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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge
Trial Court Case No.: 2021CP2607668

Appellate Case No.: 2023-000239

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. Alagna 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

APPELLANT'S FINAL REPLY BRIEF

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SCOPE OF REVIEW

At the pre-trial stage, the Appellant only has to present a *prima facie* case to establish personal jurisdiction. In addition to the error committed by the trial court as to general and specific jurisdiction, the trial court erred throughout the Dismissal Order (R. pp. 17-30) by applying the wrong standard to the Respondent's motion to dismiss based on lack of personal jurisdiction in determining if jurisdiction exists in South Carolina. The trial court required the Appellant to prove her case on the on the merits as to all issues relating to the existence and scope of the partnership between Chicago Title Insurance Company ("Chicago Title") and Chicago Land Agency Services ("CLAS"), rather than determining whether the Appellant met her burden of establishing a *prima facie* case. As the Appellant presented sufficient facts to support her *prima facie* case establishing jurisdiction of Chicago Title and the partnership, the Dismissal Order should be reversed.

The appropriate standard on a motion to dismiss based on lack of personal jurisdiction is set forth in *M.B. Khan Construction Co. v. Three Rivers Bank & Trust Co.*, 354 S.C. 412 at 415-416, 581 S.E.2d 481, 482 (2003):

> At the pre-trial stage, only a prima facie showing is required to support jurisdiction. *Mid-State Distribs. Inc. v. Century Importers, Inc.,* 310 S.C. 330, 426 S.E.2d 777 (1993). On a motion to dismiss for lack of personal jurisdiction, factual disputes arising by affidavit will be resolved in favor of the non-moving party. *Brown v. Investment Management and Research, Inc.,* 323 S.C. 395, 475 S.E. 2d 754 (1996). Where the non-moving party submits facts sufficient to make a prima facie showing of an agency relationship supporting long-arm jurisdiction under §36-2-803, the motion to dismiss should be denied.

Id., M.B. Khan at 415, 416, S.E.2d at 482-483. "There is no 'other evidence' requirement for personal jurisdiction where the complaint itself demonstrates jurisdiction." *Mid-State Distribs. Inc. v. Century Importers, Inc.,* 310 S.C. 330, 426 S.E.2d 777 (1993). Additionally,

"in complex cases it may be desirable to delay a decision on personal jurisdiction so as to allow parties to conduct discovery,'which might lead to a more accurate judgment than one made solely on the basis of affidavits'". *Brown v. Investment Management and Research, Inc.,* 323 S.C. 395, 400, 475 S.E.2d 754, 756 (1996) citing 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1351 (Supp.1995).

The Appellant has established a *prima facie* case as to a partnership sufficient to defeat a motion to dismiss on the issue of whether the partnership committed a tortious act within this State. Appellant pled that a partnership exists between Chicago Title and CLAS. (R. p. 73, ¶ 29). Further, the Appellant pled that it was the partnership, through CLAS, that filed the Warranty Deed (R. p. 74, ¶30). The Appellant submitted the following facts to establish its *prima facie* case at this pre-trial stage of the proceedings:

1. CLAS and Chicago Title are two separate entities even though Chicago Title is a 49.9% shareholder of CLAS[1].

2. CLAS's management is comprised of five officers and directors, three of whom were concurrent Chicago Title officers and employees (R. p. 206).

3. CLAS and Chicago Title share the same office building in Chicago, Illinois (R. p. 206).

4. CLAS's website prominently and proudly states that it has a unique relationship with Chicago Title as a partner.[2]

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[1] At the time the Amended Complaint was filed, it was not known that Chicago Title was a 49.9% shareholder in CLAS. This was first learned when the Affidavit of Michael Cusack (R. p. 196, ¶4) was filed.

[2] As of the filing of this brief, Chicago Title and CLAS continue to display, on the website's home page, https://www.ctclas.com, the same pronouncement that Chicago Title and CLAS have a unique relationship as joint venture partners.

These facts, construed in Appellant's favor, clearly establish, at this pre-trial stage, that the Appellant has met her *prima facie* burden that Chicago Title and CLAS are partners.

At trial, the Appellant will still have the burden of proving the existence of the partnership, but at this pre-trial stage, the Appellant has met her *prima facie* burden sufficient to defeat Chicago Title's motion to dismiss. *M.B. Khan, id.* at 416, S.E.2d at 483. "Contractor still bears the burden of proving an agency relationship at a trial on the merits.". This same analysis applies with equal force to this case involving a partnership.[3]

ARGUMENT

I. South Carolina has general jurisdiction over Chicago Title

In its first argument, Chicago Title claims that Appellant conceded that general jurisdiction under the enduring relationship standard is inappropriate; Chicago Title is wrong on this point as the Appellant has not conceded this point because South Carolina courts have general jurisdiction over Chicago Title based on its enduring relationship with the State, in addition to its express consent to jurisdiction.

