IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No: 2023-00239

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles
Circuit Court Judge

C.A. No.: 2021-CP-26-07668

Gloria Ormand-Ward by and through her Guardian and Conservator, CDM Corporation, Through Its Representative, Stephen Mantell ..... Appellant,

v.

David Litt, Homedebone, LLC, Rosaria A. Alanga aka Rose Alagna; Chris Parker; Chicago Land Agency Services, Inc.; Chicago Title Insurance Company; Pereira Partners, LLC; NB Labor LLC d/b/a Newman Brothers General Contractors; John Newman; and Toorak Capital, LLC ..... Defendants

Of which,

Chicago Title Insurance Company is the ..... Respondent

RESPONDENT'S RETURN IN OPPOSITION TO APPELLANT'S MOTION TO REMAND

This appeal is of the trial court's dismissal of Chicago Title Insurance Company ("Chicago Title") for lack of personal jurisdiction. Appellant now is asking this Court to remand for the trial court to consider Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023), which was issued June 27, 2023. However, as explained in detail below, a remand would be procedurally improper.

Rather, a dismissal of the appeal is procedurally proper.

Moreover, the trial court already considered what ultimately came to be the holding in *Mallory* and determined that dismissal would be appropriate even in that event, as discussed below. Consequently, Appellant's Motion to Remand should be denied and the appeal dismissed.

I. Relevant Procedural Background

Appellant's Amended Complaint alleges that she lost title to her home as a result of a fraudulent scheme perpetrated by David Litt, Homedebone, LLC, Rosaria A. Alanga aka Rose Alagna, and Chris Parker. (Am. Comp. at ¶¶19-50 (filed as Exh. B to App.'s Mot. to Remand). Those Defendants allegedly prepared a fraudulent deed that was electronically recorded by Chicago Land Agency Services ("CLAS") with the Horry County Register of Deeds. (Id. at ¶¶23-28). Appellant alleges Chicago Title was a joint venture partner with CLAS. (Id. at ¶29). Appellant does not allege any independent liability on the part of Chicago Title. Rather, the basis of naming Chicago Title in this action rests on a statement on the website of CLAS stating (inaccurately) that "CLAS is a joint venture partnership with Chicago Title." (Id.).

Chicago Title timely moved in the trial court to dismiss for lack of personal jurisdiction. In opposing Chicago Title's motion to dismiss for lack of personal jurisdiction, Appellant argued that Chicago Title is subject to general jurisdiction because it is a licensed insurer in South Carolina and, pursuant to South Carolina Code Section 38-5-70, licensed insurers are required to appoint the Director of the South Carolina Department of Insurance (the "Director") to be their "attorney upon whom all legal process in any action or proceeding against it must be served and in this writing shall agree that any lawful process against it which is served upon this attorney is of the same legal force and validity as if served upon the insurer . . ." (Pl.'s Memo. In Opp. To Mot. Dismiss at 7-8, 14-16, attached as **Exh. 1** hereto). In support of this argument, Appellant cited

Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U.S. 93 (1917), where the Supreme Court held that an insurer consented to general jurisdiction in Missouri by complying with a state law requiring it to obtain a license and execute a power of attorney agreeing that service on the superintendent of insurance was the equivalent of personal service. (Id. at 14). Appellant included a footnote, which stated as follows:

> The issue of whether a foreign corporation consents to the general jurisdiction of a state by appointing a registered agent is presently before the U.S. Supreme Court in *Mallory v. Norfolk Southern Railway Co.*, No. 21-1168. The issue of whether a licensed insurance company has consented to jurisdiction by virtue of its registration with the state is not before the U.S. Supreme Court. From a review of the South Carolina Secretary of State's website, it does not appear that CTIC has registered to do business in South Carolina pursuant to S.C. Code § 33-15-101 and this statute is not the basis of this argument why CTIC is subject to this Court's general jurisdiction.

(Id. at 16 n. 10).

Chicago Title filed a Reply brief addressing Appellant's arguments. (Reply in Supp. of Mot. Dism., attached **Exh. 2** hereto). An oral argument was held on the motion on September 19, 2022. On October 12, 2022, the trial court entered an order granting Chicago Title's Motion to Dismiss (hereafter the "Dismissal Order"). (See Exh. D to App.'s Mot. to Remand). In rejecting Appellant's arguments regarding general personal jurisdiction, the trial court held that 1) Pennsylvania Fire was no longer good law in light of more recent case law and 2) even if Pennsylvania Fire was still good law, Chicago Title did not consent to general jurisdiction by complying with the insurance licensing statute because South Carolina Code Section 38-5-70 does not constitute consent to general jurisdiction in South Carolina. (Id. at pp. 7-9).

