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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Special Referee

Appeal No.: 2023-00173

Mark McAuley,.. Plaintiff/Respondent,

v.

Sunshine 11, LLC d/b/a Relax Inn, Usha Patel
And Anjan Patel,.. Defendants,
Of Whom

Sunshine 11, LLC d/b/a Relax Inn is the .... Appellant.

MOTION TO STRIKE PORTIONS OF INITIAL BRIEF OF RESPONDENT AND RESPONDENT'S DESIGNATION OF MATTER

Pursuant to Rules 208, 209 and 240, SCACR, Appellant Sunshine 11, LLC d/b/a Relax Inn ("Appellant") hereby moves this Court to strike portions of the Initial Brief of Respondent ("Initial Brief"), and Respondent's Designation of Matters to be Included in Record on Appeal ("Designation") No. 3, both dated October 5, 2023.

Pursuant to Rule 208(b)(4), SCACR, a party's brief "shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged." Rule 210(c), SCACR, provides that the Record on Appeal "shall not … include matter which was not presented to the

lower court or tribunal." Accordingly, Rule 209(b), SCACR, provides that "the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)]."

Respondent has designated as Designation No. 3, "Plaintiff's Motion to Remand filed in Federal Court and Exhibit" for inclusion in the Record on Appeal. Respondent's Initial Brief substantively relies on this exhibit. However, Respondent has not, and cannot, show that the "Exhibit" to "Plaintiff's Motion to Remand filed in Federal Court" was ever presented to the circuit court. As a result, the "Exhibit" cannot be included in the Record on Appeal and cannot be substantively relied on in Respondent's Brief. *See* Rules 208(b)(4), 209(b) & 210(c), SCACR.

On May 23, 2023, the Special Referee held a hearing on Appellant's motion to set aside default judgment. *See* Transcript of Motion Hearing, attached hereto as Exhibit "A." During the hearing, Respondent's counsel noted:

> We had referenced a motion to remand that we filed in Federal Court that included as an attachment the Summons and Complaint in the tort case. We referenced that in our brief, but I don't know that that's ever been made an exhibit, so we would supplement our brief with that document. It's simply a motion that was filed in the federal case, along with the attachment which is the Summons and Complaint, and I can send that – we can file it with the court as an exhibit or whatever Your Honor wants to do, but that's the only thing we would be relying on that I don't think its officially part of the record yet.

See Transcript at 5:5-5:17.

Later during the hearing the following exchange occurred:

> THE COURT: And then the last question would be, my fourth one is, what is that federal document? I don't think I have access to

> that and the date of it. If I do have it, if you tell me where it is in the body of evidence before me, I'll look there.
>
> MR. LANFORD: So I did just e-mail that.
>
> MR. DAVIES: Copy me on it, too, Brad, because I haven't seen it, either please.
>
> MR. LANFORD: Absolutely.
>
> THE COURT: Mr. Lanford, are you saying that you just e-mailed that [to] everybody?
>
> MR. LANFORD: I did, I've E-mailed it to the Court reporter, and I just forward that e-mail to everyone, to Sterling, to Special Referee Baxley, and I copied George and Kenny. It's the Motion to Remand that was filed with the Federal Court that includes the exhibit which is the Complaint.

See Transcript at 46:3-46:19.

At that same time, Respondent's counsel emailed the Special Referee "the exhibit referenced in the hearing." *See* Email dated May 23, 2023, attached hereto as Exhibit "B." However, the email's only attachment was "Plaintiff's Motion to Remand" and did not include any exhibits. *See id*.

Accordingly, at no time did Respondent provide the "Exhibit" to "Plaintiff's Motion to Remand filed in Federal Court" to the lower tribunal. As such the "Exhibit" cannot be included in Respondent's Designation and/or substantively relied on in his Brief.

CONCLUSION

Appellant requests that this Court strike Respondent's Initial Brief and Designation of Matter, and order that they be revised to omit any reference to the "Exhibit" contained in Designation No. 3 or any argument based on the contents of the "Exhibit." Appellant also

requests that the deadline for filing its Reply Brief be suspended until ten days after this Court resolves this Motion.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

October 9, 2023

s/Helen F. Hiser

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EXHIBIT "A"

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MOTION HEARING

May 23, 2023

Mark McAuley

vs

Sunshine 11, LLC, etc.

