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Jan 10 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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 BlackRespondents.

Appellate Case No. 2022-000576

APPELLANTS' FINAL REPLY BRIEF

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I. REPLY TO DEFENDANTS/RESPONDENTS SOUTH WIND RANCH, RONALD HAKALA, AND ASHLEY BLACK'S ARGUMENTS

A. The underlying action.

The respondents continue to misstate the facts, which is important because this is an appeal of a motion to dismiss. On page one (1) of the respondent's brief, they state that the appellants chose to cancel their wedding with South Wind Ranch. That is not true. South Wind unilaterally changed its price and attempted to use the pandemic to profit from the appellants' vulnerable position, which forced the appellants to seek an affordable option. It is not important at this stage to prevail upon those merits, however, but only to point out that the appellants' allegations must have been taken as true by the trial court. The respondent's motion to dismiss was denied by the trial court because to grant it would have been reversible error in violation of Rule 12 and the case law interpreting it. See *SCRCP* 8 and 12, as well as *Baird v. Charleston County*, *Stiles v. Oranato*, and others.¹

B. The declaratory judgment action.

Respondents are correct that Appellants discovered insurance coverage in the course of discovery. In South Carolina, an insurer must provide a defense if there is arguable coverage in the face of the complaint. Clearly, there is arguably coverage in this case. Scottsdale simply refused to discharge its duty to defend, despite the trial court's denial of the motion to dismiss, and the negligence and other causes of action going forward. The proper vehicle for determining Scottsdale's duties is a declaratory judgment action, which the appellants filed. See *Snakenburg v. Hartford*, 383 S.E.2d 2, 299 S.C. 164 (S.C. Ct. App 1989), *S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n v. Ferry*, 291 S.C. 460, 354 S.E.2d 378 (1987) and others.

¹ The trial court has now granted summary judgment even though multiple deposition transcripts were submitted supporting the appellants' claims, and as a result, that action is now on appeal.

C. Dismissal of declaratory judgment action.

The respondents simply refer to the trial court's erroneous dismissal of the declaratory judgment action. The declaratory judgment statute exists to establish rights and coverage. Scottsdale and other insurers regularly file these actions for this reason. For reasons stated below, Scottsdale is judicially estopped from taking the position it has. It also violates the Equal Protection Clause to deny the appellants access to this relief while allowing Scottsdale and other insurers to regularly use the statute for its intended purpose. 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 S.W.3d 72 (Tex. Ct. App. 5th Dist. 2001).

D. Disposition of underlying claim.

The respondents are correct that the court granted summary judgment – despite the appellants' submission of ample evidence in support of their claims. The appellants have filed a motion to reconsider and plan to file an appeal if the trial court does not alter or amend its ruling to comply with the rules and case law. The lower court's ruling is at odds with *SCRCP 56*, *Hancock*, and its progeny.

E. This appeal is not moot.

If the respondents' position were correct, the Court of Appeals would not have decided on any declaratory judgment action cases filed while an underlying action was pending, including the declaratory judgement actions filed by The Hartford. The Appellate Court has reviewed such cases repeatedly, and a body of case law exists because of these reversals. Not only is this appeal not moot, but it is also related to a dismissal in violation of the plain language of the declaratory judgment statute.

F. The declaratory judgment action allows plaintiffs to name insurers.

The respondents have repeatedly confused the improper claims practices act with the declaratory judgment statute. A declaratory judgment action is synonymous with a claim for third-party bad faith or a private cause of action for improper claims practices. This is a red herring and the respondents have worn it out. As previously stated in the appellants' initial brief, *Kleckly* and *Trancik* are not declaratory judgment actions. Reliance upon those cases by the trial court, accomplished through the adoption of the defendant's proposed order, was misplaced.

G. Standing

As stated in the appellants' initial brief, the declaratory judgment statute provides that any affected party may file a declaratory judgment action. Clearly, the appellants are affected and have named the proper parties. The respondents' justiciability argument is also not convincing. The declaratory judgment statute does not require privity of contract, but rather allows parties affected to file such an action. This also applies to standing. Any affected party may file a declaratory judgment action.

