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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis
Circuit Court Judge

Case No.: 2014-CP-45-00132
(Court of Appeals Case No.: 2021-000835)

South Carolina Farm Bureau Ins. Co. Plaintiff,

v.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, Arthur McKenzie, a/k/a Arther McKenzie, The Travelers Home and Marine Insurance Company, The United States of America acting by and through Its agency, The Internal Revenue Services and The South Carolina Tax Commission, Defendants,

Of whom Marion L. Driggers is the Appellant and The Travelers Home and Marine Insurance Company is the Respondent.

**RESPONDENT’S RETURN TO SOUTH CAROLINA FARM
BUREAU MUTUAL INSURANCE COMPANY’S
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

South Carolina Farm Bureau Ins. Co. (“Farm Bureau”) has moved this court for leave to file its proposed amicus curiae brief in the above captioned appeal. The Travelers Home and Marine Insurance Company (“Respondent”) respectfully submits this Return to Farm Bureau’s motion and requests that the same be denied. Farm Bureau’s proposed brief does not meet the requirements as prescribed by Rule 213, SCACR for an amicus curiae brief. Therefore, Farm Bureau’s motion for leave must be denied.

On May 23, 2022, Appellant Marion L. Driggers (“Defendant-Appellant”) filed his Initial Brief of Defendant-Appellant Marion L. Driggers. (Exhibit A). On June 22, 2022, Farm Bureau filed an Initial Brief of Plaintiff South Carolina Farm Bureau Ins. Co. (Exhibit B). On June 24, 2022, Respondent filed its Motion to Strike Plaintiff South Carolina Farm Bureau Ins. Co.’s Initial Brief and Initial Designation of Matter. (Exhibit C). In response, Farm Bureau filed its Return on June 29, 2022. (Exhibit D). Lastly, on July 6, 2022, Respondent filed its Reply to Farm Bureau’s Return to Respondent’s Motion to Strike. (Exhibit E).

After a review of all briefing related to the issue of striking Farm Bureau’s Initial Brief, on September 6, 2022 this Court granted Respondent’s Motion to Strike due to the fact that Farm Bureau is not a party in the above-captioned matter. (Exhibit F). Further, the court noted that if Farm Bureau wished to submit a brief as amicus curiae it must make a motion before the court to do so. *Id.* After waiting over nine months following receipt of this Court’s Order, on June 14, 2023 Farm Bureau motioned the court for leave to file a brief of amicus curiae. (Exhibit G). As permitted by Rule 213, SCACR Farm Bureau also attached its proposed brief along with the motion. *Id.* Interestingly, despite the nine month delay, the proposed Amicus Curiae Brief is substantially similar to the earlier “Initial Brief of Plaintiff” filed by Farm Bureau. *See Exhibits B and G.*¹

Rule 213, SCACR provides that an amicus curiae brief “may be filed only by leave of the appellate court granted on motion, or at the request of the appellate court.” Additionally, an amicus brief “shall be limited to argument of the issues on appeal as presented by the parties.” *Id.*; *See James v. Anne’s Inc.*, 390 S.C. 188, 193, 701 S.E.2d

¹ The only difference is two of the three issues have been omitted as well as some other nominal portions of the initial brief. *See Exhibits B and G*

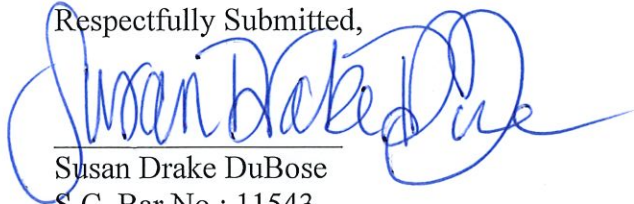
730, 732 (2010). A motion for leave to file an amicus curiae brief shall “identify the interest of the applicant and shall state the reasons why the brief of an amicus curiae is desirable.” *Id.* The Court has considered issues raised for the first time in an amicus brief but only when they concern a “matter of significant public interest.” *Ex Parte Brown*, 393 S.C. 214, 216, 711 S.E.2d 899, 900 (2011). This exception is applied narrowly and under only appropriate circumstances. *See State v. Langford*, 400 S.C. 421, 433, 735 S.E.2d 471, 477 (2012).

Farm Bureau’s proposed amicus brief is an improper attempt to go outside and expand the issues previously identified by the actual parties to this appeal. Pursuant to the South Carolina Appellate Court Rules, Farm Bureau is not permitted to add additional issues by way of an amicus brief that have not been previously identified by the actual parties to the appeal. Rule 213, SCACR. Here, Farm Bureau seeks to inject the argument of “standing” to bolster the arguments of Defendant-Appellant despite the issue of “standing” not being raised by the actual parties to this appeal. Furthermore, the South Carolina Supreme Court “has declined to rule on standing when it [is first] raised by amicus.” *S.C. Pub. Interest Found. v. Richland Cty.*, 436 S.C. 271, 281 (citing *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732-33 (2010)); *See also* Rule 213, SCACR (“The [amicus] brief shall be limited to argument of the issues on appeal as presented by the parties . . .”).

Accordingly, pursuant to the rules of this Court and South Carolina Supreme Court precedent, the issue of “standing” cannot be considered if it is first raised by amicus, as Farm Bureau attempts here. Clearly, Farm Bureau’s proposed amicus brief is not limited to the issues on appeal as presented by the parties to this appeal. Furthermore, there is no

significant public interest in the current matter to warrant granting the motion for leave to file the proposed brief. Therefore, Farm Bureau's motion to leave to file its amicus brief must be denied as it fails to comply with requirements of Rule 213 of the South Carolina Appellate Civil Rules and South Carolina law.

Respectfully Submitted,



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Columbia, South Carolina
June 26, 2023

EXHIBIT A

RECEIVED

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge
Case No.: 2014-CP-45-00132

Case No.: 2021-000835

South Carolina Farm Bureau Mutual Ins. Co.,

Plaintiff-Appellant,

v.

Marion L. Driggers,

Defendant-Appellant,

and

**Shiralee Driggers, Tammy D. Floyd, Estate of Arthur
McKenzie, The Travelers Home and Marine Insurance
Company, The United States of America acting by and
through Its agency, The Internal Revenue Service, and
The South Carolina Tax Commission,**

Of Whom,

The Travelers Home and Marine Insurance Company is the,

Defendant-Respondent.

INITIAL BRIEF OF DEFENDANT-APPELLANT MARION L. DRIGGERS

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May 23, 2022

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	4
FACTS	6
ARGUMENT	7
I. The Trial Court erred by granting summary judgment where (a) discovery has not been completed, and (b) additional inquiry into the facts of this case is necessary before any claims of Appellant/Defendant Marion L. Driggers may be summarily disposed of	7
II. The lower Court erred by granting interpleader “by consent,” effectively releasing the Defendant Travelers Home and Marine Insurance Company from further liability from all claims, where the record reflects that all Parties did not consent to the release of Travelers by such Interpleader	10
III. There are Genuine Issues of Material Fact that need to be resolved in this case, and those Issues of Material Fact should have precluded the lower Court from granting Summary Judgment in favor of Travelers	11
CONCLUSION	15

TABLE OF CASES AND AUTHORITIES

Cases	Page
<u>Baril v. Aiken Regl Med. Ctrs.</u> , 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002)	4
<u>Bayle v. South Carolina Dept of Transp.</u> , 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001)	5
<u>Cunningham v. Anderson County</u> , 402 S.C. 434, 741 S.E.2d 545 (S.C. App. 2013)	7, 10
<u>Dawkins v. Fields</u> , 354 S.C. 58, 580 S.E.2d 433 (2003)	5
<u>Ferguson v. Charleston Lincoln Mercury, Inc.</u> , 349 S.C. 558, 564 S.E.2d 94 (2002)	5
<u>Fleming v. Rose</u> , 350 S.C. 488, 567 S.E.2d 857 (2002)	4
<u>Fountain v. First Reliance Bank</u> , 398 S.C. 434, 730 S.E.2d 305 (S.C. 2012)	12
<u>George v. Fabri</u> , 345 S.C. 440, 548 S.E.2d 868 (2001)	5
<u>Grecy v. S.C. Bank & Trust Co.</u> , 422 S.C. 509, 812 S.E.2d 750 (S.C. App. 2018)	12
<u>Hendricks v. Clemson Univ.</u> , 353 S.C. 449, 578 S.E.2d 711 (2003)	4
<u>Lanham v. Blue Cross & Blue Shield of S.C., Inc.</u> , 349 S.C. 356, 563 S.E.2d 331 (S.C. 2002)	7, 8, 10
<u>Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers</u> , 355 S.C. 104, 584 S.E.2d 375 (2003)	4
<u>Lee v. Chesterfield Gen. Hospital, Inc.</u> , 289 S.C. 6, 344 S.E.2d 379 (S.C. App. 1986)	14
<u>McNair v. Rainsford</u> , 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998)	4
<u>Park v. Safeco Insurance Company of America</u> , 251 S.C. 410, 162 S.E. 2d 709 (1968)	13

<u>Peterson v. West American Ins. Co.</u> , 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999)	5
<u>Regions Bank v. Schmauch</u> , 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003)	4, 5
<u>Redwend Ltd. Pship v. Edwards</u> , 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003)	4
<u>Russell v. Wachovia Bank, N.A.</u> , 353 S.C. 208, 578 S.E.2d 329 (2003)	4
<u>Sauner v. Public Serv. Auth.</u> , 354 S.C. 397, 581 S.E.2d 161 (2003)	4
<u>SSI Med. Servs., Inc. v. Cox</u> , 301 S.C. 493, 392 S.E.2d 789 (1990)	5
<u>Trivelas v. South Carolina Dept of Transp.</u> , 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001)	5
<u>USAA Property and Cas. Ins. Co. v. Clegg</u> , 377 S.C. 643, 661 S.E.2d 791 (S.C. 2008)	11
<u>Young v. South Carolina Dept of Corrections</u> , 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999)	4

Statutes and Authorities

S.C. Code Ann. §38-75-20	9
S.C. Code Ann. §28-75-350	9
Rule 56(c), SCRCP	4, 5

INTRODUCTION

This is an appeal from Williamsburg County, Court of Common Pleas, of two Orders issued by the Honorable Kristi F. Curtis, which were entered on March 4, 2021 and March 30, 2021, whereby the Court granted Motions for Summary Judgment previously filed by Defendant-Respondent Travelers Home and Marine Insurance Company ("Travelers"), and a third Order entered on April 19, 2021, which granted Traveler's claim for Interpleader in the Court below.

STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court err in granting summary judgment where (a) discovery had not been completed, and (b) additional inquiry into the facts of this case is necessary before any claims of Appellant/Defendant Marion L. Driggers may be disposed of as a matter of law?
- II. Did the Williamsburg County Court of Common Pleas commit reversible error by granting Interpleader "by consent," effectively releasing the Defendant Travelers Home and Marine Insurance Company from further liability from all claims, where the record reflects that all Parties did not consent to such release of Travelers?
- III. Are there Genuine Issues of Material fact such that Summary Judgment and Interpleader to Travelers should have been denied?