Prior to *Daimler AG v. Bauman*, 571 U.S. 117 (2014), there would have been no question that Chicago Title would be subject to general jurisdiction in South Carolina by virtue of S.C. Code Ann. § 36-2-802 entitled **"Personal jurisdiction based on enduring relationship"**. *See QZO Inc. v. Moyer*, 358 S.C. 246, 253-254, 594 S.E.2d 541, 545 (Ct. App. 2004). Chicago Title is a national title insurance company. It has offices in South Carolina and it sells title insurance through its agents throughout the state. Most

[3] In South Carolina, a partner is an agent of the partnership. S.C. Code Ann. § 33-41-310(1) ("Every partner is an agent of the partnership and the act of the partner, including the execution of any instrument, for apparently carrying on in the usual way the business of the partnership of which is a member binds the partnership ...").

importantly, for the purpose of this argument, Chicago Title is an "admitted insurer" in South Carolina. Chicago Title has had, and continues to have, an enduring relationship with South Carolina because of its licensure and the business it conducts in the State.

It has long been recognized that states have had a "special relation to insurance". *Osborn v. Ozlin*, 310 U.S. 53, 65 (1940). "The state may fix insurance rates, it may regulate the compensation of agents, it may curtail drastically the area of free contract" and may "control [ ] the expenses of insurance companies." *Id.* at 65-66 (citations omitted). *See also* SUSAN RANDALL, INSURANCE REGULATION IN THE UNITED STATES: REGULATORY FEDERALISM AND THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, 26 Fla. St. U. L. Rev. 625, 629 (1999). ("Insurance is unique among financial services because it is regulated by the states.") Through the licensure process, an insurer subjects itself to the control and conditions imposed by state law.

Both Appellant and Respondent have discussed, in their Briefs, the impact that *Daimler* has had on general jurisdiction analysis. *Daimler* now limits general jurisdiction to a company's place of incorporation or its principal place of business. However, as Chicago Title points out in its Brief, *Daimler* states that there can be an "exceptional case" that extends general jurisdiction beyond a state of incorporation or principal place of business. *Id.,* 139, n.19. Like a state of incorporation or a principal place of business, an insurer's registration and licensure with a state "indicates general submission to the State's powers" and has always been a "traditional" basis for exercising general jurisdiction. *J. McIntyre Mach. Ltd. v. Nicastro,* 564 U.S. 873, 880 (2011). Chicago Title's licensure as an admitted insurer, constitutes such an "exceptional case" under *Daimler.*

This Court has recognized the responsibilities of the Director of the Department of Insurance in regulating insurance companies in the State. In *White Oak Manor, Inc. v. Lexington Ins. Co.*, 394 S.C. 375, 381, 715 S.E.2d 383, 387 (Ct. App. 2011) (*rev'd on other grounds*):

> Rather, it is consistent with other statutory responsibilities entrusted to the Director, including duties to (1) "see that all laws of this State governing insurers or relating to the business of insurance are faithfully executed [,]" (2) "report to the Attorney General or other appropriate law enforcement officials criminal violations of the laws relative to the business of insurance or the provisions of this title which he considers necessary to report[,]" and (3) institute civil actions when appropriate.

S.C. Code Ann. § 38-3-110 (2002). These duties and responsibilities emphasize the fact that insurance companies are the subject of intense regulation by the State as detailed in Appellant's Initial Brief on pp. 9-10, thus subjecting foreign insurers to the jurisdiction of the Director of the Department of Insurance. Chicago Title's registration as a foreign insurance company in South Carolina constitutes a *Daimler* exceptional case; by becoming an admitted insurer, Chicago Title has voluntarily submitted itself to the general jurisdiction of the State.

II. Chicago Title Consented to the General Jurisdiction of the Courts of South Carolina

In addition to Appellant's arguments supporting general and specific jurisdiction, Chicago Title intentionally consented to jurisdiction in South Carolina, which constitutes an independent basis for jurisdiction. Chicago Title concedes that the trial court erred in ruling that *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917) did not apply to this case. The core significance of *Pennsylvania Fire* is explained in *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122, 138 (2023): "[o]ur

precedents have recognized, too, that 'express or implied consent' can continue to ground personal jurisdiction – and consent may be manifested in various ways by word or deed." In *Pennsylvania Fire*, the U.S. Supreme Court held that the Missouri statute authorizing service on its insurance commissioner conferred personal general jurisdiction in Missouri. *Pennsylvania Fire* is still the prevailing law and is binding on the trial court. The facts and law of *Pennsylvania Fire* apply directly to this appeal. Chicago Title has manifested its consent to jurisdiction by licensure, especially by S.C. Code Ann. § 38-5-70.

