

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:

J. Dwight Hudson (SCB# 2753)
Hudson & Graham
PO Box 70218
Myrtle Beach, SC 29572
T: (843) 692-9889; F: 692-9190
HUDSONLAW@HUDSONLAWOFFICE.COM
*Attorney for Amicus Curiae,
South Carolina Farm Bureau Ins. Co.*

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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

J. Dwight Hudson (SCB# 2753)

Hudson & Graham

PO Box 70218

Myrtle Beach, SC 29572

T: (843) 692-9889; F: 692-9190

HUDSONLAW@HUDSONLAWOFFICE.COM

Attorney SC Farm Bureau

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