STATEMENT OF THE CASE

This appeal arises from a suit filed in Williamsburg County, Court of Common Pleas, by South Carolina Farm Bureau Insurance Company, on or about March 7, 2014. The case was brought against Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, the Estate of Arthur McKenzie, The Travelers Home and Marine Insurance Company, the United States of America acting by and through its agent, The Internal Revenue Service, and The South Carolina Tax Commission. The case, primarily a declaratory judgment action, arises from the fire damage and loss to a house located in Williamsburg County, that was insured by two different insurance policies, issued by two different insurance companies, to two different named insureds, on the same property. The declaratory judgment action includes causes of action for Declaratory Judgment, Misrepresentation, Breach of Contract, and Equitable Indemnity. South Carolina Farm Bureau's Complaint seeks (a) a determination of the insured value of the property in question at the time of loss, (b) the ownership or distribution of the insurable interests in the property at the time of such loss, and (c) the amount due under each insurance policy, and to whom, as a result of such loss. South Carolina Farm Bureau, argued that it was not liable for a claim submitted by its insured, Marion L. Driggers, as the policy proceeds paid by Travelers to Defendant Arthur McKenzie already exceeded the value of the property in question. (Complaint, pp. 5-6) Defendants Marion L. Driggers, Shiralee Driggers and Tammy D. Floyd answered the complaint on April 8, 2014, asserting counterclaims against Arthur McKenzie and Travelers and arguing that McKenzie did not have an insurable interest in the property due to his violation of a lease-purchase agreement between the parties, and that

Travelers and McKenzie conspired to avoid payment of viable claims by the remaining defendants and failed to appropriately investigate this claim. (Answer of Driggers, Driggers and Floyd, pp 6-8.) After the Plaintiff filed an Amended Complaint on July 13, 2016, Defendant Travelers filed an Answer, that contained a counterclaim for Interpleader and contribution, which acknowledged that it denied the claim of Marion Driggers and that Defendant Driggers had a policy of insurance with Farm Bureau for the same property. (Travelers Answer, p.2, 6-8.)

After hearing various motions filed by the parties for Summary Judgment, along with the Travelers Motion for Interpleader, the Court granted the Travelers Motion for Summary Judgment. The lower court issued Orders on March 4, 2021 and March 31, 2021 granting summary judgment and an Order on April 19, 2021 dismissing Travelers from this action.

Appellant, Marion L. Driggers appeals to this Court the following Orders issued by the lower court:

- (1) March 4, 2021 Order granting Summary Judgment to Travelers on Civil Conspiracy, Breach of Contract, and Bad Faith, reconsideration denied on June 25, 2021; and
- (2) March 30, 2021 Order granting Summary Judgment to Travelers on Equitable Estoppel, reconsideration denied on April 12, 2021; and
- (3) April 19, 2021 granting Travelers Interpleader, and otherwise dismissing Travelers from the action.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court shall apply the same standard which governs the trial court under Rule 56(c), SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003); Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003); Redwend Ltd. Pship v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Sauner v. Public Serv. Auth., 354 S.C. 397, 581 S.E.2d 161 (2003); Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003); McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998); see also Laurens Emergency Med. Specialists, 355 S.C. at 108, 584 S.E.2d at 377 (stating that in reviewing summary judgment motion, facts and circumstances must be viewed in light most favorable to non-moving party). If triable issues exist, those issues must go to the jury. Baril v. Aiken Regl Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); Young v. South Carolina Dept of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Russell v. Wachovia Bank, N.A., 353 S.C. 208, 578 S.E.2d 329 (2003); Regions Bank, 354 S.C. at 659, 582 S.E.2d at 438; Rule 56(c), SCRPC. All

ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Bayle v. South Carolina Dept of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); see also Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) (On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.).

Under Rule 56(c), SCRPC, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Regions Bank, 354 S.C. at 659, 582 S.E.2d at 438; Trivelas v. South Carolina Dept of Transp., 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponents case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Regions Bank, 354 S.C. at 660, 582 S.E.2d at 438. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999); Rule 56(c), SCRPC. The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003); George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

FACTS OF THE CASE

On or about April 25, 1997, Lisa Gamble and Tammy Floyd entered into a "Lease to Own Agreement" for 200 W. Highway 378 Bypass, Lake City, South Carolina (the "Property")(Order of 3/04/2021, at pp. 1-2). The lease-purchase contract included an insurance clause, whereby the tenant/buyer was required to name the owner of the property as an additional insured on a policy of insurance. The agreement further stipulated that the tenant/buyer, Ms. Gamble, had "no equity" in the property until the final installment payment was made. Ms. Gamble thereafter assigned her rights in the agreement to Arthur McKenzie on October 13, 2006, which assignment was recorded on January 5, 2009. Marion L. Driggers was concerned that Mr. McKenzie might not abide by the insurance requirement in the Agreement and purchased a policy of insurance with South Carolina Farm Bureau Insurance Company in order to protect his interests in the property. (Deposition of Marion L. Driggers, pp. 59-60)

In or around May of 2009 Arthur McKenzie purchased homeowners insurance through Travelers Home and Marine Insurance Company and on November 26, 2009 the home was destroyed by fire. (Deposition of Arthur McKenzie, pp. 51-52). Mr. McKenzie filed a claim with Travelers for damage to the house and personal property. (Sworn Statement in Proof of Loss dated April 17, 2010). Thereafter, in April of 2010 Mr. McKenzie stopped making payments under the lease to own agreement and was considered in default under the agreement. He was subsequently evicted through an Order of Default and Order of Ejectment issued on March 6, 2013. (Order of the Williamsburg Magistrate Court dated March 6, 2013).

Prior to the eviction proceeding, Marion L. Driggers filed an insurance claim with South Carolina Farm Bureau Insurance Company. South Carolina Farm Bureau filed a complaint on March 6, 2014 and Mr. Driggers filed a crossclaim against Arthur McKenzie for breach of contract and quiet title and against Travelers Home and Marine Insurance Company for breach of contract, conspiracy and bad faith. Throughout the lengthy litigation in this matter the lower court granted Traveler's Interpleader, denied Marion Drigger's motion to amend his answer to include counterclaims and cross claims against Travelers. Travelers' motions for summary judgment in connection with the cross claims of Shiralee Driggers, Tammy Floyd and Marion L. Driggers were granted and Defendant Marion L. Driggers filed a motion for reconsideration on March 17, 2021. The lower court thereafter issued an order on April 19, 2021, granting Travelers' claim for Interpleader and dismissing Travelers from the action.

For additional treatment of the facts of this case in greater detail, this Appellant also adopts the Statement of Facts as set forth by the Appellant South Carolina Farm Bureau in their Brief on Appeal.

ARGUMENT

- I. The Trial Court erred by granting summary judgment where (a) discovery has not been completed, and (b) additional inquiry into the facts of this case is necessary before any claims of Appellant/Defendant Marion L. Driggers may be summarily disposed of.**

It is well-settled law that summary judgment is a drastic remedy that should not be granted unless and until all parties have had a full and fair opportunity to conduct and complete their discovery. *See, e.g., Cunningham v. Anderson County*, 402 S.C. 434, 741 S.E.2d 545 (S.C. App. 2013), *reh'g denied, affirmed in part, reversed in part*, 515 S.C. 298,

778 S.E.2d 884. Appellant Marion Driggers would also draw the Court's attention to the case of Lanham v. Blue Cross and Blue Shield, wherein the S.C. Supreme Court held that it was improper to grant summary judgment to a health insurer, where the insurer had canceled a policy based on an alleged misrepresentation in the application, but where discovery as to the insurer's underwriting standards and policies had not been completed, and the insured's motions to compel discovery of documents containing the insurer's standards and policies had not been completed. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 563 S.E.2d 331 (S.C. 2002).

Here, the trial court below seemed to focus on the age of the case in granting summary judgment to Travelers. However, the Court does not seem to have adequately considered the numerous factors contributing to the age of the case, including the death of Mr. McKenzie, which required an Estate to be opened and a Personal Representative to be appointed, further delays caused by the COVID-19 pandemic, numerous changes in counsel for the various parties throughout the course of these proceedings, as well as the delays caused by the involvement of a *pro se* litigant, Marion L. Driggers, in the proceedings below. Moreover, the concerns of the trial court regarding the length of time the case has been pending should not foreclose the clear need to plumb all material issues and claims before granting summary judgment to a party.

Significantly in this case, Marion L. Driggers, along with Shiralee Driggers and Tammy Floyd, have asserted a cross-claim to quiet title in the subject property, due to Mr. McKenzie's alleged breach, and the subsequent termination of the "rent to own" agreement dated April 25, 1997. For the reasons discussed in the hearings below,

discovery on this issue, as with other issues before the lower court, has not been completed. (Mtn. Hear'g Transcript, Feb. 18, 2021, at pp. 6, 8, 9, 15, 18, 21, 22.) However, the question of McKenzie's equity interest is a fundamental and threshold issue; if Mr. McKenzie had no equity interest in the property, the Traveler's payments to him in December of 2020 were improper, as Mr. McKenzie would have had as a result, no equity interest in the property, and the payments to him would have been invalid, both as a matter of South Carolina law, and pursuant to the terms of Traveler's own contract with McKenzie. (See S.C. Code Ann. 38-75-20 and 38-75-350, and Traveler's Contract, at p. 14, ¶1 and p. 19, both of which preclude payments of insurance proceeds to any party that does not have an insurable interest in the insured property.) In this case, proper resolution of this narrow question is fundamental to the resolution of the case in its entirety. If the evidence and discovery in this case bear out the conclusion, or the likelihood that a jury may conclude, that Arthur McKenzie had no insurable interest in the real estate at issue in this matter, then a proper resolution of this matter is utterly and fundamentally different from what the Court has ordered in its rulings on the summary judgment motions, and Travelers has paid out to its insured, Arthur McKenzie, no less than \$65,630 in benefits that were improper, both under South Carolina law and under the terms of Traveler's own policy¹. If Travelers had not improperly paid out the funds in such manner, and if it is determined, for example, that McKenzie's equity interest in the property has been extinguished, then the proper

¹ On or about Dec. 2, 2020, Travelers paid to Arthur McKenzie, through his counsel, the sum of \$115,140.40, of which, \$65,630.03 were paid for losses to the building (other payments being for replacement of personal property (\$44,904.75), and "other expenses" (\$4605.62), respectively.) See Copy of Payment of Travelers referenced in the February 18, 2021 hearing at page 12.

distribution of insurance proceeds in this case will be almost entirely different from what the trial court below has thus far ruled.

It is well-settled law that summary judgment is appropriate only where parties have had a full and fair opportunity to complete discovery, Cunningham, *supra.*, and where further discovery is not needed to clarify the application of law to the facts of a case, Lanham, *supra.* In this case, additional discovery is necessary in order to resolve open questions of material fact which have not yet been fully developed, and in order to clarify the proper application of the law to the complex fact pattern at issue here. For these reasons, the appealed-from summary judgment rulings were improper, and should be reversed.

II. The lower Court erred by granting Interpleader “by consent,” and releasing the Defendant Travelers Home and Marine Insurance Company from further liability from all claims, where the record reflects that all Parties did not consent to the release of Travelers by such Interpleader.

The January 5, 2021 Order of the Common Pleas Court below granted the motion of Travelers for Interpleader (*See* Order dated 1/5/21). The court states that the motion of Travelers for Interpleader to pay funds into court was granted with the consent of all parties (9/17/20 transcript at page 54). However, the transcript of September 17, 2020 does not contain any testimony indicating that the parties consented to a grant of Interpleader and full release to Travelers (1/4/21 transcript at page 7, 33). Rather, the parties agreed to allow the substitution of the Estate of Arthur McKenzie for MR. McKenzie individually, in light of Mr. McKenzie’s passing. (9/17/20 Transcript at p. 14). Defendant-Appellant Driggers specifically asked the Court, at the September 17, 2020 hearing, if Travelers was not going to be released from this lawsuit and the Court

confirmed that “[t]hey’re going to pay that money into court” and that no ruling would be made on the motion for summary judgment of Travelers at that time. (9/17/20 Transcript at page 58). (Emphasis supplied). However, and notwithstanding this exchange with the Parties from the bench and on record, the Court subsequently issued an Order, granting the requested Interpleader, and further providing that “Travelers is hereby dismissed from this action with prejudice.” (See Order of April 19, 2021, at p. 1).

