THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Civil Action No. 2017-CP-07-02310
Appellate Case No. 2023-000354

Calvin C. "Skip" Hoagland and Lisa Sulka, ... Respondents

v.

Privilege Underwriters Reciprocal Exchange, ... Petitioner

RETURN TO MOTION TO DISMISS APPEAL AND IN SUPPORT OF WRIT OF CERTIORARI

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INTRODUCTION

Rather than file a Return to this Petition for Writ of Certiorari asking this Court to consider the correctness of the Court of Appeals' *sua sponte* dismissal of the appeal in this matter, the Respondent Lisa Sulka ("Sulka") filed a "Motion to Dismiss Appeal" in this Court. Petitioner Privilege Underwriters Reciprocal Exchange ("PURE") moved for additional time to file a Reply, stating it would construe the Motion as a Return, but the Court informed PURE that the "Motion to Dismiss Appeal" stayed all further time limits and there would be no action on the Reply extension request. *See* "No action letter" of this Court dated April 21, 2023. PURE thus instead sought an extension to file a Return to the Motion to Dismiss Appeal, which was granted. PURE now files this Return to the Motion to Dismiss Appeal, and incorporates the arguments it made in its Petition for Writ of Certiorari herein.

ARGUMENT

If the June 2022 Order of the trial court in question (hereinafter "vacating order") was a simple denial of a summary judgment motion, the parties would not be here before this Court. All agree the denial of summary judgment is not appealable. Instead, what is the before this Court is whether a circuit court can grant summary judgment in favor of a party against two other parties, then five (5) months later vacate that summary judgment—not on any ground raised in a motion to reconsider—but instead *sua sponte* under Rule 60, SCRCP. PURE contends the circuit court is without power to do this, and hence, it appealed.

In the Motion to Dismiss Appeal at p. 16, Sulka notes: "It is true that in some jurisdictions courts have found that an order vacating a prior order under Rule 60 is immediately appealable if the trial court did not have authority to vacate the order under the Rule, but if the trial court did have such authority, the order is not immediately appealable." Exactly. PURE's contention is the

circuit court had no authority to enter the vacating order, and thus, under the circumstances, its vacating order must itself be vacated, which would lead to the reinstatement of the circuit court's summary judgment in favor of PURE. However, the Court of Appeals has, respectfully, improperly foreclosed any examination of this vacating order by its own *sua sponte* dismissal of PURE's appeal. As a result, PURE has sought this Petition for Writ of Certiorari to reverse the Court of Appeals' dismissal and reinstate the appeal.

As stated in the Petition for Writ of Certiorari, this is a highly unusual matter involving judicial power limits which warrants this Court's review. The Court of Appeals ruled that the vacating order at issue was not immediately appealable, and the Court of Appeals accepted the label of the vacating order as a "denial of summary judgment." But that is not really what the vacating order was. Rather, *certiorari* should be granted because the Court of Appeals' dismissal (and the Motion to Dismiss appeal) are both inconsistent with this Court's precedent on appealability being determined based on the "effect" of an order, rather than its label. *See Morrow v. Fundamental Long-Term Care,* 773 S.E.2d 144 (2015) (holding that appealability depends on the effect, rather than the style or the name, of the order).

Further, the Court of Appeals' dismissal (and the Motion to Dismiss Appeal) are both inconsistent with this Court's precedent regarding the lack of judicial power to make *sua sponte* changes to a judgment after the expiration of ten days from that judgment. *Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 530 S.E.2d 127 (2000). The Court of Appeals' dismissal (and the Motion to Dismiss Appeal) are both also inconsistent with precedent regarding granting of relief based on grounds not moved for and regarding defective Rule 59(e), SCRCP, motions. In addition, and as noted in the Petition, the vacating order isn't a "mistake" correction order under Rule 60(a), SCRCP. Finally, neither the Court of Appeals' dismissal order (nor Sulka's Motion to Dismiss

Appeal) addressed the fact that Calvin Hoagland ("Hoagland") never challenged PURE's summary judgment motion, made no motion under Rule 59(e) regarding the summary judgment order in favor of the PURE and against him, and did not appeal the summary judgment order in favor of PURE against him. At minimum, the circuit court had no power to issue a vacating order granting relief from the summary judgment order as to Hoagland. This Court should grant *certiorari,* reverse the Court of Appeals' dismissal of the appeal, deny the Motion to Dismiss Appeal, and remand for the appeal to proceed on its merits (or this Court could certify the appeal to itself for handling).