2022-CP-17-00356

REPORTER: Jill Vickers

1 possession?
2 MR. LANFORD: Your Honor, the only thing -- and I
3 thought it was already part of the record and then
4 realized just a few minutes ago that I don't think it
5 is. We had referenced a motion to remand that we
6 filed in Federal Court that included as an attachment
7 the Summons and Complaint in the tort case. We
8 referenced that in our brief, but I don't know that
9 that's ever been made an exhibit, so we would
10 supplement our brief with that document. It's simply
11 a motion that was filed in the federal case, along
12 with the attachment which is the Summons and
13 Complaint, and I can send that -- we can file it with
14 the court as an exhibit or whatever Your Honor wants
15 to do, but that's the only thing we would be relying
16 on that I don't think is officially part of the
17 record yet.
18 THE COURT: And gentlemen, for completeness of record,
19 maybe after this discussion today, if you all could
20 make sure you put all of these documents in a packet
21 that would go to the court reporter so it would be
22 part of the record, as well, and that would leave the
23 question that the documents, all of them and
24 individually were part of this record and were
25 considered as part of the record. Is that fair

1 Service, I think it states that they were personally
2 served.
3 THE COURT: And then the last question would be, my
4 fourth one is, what is that federal document? I
5 don't think I have access to that and the date of it.
6 If I do have it, if you tell me where it is in the
7 body of evidence before me, I'll look there.
8 MR. LANFORD: So I did just e-mail that.
9 MR. DAVIES: Copy me on it, too, Brad, because I
10 haven't seen it, either, please.
11 MR. LANFORD: Absolutely.
12 THE COURT: Mr. Lanford, are you saying that you just
13 e-mailed that everybody?
14 MR. LANFORD: I did, I've E-mailed it to the court
15 reporter, and I just forwarded that e-mail to
16 everyone, to Sterling, to Special Referee Baxley, and
17 I copied George and Kenny. It's the Motion to Remand
18 that was filed with the Federal Court that includes
19 the exhibit which is the Complaint.
20 THE COURT: Okay. Understood. Well, gentleman, let
21 me do this. As I said, this has been well argued.
22 It's easy with good lawyers. The good news is, I
23 have nothing under advisement, because I'm not in the
24 judging business anymore, and so this is a matter I'd
25 like to reflect on a little bit and take a look at

1 in the queue and get it signed and get it filed. So
2 my suggestion would be that we just do all this in
3 one fell swoop, and if we can include it in the final
4 order here, but I don't demand that from you, just if
5 you're willing to do it, I think it would be ...
6 MR. DAVIES: To me, that makes the most sense, Your
7 Honor.
8 MR. LANFORD: Works for me.
9 (Whereupon, the hearing concluded at 3:28 p.m.)
10 (PLAINTIFF'S EXHIBIT 1 WAS POST-MARKED FOR
11 IDENTIFICATION PURPOSES (6 pages) - Plaintiff's
12 Motion to Remand.)
13 (DEFENDANT'S EXHIBIT 1 WAS POST-MARKED FOR
14 IDENTIFICATION PURPOSES (3 pages) - Stipulations of
15 Facts and Agreements as to Certain Parties and
16 Issues.)
17 (DEFENDANT'S EXHIBIT 2 WAS POST-MARKED FOR
18 IDENTIFICATION PURPOSES (6 pages) - Summons and
19 Complaint dated 3/22/22.)
20 (DEFENDANT'S EXHIBIT 3 WAS POST-MARKED FOR
21 IDENTIFICATION PURPOSES (5 pages) - Summons and
22 Complaint dated 7/29/22.)
23 (DEFENDANT'S EXHIBIT 4 WAS POST-MARKED FOR
24 IDENTIFICATION PURPOSES (5 pages) - Affidavit of
25 Anjan Patel.)