As the Court has ruled in a manner substantively different from its instructions to the Parties in court, and Defendant-Appellant Driggers has been prejudiced as a result, Defendant-Appellant Driggers believes that the Court’s Order of April 19, 2021, should be vacated, reversed, and remanded to the trial court for further proceedings consistent with the Court’s original ruling from the bench. The record does not support a finding that the Parties “consented” to the dismissal of Travelers from this action with prejudice.

III. There are Genuine Issues of Material Fact that need to be resolved in this case, and those Issues of Material Fact should have precluded the lower Court from granting Summary Judgment in favor of Travelers.

While summary judgment is appropriate where there are plain, palpable, and indisputable facts upon which reasonable minds cannot differ, summary judgment is not appropriate where further inquiry into the facts of a case is desirable to clarify the application of the facts to the law. See USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (S.C. 2008)(*reh’g denied*). In cases where a “preponderance of the evidence” standard of proof will apply, as here, the non-moving party is only required to show a mere “scintilla of evidence” to withstand a motion for summary judgment.

See, Fountain v. First Reliance Bank, 398 S.C. 434, 730 S.E.2d 305 (S.C. 2012); see also, Grecy v. S.C. Bank & Trust Co., 422 S.C. 509, 812 S.E.2d 750 (S.C. App. 2018).

Here, there are numerous open questions of material fact, for which more than a mere scintilla of evidence exists, which should preclude for numerous reasons the summary judgment rulings in favor of Travelers below. As previously noted, herein above, there are open questions as to whether the Estate of Arthur McKenzie retains an equity (and therefore an insurable) interest in the property sufficient to support and justify the payments already made by Travelers to Mr. McKenzie. The Court's orders and the Travelers' contract with Mr. McKenzie certainly provide more than a scintilla of evidence that Mr. McKenzie did not have an insurable interest in the property sufficient to support the payments that Travelers has already made to him. (Contract, at pp. 19; Order of the Williamsburg County Circuit Court in Matthews v. McKenzie, dated July 10, 1996, at p. 5). On its face, the Travelers contract limits Travelers' insured, Arthur McKenzie, to payments made for his "insurable interest," which in this case appears to be his personal property only. In such instance, payment of Mr. McKenzie's attorneys' fees and other expenses from the Travelers' policy proceeds would have been improper, but there is well more than a scintilla of evidence that such payments were made.

Travelers' insured, Arthur McKenzie, has also acknowledged that Mr. Driggers is a "Mortgagee" on the property in question. (See Travelers call logs dated 1/2/2010 and Travelers Policy with McKenzie at p. 16, #12.) Moreover, the "proof of loss" documentation produced by Travelers in this matter, and dated April 17, 2010, make it very clear that Travelers received actual notice of the Driggers' mortgage interest in the property, no later than that date. (See Proof of Loss Form dated 4/17/2010.) Call logs

produced by the Travelers, dated January 2, 2010, also make clear that Travelers received notification of the Driggers' mortgage on that date, and in their internal file notes from February 28, 2010, Travelers representatives note in the file that the question of ownership of the house is confusing, and there are two large tax liens associated with the property. (See Travelers call logs dated 1/2/2010)

Further, Travelers' own contract with McKenzie states that "we will pay you unless some other person is legally entitled" to receive such payment. Yet, having all of this information readily at hand, Travelers nonetheless paid out insurance funds to its insured, Arthur McKenzie, in an amount that far exceeds the apparent value of any "insurable interest" (see above), thereby compromising Travelers' ability to pay other, legitimate claims to the insurance proceeds, to include, without limitation, Marion Driggers' claims to the funds as a mortgagee of the property.

Thus, there are significant questions related to the existence of a mortgage in favor of Marion and Shiralee Driggers, and Travelers' knowledge and actual notice of that mortgage, that must be resolved before summary judgment in favor of the Travelers could properly be granted. The Order of the trial court below, granting summary judgment to Travelers, cites the case of Park v. Safeco Insurance Company of America, 251 S.C. 410, 162 S.E. 2d 709 (1968), for the proposition that the Driggers and Floyd parties are "strangers" to the Travelers policy and therefore do not have standing to assert any of their cross-claims against the Travelers. However, Park v. Safeco is distinguishable in that in Park, an injured driver, sued the at-fault driver's insurance company following an automobile accident. There, the court held that the injured driver did not bring suit against an at-fault driver, and was therefore a stranger to the

insurance contract, therefore had no standing. This case is very distinguishable. First, both parties here assert a claim to the same asset. Second, Driggers did assert a claim against McKenzie in the same lawsuit, and is awaiting judgment on that claim (now pending due to this present appeal). Third, while Marion Driggers may not be a signatory or a named party to the Travelers insurance contract with Mr. McKenzie, he is a third party beneficiary of that contract, because the contract provides that the appropriate payee for insurance benefits under the policy is the person (or persons) "legally entitled to receive payment." (See Travelers' Contract, at p. 16, ¶ 6.) McKenzie is not the individual legally entitled to receive payment for the building, as he has no equity interest in the building, and therefore no *insurable interest* in the building, and cannot therefore, legally receive that portion of the Traveler's insurance proceeds. There is well more than a scintilla of evidence that supports this particular argument, and this conclusion on this open issue of material fact, and therefore, summary judgment in favor of the Travelers was not proper.

Additionally, in its order granting summary judgment to Travelers, the lower court relies on the case of Lee v. Chesterfield Gen. Hospital, Inc., 289 S.C. 6, 14, 344 S.E.2d 379 (S.C. App. 1986), for the proposition that the Driggers and Floyd parties have no standing to sue for civil conspiracy; however, the lower court's reliance on the Lee case in this instance is misplaced. In Lee, the hospital in question refused to allow Dr. Lee to perform certain medical procedures, and Dr. Lee's complaint against the hospital alleged that a conspiracy between the hospital and certain of its other doctors, with the goal of procuring a larger share of such services performed at the hospital, to Dr. Lee's detriment and his pecuniary loss. In Lee, the Court finds that Dr. Lee had standing to

pursue a claim against Hospital on those grounds. Here, the Driggers and Floyd parties have made the allegations in their cross-claims that the Travelers and its insured, Arthur McKenzie, cooperated or worked together to financially harm Mr. Driggers, and the other cross-claimants, by virtue of the funds that have been improperly disbursed, as discussed herein above. As Mr. Driggers and the other cross-claimants have been financially harmed by these actions, they have more than sufficient standing under Lee and other controlling case law to bring these claims. Moreover, as set forth at length herein above, there is well more than a mere scintilla of evidence that improper payments to Mr. McKenzie have been made, and that in the process of adjusting this file for the benefit of its insured, Travelers has financially harmed Mr. Driggers.

As there is well more than a scintilla of evidence of financial harm to Mr. Driggers, and the other cross-claimants, the cross-claimants have standing, and dismissing their cross-claim for civil conspiracy by way of summary judgment, as the lower court has done, is improper. This aspect of the lower court's ruling should be reversed, and the matter remanded back to the trial court for further proceedings.

CONCLUSION

For the reasons set forth herein, Defendant-Appellant Marion L. Driggers respectfully requests that this Court reverse the rulings of the trial court below that have granted summary judgments in favor of the Travelers, and released them from further liability in this matter by way of their Interpleader motion, which was improperly granted by the trial court below. Mr. Driggers requests that this Court reverse the appealed-from judgments of the lower court below, and restore this action as an active matter in the Circuit Court below, for further proceeding consistent with

the Court's opinion.

Respectfully submitted,

s/ Reese R. Boyd, III

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Dated: May 23, 2022
Myrtle Beach, South Carolina

EXHIBIT B

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No: 2014-CP-45-00132

Appellate Case No: 2021-000835

South Carolina Farm Bureau Ins. Co, Plaintiff
v.

Marion L. Driggers, Shiralee Driggers, Tammy D.
Floyd, Estate of Arthur McKenzie, The Travelers
Home and Marine Insurance Company, The
United States of America acting by and through
Its agency, The Internal Revenue Service, and
The South Carolina Tax Commission, Defendants,

Of Which Marion L. Driggers is Appellant and The Travelers
Home and Marine Insurance Company is the Respondent.

**INITIAL BRIEF OF PLAINTIFF
SOUTH CAROLINA FARM BUREAU INS. CO.**

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TABLE OF CONTENTS

Table of Authorities3

Statement Of Issues On Appeal4

Introduction4

Statement Of The Case4

Statement Of The Facts.....5

Standard Of Review9

Argument9

***I. The Trial Court Incorrectly Ruled That M. Driggers Was A “Stranger”
To The Travelers Policy And Did Not Have Standing To Pursue The Action
For Bad Faith*** 9

II. The Trial Court Erred In Not Properly Advising Pro Se Litigant 13

***III. The Trial Court Erred In Granting Travelers Summary Judgment
& Dismissal Prior to The Completion Of Discovery*** 14

Conclusion17

TABLE OF AUTHORITIES

Cases

<i>Ateyeh v. Volkswagon of Florence, Inc.</i> , 288 SC 101, 341 SE2d 378 (1986)	12
<i>Baughman v. American Tel. Tel. Co.</i> , 306 S.C. 101, 410 S.E.2d 537 (1991).....	15, 16
<i>Blackwell v. State Farm Mutual</i> , 237 SC 649, 118 SE2d 701 (1961)	10
<i>BPS, Inc. v. Worthy</i> , 362 S.C. 319 (S.C. Ct. App. 2005).....	15
<i>Carter v. American Mut. Fire Ins. Co.</i> , 279 S.C. 368, 307 S.E.2d 227 (1983)	12
<i>Colony Ins. Co. v. Peterson</i> , 582 F. Appx 156 (4 th Cir., 2014).....	10
<i>Cook v. Mack's Transfer Storage</i> , 291 S.C. 84, 352 S.E.2d 296 (Ct.App. 1986)	12
<i>Davis v. Zahradnick</i> , 600 F2d 458 (4 th Cir., 1979).....	14
<i>Doe ex rel Doe v. Batson</i> , 245 SC 316, 548 SE2d 854 (2001).....	15, 16
<i>Doe v. Batson</i> , 345 S.C. 316, 548 S.E.2d 854 (2001)	15
<i>F.M. Nat'l Bank v. Moore</i> , 135 SC 391, 133 SE 913 (1926)	10
<i>Gardner v. Newsome Chevrolet-Buick, Inc.</i> , 304 SC 328, 404 SE2d 400 (1991)	14
<i>Horry Cnty. v. Ray</i> , 382 S.C. 76, 83-S4, 674 S.E.2d 519, 524 (SC Ct. App, 2009).....	11, 13
<i>Lanham v. Blue Cross and Blue Shield of South Carolina</i> , 349 SC 356, 563 SE2d 361 (2002).....	15
<i>Lee v. N-Link Corp.</i> , C/A No. 3:12-2109-CMC-SMH.....	14
<i>Nationwide Mut. Ins. Co. v. Hunt</i> , 327 SC 89, 488 SE2d 339 (1997).....	13
<i>Osborne v. Adams</i> , 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).....	9
<i>Regions Bank v. Wingard Properties, Inc.</i> , 394 S.C. 241, 250 (S.C. Ct. App. 2011)	11
<i>Roseboro v. Garrison</i> , 528 F2d 309 (4 th Cir., 1975).....	14
<i>Schmidt v. Courtney</i> , 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct.App. 2003).....	15
<i>Swinton v. Chubb Son, Inc.</i> , 283 S.C. 11, 320 S.E.2d 495 (Ct.App. 1984)	12
<i>Wheeler Factors' Traders' Ins. Co.</i> , 101 U.S. 439 (1879).....	11
<i>Williams v. Chesterfield Lumber Co.</i> , 267 S.C. 607, 230 S.E.2d 447 (1976)	9

Statutes

<i>SC Code Ann. §40-5-80, 1976, as amended</i>	13
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STATEMENT OF ISSUES ON APPEAL

- I. The Trial Court Incorrectly Ruled That M. Driggers Was A “Stranger” To The Travelers Policy And Did Not Have Standing To Pursue The Action For Bad Faith*
- II. The Trial Court Erred In Not Properly Advising Pro Se Litigant*
- III. The Trial Court Erred In Granting Travelers Summary Judgment & Dismissal Prior to The Completion Of Discovery*

INTRODUCTION

This case arises from the same core of complex facts at issue in the following pending appeal: *S.C. Farm Bureau v. The Travelers Home, Appellate Case No. 2021-000494*. The briefing is complete and the record is closed in that case. However, due to the complex procedural history and facts involved in this case, SCFB incorporates its Final Brief and Final Reply Brief from No. 2021-000494 herein by reference and incorporates pertinent parts of the Record as well.