In her Motion to Dismiss Appeal, Sulka makes various insinuations that PURE acted "strangely," and "tacitly" conspired with Hoagland to create a setting where Sulka would be unable to pursue liability insurance proceeds in her litigation directed at Hoagland. Sulka points to an agreement (and later settlement) addressing a different claimant – Kim Likens. However, the very agreement Sulka references with respect to the claim of Likens specifically and expressly does not affect Sulka. See Exhibit 7 to Motion to Dismiss Appeal, at p. 4 "The Parties also agree that nothing in this agreement shall be used by either party in relation to the Sulka Action or those portions of the DJ Action with relate to the Sulka Action or Lisa Sulka." Sulka presented no evidence of any conspiracy or agreement between Hoagland and PURE with respect to ***her*** when she opposed PURE's summary judgment motion. Instead, the only thing she references regarding herself is an email proposal by Hoagland to PURE requesting an agreement proposal that PURE ***declined***. See Exhibit 19 to Motion to Dismiss Appeal, at p. 5, describing emails from Hoagland requesting PURE to agree to a course of conduct regarding Sulka, and admitting PURE did not agree. The evidence PURE presented in favor of its summary judgment motion due to lack of cooperation was overwhelming – Hoagland emphatically took the position he was going to refuse

to defend himself or cooperate in the court process, and this was shown to the circuit court. Hence, the circuit court properly granted PURE summary judgment. From there, events took an unusual turn.

It is true that Sulka moved to reconsider the grant of summary judgment to PURE (and equally true that Hoagland did not). However, as further explained below, Sulka only made a ***single*** argument in that motion to reconsider, which was a different argument from what she had made in opposing the motion for summary judgment. As the summary judgment for PURE stood and after the automatic ten (10) day stay period expired on its enforceability as a judgment, Sulka proceeded to trial against Hoagland and achieved a $50 million verdict against him (wherein Hoagland did not appear or defend and wherein Hoagland personally emailed the clerk of court during the trial, asking for a verdict against himself for $10 million). Then, five (5) months after granting summary judgment to PURE, the circuit court issued an order vacating that summary judgment grant and stated in the order an intention to "grant coverage" to Hoagland, based on a mistake. This vacating order is not the simple denial of summary judgment as charactered by Sulka.

The below questions were presented for review by the Petition for Writ of Certiorari. Underneath each question is the Motion to Dismiss Appeal response.

Questions Presented for Review

1. Whether the Court of Appeals erred in finding the circuit court's June 7, 2022, order vacating its January 20, 2022, order was not immediately appealable where Sulka's motion to reconsider was improper and therefore did not toll time limits for appeal, rendering the earlier summary judgment for PURE final for purposes of appeal?

Sulka does not address any of these points in the Motion to Dismiss Appeal.

2. Whether the Court of Appeals erred in finding the circuit court's June 7, 2022, order vacating its January 20, 2022, order, was not immediately

> appealable where the circuit court's decision rested, not on arguments raised in Sulka's motion to reconsider, but instead on a *sua sponte* "mistake" basis, thus depriving PURE of due process, and affecting the substantial rights of PURE?

Sulka does not address any of these points in the Motion to Dismiss Appeal.

> 3. Whether the Court of Appeals erred in finding the circuit court's June 7, 2022, order vacating its January 20, 2022, order was not immediately appealable where Hoagland did not challenge the June 20, 2022, order, and thus the circuit court did not have any jurisdiction to vacate a judgment regarding Hoagland in response to another party's motion?

Sulka does not address any of these points in the Motion to Dismiss Appeal.