Chicago Title tries to minimize the trial court's error by arguing that Chicago Title, notwithstanding the holding in *Pennsylvania Fire,* has not subjected itself to the general jurisdiction in South Carolina notwithstanding its licensure within the State, including its compliance with S.C. Code Ann. § 38-5-70. Chicago Title's arguments are essentially three-fold: (1) that the Missouri Consent Statute[4] uses the word "jurisdiction" within the body of its statute and that this differentiates the Missouri Consent Statute from S.C. Code Ann Code Ann. § 38-5-70; (2) that the Missouri Supreme Court subsequently overruled, in part, the underlying case which was the focus of the *Pennsylvania Fire* decision; and, (3) the South Carolina cases that opine that S.C. Code Ann. § 38-5-70 confers general jurisdiction should not be understood as actually saying what they say.

Chicago Title argues that S.C. Code Ann. § 38-5-70 does not constitute consent to jurisdiction in South Carolina. In order to do this, Chicago Title first argues that the operative Consent Statute in *Pennsylvania Fire*, Missouri Rev. Stats., 1909, § 7042, uses

[4] Reference to the various states statutory code sections referencing the appointment of the Superintendent, Director or Commissioner as the attorney for service of process can be cumbersome to follow. Appellant will refer to the statutes hereinafter generally as the "Consent Statute" unless otherwise indicated.

the word "jurisdiction" and that the South Carolina statute has no equivalent language. Although the Missouri Consent Statute does use the word "jurisdiction," it does not use it in the context that Chicago Title has framed its argument. The actual part of the sentence in the Missouri Consent Statute that refers to jurisdiction states:

> . . . **and in case such process is issued by a justice of the peace or other inferior court**, the same may be directed to and served by any officer authorized to serve process in the city or county where said superintendent shall have his office, at least fifteen days before the return thereof, and such service **shall confer jurisdiction**. . . . (emphasis added).

In context, this part of the sentence makes clear that the Missouri inferior courts, such as the justice of the peace, shall also have jurisdiction over the insurer if properly served. The clear implication is that the Missouri courts of general jurisdiction already have jurisdiction by virtue of its Consent Statute and the Missouri legislature wanted to make it clear that its inferior courts had jurisdiction as well. Therefore, the use of the word "jurisdiction" in this limited sense does not stand for Chicago Title's proposition that the Missouri Consent Statute is inherently different than S.C. Code Ann. § 38-5-70.

Second, the Missouri case which led to the U.S. Supreme Court Pennsylvania Fire decision is *Gold Mining Co.* v. *Pennsylvania Fire Ins. Co. of Philadelphia,* 267 Mo. 524, 184 S.W. 999 (Mo. 1916). *Gold Mining* was subsequently reversed, in part, by *State ex rel. Am. Central Life Ins. Co. v. Landweh*r, 318 Mo. 181, 300 S.W. 294 (Mo. 1927). Chicago Title argues that, because *Gold Mining* was subsequently reversed, in part, by *Landwehr*, *Pennsylvania Fire* is no longer applicable as binding precedent. Although technically correct that *Landwehr* overruled some of the *Pennsylvania Fire* state case, the *Landwehr* decision actually supports the Appellant's position in this appeal.

In *Landwehr*, the issue was whether the Missouri courts had general jurisdiction over American Central Insurance Co., an Indiana insurance company, on a life insurance policy it wrote on a Kansas resident. When the insured died, his wife, the beneficiary, also a Kansas resident, brought an action against American Central in Missouri *(id*. at 184, S.W. at 294). It was argued that the inclusion of the language in the Consent Statute "in all proceedings" gave the Kansas citizen the right to bring her action in Missouri. The *Landwehr* court, however, in interpreting its then current Consent Statute, ruled that this specific language had to be read and interpreted through the lens of its prior legislative history of the Missouri Consent Statutes. The *Landwehr* court held, that because of its unique legislative history, the Consent Statute at issue in *Landwehr* only allowed actions brought by citizens and residents of Missouri on policies that were written in Missouri. The operative phrase "in all proceedings" could only be properly understood by reading into it the prior legislative history, notwithstanding the otherwise plain and broad language of the statute which would normally have allowed general jurisdiction over all claims. The phrase "in all proceedings", as applied in Missouri's Consent Statute, was explained by the *Landwehr*'s court this way:

> While the words "in all proceedings" are very broad, they really include no sort of action or proceeding not fairly included in the language of the first part of § 31, page 38 of the Laws of 1869 [part of the prior Consent Statute legislation used to interpret the current statute]. *Standing alone and without reference to the history of prior legislation upon the subject*, those words might well be construed to extend the right to bring suit in this State against, and to obtain service of process upon, foreign insurance companies doing business in this State, to all actions against such companies, whether based on contracts of insurance made in this State or not, or whether based upon other liabilities incurred within this State or not. But, as in the 1869 Act, a provision was retained which indicates that the General Assembly intended

> to qualify the words "in all proceedings" and to limit their scope (emphasis added).