H. Declaratory judgment action is broadly written.

The respondents contend Appellants read the statute too broadly, but, in actuality, the statute is simply broadly written. "Any affected party" is the language of the legislature, not the appellants. Scottsdale has taken advantage of this broad language many times and cannot in good faith argue that the appellants are barred from doing the same.

II. REPLY TO RESPONDENT SCOTTSDALE INSURANCE, CO.'S ARGUMENTS

A. The appellants are parties within the broad language of the Uniform Declaratory Judgments Act.

Like South Wind, Scottsdale focuses upon standing. However, it is clear that any affected party has standing to file a declaratory judgment action. Scottsdale cannot get around the

legislature's clear language or the fact that it flatly refused to provide a defense where there was far more than arguable coverage on the face of the complaint. "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.

The reversible error of the Court's order is clear. On page four (4) of Scottsdale's brief it describes the Court's ruling that the appellants are "uninterested" parties. Scottsdale ignores, in this part of its brief, the fact that it regularly files declaratory judgment actions against claimants like the appellants. 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 S.W.3d 72 (Tex. Ct. App. 5th Dist. 2001). What is good for the goose is good for the gander. If Scottsdale is "interested" because it may have to pay money to claimants, then claimants like the appellants are "interested" when Scottsdale may be on the hook to pay them and to provide a defense to insureds like South Wind.

B. The appellants have preserved all issues for appeal

Scottsdale wants form to be more important than substance because substantively, South Wind has no argument. Form arguments fail too, though. Despite being limited by the trial court, the appellants preserved all issues for appeal with their motion to reconsider.

C. The appellants sought a declaration of coverage, which is proper under the declaratory judgment statute.

Scottsdale again attempts to turn a declaratory judgment action into a third-party bad faith action because it knows it loses on the declaratory judgment issue. Again, *Kleckley* and *Trancik* have nothing to do with declaratory judgment actions, and the appellants never brought an action for third-party bad faith. It is abundantly clear that Scottsdale has in fact acted in bad faith, but that is not the cause of action the appellants brought, and Scottsdale cannot make it so by saying it repeatedly.

D. Scottsdale is judicially estopped from arguing the appellants cannot file a declaratory judgment action.

Scottsdale regularly files declaratory judgment actions against claimants like the appellants. See *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546 (6th Cir. 2008); *Scottsdale Ins. Co. v. Rounph*, 211 F.3d 964 (6th Cir. 2000); *Scottsdale Ins. Co. v. Travis*, 68 S.W.3d 72 (Tex. Ct. App. 5th Dist. 2001). Additionally, Scottsdale argues that the appellants did not preserve the issue for appeal while, at the same time, time quoting language from the hearing where the court cut counsel for the appellants off during argument. Scottsdale cannot argue that the appellants did not preserve the issue and at the same time quote language where the court prevented the appellants' counsel from articulating the appellants' argument. Scottsdale points to an exchange about estoppel on page seventeen (17) of its brief. This exchange was about the Court assuming that the appellants

wanted to make an estoppel argument related to the Court denying a motion to dismiss in the underlying action, not that Scottsdale is judicially estopped from taking a position completely opposite to the position it takes in every declaratory judgment action it files against claimants like the appellants.

Moreover, the appellants went above and beyond what is required for preservation of appellate issues by preserving all issues related to the case in any way in their Rule 59(e) motion.

E. The ruling violates the appellants' state and constitutional rights.

Clearly, preventing the appellants from a jury trial guaranteed by the declaratory judgment statute, the South Carolina Constitution, and the Seventh Amendment of the United States Constitution violates the appellants' right to a jury trial. The right to a jury trial is among the most important rights held by American citizens. The Court's deprivation of this right in spite of the plain language of the declaratory judgment statute, South Carolina Constitution, and United States Constitutions demands redress.

CONCLUSION

For the foregoing reasons, the appellants respectfully request the Appellate Court reverse the Trial Court and remand the case for further proceedings.

Respectfully submitted,

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Certificate of Counsel

The undersigned hereby certifies that the final reply brief complies with Rule 211(b), SCACR.

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