Sulka instead makes two arguments in her Motion to Dismiss Appeal: (1) PURE has not "lost" anything yet, because it can still raise the points it raised before, or others, to the circuit court; and (2) the circuit court was authorized under Rule 60(a), SCRCP to issue the vacating order.

As to point (1), Sulka admits in the quote from her own motion above that if the trial court had no authority to issue the Rule 60(a), SCRCP order, then the order is immediately appealable.

Sulka's main point is thus point (2)—that the vacating order was proper under Rule 60(a), SCRCP. However, for the reasons that follow, the vacating order was not proper and was issued without authority.

First, the trial court's exercise of jurisdiction was, at the time of the vacating order, limited only to Sulka's motion to reconsider. That motion to reconsider raised a solitary improper argument, and thus should be treated as a nullity. When a party makes an argument for the first time in a motion to reconsider that it could have made initially, that argument is improper and should not be considered. *Patterson v. Reid*, 456 S.E.2d 436 (Ct. App. 1995) (noting a party cannot for the first time raise by 59(e) motion an issue which could have been raised at trial); *Stevens &*

Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 566–67, 762 S.E.2d 693, 695 (2014) (finding that defendant's issue was not preserved when it was raised for first time in Rule 59(e) motion to amend judgment after trial court granted partial summary judgment in favor of plaintiff).

Consequently, the single argument motion to reconsider was procedurally defective, and therefore, should be considered as a nullity. Because Sulka's motion to reconsider was procedurally barred from consideration, it should not have tolled any timelines to appeal, and thus, the January 2022 summary judgment order should have matured into a final judgment for purposes of appeal[1] after the passage of 30 days. *Cf. Elam v. South Carolina Dept. of Trans.*, 602 S.E.2d 772 (1994) (holding a procedurally defective Rule 59 motion does not stay any time limits, including time for appeal).

Because Sulka's motion to reconsider raised only one argument, and that one argument had not been raised previously (but could have been), it was not a proper motion to reconsider. This was noted and pointed out to the circuit court, which improperly proceeded nonetheless to issue the vacating order. As will be noted further below, but bears repeating, Hoagland made no motion to reconsider nor took any appeal.

Second, the circuit court did not address the singular argument made in Sulka's motion to reconsider, but nonetheless granted relief to Sulka via the vacating order. This too is improper *See, e.g., Friedberg v. Goudeau*, 279 S.C. 561, 309 S.E.2d 758 (1983) (reversing order granting motion for summary judgment because ground on which motion granted not properly before the court); *Bass v. Bass*, 272 S.C. 177, 180, 249 S.E.2d 905, 906 (1978) ("Due process requires that a litigant be placed on notice of the issues which a court is to consider."); *Skinner v. Skinner*, 257 S.C. 544,

[1] The summary judgment order was final after ten (10) days for purposes of enforceability and no stay motion was made by Sulka. Rule 62, SCRCP.

186 S.E.2d 523 (1972) (in granting a motion, a court ordinarily may not grant relief beyond the scope of the motion).

In *Turbeville v. Floyd*, counsel for the defendants argued that summary judgment should be granted on the three grounds set forth in the motion and plaintiff's counsel argued that it should not. 288 S.C. 171, 173-74, 341 S.E.2d 651, 652–53 (Ct. App. 1986). The circuit court's order, however, granted summary judgment "not on any of the three grounds set out in the notice of motion" but on a different ground that was not included in the notice of motion or argued by the movant to the circuit court. *Id*. The Court of Appeals found that such was a reversible error, noting that one of the "basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefor" and "[o]rdinarily, a court may not grant relief beyond the limits or scope of such notice." *Id*.