Id. at Mo. 187-188, 300 S.W. at 296. Because of the prior legislative history of this statute, though, the *Landwehr* court felt compelled to limit the scope of the meaning "in all proceedings" to only suits brought by Missouri residents on policy and actions arising in Missouri, notwithstanding the plain language of the statute. South Carolina has no such limiting legislative history that curtails the reach of S.C. Code Ann. §38-5-70.[5]

Missouri now interprets its Consent Statute to allow for suits by out-of-state residents against foreign insurers on most claims. In *Moore v. Christian Fidelity Life Ins. Co.,* 687 S.W.2d 210 (Mo. App. 1984), the plaintiff, a former employee of Christian Fidelity brought an action for the payment of wages and a bonus. The plaintiff was a citizen of Iowa when he filed his suit, and Christian Fidelity was a Texas life insurance company licensed in and doing business in Missouri. Christian Fidelity moved to dismiss the lawsuit against it on the grounds of lack of personal jurisdiction over it in Missouri because the action was brought by an out-of-state plaintiff on a claim that did not arise in Missouri. The insurer claimed that jurisdiction could not be based on its long-arm statute. The trial court granted Christian Fidelity's motion to dismiss for lack of personal jurisdiction on the grounds that the trial court did not have specific jurisdiction over the insurer under its long-

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[5] Using the *Landwehr* paradigm of interpreting the scope of § 38-5-70 through previous legislative history, South Carolina's earlier Consent Statute strongly supports jurisdiction in this case. The Consent Statute found in the Code of 1912 stated, in part: "... and such appointment shall continue in full force and effect as long as such company shall have outstanding policies in this state and **until all claims of every character held by citizens of this state against such company shall have been settled** ...".). *Murray v. Soverign Camp, W.O.W.,* 192 S.C. 101, 5 S.E.3d, 560, 561 (1939) (emphasis added). South Carolina's legislative history on the reach of its Consent Statute extended to "all claims of every character").

arm statute. On appeal, the Missouri Court of Appeals reversed the trial court's order of dismissal, holding that the Missouri Consent Statute allowed for a non-resident plaintiff to sue a foreign insurance company for unpaid wages in Missouri based on its Consent Statute. The court held that the registration statute (which is similar, in substance, to S.C. Code Ann. § 38-5-70), independent of Missouri's long-arm statute, subjects foreign insurance companies to general jurisdiction in the Missouri courts as to any cause of action.[6] The *Moore* court stated:

> The plaintiff Moore accomplished service upon the foreign insurance company defendant in the manner [provided by the Consent Statute]. Personal jurisdiction over the non-resident under that procedure is based upon the express consent of the foreign insurer–as a condition to the issuance of policies or transaction of business in Missouri–to authorize the Director of the Division of Insurance to acknowledge and receive service of all lawful process against the company in any action commenced in a court of our state.
>
> . . .
>
> The exercise of jurisdiction over the person of the non-resident under [the Consent Statute], on the other hand, rests on the express consent of the insurer to submit to the judgment of the court and amounts to an intentional waiver of the question of adjudicatory jurisdiction. *Insurance Corporation of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S. Ct. 2099, 2105, 72 L. Ed. 2d 492 (1982); *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315, 84 S. Ct. 411, 414, 11 L. Ed. 2d 354, 1964. The explicit terms of [the Consent Statute],moreover are notice to the consensual non-resident insurer to expect that in all actions brought by non-residents of this state on a cause of action, other than an action on a policy of insurance, which arises out of business transacted, acts done, or contracts made in this state, it will be required to respond in the Missouri court.

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[6] The Missouri Consent Statute allows service on the director of the division of insurance ". . . in *any* action against the company, instituted in any court of this state . . . (*Id.,* ___). S.C. Code Ann. §38-1-20 allows service on the Director of Insurance ". . . in *any* action or proceeding against [the insurer]. . . . (emphasis added).

