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Mar 23 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
Muxlow.....Appellants,

v.

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

**RESPONDENT SCOTTSDALE INSURANCE COMPANY'S RETURN TO
APPELLANTS' MOTION TO CONSOLIDATE APPEAL NO. 2023-000081 WITH
APPEAL NO. 2022-000576**

COMES NOW, Scottsdale Insurance Company (“Scottsdale”) and hereby responds to Appellants’ Motion to Consolidate Appeal No. 2023-000081 with Appeal No. 2022-000576 as follows:

BACKGROUND

Appellants seek to have Appeal No. 2022-000576 (the “Present Appeal”) consolidated with Appeal No. 2023-00081 (the “Wienands Appeal”) based on the misguided premise that these two appeals raise questions that are allegedly “integrally related.” As illustrated in detail below, consolidation of these appeals is improper pursuant to Rule 214 SCACR because the appeals involve different parties, do not involve the same Order from the Trial Court, and do not raise the same questions.

The Alleged Injury: Appellants Gregory and Charlotte Muxlow (the “Muxlows”), 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 the Muxlows’ wedding. The Muxlows and Christian Wienands (“Wienands”), the father of the bride, paid non-refundable deposits pursuant to the wedding venue contract. In or around July 2020, due to the COVID-19 pandemic, the Muxlows contacted the Insureds about postponing their wedding. Shortly thereafter, the Muxlows requested new dates to reschedule the postponed wedding.

Twelve days after deciding to postpone the wedding, the Muxlows cancelled their contracts with the Insureds. Upon cancellation, the Muxlows requested their non-refundable deposits be returned to them. The Insureds refused to refund the non-refundable deposits. On January 26, 2021, the Muxlows filed suit against the Insureds in the matter of *Christian Wienands, et al. v. South Wind Ranch Holdings LLC, et al.* (c/a no. 2021-CP-23-00416) (the

“Underlying Lawsuit”) in the Greenville County Court of Common Pleas. The Underlying Lawsuit is the subject of the Wienands Appeal. Scottsdale is not a party to the Underlying Lawsuit.

Facts Relevant to the Wienands Appeal¹: The Underlying Lawsuit is an action brought by the Muxlows and Wienands (the “Wienands Appellants”) against the Insureds, alleging claims for negligence and recklessness, South Carolina Unfair Trade Practices Act violations, breach of contract accompanied by fraudulent act, and quantum meruit. On January 26, 2022, the Insureds filed a Motion for Summary Judgment in the Underlying Lawsuit. On or around May 9, 2022, the Honorable J. Derham Cole heard the Insureds’ Motion for Summary Judgment, which was granted by the Trial Court via Form 4 Order dated August 21, 2022, as well as by an Order dated September 16, 2022.² In the September 16, 2022 Order, Judge Cole found that the Insureds were entitled to summary judgment because the contract(s) between the Muxlows and the Insureds precluded all of the Wienands Appellants’ claims. On September 23, 2022, the Wienands Appellants filed a Motion to Reconsider, which was subsequently denied by the Trial Court on January 16, 2023.

On January 19, 2023, the Wienands Appellants filed the Wienands Appeal; wherein, they indicate they are appealing the January 16, 2023 Order. Via a footnote in the Notice of Appeal, the Wienands Appellants also identified they were appealing the September 16, 2022 Order. As

¹ Because Scottsdale was not a party to the Underlying Lawsuit and is not a party to the Wienands Appeal, Scottsdale reiterates these facts based on the public record from the Trial Court, as well as the briefs filed by the parties in the Present Appeal. Scottsdale does not have first-hand knowledge of the facts and filings regarding the Underlying Lawsuit or the Wienands Appeal.

² The Trial Court also heard the following motions: Motion for Protective Order; Motion to Compel; and Motion to Amend the Complaint. These motions were filed by the Muxlows and Wienands, and subsequently denied by the Trial Court.

of the date of this Return, the Wienands Appellants have not filed an Initial Brief in the Wienands Appeal; thus, it is unclear what questions are being raised in the Wienands Appeal.

Through the course of discovery in the Underlying Lawsuit, the Muxlows learned that the Insureds maintained a Commercial General Liability Policy (“the Policy”) with Scottsdale. On August 4, 2021, the Muxlows, through counsel, sent a letter entitled “Official Notice of Nationwide’s Bad Faith” to Scottsdale. On August 23, 2021, Scottsdale sent a letter to the Muxlows denying their claim for Scottsdale to tender a defense to its Insureds in the Underlying Lawsuit.³ As a result of Scottsdale’s denial letter, on August 26, 2021, while the Underlying Lawsuit was still ongoing in the Greenville County Court of Common Pleas, the Muxlows filed this declaratory judgment action with the trial court.

The Present Appeal: This appeal stems from the trial court’s granting Scottsdale and the Insureds’ Motion(s) to Dismiss (the “Motions”). This case involves a declaratory judgment action, filed by the Muxlows⁴ against Scottsdale and the Insureds, seeking a determination of insurance coverage under a policy for insurance between South Wind Ranch Holdings, LLC (“South Wind”) and Scottsdale. On October 18, 2021, Scottsdale filed a Motion to Dismiss the declaratory judgment action on the grounds that Appellants, as third parties to the insurance policy, lack standing to bring a direct action against Scottsdale.⁵ On January 10, 2022, the Honorable Edward W. Miller heard the Motions and determined that the Muxlows’ claims were not ripe for judicial determination and the Muxlows lacked standing to bring this declaratory judgment action because the Muxlows are not parties to the contract. On February 8, 2022, the

³ Scottsdale notes that the Request to Tender a Defense at issue in this case was made by the Appellants, *not* Scottsdale’s insureds.