Third, the circuit court decided here, on a *sua sponte* basis, that it had made a "mistake" and had not intended to grant summary judgment to PURE in the January 2022 order. A circuit court has only ten (10) days from entry of judgment to alter or amend an earlier order on its own initiative absent a "reservation" of jurisdiction in the form order. *Leviner v. Sonoco Prod. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) ("When no timely Rule 59 motion was made nor timely *sua sponte* order filed under Rule 59(e), the January form order 'matured' into a final judgment."). *See also Ness v. Eckerd Corp.*, 350 S.C. 399, 402–03, 566 S.E.2d 193, 195 (Ct. App. 2002) (same); *Heins v. Heins*, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001) (same). Here, the January 2022 order granted partial summary judgment to PURE, and contained no reservation. Thus, at the time of the June 2022 order "vacating" the grant of summary judgment and "substituting" in an order "denying" summary judgment, the ten-day period for altering or amending an order *sua sponte* had long since passed. Thus, the vacating order issued *sua sponte* is improper and a nullity.

Fourth, Rule 60(a), SCRCP does not grant circuit courts the unrestricted authority to *sua sponte* alter the scope of a prior judgment. Rule 60(a), SCRCP permits a court to correct "clerical mistakes in judgments, orders or other parts of the records" on its own initiative. A clerical error is "defined as a mistake in writing or copying" and for judgments is a mistake or omission by "a clerk, counsel, judge or printer which is not the result of exercise of judicial function." *Dion v. Ravenel*, 316 S.C. 226, 230, 449 S.E.2d 253 (Ct. App. 1994). Thus, "[w]hile a court may correct mistakes or clerical errors in its own process to make it conform to the record, it cannot change the scope of the judgment." *Id.* at 230, 449 S.E.2d at 253-54. Here, the circuit court's June 2022 order entirely altered the scope of the January 2022 order's judgment by denying, rather than granting, PURE's motion for summary judgment, twenty weeks after entering the initial order. Rule 60(a) does not provide a mechanism to achieve the circuit court's purported result. *See also, Blankenship v. Royalty Holding Co.,* 202 F.2d 77 (10th Cir. 1953) (where the record of the order was clear, and where all parties understood that an order granted judgment with prejudice, the trial court lacked authority to change the scope of judgment based on his intent to reflect that the order granted judgment without prejudice); *Morse Boulger Destructor Co. v. Camden Fibre Mills, Inc*., 239 F.2d 382 (3rd. Cir. 1956)(reversing lower court's attempted later amendment of judgment to include interest and reinstating prior judgment).

Moreover, contrary to the circuit court's reasoning in the August 2022 order denying PURE's motion to reconsider, *Landry v. Landry* does not empower a court to *sua sponte* alter the scope of judgment twenty two weeks after the entry of a judgment. 430 S.C. 153, 843 S.E.2d 491 (2020). The *Landry* opinion provides:

> The basic distinction between clerical mistakes and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of blunders in execution whereas the latter consist of instances where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or

> because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.

Id. at 161, 843 S.E.2d at 495 (quoting *Sartin v. McNair Law Firm*, 756 F.3d 259, 265 (4th Cir. 2014).

Landry involved a situation in a domestic relations case where an order, drafted by the husband's counsel for the use by the court, reflected the husband's agreement to pay the wife in a divorce a portion of his retirement funds. 430 S.C. at 158, 843 S.E.2d at 493. The husband's counsel prepared the proposed order with an agreement handwritten by the husband and wife. *Id*. Nine weeks later, the husband filed a Rule 60(a) motion indicating his counsel mistakenly included the provision regarding his retirement funds during the process of incorporating the handwritten terms into the order and that he had not agreed to that term. *Id.* In light of no record evidence of the family court determining the parties' intent as to the retirement provision in the handwritten agreement, this Court remanded the matter, noting that the family court sits in equity and such rulings can thus be considered in balancing the equities to achieve a fair overall result. *Id*. at 167, 843 S.E.2d at 498.

In contrast to *Landry*, here, the circuit court decided an issue of law and entered a form order, stating, "Plaintiff Privilege Underwriters Reciprocal Exchange's Motion for Summary Judgment is granted for the coverage as to Skip Hoagland." Yet, twenty weeks after granting the dispositive motion, the circuit court indicated, during a hearing and for the first time, that it had made a "mistake" and did not mean to grant summary judgment to PURE. In such an instance, the utilization of Rule 60(a) is improper. *Landry*, at 161, 843 S.E.2d at 495 (quoting *Sartin v. McNair Law Firm*, 756 F.3d 259, 265 (4th Cir. 2014)).