Id. at 213-214. This pronouncement by the *Moore* Court mirrors Appellant's argument that S.C. Code Ann. § 38-5-70 creates general jurisdiction allowing her to bring her action against a licensed foreign insurer. It should be noted that, unlike the plaintiff in *Moore*, who was not a Missouri resident, the Appellant is a resident of South Carolina, which makes her argument even stronger.

The case law of Missouri does not detract from Appellant's argument but, on the contrary, supports the Appellant. The explanation in *Landwehr* setting forth what "in any proceeding" meant in Missouri based on Missouri's limiting legislative history and the subsequent holding in *Moore* support the Appellant's position in this appeal.

Thirdly, Chicago Title contends that South Carolina case law does not support the proposition that South Carolina Code Ann. § 38-5-70 provides the basis for general jurisdiction in this State. The three South Carolina cases that stand for the proposition that licensure in South Carolina subjects a foreign insurer to general jurisdiction are *Wofford v. Prudential Ins. Co. of America*, 65 F.Supp. 637 (D.S.C. 1946), *Equilease Corp. v. Weathers*, 275 S.C. 478, 272 S.E.2d 789 (1980) and *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 9, 753 S.E.2d 537 (2014). Chicago Title attempts to distinguish these cases in order to argue that they do not say what they actually say, i.e., that compliance with the Consent Statute subjects an insurer to general jurisdiction in this state. What Chicago Title fails to recognize is that these three court pronouncements are based on the traditional rules of statutory construction that the clear and unambiguous language of a statute controls its interpretation. As stated in *Murray v. Sovereign Camp, W.O.W.:*

> As has often been said, the chief purpose in judicial construction of statutes is to ascertain the intention of the Legislature. In *Home Building & Loan Assn. v. City of Spartanburg*, 185 S.C. 313, 194 S.E. 139, 142, the Court, speaking through Mr. Justice Fishburne, said: "the books are so full of cases holding that the intention of the legislative body is the first rule of construction of statutes that a citation of them is wholly unnecessary. Full effect must be given to each section, and the words must be given their plain meaning. Where there is no ambiguity, words must not be added to or taken from the statute." (citations omitted).

Supra, S.C. 101-102, S.E.2d 562. The plain meaning of S.C. Code Ann. § 38-5-70, when it states "in any action and proceeding against it" and "so long as any liability remains" compels a finding that compliance with the South Carolina licensing statutes creates general jurisdiction in South Carolina.

To further support that compliance with S.C. Code Ann. § 38-5-70 is consent to jurisdiction in the state, the statute governing service on an unauthorized insurer in South Carolina is less encompassing. S.C. Code Ann. § 38-25-520(a) entitled **"Director agent for service of process on unauthorized insurers"** limits actions against unauthorized insurers doing business in the State to actions "arising out of the policy or contract" made on behalf of the insured. A plaintiff cannot obtain general jurisdiction on an unauthorized insurer by express mandate of this Code Section; the plaintiff is limited to only actions on an insurance policy "issued on behalf of the insured." The Legislature could have, but did not, include this kind of limiting language in S.C. Code Ann. § 38-5-70. This is further evidence of legislative intent that a licensed foreign insurer is subject to general jurisdiction in South Carolina.

In the case of *Brown, supra,* our Supreme Court held that registration under the South Carolina Uniform Security Act of 2005 provides an independent basis for jurisdiction.

The Supreme Court explained that S.C. Code Ann. § 35-1-1420, which deals with service on the S.C. Securities Commissioner:

> provides any person, including a nonresident of the State, who "engages in conduct prohibited or made actionable by this chapter" is deemed to consent to the appointment of the Securities Commissioner to receive lawful process as if it were personally served upon it. *Id*. at 401, S.E.2d at 757.
>
> . . .
>
> We hold Appellants made a prima facie showing of personal jurisdiction to satisfy our long-arm statute. Furthermore, **we hold as a matter of law that in selling securities in this state, Respondents submitted to personal jurisdiction in South Carolina.**

Id. at S.C. at 401, S.E.2d at 757 (emphasis added). This reasoning applies with equal force to foreign insurance carriers who are licensed in the state.

Appellant's position can be best summarized by the rationale found in *Littlejohn v. Southern Ry. Co.*, 45 S.C. 96, 22 S.E. 761, 761-762 (1895):

> If an individual comes within the limits of the state, and thus places himself within reach of the jurisdiction of our courts, he surely can be made a party to an action by serving him with process while here; and we do not see why the same principle should not be applied to a foreign corporation.

Chicago Title is present in this State because it went through the rigorous requirements of licensure to allow it to be present here. As explained above, one of the requirements was to consent to jurisdiction in South Carolina "to any action or proceeding" brought against it in the courts of South Carolina and Chicago Title consented.