On October 21, 2022, Appellant moved to reconsider the Dismissal Order, relying primarily on the fact that the United States Supreme Court had granted certiori in Mallory v.

Norfolk So. Ry. Co., 266 A.3d 542 (Pa. 2021), cert. granted, 2022 WL 1205835 (No. 21-1168, April 25, 2022) and oral argument in that matter was scheduled for November 8, 2022. (See Pl.'s Mot. to Reconsider at 2, attached hereto as **Exh. 3**). Appellant asserted to the trial court that the issue in Mallory was "whether corporations have consented to general jurisdiction when they appoint a registered agent at the time they qualify to do business within a state" and urged the trial court to withdraw its prior order and withhold a final decision until the United States Supreme Court decided Mallory. (Id.).

Chicago Title opposed Appellant's Motion to Reconsider, arguing that "even if the Supreme Court finds that Pennsylvania Fire is still good law, that ruling would not warrant reversal of the Dismissal Order." (Chicago Title Opp. To Mot. Recon. at 2, attached hereto as **Exh. 4**). Chicago Title's Memorandum in Opposition to Plaintiff's Motion to Reconsider included a detailed discussion of Mallory and why it is distinct from the present case even if Pennsylvania Fire is still good law. (Id. at 2-5). An oral argument was held on the Motion to Reconsider on November 22, 2022. The argument lasted 50 minutes with the anticipated decision in Mallory being the focal point of the hearing. (See 11/22/22 Hearing Tran., attached hereto as **Exh. 5**). The Court rejected Appellant's argument and denied the motion to reconsider by order dated January 17, 2023. (**Exh. 6**).

Plaintiff filed the Notice of Appeal on February 16, 2023. On May 24, 2023, Appellant moved for "an Order stating the proceedings in this appeal until after the issuance of a decision in the United States Supreme Court case of Mallory v. Norfolk Southern Railway Co., No. 21-1168." Chicago Title consented "so long as a decision is made within a reasonable time and the stay does not prejudice Chicago Title from making any arguments on appeal." Chicago Title filed a Return to Appellant's Motion "to ensure its position is clear that the Court can and should affirm the trial

court's dismissal of Chicago Title regardless of the United States Supreme Court's decision Mallory." The Court granted the motion to stay via Order dated June 6 and required Appellant to inform the court of the issuance of the decision in Mallory within ten (10) days of the date of the decision.

On June 27, 2023, the Supreme Court issued its decision in Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028 (2023), where a plurality of the Court held that Pennsylvania's consent to jurisdiction by registration statute, 42 Pa.C.S. Section 5301(a)(2), which provides that such registration is "a sufficient basis of jurisdiction to enable the tribunals of this commonwealth to exercise general personal jurisdiction over such person," does not violate the Due Process clause contained in the Fourteenth Amendment of the United States Constitution.

Appellant informed this Court of the Mallory decision via letter dated July 6, 2023. This Court issued a letter dated July 7, 2023 stating that "[t]his case will no longer be held in abeyance and the appellant's initial brief and designation of matter is due within 30 days from the date of this letter. Failure to comply with this request will result in the dismissal of this appeal."

Appellant did not file an initial brief or designation of matter. Rather, on August 4, Appellant filed the Motion to Remand.

Appellant now seeks to have this Court remand to the trial court "with instructions that it consider Pennsylvania Fire and Mallory as binding law on the issue of personal jurisdiction." (Pl. Mot. to Remand at 8).

II. A Remand at this juncture would be procedurally improper.

In the Motion to Remand, Appellant is not asking the Court to reverse or vacate the Dismissal Order with instructions to reconsider. Nor could Appellant request that relief in a motion, since a reversal or vacating the Dismissal Order would be dispositional decision that

should be issued by the Court via an opinion after the issues are briefed with references to the Record on Appeal as set forth in the South Carolina Appellate Court Rules.

If the Court grants Appellant's Motion to Remand, Appellant would not be able to file a motion to reconsider when the case is remanded since the time to file another such motion has expired. Such a motion must be filed within 10 days of the order sought to be reconsidered. See Rules 59 & 60, SCRCP. The trial court issued its Order denying Appellant's Motion to Reconsider on January 17, 2023 (**Exh. 6**) and Appellant did not file any motion to reconsider or alter or amend thereafter. Rather, Appellant filed a Notice of Appeal on February 16, 2023, which was 20 days after the time expired for Appellant to file a motion to reconsider. Thus, the time to file another motion to reconsider has expired. A remand under these circumstances would make no sense.