Fifth, Sulka's motion to reconsider did not raise "mistake," and therefore, the circuit court did not have the authority to, *sua sponte*, set aside the findings of the January 2022 order due to "mistake" under Rule 60(b) grounds. *See Woods v. Woods*, 418 S.C. 100, 122 n.10, 790 S.E.2d 906, 917 n.10 (Ct. App. 2016) (finding the lower court invoking Rule 60(b) on its own initiative was erroneous).

Lastly, and **sixth**, Hoagland did not challenge the summary judgment order at any time – did not oppose summary judgment, did not move to reconsider summary judgment, and did not appeal the summary judgment order. Thus, the January 2022 order's summary judgment grant in favor of PURE as to Hoagland must stand because the circuit court had no power to "deny summary judgment" (at minimum as to Hoagland) pursuant to a different party's motion to reconsider the January 2022 order. The circuit court's summary judgment order was final for all purposes as to Hoagland thirty (30) days after its issuance. Only Sulka moved to reconsider the January 2022 order granting of summary judgment to PURE. Sulka had no standing to move to reconsider on behalf of Hoagland, a party to whom she is adverse. As such, the circuit court's January 2022 order as to Hoagland is final for all purposes, and there was no basis for the circuit court to alter, amend, or otherwise affect its prior order as to Hoagland. An unappealed order is the law of the case. *Judy v. Martin*, 674 S.E.2d 151 (2009).

The vacating order makes no distinction between the parties, and purports in certain language to be granting a motion to reconsider and changing its earlier grant of summary judgment to PURE in its entirety. The circuit court had no power to do this, and this lack of power was pointed out to the circuit court. The circuit court did not expressly limit its order, however, and the Court of Appeals erred in not accepting the appeal to correct the circuit court's error and, at minimum, limit the vacating order in this regard. *See, e.g., Tupper v. Dorchester County*, 326 S.C.

318, 324, 487 S.E.2d 187, 190 (1997) (finding co-defendant's raising of statute of frauds issue not allowed to be asserted by other party who failed to assert the issue himself, no "bootstrapping" allowed).

Similarly, to the extent the vacating order indicates PURE was obligated to provide a defense to Hoagland, in spite of neither Hoagland nor Sulka moving for such relief, the circuit court lacked the authority to do so, and Sulka lacks standing to request it. The duty to defend is "a valuable right of the insured for which the insured pays and to which the insured is entitled by the very words of the policy." *Nationwide Mut. Ins. Co. v. Tate*, 313 S.C. 444, 447, 438 S.E.2d 266, 268 (Ct. App. 1993) (quoting *Nationwide Mutual Ins. Co. v. Simmonds*, 315 S.C. 404, 434 S.E.2d 277 (1993)). The duty to provide a defense is a contractual obligation paid for by Hoagland "for the protection of the insured" only. *Id*. *See also Shelby Mut. Ins. Co. v. Askins*, 307 S.C. 81, 413 S.E.2d 855, 859 (Ct. App. 1992) ("Fundamental to the concept of duty to defend is the requirement that the party seeking the defense must be an insured under a contract of insurance."). Sulka, a non-party to the insurance policy, does not have standing to demand such an obligation. *See, e.g., id.* (declining to extend the duty to defend to a third party and holding that the third party did not have standing to assert such a claim).

As a result, the Court of Appeals should have, at minimum, allowed the appeal and clarified that the vacating order could not alter the summary judgment grant to PURE as to Hoagland because it was final and unappealed.

CONCLUSION

Based on the arguments set forth above and in the Petition for Writ of Certiorari, this Court should issue a writ of *certiorari* to review and reverse the Court of Appeals' decision below dismissing the appeal; deny the Motion to Dismiss Appeal; and remand for an appeal on the merits

to the Court of Appeals (or certify the appeal to itself); and take such other actions as are just and proper under the circumstances.

Respectfully submitted,

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