III. Chicago Title's attack on the constitutionality of S.C. Code Ann. §38-5-70 is untimely and S.C. Code §38-5-70 does not violate the Dormant Commerce Clause

A. Chicago Title's constitutional argument is not properly before the Court

Chicago Title's second argument challenging the constitutionality of S.C. Code Ann. § 38-5-70 is not properly before the Court for two reasons.

1. This is the first time that Chicago Title has raised the issue of the constitutionality of the Consent Statute. This issue was not brought before the trial court and the trial court did not rule on this issue. Although it is not generally necessary for a party to have presented the issue to the trial court or to obtain a ruling from the trial court before raising it as an additional sustaining ground, this argument is not an additional sustaining ground in the traditional sense. JEAN HOEFER TOAL, SHAHIN VAFAI AND ROBERT A. MUCKENFUSS, APPELLATE PRACTICE IN SOUTH CAROLINA (2nd edition, 2002), pp. 61-62. In this appeal, Chicago Title is asking this Court to declare S.C. Code Ann. § 38-5-70 as unconstitutional, which is qualitatively different than raising an issue that would sustain the trial court's decision. If this Court were to rule that S.C. Code Ann. § 38-5-70 is unconstitutional, it would not be affirming the trial court's interpretation of the statute; rather, it would be striking the statute in its entirety, which would be an additional sustaining ground.

2. Chicago Title's argument is actually seeking a declaratory ruling on this issue by this Court. When a party alleges that a statute is unconstitutional ". . . the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard". S.C. Code Ann. § 15-53-80 (2022). *See also* Rule 24(c), SCRCP ("when the constitutionality of a statute is drawn in question in any action in which the state . . . is not a party, the party shall also serve the motion on the attorney general."). Appellant respectfully doubts that the Attorney General has been notified of this proceeding. Accordingly, this is not the proper time or forum to raise this issue.

B. S.C. Code Ann. § 38-5-70 does not violate the Dormant Commerce Clause of the United States Constitution

If this Court determines that Chicago Title's Dormant Commerce Clause argument is properly before it, S.C. Code Ann. § 38-5-70 does not violate the Dormant Commerce Clause. In his concurring opinion in *Mallory*, *supra,* Justice Alito provides an explanation why the Appellant's case, under S.C. Code Ann. § 38-5-70, would not violate the Dormant Commerce Clause.

First, Justice Alito notes that consent is a separate basis for jurisdiction and that is why he voted to affirm *Pennsylvania Fire* in *Mallory. Mallory, supra*, at 183.

In discussing the Dormant Commerce Clause, Justice Alito observed:

> We have long recognized that the Constitution restricts the States' power to reach out and regulate conduct that has little if any connection with the state's legitimate interest.

Mallory, supra, at 154. Justice Alito then clarified and made more concrete his thoughts about the registration in the *Mallory* case.

> In my view, there is a good prospect that Pennsylvania's assertion of jurisdiction here–over an out-of-state company in a suit filed by an out-of-state plaintiff on claims wholly unrelated to Pennsylvania--violates the Commerce Clause.

Mallory, supra, at 160. Justice Alito goes on to further clarify his position as follows:

> Given these serious burdens, to survive Commerce Clause scrutiny under this Court's framework, the law must advance a "'legitimate local public interest'" and the burdens must not be "'clearly excessive in relation to the putative local benefits.'" (citation omitted.) But I am hard-pressed to identify any *legitimate local* interest that is advanced by requiring an out-of-state company to defend a suit by an out-of-state plaintiff on a claim totally unconnected to the forum State. A State certainly has legitimate interest in regulating activities conducted within its borders, which may include providing a forum to redress harms that occur within the State (citations omitted). A state may also have an interest "in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (citations

> omitted.) But a state generally does *not* have a legitimate local interest in vindicating the rights of non-residents harmed by out-of-state actors for conduct outside the State. . . .

Mallory, supra, at 162. Justice Alito's above explanation confirms that there is not a Dormant Commerce Clause violation as to S.C. Code Ann. § 38-5-70.

First and foremost, Ms. Ward, the Appellant, is a citizen and resident of South Carolina. She lost her Home in South Carolina, and the loss of her Home was proximately caused by the recording of the fraudulent Warranty Deed with the Horry County Register of Deeds by the Chicago Title/CLAS partnership. The harms that Ms. Ward experienced occurred within this State. It would be unfair to the Appellant to force her to go to another state to seek redress for the loss of her Home in South Carolina because of acts committed in this State. Justice Alito's concern about a situation where an out-of-state claimant is suing an out-of-state defendant for harms or actions that were conducted outside the State has no bearing on this case whatsoever.