STATEMENT OF THE CASE

SCFB initiated the underlying action on March 7, 2014 by filing a Declaratory Judgment Action. **See: Referenced Pleading.** It asked that the Court inquire into the circumstances of an insurance claim filed by Appellant Marion Driggers and Respondents Shiralee Driggers and Tammy Floyd. It asked the Court to declare certain matters as to the rights and obligations of the parties, including the following: (a) The insurable value of the property at the time of the subject loss; (b) The ownership/rental/insurable interests, if any, held by the parties in the property at the time of the subject loss; (c) The amount due from each policy and to whom that amount is due on account of this loss, if any, considering all relevant factors, including ownership, valuation, the damage incurred, and the relevant policy provisions; and (d) That no sums are due from Farm

Bureau to its insured for this loss because the insured's late notice substantially prejudiced Farm Bureau and/or denied Farm Bureau's right to investigate the subject loss, an apparently intentionally set fire. **See: Referenced Pleading.**

The specific procedural history is detailed in the incorporated Final Brief and Final Reply Brief from 2021-000494. Ultimately, the pleadings were joined with SCFB also seeking equitable indemnity from Travelers per the involved *Pro Rata Statute*, S.C. Code Ann., § 38-75-20, 1976, as amended. Mr. Driggers, *pro se*, along with Shiralee Driggers and Tammy Floyd, via counsel, filed bad faith actions against Travelers and SCFB. Travelers filed a claim for interpleader and McKenzie filed a cross-claim against the Driggers parties. **See Referenced Pleadings.** Parts of these claims remain pending below, but the trial court granted Summary Judgment to Travelers on all claims, denied motions for reconsideration, and granted Travelers dismissal. Farm Bureau's Motion For Summary Judgment was found to be premature because discovery had not been completed, but the Judge then granted Travelers Motion for Summary Judgment and dismissed Travelers from the case before discovery was completed. **See: Transcript, p. 55; Order re Summary Judgment to Travelers re FB Equitable Indemntiy claim, Orders re Interpleaders and Orders of Dismissal as to Travelers.**

The appeal of SCFB in **2021-000494** and then this appeal followed.

STATEMENT OF THE FACTS

Like the procedural history and legal issues, the facts of this case are quite complex. All are specifically described in SCFB's Final Brief and Final Reply Brief in No. 2021-000494, which, along with pertinent portions of the Record from the same action, are incorporated herein.

The legal relationship between the Driggers/Floyd and the McKenzie parties began with a, not surprisingly, complex real estate transaction, all centering around a Williamsburg County house located at 3328 Turbeville Highway (also known as 200 W. Highway 378 Bypass, Lake City, South Carolina). McKenzie originally owned the house, but he lost it for taxes and, at the tax sale, Elsie Matthews bid the property in as a “straw buyer” for Driggers/Floyd. Matthews transferred the property to Tammy Floyd and she signed a Contract For Sale And Purchase with Liza Gamble, McKenzie’s girlfriend, because McKenzie’s tax issues prevented him from holding anything in his name. Later, Gamble assigned her interest in the Contract to McKenzie, though none of the Driggers/Floyd parties ever signed off on or agreed to the assignment. **See Deed to Floyd, Contract To Purchase, Assignment of Contract to Purchase, EUO of M. Driggers, p. 58-60; and EUO of S. Driggers, p. 9-16).** Throughout the relevant history of this property, it was titled to Floyd and occupied by McKenzie, with ownership interests varying according to the terms of the Contract For Sale and Purchase, as measured by the payment history for the property. Summary Judgment and dismissal in favor of Travelers for all claims here and in No. 2021-000494 was granted by the court without the payment history or disputed ownership percentages being established.

The troubled payment history is a matter of longstanding, and the property was the subject of a previous eviction proceeding. Judge Shuler resolved this eviction by his Order of July 10, 1996 which was not appealed and stands as a final determination of the property rights and obligations of the Driggers/Floyd/McKenzie parties. **See: Order of Judge Shuler, recorded 7.10.1996.** That Order provided that in exchange for certain payments and certain considerations, McKenzie would retain his occupancy and purchase rights for the property. One of the terms for the sale of a property interest to McKenzie was that he maintain insurance on the house for at least

\$80,000, with a loss payable clause in favor of Leroy Driggers and Shirley Driggers or their Designee. **See Order of Judge Shuler, 1.10.96, pages 3-4.** This insurance was a term or condition of the sale, per Judge Shuler's Order, and without the insurance contract designating Leroy and Shirley Driggers as loss payees, then McKenzie had no ownership interest in or insurable interest to the subject property.

Driggers/Driggers and Floyd were aware of this Order, but also knew the uncertain payment history by McKenzie, so they took out fire insurance covering the same property, intending that it be "mortgage insurance," although Farm Bureau was unaware of any other ownership interest or insurance as to the subject property. These facts are detailed in Farm Bureau's Final Brief and Final Reply Brief as to incorporated No. 2021-000494.

On November 26, 2009, a fire occurred at the subject property, causing substantial damage. A prompt claim was filed by McKenzie as to the Travelers policy, which claims should have included the judicially declared loss payee interest of Driggers. However, the claim dragged on, the interest of Driggers was not confirmed by Travelers, so Driggers/Driggers and Floyd filed a claim as to the Farm Bureau policy. No claim was filed against the Farm Bureau policy for almost three years after the fire loss, with a claim filed about a month prior to the Statute of Limitations. **See: Complaint and Amended Complaint.** This DJ action was filed by Farm Bureau on March 7, 2014. No lawsuit as to the fire loss was filed prior to the running of the Statute of Limitations on November 26, 2012.

Farm Bureau's Motion For Summary Judgment was found to be premature because discovery had not been completed, but the Judge then granted Travelers Motion for Summary Judgment and dismissed Travelers from the case before discovery was completed. **See: Transcript, p. 55; Order re Summary Judgment to Travelers re FB Equitable Indemntiy**

claim, Orders re Interpleaders and Orders of Dismissal as to Travelers. The trial court dismissed all claims against Travelers before it was even deposed. At the time of the dismissal, depositions were scheduled for the immediate future, and those have been held. These depositions did not include testimony from Travelers, which asked for and got interpleader and dismissal of all claims, including Farm Bureau's equitable indemnity claim. Travelers was dismissed even though during this litigation, on July 7, 2014, Travelers settled McKenzie's claim for Two Hundred Thirty-Two Thousand Seventy Three and 45/100 (\$232,073.45) Dollars, Fifty Four Thousand Nine Hundred Twenty Six and 55/100 (\$54,926.55) less than the full amount of its coverage. **See: Settlement Agreement With McKenzie.** Of the total settlement amount, One Hundred Sixteen Thousand Nine Hundred Thirty Three and 05/100 (\$116,933.05) Dollars was paid on behalf of McKenzie to his present and former attorneys. **See: Settlement Agreement, Order of March 30, 2021.** That left a balance of the settlement sum of One Hundred Fifteen Thousand One Hundred Forty And 40/100 (\$115,140.40) Dollars, and the Court allowed Travelers to deposit this sum as interpleaded funds, and granted Travelers a dismissal with prejudice. **See: Settlement Agreement With McKenzie, Order of March 30, 2021 and Order of April 19, 2021.** This was done without deposition testimony or evidence establishing even what insurable interest Driggers and McKenzie had in the property, based upon the payment history and prior court rulings.

Farm Bureau's appeal No. 2021-000494 and this appeal followed. The Court should find in favor of both Farm Bureau and Driggers, and against Travelers.

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Coverage Involved:

Travelers covered the subject dwelling for its named insured, Arthur McKenzie, under Homeowners Policy No. 984761288 633 1 for policy period 5/07/09 - 5/07/10 providing, in

relevant part, the following coverage: A: Dwelling: \$287,000; B. Other Structures: \$28,700; C. Personal Property: \$200,900; D. Loss of Use: \$ 86,10. **SEE: Travelers Declarations Page and Policy.**

Farm Bureau covered the subject dwelling for its named insured, Marion L. Driggers, on Homeowners Policy No. FI 0401219 for policy period 5/24/09 - 5/24/10 providing, in relevant part, the following coverage: A: Dwelling: \$118,000; B. Other Structures: \$ 5,900; D. Loss of Use: \$ 11,800. **See: Farm Bureau Declarations Page and Policy.**

STANDARD OF REVIEW

On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001); *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976).

ARGUMENT

I. The Trial Court Incorrectly Ruled That M. Driggers Was A “Stranger” To The Travelers Policy And Did Not Have Standing To Pursue The Action For Bad Faith

Judge Shuler issued an Order to settle a prior eviction action regarding the property, and this Order set the terms for the Contract for Sale and Purchase between the parties. **See: Order of Judge Shuler, recorded 7.10.1996; Contract for Sale and Purchase.** This Order and the contract adopting the Order’s terms form the basis for Travelers’ Insured, McKenzie, having an insurable interest in the property. Thus, the Order and the Contract form the basis for the policy

issued by Travelers. The Order required that McKenzie insure the property for a minimum of Eighty Thousand and no/100 (\$80,000) Dollars and that the issued policy name and protect Driggers as a loss payee. The policy issued by Travelers subject to the Order is subject to the terms of the Order, and the lower Court erred in not so finding.

A loss payee stands in the shoes of a mortgagee and has rights coterminous with those of a mortgagee. *Colony Ins. Co. v. Peterson*, 582 F. Appx 156 (4th Cir., 2014). If a mortgagor – or property owner – is bound by a covenant in the mortgage “or otherwise” to insure the premises for the security of the mortgagee or lender, then the mortgagee or lender will have an equitable lien on the policy proceeds. *Blackwell v. State Farm Mutual*, 237 SC 649, 118 SE2d 701 (1961). “This equitable lien arises solely from the unperformed contract to protect, the theory being that since equity regards as done that which ought to have been done, if the mortgagor, having so covenanted, fails to make the insurance payable to the mortgagee, or to assign the same, the fund arising therefrom is within the operation of the maxim.” *Id at p. 654*. The equitable lien arises on a policy of insurance “even though taken out in the name of the mortgagor.” *F.M. Nat’l Bank v. Moore*, 135 SC 391, 133 SE 913 (1926). This equitable lien exists even if the contract expressly gives the mortgagee (lender) the right to procure insurance, at the expense of the mortgagor (owner), if the mortgagor/owner fails to do so. *Id at p. 396-397*.

It is the covenant or agreement to insure that gives a mortgagee (lender) the equitable interest and in the absence of such agreement or covenant, the mortgagee (lender) acquires no interest in a policy the mortgagor takes out to insure his own interest. *F.M. Nat’l Bank* at p. 397. “And such a covenant or agreement creates an equitable lien on the insurance money in favor of the mortgagee, though the policy is in the name of and payable to the mortgagor, and has not been

assigned by him to the mortgagee,” *Id at p. 397*, citing *Wheeler Factors’ Traders’ Ins. Co., 101 U.S. 439 (1879)*.