EXHIBIT “B”

From:	Brad Lanford <blanford@bergerlawsc.com>
Sent:	Tuesday, May 23, 2023 3:13 PM
To:	J. Michael Baxley
Subject:	Fwd: McAuley Hearing
Attachments:	11 Motion to Remand.pdf

---------- Forwarded message ---------
From: **Brad Lanford** <blanford@bergerlawsc.com>
Date: Tue, May 23, 2023 at 3:01 PM
Subject: McAuley Hearing
To: <jillhvickers@gmail.com>

Attached is the exhibit referenced in the hearing.

--
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Learn more about the mission and values that guide our practice today and why we represent truly injured people throughout South Carolina.

--
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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Mark Joseph McAuley, Plaintiff, vs. Northfield Insurance Company, Sunshine 11, LLC d/b/a Relax Inn, Usha Patel, Anjan Patel, and Lavan Drawhorn, Defendants.	C/A No. 4:22-cv-02376-JD **PLAINTIFF'S MOTION TO REMAND**

Plaintiff Mark Joseph McAuley ("Plaintiff") hereby moves to remand this matter to state court on the ground that the District Court should abstain from hearing this declaratory judgment action. Pursuant to Local Civil Rule 7.04, the filing of a separate memorandum would serve no useful purpose as a full explanation of the grounds for the motion is set forth below.

FACTS AND PROCEDURAL HISTORY

The facts of the incident giving rise to this declaratory judgment action are not complicated. Plaintiff rented a room from Relax Inn and was given a key to a room that was already occupied by Defendant Drawhorn. When Plaintiff attempted to enter the room he was shot when Drawhorn fired a weapon at the door. A separate civil suit has been filed in state court in Dillon County with Civil Action Number 2022-CP-17-00356. Exhibit "A".

This action was instituted as a declaratory judgment action seeking clarification of coverage under Defendant Northfield Insurance Company's ("Northfield") insurance policy covering Defendant Sunshine 11, LLC d/b/a Relax Inn ("Relax Inn") and its two employees/agents Usha Patel and Anjan Patel. Northfield filed a Notice of Removal, even though there was not complete diversity among the parties, alleging that a realignment of the parties will result in

complete diversity. That motion has been fully briefed and is currently pending before the Court. This motion to remand follows.

APPLICABLE LAW

The Federal Declaratory Judgment Act provides:

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon filing of the appropriate pleading, ***may*** declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is sought or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (emphasis added).

The United States Supreme Court has consistently held that the Act's use of the permissive word "may" gives courts considerable discretion whether to entertain a declaratory judgment action, even where subject matter jurisdiction over the action otherwise exists. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 290 (1995) ("We believe it more consistent with the statute to vest the district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp."). "The Supreme Court has 'repeatedly characterized the Declaratory Judgment Act as "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant."'" *Brown-Thomas v. Hynie*, 412 F. Supp. 3d 600, 605-06 (D.S.C. 2019) (citations omitted).

Notwithstanding the usefulness of declaratory judgment actions to address actual cases and controversies, "[w]hen a related state court proceeding is pending, however, 'considerations of federalism, efficiency, and comity' should inform the district court's decision whether to exercise jurisdiction over a declaratory judgment action." *American Serv. Ins. Co. v. OnTime Transp.,* 2019 WL 3972820, at *5 (D.S.C. 2019), *quoting Penn-Am. Ins. Co. v. Coffey*, 368 F.3d 409, 412 (4th Cir. 2004). The Supreme Court, the Fourth Circuit, and this Court have often been reluctant to

exercise jurisdiction over declaratory judgment actions relating to state law insurance issues. *See, e.g., id.; Mitcheson v. Harris,* 955 F.2d 235 (4th Cir. 1992); *Columbia Ins. Co. v. Reynolds.,* 225 F. Supp. 2d 375 (D.S.C. 2016); *Beach Cove Associates v. U.S. Fire Ins. Co.,* 903 F. Supp. 959 (D.S.C.1995).

The Fourth Circuit has identified four factors a District Court must consider in deciding whether to exercise jurisdiction over a declaratory judgment action:

> [E]ven where jurisdiction is not discretionary, courts may abstain from exercising jurisdiction under certain circumstances that may intrude on the prerogative of state courts. Abstention helps avoid duplicative litigation and interference with state-court proceedings.
>
> For similar reasons, in declaratory judgment actions, courts must consider whether "federalism, efficiency, and comity" counsel against exercising jurisdiction when an ongoing proceeding in state court overlaps with the federal case. In making this determination, we often look to (1) the state's interest in having its own courts decide the issue; (2) the state courts' ability to resolve the issues more efficiently than the federal courts; (3) the potential for unnecessary entanglement between the state and federal courts based on overlapping issues of fact or law; and (4) whether the federal action is mere forum-shopping.