⁴ Christian Wienands is not a party to the declaratory judgment action. Likewise, Wienands is not a party to the Present Appeal.

⁵ The Insureds Motion to Dismiss was filed on October 14, 2021. The Insureds Motion to Dismiss was also based on the Muxlows lack of standing.

Muxlows filed a Motion to Reconsider, which was subsequently denied by the Trial Court through an Order dated April 19, 2022. The Present Appeal followed.

On April 29, 2022, the Muxlows filed a Notice of Appeal for the Present Appeal, wherein, they indicate they are appealing the April 19, 2022 Order. The Muxlows filed an Initial Brief indicating 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

Scottsdale filed its Initial Brief on September 6, 2022, identifying the following 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

Similarly, on September 6, 2022, the Insureds filed their Initial Brief based on the following:

1. THE PRESENT APPEAL SHOULD BE DISMISSED
AS MOOT

2. THE TRIAL COURT CORRECTLY DISMISSED THE
ACTION AS SOUTH CAROLINA CASE LAW
PROHIBITS DIRECT CLAIMS AGAINST INSURERS
BY THIRD PARTIES

3. THE TRIAL COURT CORRECTLY HELD THAT
APPELLANTS LACK STANDING

On October 17, 2022, the Muxlows filed a Reply to Scottsdale and the Insureds’ Initial Briefs. The Record on Appeal in the Present Appeal was filed on December 8, 2022. Finally, on December 22, 2022, the Muxlows filed their Final Brief. The Insureds filed their Final Brief on December 20, 2022. Scottsdale filed its Final Brief on December 28, 2022. At this juncture, all briefings have concluded in the Present Appeal, and the Present Appeal is ripe for judicial determination and/or oral argument.

ARGUMENT

Appellants improperly ask this court to consolidate the Present Appeal with the Wienands Appeal—an appeal wholly unrelated to the April 19, 2022 Order and any questions which may be raised in the Present Appeal. Rule 214, SCACR, provides “[w]here there is more than one appeal from the same order, judgment, decision or decree, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its discretion, order the appeal to be consolidated.” S.C. App. Ct. R. 214 (emphasis added).

The Muxlows' Motion to Consolidate these appeals must be denied because the Present Appeal presents different issues from the Wienands Appeal. The underlying order(s) in the Wienands Appeal was not decided at the same time, or during the same hearing as the underlying order in the Present Appeal, nor do the orders of either appeal stem from the same judge or hearing transcript. Moreover, each appeal presents fundamentally different questions of law. The Present Appeal focuses on whether a third party to an insurance contract has standing to pursue a declaratory judgment against an insurer with whom that third party does not have contractual privity with, whereas the Wienands Appeal likely will focus on whether the Wienands court properly granted summary judgment in favor of the Insureds. Because the underlying orders of both appeals present different questions, and do not arise from the same order, hearing, or transcript, consolidation of these appeals is improper under S.C. App. Ct. R. 214.

Further, Appellants' Motion to Consolidate must be denied because consolidation would greatly prejudice Scottsdale because Scottsdale is not a party to the Wienands Appeal. Consolidation of these appeals would effectively force Scottsdale to incur the additional and unnecessary expense of participating in and defending an appeal for a case to which Scottsdale was not a party.

Finally, Appellants' Motion to Consolidate should be denied as untimely. The Muxlows filed the Present Appeal on April 29, 2022. Initial briefing of this appeal concluded on September 6, 2022. On September 16, 2022, the Wienands Appellants knew of the Trial Court's decision in the Underlying Action and had reason to believe an appeal may be forthcoming regarding that Order. If the interest of justice and economy served to consolidate these appeals, the Muxlows should have sought to stay the Present Appeal until such time as the Trial Court

decided Wienands Appellants' Motion for Reconsideration in the Underlying Case. That did not happen. Instead, the parties to the Present Appeal commenced with final briefing in this matter, wherein, judicial determination and/or oral argument of the Present Appeal is imminent.

CONCLUSION

Based on the foregoing, Appellants' Motion for Consolidation should be denied because the appeals Appellants seek to consolidate do not present the same question. Additionally, Appellants' Motion for Consolidation must be denied because consolidation, at this juncture, would substantially prejudice Scottsdale by forcing Scottsdale to incur costs to defend an appeal of a matter to which it is not a party.

s/Pamela J. Larson

Harriet Condon Ward (SC Bar No. 104279)

Pamela J. Larson (SC Bar No. 104181)

WOMBLE BOND DICKINSON (US) LLP

5 Exchange Street (29401)

P.O. Box 999

Charleston, SC 29402

(843) 720-4630

Pamela.larson@wbd-us.com

**Attorneys for Respondent
Scottsdale Insurance Company**

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PROOF OF SERVICE

I certify that on this date, March 24, 2023, I filed the foregoing Respondent Scottsdale Insurance Company's Return to Appellants' Motion to Consolidate Appeal No. 2023-000081 With Appeal No. 2022-000576 with the South Carolina Court of Appeals via electronic filing only, to ctappfilings@sccourts.org and served a copy on Appellants via electronic service, addressed to the attorneys of record below:

(ADDRESSEES AND SIGNATURE PAGE FOLLOWS)

Joshua T. Hawkins
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
Attorney for Appellant

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

WOMBLE BOND DICKINSON (US) LLP

s/Pamela J. Larson
Harriet Condon Ward (SC Bar No. 104279)
Pamela J. Larson (SC Bar No. 104181)
5 Exchange Street (29401)
P.O. Box 999
Charleston, SC 29402

**Attorneys for Respondent
Scottsdale Insurance Company**

Charleston, SC

March 23, 2023