"For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt." *First Fed. Sav. Loan Ass'n of S.C. v. Finn, 300 S.C. 228, 231, 387 S.E.2d 253, 254 (1989)*. An equitable lien is a "mere floating equity until a judgment or decree subjecting the property to the payment of the debt or claim is rendered." *Horry Cnty. v. Ray, 382 S.C. 76, 83-S4, 674 S.E.2d 519, 524 (Ct.App. 2009)* Even though an equitable lien is not judicially recognized until a judgment is entered declaring its existence, the lien relates back to the time it was created by the conduct of the parties. *Id. at 84, 674 S.E.2d at 524*.

Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 250 (S.C. Ct. App. 2011)

As noted above, Mr. Driggers’ interest in the Travelers policy derives from two sources:

(1) The Order of Judge Shuler resolving the prior eviction proceedings between the Driggers and the McKenzie parties; and (2) The Contract for Sale and Purchase containing the terms required by the Shuler Order. **See: Order of Judge Shuler, recorded 7.10.1996. Contract For Sale and Purchase, recorded 2.10.1998.** South Carolina law is clear and of long-standing in applying such equitable interests.

Travelers knew of the equitable interest that Mr. and Mrs. Driggers had in the property, During its investigation, Travelers became aware that there was a complex history involving the property, noting “odd” issues with the sale by titled owner Floyd, but determining that based on the sale, McKenzie had an insurable interest. **See Travelers 29-34 at p 11; Internal Correspondence.** On January 2, 2010, Travelers Claims Representative Ted Alexander got a call from Travelers agent that he’d been contacted by Mrs. Driggers advising of an \$80,000 mortgage they held on the subject property. **See: Travelers 3-14 Claim Notes, p. 5.** On January 12, 2010, Alexander’s notes for Travelers reflect that he asked the PM (possibly Primary Manager, but exact meaning unknown) about the Driggers’ mortgage and “He said that has been taken care of. I

advised that we were now on notice of the mortgage.” After the call S Driggers left a voice mail. **See: Travelers 493-515 at p. 15-16; Travis Notes.** Despite Travelers being on notice of the Driggers’ mortgage and failing to pay the same, Mr. Driggers was told that he did not have a claim against Travelers because his interest wasn’t listed on the policy. **See: EUO of M. Driggers, p. 36-37.**

After initial joint representation of the Driggers, Driggers, Floyd parties by Attorney James Dotson, and then a subsequent period of joint representation by Attorney Edward K. Pritchard, III, Mr. Driggers represented himself *pro se*, and did so for most of this action, up to the point of this appeal. On his own and through his various counsel, Mr. Driggers has consistently maintained his position that his interests were and should be protected by the Travelers policy. Since Travelers shirked its clear equitable obligation to Driggers, he has made a claim against Travelers for bad faith. Normally, South Carolina law provides that only a named insured can make a claim for bad faith against an insurance carrier. *Carter v. American Mut. Fire Ins. Co.*, 279 S.C. 368, 307 S.E.2d 227 (1983); *Cook v. Mack's Transfer Storage*, 291 S.C. 84, 352 S.E.2d 296 (Ct.App. 1986); *Swinton v. Chubb Son, Inc.*, 283 S.C. 11, 320 S.E.2d 495 (Ct.App. 1984). However, an exception to this rule exists for one in a derivative policyholder position where a claim is not merely contingent. The court has held that a widow may recover in a bad faith claim against her spouse’s employer and health insurance carrier. *Ateyeh v. Volkswagon of Florence, Inc.*, 288 SC 101, 341 SE2d 378 (1986). In *Ateyeh*, the Court held that the widow had more than a contingent interest in the policy as her interest was derivative. *Id.* Applying that principal here, even if Driggers was not a named party to the contract between Travelers and McKenzie, Driggers held an equitable lien as a loss payee or mortgagee. This equitable lien would not be established until the time of judgment, but it would then date back to its creation. *Horry Cnty. v. Ray*, 382 S.C. 76, 83-

S4, 674 S.E.2d 519, 524 (SC Ct. App, 2009) Under the facts of this case, as a loss payee to the Travelers Policy, Driggers had more than a contingent interest in the insurance such that he is not a third party. And, since a loss payee stands in the shoes of the insured, Driggers' interest is derivative in nature. A mortgagee's rights under a fire insurance policy depend on the existent of a secured debt owed the mortgagee by the mortgagor-insured such that the mortgagee cannot be independent of the mortgagor. *Nationwide Mut. Ins. Co. v. Hunt*, 327 SC 89, 488 SE2d 339 (1997). Prior South Carolina case law includes actions by mortgagees against an insurer for breach of contract and bad faith. In one such case, the bad faith claim was not dismissed and went to the jury. *Id.*

The trial court erred in finding that Driggers was a stranger to the policy and lacked standing to bring an action for bad faith.

II. The Trial Court Erred In Not Properly Advising Pro Se Litigant

South Carolina law recognizes an individual's ability to appear *pro se* with leave of the court. *SC Code Ann. §40-5-80, 1976, as amended.* Mr. Driggers has appeared *pro se* since fairly early on in the litigation. He was *pro se* at the times that disputes arose over earlier attempts to mediate and take depositions. At those times, he often declined to participate absent certain conditions, as to mediation, and unless all attorneys were also being deposed, as to depositions. The lack of understanding as to the rules and procedures for ADR and depositions led to delays and conflict. Similarly, informal methods of filing motions, such as letters, and the filing of multiple motions caused issues and further confusion as to the record and as to the status of outstanding matters. Further, and particularly, Mr. Driggers was *pro se* at the time of the instant dispositive motions and orders as to Travelers.

South Carolina's Rules of Civil Procedure are based on the Federal Rules, and our courts look to how federal case law construes the Federal Rules as guidance for construction of the state rules. *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 SC 328, 404 SE2d 400 (1991). The Federal Courts have a specific *pro se* litigant guide, and courts will advise litigants to consult this guide during the course of litigation. *Lee v. N-Link Corp.*, C/A No. 3:12-2109-CMC-SMH. Further, prior to the grant of any dispositive motion, Federal Courts generally issue a "Roseboro" Order to *pro se litigants*, (and must do so for incarcerated litigants) explaining the procedures for responding to dispositive motions and warning of the consequences for failing to respond. *Id.*, citing, *Roseboro v. Garrison*, 528 F2d 309 (4th Cir., 1975). The requirement that *pro se* litigants be provided with notice and instructions is consistent with the Federal Rules requirement for reasonable notice. *Davis v. Zahradnick*, 600 F2d 458 (4th Cir., 1979).

In the present case, the absence of *pro se* guidance to Mr. Driggers appears to have delayed the case and complicated matters considerably. While *pro se* litigants are not entitled to any more or less consideration than are represented litigants, the absence of such material raises due process concerns, especially as to the grant of a dispositive motion.

III. The Trial Court Erred In Granting Travelers Summary Judgment & Dismissal Prior to The Completion Of Discovery

The Trial Court granted Summary Judgment to Travelers, allowing Interpleader and deposit of the partial, remaining coverage, thereby dismissing Mr. Driggers' bad faith claim. **See: Orders.** At the time of dismissal, depositions were not complete, the deposition of Travelers had not been taken and key parties Mr. and Mrs. Driggers had not been deposed, though depositions were scheduled and have since been held. However, Travelers was dismissed and has never been deposed.

Summary Judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *BPS, Inc. v. Worthy*, 362 S.C. 319 (S.C. Ct. App. 2005), citing *Doe v. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001); *Baughman v. American Tel. Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); see also *Schmidt v. Courtney*, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct.App. 2003). Additionally, Summary Judgment is not appropriate if further inquiry into the facts is needed to clarify the application of the law. *Lanham v. Blue Cross and Blue Shield of South Carolina*, 349 SC 356, 563 SE2d 361 (2002).

It should be noted that a large number of contributing factors affected scheduling in this case. This did include some issues by Mr. Driggers due to him lacking information by way of support and guidance to him, as a *pro se* party. However, much of the delay was occasioned by other issues, including: (1) Changes in counsel; (2) the death of Mr. McKenzie and the time involved with setting up an estate and getting a PR; (3) the Covid pandemic shutting down everything for a period of time; (4) Covid precautions that limited the number and frequency of terms of court and the availability of court reporters; (5) Covid quarantines and related issues affecting parties, counsel and law firm staff; (6) The need for hearings and motions in this case to be physically held in Court, rather than conducted virtually. Based upon the events listed, the full and fair opportunity to complete discovery required by South Carolina law was not given in this case and granting dismissal while the necessary discovery was scheduled was clear error.

Given the complex facts of this case, and the procedural history and impediments noted above, it was error for the Court to grant Summary Judgment to Travelers prior to the parties having a full and fair opportunity to complete discovery. Further, there are issues of fact and/or disputed facts directly affecting Mr. Driggers and the issues in this appeal which arose during the parties' depositions. Those are not a part of the Record because the depositions were

scheduled but not yet taken at the time of dismissal. Other disputed issues include the payment history, Travelers settlement with McKenzie and its failure to pay its full coverage into Court, the total value of the property and of each party's interest, particularly in view of the *Pro Rata* statute.

This case is procedurally like another SC action where a trial court granted Summary Judgment even though depositions were set to be held a week later and the grant of Summary Judgment was reversed by the Court of Appeals and that reversal was affirmed by the SC Supreme Court. *Doe ex rel Doe v. Batson*, 245 SC 316, 548 SE2d 854 (2001). The Supreme Court noted that delays in discovery were not solely attributable to either party. Citing to a prior decision, the Court said that Summary Judgment is premature if there is a likelihood shown that further discovery will uncover additional relevant evidence and the delay in discovery cannot fairly be attributable solely to the party opposing the motion. *Id.*, citing *Baughman v. American Tel. Tel. Co.*, 306 SC 101 at 112-114, 410 SE2d at 544. In *Doe*, the court found that the delay in discovery was not solely the plaintiff's fault and was influenced by the complexity of the case. The same is even more true here, where the delays were due to all of the factors noted above, including an unprecedented pandemic. As to the likelihood of additional relevant evidence, testimony from the parties, for the first time, disclosed or claimed a previously unknown action by Travelers which directly relates to the policy issues involved in this appeal. And, as noted above, that evidence is not before this Court, and Travelers has not yet been examined as to the evidence, because the dismissal was entered before the then-scheduled depositions.

Summary Judgment against Mr. Driggers and the grant of interpleader and dismissal to Travelers was clearly premature in this case. This court should, therefore, reverse and remand this matter.

CONCLUSION

The Court erred in finding that Driggers did not have standing for this action, and in failing to hold that Summary Judgment or dismissal was premature. Mr. Driggers had a court-ordered and a contractual interest as a loss payee to the Travelers policy, and this interest should be recognized and upheld. The loss payee interest puts Mr. Driggers in McKenzie's shoes as to the loss, making it a derivative interest and giving him the right to pursue a claim for bad faith against Travelers. Further, the grant of Summary Judgment or dismissal was premature, and information relevant to the coverage issues was shown at the parties' depositions, and discovery was not delayed solely due to Mr. Driggers actions or failures to act.

This Court should reverse the trial court and remand this case.

Respectfully Submitted,

/s/ J. Dwight Hudson

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Dated: June 22, 2022

Attorney SC Farm Bureau

EXHIBIT C

RECEIVED

Jun 24 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis
Circuit Court Judge

Case No.: 2014-CP-45-00132
(Court of Appeals Case No.: 2021-000835)

South Carolina Farm Bureau Ins. Co. Plaintiff,

v.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, Arthur McKenzie, a/k/a Arther McKenzie, The Travelers Home and Marine Insurance Company, The United States of America acting by and through Its agency, The Internal Revenue Services and The South Carolina Tax Commission, Defendants,

Of whom Marion L. Driggers is Appellant and The Travelers Home and Marine Insurance Company is the Respondent.

