended meaning of the legislature, and in the interest of judicial economy.

For the reasons above, this Court should affirm the trial court’s order.

III. APPELLANTS’ JUDICIAL ESTOPPEL ARGUMENT HAS NOT BEEN PRESERVED FOR APPELLANT REVIEW

Contrary to any reference on the record, Appellants posit that Scottsdale should not be allowed to take the position that a third party to a contract lacks privity to bring a declaratory judgment action because “Scottsdale routinely files declaratory judgment actions against third parties to insurance contracts to avoid defending claims and paying damages.” (Appellants’ Br., p. 8, ¶ 2).

Neither Appellants, nor Scottsdale, have ever made this argument before the trial court, and the trial court's order did not address this issue in its Order. In fact, the Appellant's counsel stated to the trial court that he was not asserting an estoppel argument:

MR. HAWKINS: Yeah, they filed a motion to dismiss in the underlying case, but it was denied. So we still have our negligence –

THE COURT: What was the cause of action that they, I mean, what are we talking about here? **You're sort of alleging judicial estoppel. Right?**

MR. HAWKINS: Well, --

THE COURT: **Some sort of estoppel.**

MR. HAWKINS: **No. Under the -- respectfully. Your Honor, no.** We're -- what we're doing is we're saying under the declaratory judgment statute -- because insurance companies do it all the time, and they're not a party to litigation or a contract. We're saying any right, which is what the statute says, any person who has a right affected by coverage or who wants a determination related to coverage is entitled to file a DJ action.

(R. p. 68, lines 23-25; p. 69, lines 1-13) (emphasis added). Appellants raised no objection and conceded that they were not raising the issue of judicial estoppel.

“In order for an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial court.” *Cullen v. McNeal*, 390 S.C. 470, 492, 702 S.E.2d 378, 390 (Ct. App. 2010)(citing *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000)). “A party must ‘present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.’” *Id.* (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)); *Armstrong v. Collins*, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct. App. 2005)(holding that an issue was

not preserved for review on appeal where the argument was not presented to the trial court and the court was not given an opportunity to rule on it).

Because the Order is silent on the issue of judicial estoppel, and Appellants conceded to the trial court that they were not making an argument of judicial estoppel, Appellants judicial estoppel arguments have not been preserved for appellate review and should be summarily rejected. Appellants should not represent to the trial court that an argument is not being made and then use that argument before the Court of Appeals.

IV. THE TRIAL COURT DID NOT IMPEDE PLAINTIFF'S RIGHT TO A JURY TRIAL

Appellants have not been denied their right to a jury trial because, by dismissing the action without prejudice, the trial court did not foreclose Appellants from bringing their action if and when it is ripe. As previously discussed, Appellants claims are not justiciable; therefore, the trial court did not abuse its discretion in dismissing Appellant's declaratory judgment action. Here, the trial court dismissed Appellant's claim *without prejudice*. Further, the trial judge expressly stated:

I'm going to declare that you don't have standing at this point. But, I don't want to limit your ability to come back later should you prevail. ... [W]hat I'm saying is that this is not ripe. This issue is not ripe for the Court to hear. ...[B]ecause it's not ripe, you don't have the standing to bring it. ... I'm not cutting [Appellant] off completely.

(R. p. 82, lines 22-25; p. 83, lines 1-4). Further, the trial judge clarified "[t]his lawsuit is dismissed. ... [B]ut it's not with prejudice. ... So if you prevail ... in the underlying action, you pursue whatever you think ... my ruling would not impact what happens down the road. This is just not ripe[.]" (R. p. 84, lines 16, 18-23. Because the trial court dismissed Appellant's claim without prejudice, and expressly told Appellants that they could bring this action again should

they prevail in the underlying action, Appellants are not deprived of their right to a jury trial on the declaratory judgment action. *See e.g. Truluck v. Snyder*, 362 S.C. 108, 606 S.E.2d 792 (Ct. App. 2004) (finding that a dismissal *without prejudice* “did not compromise a claimant’s right to demand a jury trial” in a later proceeding), *abrogated on other grounds by Fulmer v. Cain*, 380 S.C. 466, 670 S.E.2d 652 (2008). Thus, there is no error by the trial court, and its Order should be affirmed.

CONCLUSION

This Court should uphold the trial court’s Order finding that this action is not ripe, a finding that Appellants did not preserve for appeal. In the alternative, this Court should also affirm that Appellants lacked standing to bring this declaratory judgment action, because Appellants are third parties to the contract and have failed to establish that they would be affected by the declaration that they seek.

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