Trustgard Ins. Co. v. Collins, 942 F.3d 195, 202-03 (4th Cir. 2019) (citations omitted).

Federal courts should avoid allowing parties to use declaratory judgment actions to determine issues that are in dispute in underlying state court actions. *State Farm Fire & Cas. Ins. Co. v. Sproull*, 329 F. Supp. 3d 238, 246 (D.S.C. 2018).

> Further, the declaratory judgment statute should not be used to "try a controversy by piecemeal, or try particular issues without settling the entire controversy, or to interfere with an action which has already been instituted." *Allied-Gen. Nuclear Servs. v. Commonwealth Edison Co.,* 675 F.2d 610, 611 (4th Cir. 1982) (internal citations and quotations omitted). It should not be used to resolve factual disputes … in an underlying suit or for underlying claims. Those matters are the subject of a lawsuit in state court…. That lawsuit remains pending. Indeed, "declaratory judgments to resolve issues in pending tort cases should be rare." *Nautilus Ins. Co. v. BSA Ltd. P'ship,* 602 F. Supp. 2d 641, 649 (D. Md. 2009); *see also Wood v. Walton,* No. CIV. WDQ-09-3398, 2011 WL 3439308, at *5 (D. Md. Aug. 4, 2011) (staying declaratory action pending the resolution of a tort case in order to prevent inconsistencies and noting that both actions required resolution of the same legal issues which could be decided differently between the federal court judge and a jury in the underlying tort case).

Id.

ANALYSIS

The crux of the coverage issue is two-fold: (1) whether the Plaintiff's injuries were due to an "assault or battery" such that the coverage provision regarding "assault or battery" would even be applicable; and (2) if the "assault or battery" provision does apply, is there still coverage in the larger amount due to another policy provision purporting to reduce the available coverage to $100,000.00. It is the first question that will ensure entanglement with the state court given the peculiar facts of this case and one of many reasons this case should be remanded to state court.

In the civil suit that has been filed, it is alleged, because it is believed to be true, that the Plaintiff's injuries were due to negligence, that negligence being the inadvertent renting of a room that was already occupied. *See* Exhibit "A", Complaint ¶¶ 8-15. That act was the act of negligence and the "occurrence" that triggers coverage and caused the Plaintiff's harm. It is further alleged in that suit that Drawhorn shot the Plaintiff because he was startled and believed that he was in danger and shot at the door in self-defense. *Id.* It is Plaintiff's position that neither an assault nor battery was ever committed by Mr. Drawhorn, and it is Plaintiff's belief that the facts to be adduced in discovery in the state court action will ultimately support that conclusion.

For Northfield to prevail in its attempt to significantly reduce the indemnity coverage available to its insured, its primary goal in raising the coverage issue and defending this declaratory judgment action, Northfield will be tasked with proving that Drawhorn's act was an assault or battery as that is defined in its insurance policy. This declaratory judgment action does not involve a simple legal interpretation of a policy, although it involves that as well. It also requires the court to make a finding of fact, the exact same finding of fact that will be made in the state court tort action. It is difficult to imagine a starker case of entanglement of the state and federal court systems, not a theoretical possibility but a certainty.

For instance, there could be conflicting rulings on discovery disputes that affect which evidence is presented and relied on in each case. There could be conflicting evidentiary rulings affecting which evidence is presented and how it is presented which could affect the outcome of the factual dispute. There could be different interpretations as to whether the judge or jury should decide this factual issue and how it should be decided. These issues will be more efficiently dealt with in state court under the same system and under the same sets of rules and possibly even by the same judge who could order consolidation of certain issues for discovery purposes.