Secondly, admitted foreign insurers are not treated differently than in-state insurers. The Insurance Act actually puts in-state and out-of-state insurers on the same level playing field; if you are an insurer in South Carolina, you are subject to the jurisdiction of the South Carolina courts. It is clearly in the State's interest to have a forum in the state where wrongs committed in South Carolina can be addressed.

Thirdly, the Dormant Commerce Clause generally does not affect those areas that are traditionally matters of local concern. Insurance is one of those areas that historically has been an exclusive area of state regulation. SUSAN RANDALL, INSURANCE REGULATION IN THE UNITED STATES: REGULATORY FEDERALISM AND THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (1999) *supra.*

As to challenges against statutes based on the Dormant Commerce Clause generally, in order to prove discriminatory effect, the party asserting a Dormant Commerce Clause violation must show that the law would negatively impact interstate commerce to a greater degree than intrastate commerce. *Amisub of South Carolina, Inc. v. SC DHEC*, 424 S.C. 80, 89-90, 817 S.E.2d 633, 638 (Ct. App. 2018). Chicago Title has not shown this negative impact on interstate commerce, nor can it. Insurers in South Carolina, whether domestic or foreign, are treated equally with respect to general jurisdiction. There is no specific advantage given to domestic insurers as they are all subject to general jurisdiction of the courts.

More importantly, "the state's power to regulate commerce is at its zenith in areas traditionally of local concern." *Id.* (internal citation omitted). Insurance is one of those areas that is traditionally a local concern. SUSAN RANDALL, INSURANCE REGULATION IN THE UNITED STATES: REGULATORY FEDERALISM AND THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (1999). This is most evident by Congress's passage of the McCarran-Ferguson Act, 15 U.S.C. 1011-1015 (1977). As a result of the passage of the McCarran-Ferguson Act, insurance laws are normally immune from Commerce Clause scrutiny. *See City of Charleston v. GEICO*, 334 S.C. 67, 517 S.E.2d 504 (1999).

For the above reasons, Chicago Title's Dormant Commerce Clause argument is not properly before the Court. Notwithstanding, Justice Alito's main Dormant Commerce Clause concern revolved around situations involving out-of-state plaintiffs suing out-of-state defendants on causes of action unrelated to the where the suit is filed, Justice Alito's Dormant Commerce Clause analysis concerning the Pennsylvania statute do not apply to the facts in this case. In addition to Justice Alito's observations about the Dormant

Commerce Clause in other contexts, insurance, because of its quintessential local nature, generally is not subject to Dormant Commerce Clause scrutiny.

IV. Chicago Title is subject to the specific jurisdiction of South Carolina

"A court may exercise personal jurisdiction over a person who acts directly, or by an agent as to a cause of action arising from . . ." (1) transacting any business in this state, (2) committing a tortious act in whole or in part in this State or (3) causing tortious injury in this State by an act or omission outside of the State. S.C. Code Ann. § 36-2-803(A)(1), (A)(3) and (A)(4).

Chicago Title falls within the scope of this statute. *See QZO, Inc. v. Moyer*, *S.C.* at 252-255, S.E.2d at 545-546. Chicago Title transacts business in the State and the filing of the Warranty Deed was a tortious act committed in the State or outside the State causing tortious injury within the State.

Chicago Title argues that it is not subject to specific jurisdiction, though, for the following reasons:

1. That it is not a partner in CLAS and characterizes Appellant's position as alleging that CLAS is the joint venture, itself, and that it not just a partner in the partnership.

2. That even if Chicago Title and CLAS are a partnership, that Appellant has **not proven** that CLAS acted within the scope of that partnership; and

3. That even if there is a partnership, there is **no evidence** that the partnership contemplated substantial performance in South Carolina.

Before addressing these three arguments, the Appellant again emphasizes that her burden is not to prove all of the issues raised by Chicago Title but, rather, to make her *prima facie* case as to the partnership. She has met her burden and made her *prima facie*

case. She has pled and presented sufficient facts to establish her *prima facie* case as to the partnership. However, a summary of the facts are as follows:

A. There are sufficient facts to show that Chicago Title and CLAS are partners

Appellant does not contend that a partnership exists because Chicago Title is a 49.9% shareholder in CLAS. The Appellant also does not contend that CLAS, itself, is the partnership. Simply stated, the Appellant contends, because of their website, two separate entities, Chicago Title and CLAS, have formed a partnership, and that the partnership recorded the fraudulent Warranty Deed in South Carolina, which resulted in the Appellant losing her Home. In South Carolina, corporations can create a partnership with other corporations or businesses. *See* S.C. Code Ann. § 33-3-102(9).