**RESPONDENT THE TRAVELERS HOME AND MARINE INSURANCE
COMPANY’S MOTION TO STRIKE PLAINTIFF SOUTH CAROLINA FARM
BUREAU INS. CO.’S INITIAL BRIEF AND INITIAL DESIGNATION OF
MATTER**

Respondent moves this Court for an Order striking the Initial Brief and Initial Designation of Matter filed by Plaintiff South Carolina Farm Bureau Ins. Co. (“Farm Bureau”), because Farm Bureau is not a listed appellant or respondent to this appeal and the filings are therefore improper.

On August 4, 2021, Appellant Marion L. Driggers (“Appellant”) filed a Notice of Appeal listing “Mrs. Mariel D. Norton, Baker, Ravenel & Bender, LLP” as Respondent.

(Notice of Appeal attached as Exhibit A). In a deficiency letter dated August 18, 2021, the Clerk stated, "The notice of appeal does not specify who the respondent(s) are. You must serve and file an amended notice of appeal that specifies the respondent(s)." (Letter attached as Exhibit B). On September 1, 2021, Appellant amended his Notice of Appeal providing the following correction to the listed respondent:

The litigants of this appeal are:

Marion L. Driggers, Appellant

Hudson Law Offices; Corbin Law Firm; Baker, Ravenal (sic) & Bender, LLP; Pritchard Law Group; SCDOR; USDOJ; The Hon. Kristi Curtis, Laura Brown, of Whom Travelers Insurance is a respondent.

(Amended Notice of Appeal attached Exhibit C). The Clerk then set forth the correct caption and parties for this appeal in a letter dated September 10, 2021:

Furthermore, the caption for this appeal has been updated below to reflect that The Travelers Home and Marine Insurance Company is the respondent.

South Carolina Farm Bureau Ins. Co., Plaintiff,

V.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, Arthur McKenzie, a/k/a Arthur McKenzie, The Travelers Home and Marine Insurance Company, The United States of America acting by and through its agency, The Internal Revenue Service and The South Carolina Tax Commission, Defendants,

of whom Marion L. Driggers is the Appellant and The Travelers Home and Marine Insurance Company is the Respondent.

(Letter attached as Exhibit D).

Farm Bureau's Initial Designation of Matter filed June 22, 2022 has a signature block that reads "Attorney for Appellant." The Initial Brief filed June 22, 2022 has a

signature block that merely reads “Attorney SC Farm Bureau.” The Proof of Service and letter accompanying these documents on June 22, 2022 reference “Appellant” throughout.

The confusion in Farm Bureau’s own filings reveal that it recognizes it is not a party to this appeal.¹ Moreover, as the early filings in this matter show, Farm Bureau is clearly not an appellant or respondent in this appeal, and its filings on June 22, 2022 are improper. Courtesy service on the parties to the underlying action, including Farm Bureau, to keep them apprised of the appeal’s developments does not create new or additional appellants and/or respondents beyond the Notice of Appeal.

Farm Bureau’s Initial Designation of Matter attempts to add numerous documents to the record that were not designated by either the Appellant or Respondent to this appeal. Furthermore, Farm Bureau’s Initial Brief attempts to add argument to the true Appellant’s Initial Brief in this matter, or it is attempting to add argument to its own Final Brief or Final Reply Brief in a separate appeal to which it is a party (Court of Appeals Case No.: 2021-000494). Either way, as a non-party to this appeal Farm Bureau’s filings are entirely inappropriate and must be disregarded.

Therefore, Respondent moves to strike the Initial Brief and Initial Designation of Matter of Farm Bureau.

¹ See Rule 202(a), SCACR (“Designation of Parties. The party appealing shall be known as the appellant and the adverse party as the respondent.”); see also S.C. Code Ann. § 18-1-120 (1976) (“The party appealing shall be known as the appellant and the adverse party as the respondent. But the title of the action shall not be changed in consequence of the appeal.”)

Maribel D. Norton
by *Susan A. Bose*

Maribel D. Norton

S.C. Bar No.: 100198

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Attorneys for Respondent The Travelers

Home and Marine Insurance Company

Columbia, South Carolina

June 24, 2022

EXHIBIT D

RECEIVED

Jun 29 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No: 2014-CP-45-00132

Appellate Case No: 2021-000835

South Carolina Farm Bureau Ins. Co, Plaintiff,
v.

Marion L. Driggers, Shiralee Driggers, Tammy D.
Floyd, Estate of Arthur McKenzie, Arthur McKenzie
a/k/a Arther McKenzie, The Travelers Home and Marine
Insurance Company, The United States of America acting
by and through Its agency, The Internal Revenue Service,
and The South Carolina Tax Commission, Defendants,

Of Whom Marion L Driggers is Appellant and The Travelers
Home and Marine Insurance Company is the Respondent.

***SOUTH CAROLINA FARM BUREAU'S RETURN
TO TRAVELER'S MOTION TO STRIKE***

Travelers has moved the Court to strike South Carolina Farm Bureau's (Hereinafter, "SCFB") Initial Brief and Designation in the captioned case. SCFB hereby makes Return to this Motion and asks that the same be denied.

Travelers claims that because SCFB was not a listed Respondent in the appeal, that it is not allowed to participate in the briefing for the case. Essentially, Travelers claims that Farm Bureau lacks standing to file a brief and designation in this case. To support this claim, Travelers points to the fact that certain signatures in its prior filing alternately reference SCFB by name or as an Appellant. Travelers then says that this shows that SCFB knew that it could not file a brief in the case. That is patently false.

The confusion in signatures arose because SCFB was uncertain as to how it should reference itself in the case. The caption of the Initial Brief by Mr. Driggers, the Appellant, called SCFB "Plaintiff-Appellant" and designates Mr. Driggers as "Defendant-Appellant." When the undersigned's office began drafting the Initial Brief, there was uncertainty as to this designation. SCFB is the Plaintiff in the underlying lawsuit, and it is the Appellant in another appeal arising from the same lawsuit and pending before this Court as Case No. 2021-000494. Because SCFB was the Plaintiff-Appellant in 2021-000494 but had not filed a Notice of Appeal in this action, 2021-000835, the undersigned's associate called the Court of Appeals manager for 2021-000835 and left a message asking for clarification on this issue. Counsel did not get guidance by way of a return telephone call, unless counsel somehow missed the message, but counsel understood that staff was likely busy due to the Covid backlog and/or that perhaps this was an issue as to which no guidance would be provided. At the time of the referenced call, counsel was partway through the drafting process, and decided to reference SCFB by name, pending any further or alternate instructions. Apparently, counsel did not edit all references in the filing.

SCFB contends that it does have standing to file this brief.

Standing refers to a "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Black's LawDictionary* 1413 (7th ed. 1999). "Standing is . . . that concept of justiciability that is concerned with whether a particular person may raise

legal arguments or claims." 1A C.J.S. *Actions* § 101 (2005). It concerns an individual's "sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." *Id.*

Powell v. Bank of America, 379 S.C. 437, 444 (S.C. Ct. App. 2008)

Standing is comprised of three elements, to wit: (1) An injury in fact; (2) A causal connection between the injury and the conduct complained of; and (3) It is likely that the injury will be redressed by a favorable decision. *Id.*, citing *Smiley v. South Carolina Dep't of Health Env't'l Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32-33 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) To have standing, a party must be a real party in interest who has a real, material interest as opposed to a nominal or technical interest. *Ex parte Morris*, 367 SC 56, 62, 624 SE2d 649, 652 (2006).

In the present case, SCFB is the Plaintiff that brought this action, and it has a pending appeal against Travelers as to the grant of Summary Judgment to Travelers relative to SCFB's claims and as to the grant of Interpleader and dismissal of Travelers. Further, Mr. Driggers is the named insured on SCFB's policy and has a loss payee interest in the Travelers policy, insuring Mckenzie as the named insured. Both policies cover the same, subject property and there is a *pro rata statute* issue. Mr. Driggers intended to collect from Travelers, and the failure of Travelers to pay Mr. Driggers was responsible for his delay in filing the claim against SCFB, and for any claim from this loss to be filed as to SCFB. (See: 2021-000494) Clearly, the Appellant, Mr. Driggers, expected SCFB's participation in this appeal since the caption of his Initial Brief noted SCFB as a "Plaintiff-Appellant."

SCFB has standing to participate in this appeal and this Court should so hold. If, for any reason the Court finds that SCFB does not otherwise possess such standing or rights, SCFB is informed and believes, and asks that the Court allow its brief as *amicus*.

Respectfully Submitted,

/s/ J. Dwight Hudson

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Dated: June 29, 2022

**Attorney For Plaintiff, South Carolina
Farm Bureau Insurance Company**

EXHIBIT E

RECEIVED

Jul 06 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis
Circuit Court Judge

Case No.: 2014-CP-45-00132
(Court of Appeals Case No.: 2021-000835)

South Carolina Farm Bureau Ins. Co. Plaintiff,

v.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, Arthur McKenzie, a/k/a Arther McKenzie, The Travelers Home and Marine Insurance Company, The United States of America acting by and through Its agency, The Internal Revenue Services and The South Carolina Tax Commission, Defendants,

Of whom Marion L. Driggers is Appellant and The Travelers Home and Marine Insurance Company is the Respondent.

**RESPONDENT THE TRAVELERS HOME AND MARINE INSURANCE
COMPANY’S REPLY TO SOUTH CAROLINA FARM BUREAU INS. CO.’S
RETURN TO RESPONDENT’S MOTION TO STRIKE**

Respondent The Travelers Home and Marine Insurance Company (“Respondent”) files this Reply pursuant to Rule 240(f), SCACR to South Carolina Farm Bureau Ins. Co.’s (“Farm Bureau”) June 29, 2022 Return to Respondent’s Motion to Strike.

Farm Bureau asserts in its Return that Appellant’s Initial Brief called Farm Bureau “Plaintiff-Appellant,” prompting its confusion and the filing of an Initial Brief and Designation of Matter in an appeal in which it is not a party. Respondent has no knowledge

of the alleged communications Farm Bureau’s counsel may have had or attempted with the Court to seek guidance on its status as an appellant. Nevertheless, Farm Bureau did not file a notice of appeal in this matter to trigger any such status, irrespective of how a caption identified it. Moreover, as this Court is well aware, the day after Appellant’s Initial Brief and Designation of Matter were filed, the Clerk notified Appellant’s counsel of the deficiency in the caption, directing counsel to correct the caption in its final brief to the following:

South Carolina Farm Bureau Ins. Co., Plaintiff,

v.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, Arthur McKenzie, a/k/a Arthur McKenzie, The Travelers Home and Marine Insurance Company, The United States of America acting by and through its agency, The Internal Revenue Service and The South Carolina Tax Commission, Defendants,

of whom Marion L. Driggers is the Appellant and The Travelers Home and Marine Insurance Company is the Respondent.

(Letter – Exhibit A). This correspondence from the Court of Appeals clears up any confusion regarding whether Farm Bureau was an appellant in this matter and was available for Farm Bureau’s review on the South Carolina Appellate Case Management System.