In fact, this is exactly what the Fourth Circuit in *Trustgard* was concerned with. In that case, in reversing the district court and finding the district court judge had abused her discretion in ruling on the declaratory judgment issue, the Court focused on the fact that the federal court and state court were essentially resolving the same factual issues. *Trustgard*, 942 F.3d at 203. Notably the Court held: "This overlap with the state-court proceeding is significant. . . Resolving those issues in a federal venue might have the unfortunate result of precluding the parties from fully litigating them in state court." *Id.* The Fourth Circuit made it clear that the factual issues should have been resolved in state court and in fact the entire declaratory judgment action should have been remanded to state court. That is clearly the case here as well.

Analyzing the other three factors mentioned in *Trustgard* also favor remand. The first factor is whether the state has an interest in resolving the issue. It is undisputed that state contract and insurance law will be controlling in looking to resolve this coverage dispute. "There exists an interest in having the most authoritative voice speak on the meaning of applicable state law controls the resolution of the case." *Mitcheson*, 955 F.2d at 237. Firtjer. "[s]tate courts have a particular interest in deciding questions of insurance law." *Beach Cove Associates*, 903 F.Supp. at 962, *citing SEC v. National Securities*, 939 U.S. 453, 459 (1969).

The second factor is whether the issues can be resolved more efficiently in state court. While there could certainly be arguments generally as to which courts are more efficient, resolving the factual issues in state court where the tort case is also pending will be more efficient where there can be greater flexibility and coordination with the cases pending in the same court, and also much less likelihood of any conflicting rulings and findings of fact.

The fourth and final factor mentioned in the *Trustgard* opinion is whether the federal action was merely forum-shopping. That would certainly be the case here as the action was initially filed in state court and was removed by the insurance company who had to file a separate motion to realign the parties in an effort to create diversity such that the District Court would even be able to exercise jurisdiction over the case. Clearly the insurance company believed that federal court was a better forum otherwise there would be no other reason to remove the case.

CONCLUSION

For the above stated reasons, Plaintiff respectfully requests that the Court exercise its discretion to abstain from hearing this declaratory judgment action and remand this action to the Dillon County Court of Common Pleas.

Respectfully submitted,

LAW OFFICE OF KENNETH E. BERGER, LLC

/s/ Bradley L. Lanford
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Attorneys for the Plaintiff

Columbia, South Carolina
August 16, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Special Referee

Appeal No.: 2023-00173

Mark McAuley, ... Plaintiff/Respondent,

v.

Sunshine 11, LLC d/b/a Relax Inn, Usha Patel
And Anjan Patel, ... Defendants,
Of Whom

Sunshine 11, LLC d/b/a Relax Inn is the .... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant's **Motion to Strike Portions of Initial Brief of Respondent and Respondent's Designation of Matter** on Mark McAuley by emailing a copy to his attorneys of record, as follows:

Kenneth E. Berger, Esquire
Bradley L. Lanford, Esquire
The Law Office of Kenneth E. Berger, LLC
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Email: kberger@bergerlawsc.com
Email: blanford@bergerlawsc.com

Attorneys for Respondent Mark McAuley

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

McAngus Goudelock & Courie, LLC

s/*Jake Markland*

October 9, 2023

Legal Assistant to Helen F. Hiser
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Attorneys for Appellant Sunshine 11, LLC d/b/a Relax Inn

mgc

RECEIVED
Oct 09 2023
SC Court of Appeals

Reply To
HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

October 9, 2023

Via S.C. Courts E-filing & U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Mark McAuley vs Sunshine 11, LLC d/b/a Relax Inn, Usha Patel and Anjan Patel
Civil Action No.: 2022CP1700356 (Dillon)
Date of Incident: October 17, 2021
Carrier Claim No.: F3D6620
MGC File No.: 21027.22023
Appeal No.: 2023-00173

Dear Ms. Kitchings:

Enclosed for filing is Appellant's Motion to Strike Portions of Initial Brief of Respondent and Respondent's Designation of Matter in the above-referenced matter, along with the Proof of Service. We are serving counsel of record via email. We will send our firm's check in the amount of $50 for filing the motion via U.S. Mail with a copy of this letter.

Please let us know if you have any questions. Thanking you in advance for your assistance, I am

Yours truly,

Helen F. Hiser

cc: Bradley L. Lanford, Esquire (via E-mail only)
Kenneth E. Berger, Esquire (via E-mail only)