Moreover, dismissal of the appeal is the appropriate remedy. According to this Court's July 7, 2023 letter, Appellant's Initial Brief and the Designation of Matter were due 30 days from that date, which would fall to Monday, August 7, 2023. The Court's letter also instructed that [f]ailure to comply with this request will result in the dismissal of this appeal." (emphasis added).

The Court's instruction is consistent with Rules 208(a)(4) and 260(a), SCACR. Rule 208(a)(4), SCACR, provides that "[u]pon the failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court shall sign an order dismissing the appeal, and the appeal shall not be reinstated except as provided by Rule 260." Rule 260(a), SCACR, provides that "[w]henever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties."

Appellant did not file an Initial Brief on or before August 7, 2023 as required by the Court

and the South Carolina Appellate Court Rules. Appellant's Motion to Remand is not an Initial Brief and it does not stay the August 7, 2023 deadline by which Appellant was required to file the Initial Brief or Designation of Matter. Rule 240(b), SCACR, provides that "[u]nless otherwise provided by these Rules, or ordered by the appellate court, the time limits imposed by these Rules shall not be stayed by the filing of a motion or petition." There does not appear to be any exception for a motion to remand. Consequently, the appeal must be dismissed, not remanded.

III. The Supreme Court's decision in *Mallory* does not change the Dismissal Order since the Trial Court found that even if *Pennsylvania Fire* was still good law, South Carolina Code Section 38-5-70 does not constitute consent to general jurisdiction in South Carolina

As discussed above, the trial court in this case held that even if Pennsylvania Fire was still good law, Chicago Title did not consent to general jurisdiction by complying with the insurance licensing statute because South Carolina Code Section 38-5-70 does not constitute consent to general jurisdiction in South Carolina. The trial court explained:

> Even under the holding in *Pennsylvania Fire*, state licensure requirements amount to consent to general jurisdiction only if the state court has interpreted the statute as imposing that condition. *See State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 53 n. 11 (Mo. 2017) ("Pennsylvania Fire made clear it simply accepted Missouri's interpretation of its own statute as allowing such broad jurisdiction over foreign insurers, without independently examining whether that statute actually made registration consent to general jurisdiction."); *Fidrych*, 952 F. 3d at 137. Ten years after *Pennsylvania Fire*, the Missouri Supreme Court, in *State ex rel. American Cent. Life Ins. Co. v. Landwehr*, 300 S.W. 294 (Mo. banc 1927), specifically overturned its interpretation of the Missouri statute as providing for consent to jurisdiction, and held that that an insurer's registration constituted consent only to suit on insurance policies that were made in Missouri or outstanding in Missouri. *American Cent. Life Ins. Co.*, 300 S.W. at 298; Dolan, 512 S.W.3d at 53 n. 11.
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> Similarly, here, I find that South Carolina Code Section 38-5-70 does not constitute consent to general jurisdiction in South

> Carolina. The statute speaks in terms of service of process rather than jurisdiction, but even proper service of process does not confer personal jurisdiction on a defendant in the absence of sufficient minimum contacts. *See, e.g., Delta Apparel, Inc. v. Farina,* 406 S.C. 257, 750 S.E.2d 615 (Ct. App. 2013) (finding that the defendant was properly served but that the court lacked personal jurisdiction over the defendant because there were insufficient minimum contacts). Chicago Title is not challenging the sufficiency of service of process and, in fact, service of process was not made on the Director until after Chicago Title challenged personal jurisdiction. Moreover, the statute provides for the director's authority to continue "so long as any liability remains outstanding in the State," which indicates that it was intended to be limited to cases pertaining to policies it issued in South Carolina, or at least cases that arise out of the insurer's contacts with South Carolina. Furthermore, although Section 38-5-70 was not at issue, the South Carolina Court of Appeals has held that a certificate of authority and appointment of an agent for service by a foreign corporation does not automatically subject a foreign corporation to jurisdiction in South Carolina courts, and that jurisdiction instead depends on sufficient South Carolina contacts by the foreign corporation. B*uilders Mart of Am., Inc. v. First Union Corp.*, 349 S.C. 500, 563 S.E.2d 352 (S.C. Ct. App. 2002), overruled in part on other grounds by *Farmer v. Monsanto Corp*., 353 S.C. 553, 579 S.E.2d 325 (2003)); *see also Natl. Bev. Screen Printers, Inc. v. DALB, Inc.*, 1:16-CV-03850-JMC, 2018 WL 2718035, at *3 (D.S.C. June 6, 2018) ("the application to do business and the appointment of an agent for service to fulfill a state law requirement is of no special weight in the present context [of establishing personal jurisdiction]") (quoting *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745, 748 (4th Cir. 1971)).