The existence of this partnership is based on the website https://www.ctclas.com. The website proudly and prominently announces the existence of the partnership between the two companies. Considering that three of the director/officers of CLAS are also directors or officers of Chicago Title and it is the board of directors that have the legal duty to manage their website, it is hard to imagine that this pronouncement is merely "incorrect" as Chicago Title attempts to allude to in its Brief.[7] The website name, itself, is further evidence of a partnership. It is safe to assume that the "ct" of "ctclas.com" is short for Chicago Title. In the two Affidavits submitted by Michael Cusack, the executive vice

[7] The Board of Directors manages the business and affairs of the corporation. *See* S.C. Code Ann. § 33-8-101.

president of Chicago Title and a member of CLAS's board, Mr. Cusack does not say that the statement on the website is incorrect.[8] (R. pp. 196, 385).

Chicago Title's statements, in Respondent's Initial Brief at pp. 27-33, that the Appellant contends that CLAS, standing alone, is the partnership, are simply incorrect. The ctclas.com website states, in simple and clear terms, that "CLAS is a joint venture partnership with Chicago Title Insurance Company". The two entities have joined together to form their partnership.

Considering the above, Appellant has sufficiently established a *prima facie* case of the existence of a partnership. Even if Chicago Title was able to present facts about the "mistake", the evidence would not defeat Appellant's having met her burden of making her *prima facie* case. The issue of the "mistake" should be litigated at trial. *M.B. Khan, supra.*

B. A prima facie showing exists as to the scope of the partnership

Chicago Title also contends that Appellant did not prove that the recording of the fraudulent Warranty Deed was within the scope of the partnership. Again, this is a fact that should be litigated at trial. *M.B. Khan, supra.*

However, Appellant pled that CLAS provides underwriting support and general assistance in the preparation of title insurance policies as well as recording deeds. (R. pp. 3, 82). This was not specifically denied by CLAS (R. p. 319, ¶ 6, p. 323, ¶38). These services were taken from the "FAQ" section of the ctclas website (ctclas.com/pages/faqs/).

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[8] In its Brief, Chicago Title claims five times that the website announcement is incorrect. The Affidavits of Michael Cusack submitted by Chicago Title do not state that the website pronouncement is incorrect (R. p. 196 and p. 385) or otherwise explain how this pronouncement made its way into the www.ctclas.com website. Nonetheless, this is a matter that should be proven at trial.

Likewise, Appellant pled that Chicago Title provides expert title examining, writing title insurance and providing efficient and smooth closing services (R. p. 82, ¶71). This was taken from Chicago Title's own website (ctic.com/services).

The Appellant also alleged that the Warranty Deed was recorded by CLAS or Chicago Title (R. p. 82, ¶72). The recording of a deed is within the scope of CLAS's and Chicago Title's business. These facts are sufficient to establish that the filing of the Warranty Deed was within the scope of the Chicago Title/CLAS partnership.

C. The filing of the Warranty Deed is substantial performance

Chicago Title also submits that Appellant failed to prove that the partnership contemplated and actually involved substantial performance in South Carolina. Chicago Title overlooks, however, that one tortious act can be the basis of specific jurisdiction. *Hess v. Pawloski*, 274 U.S. 352 (1927). The filing of the fraudulent Warranty Deed in South Carolina that resulted in the Appellant having lost her Home, could also constitute substantial performance in South Carolina.

The Appellant has established a *prima facie* case about the partnership and the Appellant should be allowed to proceed to trial on these issues.

CONCLUSION

The fundamental issue raised in this appeal is what is fair and what will accomplish substantial justice. The Appellant, an elderly woman, lost her Home in Myrtle Beach when CLAS/Chicago Title electronically recorded the fraudulent Warranty Deed, via CLAS's portal in Chicago, Illinois, with the Horry County Register of Deeds in Conway, South

Carolina. It would be less than substantial justice to deny the Appellant to pursue her claims in South Carolina.

Chicago Title is subject to jurisdiction in South Carolina. It is a licensed insurer and through its license and business activities, it has an enduring relationship with this State. This enduring relationship is evidenced by its consent to appoint the Director of Insurance as its agent for service of any lawful process against it. This consent constitutes consent to general jurisdiction in South Carolina. Allowing the lawsuit to proceed against Chicago Title is fair play.

For these reasons, the Appellant prays that this Court reverse the Dismissal Order of the trial court below and allow this case to proceed to trial.

Respectfully submitted,

/s/ John M. Leiter

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No.: 2021CP2607668

Appellate Case No.: 2023-000239

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. Alagna 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

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's Final Reply Brief in the above-referenced case has been served upon opposing counsel by email only this 29th day of February, 2024.

/s/ John M. Leiter

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