Farm Bureau focused its Return on standing. It is well established that “[o]nly a party aggrieved by an order, judgment, or sentence may appeal. Rule 201, SCACR; *see* Rule 72, SCRCR; *see also* S.C. Code Ann. § 18-1-30 (2014) (‘Any party aggrieved may appeal in the cases prescribed in this title.’).” JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 131 (3d ed. 2016). It has also been found “that there are no material distinctions between the requirements of establishing standing under general standing principles and the requirements to appeal pursuant to Rule 201(b), SCACR.” *Id.*

There are three ways to establish standing under general standing principles: “(1) through the rubric of ‘constitutional standing’; (2) under the “public importance” exception; or (3) by statute.” *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). Farm Bureau argues that it has constitutional standing. To establish constitutional standing, Farm Bureau must prove: “(1) [Farm Bureau] suffered an ‘injury in fact’; (2) there must be a casual connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be ‘redressed by a favorable decision.’” *Joseph v. S.C. Dep’t of Labor, Licensing, and Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 770 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). A real party in interest is one with a real, actual, material, or substantial interest in the subject matter of an action rather than one with only a nominal, formal, or technical interest with the action. *See Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994). The party seeking to establish standing carries the burden of demonstrating each of the three required elements. *See Sea Pines Ass’n for Prot. of Wildlife, Inc. v. S.C. Dep’t of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

Farm Bureau claims to have an *interest* in the problems alleged by Appellant Marion L. Driggers because “Mr. Driggers intended to collect from Travelers, and the failure of Travelers to pay Mr. Driggers was responsible for his delay in filing the claim against SCFB.” Farm Bureau’s Return, p. 3. Yet, a mere interest is not enough where South Carolina requires a particularized injury to meet the elements of standing. There is no personal, individual harm to Farm Bureau that has been asserted and any alleged connection claimed by Farm Bureau in its Return is too tenuous to meet the elements of standing. Appellant’s appeal seeks redress from summary judgment as to his claims of bad

faith, breach of contract, and civil conspiracy against Travelers, and, as such, there is no injury to Farm Bureau that could possibly be redressed with a favorable decision for Appellant on these issues. Appellant has every right under his policy with Farm Bureau to make a claim, irrespective of any alleged relationship he claims to have with Travelers and/or Travelers' named insured. The alleged pro rata issues Farm Bureau asserts in its Initial Brief and Return relate to a separate appeal (Court of Appeals Case No.: 2021-000494), and Appellant's alleged expectation of Farm Bureau's participation in this appeal based on an error in his caption does not create standing. Farm Bureau has not met its burden of proving that it has standing to file an Initial Brief and Designation of Matter in this appeal, and Respondent's Motion to Strike should be granted.

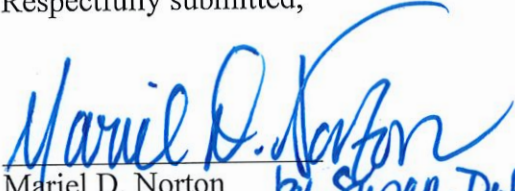
Farm Bureau concludes its Return by requesting that its Initial Brief and Designation of Matter be allowed as *amicus*. An *amicus curiae* brief "may be filed only by leave of the appellate court granted on motion, or at the request of the appellate court." Rule 213, SCACR. Additionally, an *amicus* brief "shall be limited to argument of the issues on appeal as presented by the parties." Rule 213, SCACR; *see James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010). A motion for leave to file an *amicus curiae* brief shall "identify the interest of the applicant and shall state the reasons why the brief of an *amicus curiae* is desirable." *Id.* The Court has considered issues raised for the first time in an *amicus* brief but only when they concern a "matter of significant public interest." *Ex Parte Brown*, 393 S.C. 214, 216, 711 S.E.2d 899, 900 (2011). This exception is applied narrowly and under only appropriate circumstances. *See State v. Langford*, 400 S.C. 421, 433, 735 S.E.2d 471, 477 (2012) ("[W]e have little trouble concluding that who decides

when criminal defendants in this State should be tried is a matter of significant public interest as envisioned by *Brown*.”).

Farm Bureau failed to follow Rule 213, as there has been no proper motion submitted nor has this Court requested any such brief. Moreover, the brief submitted by Farm Bureau is not limited to the arguments of the issues on appeal as presented by Appellant and Respondent. Furthermore, there is no significant public interest in the current matter to warrant elevating Farm Bureau’s Initial Brief to an amicus brief in this appeal.

For the above reasons, Respondent requests that its Motion to Strike Farm Bureau’s Initial Brief and Designation of Matter be granted on the grounds that Farm Bureau does not have standing to participate in this appeal. Respondent also requests that Farm Bureau’s request for amicus status be denied.

Respectfully submitted,


Mariel D. Norton *by Susan DeBose*

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*Attorneys for Respondent The Travelers
Home and Marine Insurance Company
Columbia, South Carolina*

July 6, 2022

EXHIBIT F

The South Carolina Court of Appeals

South Carolina Farm Bureau Ins. Co., Plaintiff,

v.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd,
Arthur McKenzie, a/k/a Arthur McKenzie, The Travelers
Home and Marine Insurance Company, The United
States of America acting by and through its agency, The
Internal Revenue Service and The South Carolina Tax
Commission, Defendants,

of whom Marion L. Driggers is the Appellant and The
Travelers Home and Marine Insurance Company is the
Respondent.

Appellate Case No. 2021-000835

ORDER

After careful consideration, Respondent's motion to strike Appellant's deposition from her designation of matters is granted. *See* Rule 210(c), SCACR ("The Record shall not . . . include matter which was not presented to the lower court or tribunal.").

Additionally, Respondent's motion to strike South Carolina Farm Bureau Ins. Co.'s (Farm Bureau's) initial brief and designation of matter is granted. Farm Bureau is not a party to this appeal. To the extent Farm Bureau wishes to submit the brief as *amicus curiae*, it must make a motion before this court. *See* Rule 213, SCACR ("A brief of an amicus curiae may be filed only by leave of the appellate court granted on motion, or at the request of the appellate court.").


FOR THE COURT

FILED
Sep 06 2022

Columbia, South Carolina

cc:

Mariel D. Norton, Esquire

Reese R. Boyd, III, Esquire

EXHIBIT G

RECEIVED

Jun 14 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No: 2014-CP-45-00132

Appellate Case No: 2021-000835

South Carolina Farm Bureau Ins. Co, Plaintiff
v.

Marion L. Driggers, Shiralee Driggers, Tammy D.
Floyd, Estate of Arthur McKenzie, The Travelers
Home and Marine Insurance Company, The
United States of America acting by and through
Its agency, The Internal Revenue Service, and
The South Carolina Tax Commission, Defendants,

Of Which Marion L. Driggers is Appellant and The Travelers
Home and Marine Insurance Company is the Respondent.

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF
SOUTH CAROLINA FARM BUREAU INS. CO. IN SUPPORT OF
APPELLANT, MARION L. DRIGGERS**

Pursuant to Rule 213, SCACR, South Carolina Farm Bureau Ins. Co. (SCFB) hereby moves that
this Court grant it leave to file its *amicus curiae* brief in this matter. The brief is being conditionally filed
according to the rule.

Like Respondent The Travelers Home and Marine Insurance Company (Travelers), SCFB carried a policy for the same period insuring the same property, and like the Appellant here, SCFB's claims at the lower court were dismissed via Summary Judgment. SCFB's appeal with Travelers is pending before this Court in Appellate Case Number 2021-000494. SCFB filed an Initial Brief in the subject action. It was dismissed per Traveler's Motion, via this Court's Order of September 6, 2022, which held that SCFB was not a party to this appeal and that SCFB could submit a brief as Amicus in this action, should the Court grant leave to do so. This Motion seeks such leave.

As an insurance carrier protecting the same property interests as Travelers in the subject property, SCFB seeks to draw the Court's attention to certain legal principals applicable to Appellant's claim for coverage under the Travelers policy. Appellant's counsel has raised issues relating to the underlying mortgage, but Appellant's position as a loss payee of the underlying mortgage raises additional legal principals important to the Court's consideration of the Travelers coverage. Because SCFB carried the Driggers policy and because this policy covered the same interests on the same property as the Travelers policy, equity and justice require this Court to consider SCFB's unique position in this matter and grant this Amicus Motion.

No rule or principal requires an Amicus to be disinterested. *Gila River Indian Community v. U.S.*, No. CV10-1993 PHX-DGC CV10-2017 PHX DKD CV10-2138 PHX MHB (D. Ariz. Dec. 14, 2010).

In deciding whether to grant leave to file an amicus brief, courts consider whether the briefing "supplement[s] the efforts of counsel, and draw[s] the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus. Mont.*, 694 F.2d 203, 204 (9th Cir. 1982). An amicus brief should be permitted on behalf of a party lacking competent representation, when the amicus has an interest in some other case that may be affected by a decision in the present case, or when the amicus has unique information that could help this court beyond the assistance already provided by the parties' lawyers. *United States v. Renown Health*, 2016 WL 6803078, at *2 (D. Nev. Nov. 15, 2016) (citing *Miller-Wohl*, 694 F.2d at 204).

United States v. Paredes-Medina, 2:21-cr-00323-CDS-DJA (D. Nev. Oct. 13, 2022)

Amicus submits that there will be no prejudice to the parties by allowing its brief to be filed. Ample time remains for the parties and the Court to review the brief prior to argument.

WHEREFORE, SCFB respectfully urges the Court to allow it to participate as amicus curiae, by allowing the filing of its amicus curiae brief submitted herewith.

Respectfully Submitted,

/s/ J. Dwight Hudson

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Dated: June 14, 2023

**Attorney For Amicus Curiae,
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RECEIVED

Jun 14 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No: 2014-CP-45-00132

Appellate Case No: 2021-000835

South Carolina Farm Bureau Ins. Co, Plaintiff
v.

Marion L. Driggers, Shiralee Driggers, Tammy D.
Floyd, Estate of Arthur McKenzie, The Travelers
Home and Marine Insurance Company, The
United States of America acting by and through
Its agency, The Internal Revenue Service, and
The South Carolina Tax Commission, Defendants,

Of Which Marion L. Driggers is Appellant and The Travelers
Home and Marine Insurance Company is the Respondent.

**AMICUS CURIAE BRIEF OF SOUTH CAROLINA FARM BUREAU
INS. CO. IN SUPPORT OF APPELLANT, MARION L. DRIGGERS**

Submitted By:

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TABLE OF CONTENTS

Table of Authorities3

Statement Of Interest4

Statement Of Issue On Appeal.....4

Statement Of The Case4

Statement Of The Facts.....5

Standard Of Review5

Argument5

*The Trial Court Incorrectly Ruled That M. Driggers Was A “Stranger”
To The Travelers Policy And Did Not Have Standing To Pursue The Action
For Bad Faith* 5

Conclusion9

TABLE OF AUTHORITIES

Cases

<i>Ateyeh v. Volkswagon of Florence, Inc.</i> , 288 SC 101, 341 SE2d 378 (1986)	8
<i>Blackwell v. State Farm Mutual</i> , 237 SC 649, 118 SE2d 701 (1961).....	6
<i>Carter v. American Mut. Fire Ins. Co.</i> , 279 S.C. 368, 307 S.E.2d 227 (1983)	8
<i>Colony Ins. Co. v. Peterson</i> , 582 F. Appx 156 (4 th Cir., 2014).....	6
<i>Cook v. Mack's Transfer Storage</i> , 291 S.C. 84, 352 S.E.2d 296 (Ct.App. 1986)	8
<i>F.M. Nat'l Bank v. Moore</i> , 135 SC 391, 133 SE 913 (1926)	6, 7
<i>First Fed. Sav. Loan Ass'n of S.C. v. Finn</i> , 300 S.C. 228, 231, 387 S.E.2d 253, 254 (1989)	7
<i>Horry Cnty. v. Ray</i> , 382 S.C. 76, 83-S4, 674 S.E.2d 519, 524 (Ct.App. 2009)	7, 8
<i>Nationwide Mut. Ins. Co. v. Hunt</i> , 327 SC 89, 488 SE2d 339 (1997).....	8
<u><i>Osborne v. Adams</i></u> , 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).....	5
<i>Regions Bank v. Wingard Properties, Inc.</i> , 394 S.C. 241, 250 (S.C. Ct. App. 2011)	7
<i>Swinton v. Chubb Son, Inc.</i> , 283 S.C. 11, 320 S.E.2d 495 (Ct.App. 1984)	8
<i>Wheeler Factors' Traders' Ins. Co.</i> , 101 U.S. 439 (1879).....	7
<u><i>Williams v. Chesterfield Lumber Co.</i></u> , 267 S.C. 607, 230 S.E.2d 447 (1976)	5

STATEMENT OF INTEREST

South Carolina Farm Bureau Insurance Co. (SCFB) is an insurance carrier that provides coverage to certain members of the South Carolina Farm Bureau Federation. SCFB insures the same property and property interest as does Travelers in this matter, although the named insureds differ for each policy.