Dismissal Order at pp. 7-9.

Thereafter, Appellant moved to reconsider and Mallory, which had been heard but not decided by the Supreme Court at that point, was the focal point of briefing and oral arguments. (See **Exhs. 4 & 5**). Chicago Title argued extensively as to why dismissal is still appropriate even if the United States Supreme Court holds that Pennsylvania Fire is still good law, and the trial court denied the Motion to Reconsider.

Clearly, the trial court already considered the possibility that the Supreme Court in Mallory

would hold that Pennsylvania Fire is still good law, and determined that dismissal of Chicago Title is appropriate even if Pennsylvania Fire is still good law. Nothing in the Mallory opinion changes the trial court's conclusions. This is merely an effort by Appellant to get a third bite at the apple. There is no reason to ask this Court to remand the case to the trial court when it is clear that it has already found that there is no personal jurisdiction over Chicago Title even if Pennsylvania Fire is still good law.

This point is further supported by Appellant's argument that "South Carolina case law is consistent with the Mallory holding." (App. Mot. to Remand at 6). Appellant cites three cases in support of that proposition. (Id. at 6-7). Appellant made the exact same argument almost verbatim and cited these same cases to the trial court in its Memorandum in Opposition to Chicago Title's Motion to Dismiss. (**Exh. 1** at pp. 15-16). Appellant also made this argument and cited these cases in Appellant's Motion to Reconsider and during the hearing on Appellant's Motion to Reconsider. (**Exh. 3** at pp. 4-5; **Exh. 5** at pp. 12-15). Chicago Title addressed these arguments in its Reply in Support of Motion to Dismiss (**Exh. 2** at p. 6 n. 3), its Opposition to Plaintiff's Motion to Reconsider (**Exh. 4** at pp. 6-8), and during the hearing on the Motion to Reconsider (**Exh. 5** at p. 24). Appellant now advances these same arguments to this Court that the trial court heard several times and rejected. Of course it would be in the normal course of things if Appellant was advancing those arguments to this Court in an Initial Brief (or Final Brief) to attempt to persuade the Court to reverse the trial court. The problem is that Appellant is asserting those arguments in an effort to persuade this Court to remand the case to the trial court so that the trial court can consider them a third time. This makes no sense and further supports why Appellant's Motion to Remand should be denied.

IV. This Court can affirm on alternative sustaining grounds.

"[A] respondent—the `winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. . . . The basis for respondent's additional sustaining grounds must appear in the record on appeal[.]"). I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

The Supreme Court's opinion in Mallory does not alter the trial court's Dismissal Order, as set forth above. An analysis of Mallory does, however, present several alternative sustaining grounds. For example, in Mallory, four (4) of the justices opined that the Pennsylvania statute at issue did not violate Due Process, four (4) of the justices opined that the Pennsylvania statute at issue does violate Due Process, and one (1) justice (Alito) opined that it did not violate Due Process, but heavily suggested that it violates the dormant commerce clause. See, e.g., Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2053 (2023) (Alito, J. concurring) ("In my view, there is a good prospect that Pennsylvania's assertion of jurisdiction here—over an out-of-state company in a suit brought by an out-of-state plaintiff on claims wholly unrelated to Pennsylvania—violates the Commerce Clause."). Accordingly, a majority (5 out of 9) of the Supreme Court justices have indicated a belief that the Pennsylvania statute at issue in Mallory violates the United States Constitution. They just do not agree on which provision it violates, and the only issue before the Court was whether the statute violated Due Process.

The Court does not need to remand the case to the trial court to consider alternative sustaining grounds to dismiss this case. The trial court has dismissed Chicago Title for lack of personal jurisdiction on grounds that were not changed by Mallory. The case is ripe for a decision and there is no need to have the trial court consider an issue it has already decided. This Court can affirm on those same grounds, or on alternative sustaining grounds.

CONCLUSION

For all of the above reasons, Chicago Title respectfully requests that this Court deny Appellant's Motion to Remand and dismiss this appeal.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

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