This brief seeks to supplement the efforts of counsel and to draw the Court's attention to law that may have escaped consideration. The amicus has an interest in a pending case that may be affected by the Court's decision in this matter: to wit, *S.C. Farm Bureau v. The Travelers Home*, Appellate Case No. 2021-000494. Also, as an insurance carrier providing coverage for the same homeowner's interest for the same property as that involved in this case, the amicus has a unique perspective and could provide information to assist this Court beyond that already provided by the parties' lawyers.

STATEMENT OF ISSUE ON APPEAL

I. The Trial Court Incorrectly Ruled That M. Driggers Was A "Stranger" To The Travelers' Policy And Did Not Have Standing To Pursue The Action For Bad Faith.

STATEMENT OF THE CASE

SCFB adopts the Statement of The Case of Appellant, Marion L. Driggers. *See Rule 208(b)(6), SCACR.*

STATEMENT OF THE FACTS

SCFB adopts the Statement of The Case of Appellant, Marion L. Driggers. *See Rule 208(b)(6), SCACR.*

STANDARD OF REVIEW

On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).; *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976)..

ARGUMENT

I. The Trial Court Incorrectly Ruled That M. Driggers Was A “Stranger” To The Travelers Policy And Did Not Have Standing To Pursue The Action For Bad Faith

Judge Shuler issued an Order to settle a prior eviction action regarding the property, and this Order set the terms for the Contract for Sale and Purchase between the parties. **(R. pp. 589-595)** This Order and the contract adopting the Order’s terms form the basis for Travelers’ Insured, McKenzie, having had, at least at the time in question, an insurable interest in the property. Thus, the Order and the Contract form the basis for the policy issued by Travelers. The Order required that McKenzie insure the property for a minimum of Eighty Thousand and no/100 (\$80,000) Dollars and that the issued policy name and protect Driggers as a loss payee. **(R. p. 592)** The policy issued by Travelers is subject to the terms of the Order, as that Order and the Contract it

authorized form the basis for any insurable interest in the property by McKenzie, Travelers named insured.

A loss payee stands in the shoes of a mortgagee and has rights coterminous with those of a mortgagee. *Colony Ins. Co. v. Peterson*, 582 F. Appx 156 (4th Cir., 2014).. If a mortgagor – or property owner – is bound by a covenant in the mortgage “or otherwise” to insure the premises for the security of the mortgagee or lender, then the mortgagee or lender will have an equitable lien on the policy proceeds. *Blackwell v. State Farm Mutual*, 237 SC 649, 118 SE2d 701 (1961).. “This equitable lien arises solely from the unperformed contract to protect, the theory being that since equity regards as done that which ought to have been done, if the mortgagor, having so covenanted, fails to make the insurance payable to the mortgagee, or to assign the same, the fund arising therefrom is within the operation of the maxim.” *Id at p. 654*. The equitable lien arises on a policy of insurance “even though taken out in the name of the mortgagor.” *F.M. Nat’l Bank v. Moore*, 135 SC 391, 133 SE 913 (1926).. This equitable lien exists even if the contract expressly gives the mortgagee (lender) the right to procure insurance, at the expense of the mortgagor (owner), if the mortgagor/owner fails to do so. *Id at p. 396-397*.

It is the covenant or agreement to insure that gives a mortgagee (lender) the equitable interest. *F.M. Nat’l. Bank* at p. 397. “And such a covenant or agreement creates an equitable lien on the insurance money in favor of the mortgagee, though the policy is in the name of and payable to the mortgagor, and has not been assigned by him to the mortgagee,” *Id at p. 397*, citing *Wheeler Factors’ Traders’ Ins. Co.*, 101 U.S. 439 (1879)..

"For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt." *First Fed. Sav. Loan Ass'n of S.C. v. Finn*, 300 S.C. 228, 231, 387 S.E.2d 253, 254 (1989). An equitable lien is a "mere floating equity until a judgment or decree subjecting the property to the payment of the debt or claim is rendered." *Horry*

Cnty. v. Ray., 382 S.C. 76, 83-S4, 674 S.E.2d 519, 524 (Ct.App. 2009) Even though an equitable lien is not judicially recognized until a judgment is entered declaring its existence, the lien relates back to the time it was created by the conduct of the parties. *Id.* at 84, 674 S.E.2d at 524.

Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 250 (S.C. Ct. App. 2011).

As noted above, Mr. Driggers' interest in the Travelers policy derives from two sources:

(1) The Order of Judge Shuler resolving the prior eviction proceedings between the Driggers and the McKenzie parties; and (2) The Contract for Sale and Purchase containing the terms required by the Shuler Order. **(R. pp. 589-595; pp 545 – 554)** South Carolina law is clear and of long-standing in applying such equitable interests.

After initial joint representation of the Driggers, Driggers, Floyd parties by Attorney James Dotson, and then a subsequent period of joint representation by Attorney Edward K. Pritchard, III, Mr. Driggers represented himself *pro se*, and did so for most of this action, up to the point of this appeal. On his own and through his various counsel, Mr. Driggers has consistently maintained his position that his interests were and should be protected by the Travelers policy. Since Travelers failed to honor its equitable obligation to Driggers, he has made a claim against Travelers for bad faith. Normally, South Carolina law provides that only a named insured can make a claim for bad faith against an insurance carrier. *Carter v. American Mut. Fire Ins. Co.*, 279 S.C. 368, 307 S.E.2d 227 (1983).; *Cook v. Mack's Transfer Storage*, 291 S.C. 84, 352 S.E.2d 296 (Ct.App. 1986).; *Swinton v. Chubb Son, Inc.*, 283 S.C. 11, 320 S.E.2d 495 (Ct.App. 1984).. However, an exception to this rule exists for one in a derivative policyholder position where a claim is not merely contingent. The court has held that a widow may recover in a bad faith claim against her spouse's employer and health insurance carrier. *Ateyeh v. Volkswagon of Florence, Inc.*, 288 SC 101, 341 SE2d 378 (1986).. In *Ateyeh*, the Court held that the widow had more than a contingent interest in the policy as her interest was derivative. *Id.* Applying that principal here, even if

Driggers was not a named party to the contract between Travelers and McKenzie, Driggers held an equitable lien as a loss payee or mortgagee. This equitable lien would not be established until the time of judgment, but it would then date back to its creation. *Horry Cnty. v. Ray*, 382 S.C. 76, 83-54, 674 S.E.2d 519, 524 (SC Ct. App, 2009). Under the facts of this case, as a loss payee to the Travelers Policy, Driggers had more than a contingent interest in the insurance such that he is not a third party. And, since a loss payee stands in the shoes of the insured, Driggers' interest is derivative in nature. A mortgagee's rights under a fire insurance policy depend on the existent of a secured debt owed the mortgagee by the mortgagor-insured such that the mortgagee cannot be independent of the mortgagor. *Nationwide Mut. Ins. Co. v. Hunt*, 327 SC 89, 488 SE2d 339 (1997).. Prior South Carolina case law includes actions by mortgagees against an insurer for breach of contract and bad faith.

The trial court erred in finding that Driggers was a stranger to the policy and lacked standing to bring an action for bad faith.

CONCLUSION

The Court erred in finding that Driggers did not have standing for this action. Mr. Driggers had a court-ordered and a contractual interest as a loss payee to the Travelers policy, and this interest should be recognized and upheld. The loss payee interest puts Mr. Driggers in McKenzie's shoes as to the loss, making it a derivative interest and giving him the right to pursue a claim for bad faith against Travelers.

Respectfully Submitted,

/s/ J. Dwight Hudson

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Dated: June 14, 2023

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Jun 26 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis
Circuit Court Judge

Case No.: 2014-CP-45-00132
(Court of Appeals Case No.: 2021-000835)

South Carolina Farm Bureau Ins. Co. Plaintiff,

v.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, Arthur McKenzie, a/k/a Arther McKenzie, The Travelers Home and Marine Insurance Company, The United States of America acting by and through Its agency, The Internal Revenue Services and The South Carolina Tax Commission, Defendants,

Of whom Marion L. Driggers is Appellant and The Travelers Home and Marine Insurance Company is the Respondent.

PROOF OF SERVICE

I, Susan Drake DuBose, attorney at Baker, Ravenel & Bender, LLP, Attorney for Respondent, hereby certify that, on this 26th day of June, 2023, I have served the following with the foregoing Respondent's Return to South Carolina Farm Bureau Mutual Insurance Company's Motion for Leave to File Amicus Curiae Brief via electronic mail of same to counsel of record at the e-mail addresses shown below:

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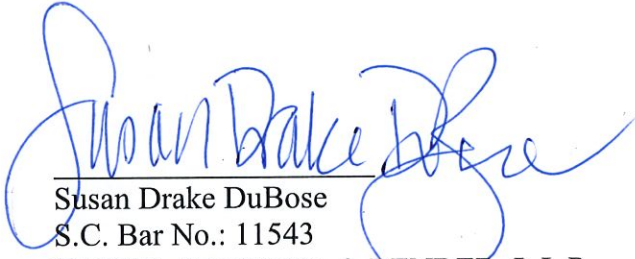
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*Attorneys for Respondent The Travelers
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DuBose, Susan

From: DuBose, Susan
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Subject: RE: Appellate Case No.: 2021-000835 SC Farm Bureau vs. Marion L. Driggers, et al. of Whom Marion L. Driggers is the Appellant and The Travelers Insurance Company is the Respondent
Attachments: Letter to Court of Appeals Filing Respondent's Return to S.C. Farm Bureau's Motion for Leave to File Amicus Brief (01125735xA5D7B).pdf; Respondent's Return to S.C. Farm Bureau's Motion for Leave to File Amicus Curiae Brief with exhibits (01125699xA5D7B).pdf

Dear Ms. Kitchings-

Attached please find a letter from me, counsel for the Respondent The Travelers Home and Marine Insurance Company, in the above-referenced matter and a copy of Respondent The Travelers Home and Marine Insurance Company's Return to South Carolina Farm Bureau Ins. Co.'s Motion for Leave to File Amicus Curiae Brief (with attached exhibits) for filing in this case. By copy hereof, all counsel are being served with the same. A proof of service will follow separately. I appreciate your assistance in filing these documents. Please let me know if you have any questions or issues.

Sincerely,

Susan DuBose

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June 26, 2023

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The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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Jun 26 2023

SC Court of Appeals

RE: South Carolina Farm Bureau Mutual Ins. Co., Appellant v. Marion L. Driggers, et al.
Of Which The Travelers Home and Marine Insurance Company is the Respondent
Appellate Case No.: 2021-000835
Our File No.: 7746.1749

Dear Ms. Kitchings:

Attached for filing in the above-referenced matter please find Respondent The Travelers Home and Marine Insurance Company's Return to South Carolina Farm Bureau Mutual Insurance Company's Motion for Leave to File Amicus Curiae Brief with attached exhibits.

By copy of this letter, the same is being served upon all counsel of record via electronic mail. The Proof of Service thereof via electronic mail will be filed separately.

If you have any questions concerning this letter, please do not hesitate to contact me.

Sincerely yours,

Susan Drake DuBose
SDD/cdc

Enclosures

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