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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2021-000797

Saundra R. Hoffman, ... Appellant,

v.

State Farm Fire and Casualty Company, ... Respondent.

PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

POINTS OVERLOOKED OR MISAPPREHENDED BY THE COURT 1

ARGUMENT 2

I. The Court erred in reversing the circuit court on the basis of equitable estoppel, as that theory was neither raised to nor ruled upon by the circuit court. 2

II. The Court erred in finding equitable estoppel where there is not evidence in the record to support a genuine issue of material fact as to that doctrine. 3

A. Hoffman has not argued or pointed to evidence (either in this Court, or below) that her delay in filing suit was due to reliance upon State Farm 3

B. The evidence of State Farm's inducement is not sufficient to support a claim for equitable estoppel to assert the statute of limitations. 6

III. The Court erred in holding State Farm is "precluded" from asserting the statute of limitations. 8

IV. Footnote 2 of the Opinion states law inapplicable in this case, as is demonstrated by the cases cited in the footnote. 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 488 S.E.2d 327, 332 (1997) 4,7

Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (Ct. App. 2005) 9

Cruz v. City of Columbia, 437 S.C. 204, 212, 877 S.E.2d 479, 482-83 (Ct. App. 2022) *4*

Gadsden v. S. R. R., 262 S.C. 590, 592, 206 S.E.2d 882, 883 (1974) 7

Harvey v. S.C. Dept. of Corr., 338 S.C. 500, 509, 527 S.E.2d 765, 770 (Ct. App. 2000).............. 8

Johnston v. Commercial Travelers Mut. Accident Ass'n of Am., 242 S.C. 387, 131 S.E.2d 91, 94 (1963).......................... 11

Kleckley v. Nw. Nat. Cas. Co., 338 S.C. 131, 137, 526 S.E.2d 218, 221 (2000).......................... 4

Kreutner v. David, 320 S.C. 283, 465 S.E.2d 88, 89 (1995) 7

Maher v. Tietex Corp., 331 S.C. 371, 381, 500 S.E.2d 204, 209 (Ct. App. 1998) 3,4,10

Moates v. Bobb, 322 S.C. 172, 175, 470 S.E.2d 402, 403 (Ct. App. 1996).......................... 3,6,7

Regions Bank v. Schmauch, 354 S.C. 648, 672, 582 S.E.2d 432, 444–45 (Ct. App.2003) 3

Roe v. Doe, 28 F.3d 404, 407 (4th Cir.1994).......................... 10

S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007).......................... 2

Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014).......................... 2

United States v. Sosa, 364 F.3d 507, 512 (4th Cir. 2004).......................... 6

Vines v. Self Mem'l Hosp., 314 S.C. 305, 309, 443 S.E.2d 909, 911 (1994) 4,7

OTHER AUTHORITIES

Toal, Jean Hoefer, et al., *Appellate Practice in South Carolina,* (2d ed. 2002) 2

The Respondent, State Farm Fire and Casualty Company ("State Farm"), respectfully submits this Petition for Rehearing under Rule 221, SCACR.

POINTS OVERLOOKED OR MISAPPREHENDED BY THE COURT

I. The Court erred in reversing the circuit court on the basis of equitable estoppel, as that defense was neither raised to nor ruled upon by the circuit court.

II. The Court erred in finding equitable estoppel where there is no evidence in the record to support application Fof that doctrine.

III. The Court erred in ruling State Farm is "precluded" from asserting the defense of the statute of limitations.

IV. Footnote 2 of the Opinion states law inapplicable to the facts in this case, as is demonstrated by the cases cited in the footnote.

ARGUMENT

I. The Court erred in reversing the circuit court on the basis of equitable estoppel, as that theory was neither raised to nor ruled upon by the circuit court.

"It is axiomatic that an issue cannot be raised for the first time on appeal; it must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Furthermore, a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (internal quotations and citations omitted) (holding it was error for court of appeals to consider appellant's argument "because it was improperly raised for the first time in the Rule 59(e) motion. The court of appeals should have refused to entertain that theory…").

The Court improperly based its reversal of summary judgment on Hoffman's breach of contract claim on grounds not preserved for appellate review. To successfully preserve an issue for appellate review, the issue must be: "(1) raised and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina,* 57 (2d ed. 2002)).

Hoffman did not argue to the circuit court that State Farm was estopped from relying on the statute of limitations. No argument was made concerning equity, estoppel, tolling, or reliance in Hoffman's fifteen-page opposition brief, during the December 17, 2020, hearing, or even in Hoffman's 20-paragraph motion to reconsider. (R. p. 6-11; p. 45-50; p. 114-128). And the circuit court's order clearly did not rule on the issue of equitable estoppel. (R. p. 1-4) In short, Hoffman never raised equitable estoppel to the trial court, the trial court did not rule on equitable estoppel,

and Hoffman did not raise equitable estoppel in her motion to reconsider. Accordingly, the issue of equitable estoppel was not preserved for appellate review and it was error for the Court to reverse the circuit court on that ground.

II. The Court erred in finding equitable estoppel where there is not evidence in the record to support a genuine issue of material fact as to that doctrine.

Even if equitable estoppel had been argued to and ruled on by the circuit court, it does not apply under the facts presented. An essential element of equitable estoppel as to the party asserting it is reliance, and an essential element as to the party estopped is conduct that has induced delay that would otherwise give operation to the statute of limitations. *See, e.g.*, *Maher v. Tietex Corp.*, 331 S.C. 371, 381, 500 S.E.2d 204, 209 (Ct. App. 1998); *Moates v. Bobb*, 322 S.C. 172, 175, 470 S.E.2d 402, 403 (Ct. App. 1996). Here, there are not facts in the record sufficient to raise a genuine issue of material fact with respect to these necessary elements of estoppel.

A. Hoffman has not argued or pointed to evidence (either in this Court, or below) that her delay in filing suit was due to reliance upon State Farm.

Hoffman has never argued she relied upon State Farm's conduct, and the Court did not find Hoffman so relied. Hoffman never alleged reliance to the circuit court, much less presented evidence of reliance. Even in her briefs to this Court, she never pointed to any evidence of reliance, or even alleged reliance. In discussing her *fraud* claim at sub-section III (D) of her brief, Hoffman alleged she had a "right to rely" on State Farm's conduct; however, there was no discussion or allegation Ms. Hoffman actually relied on anything State Farm did or said. (App. Br., p. 22-23).[1]

[1] Actual reliance is undoubtedly different from a right to rely—they are two different elements of a fraud cause of action. *See, e.g., Regions Bank v. Schmauch,* 354 S.C. 648, 672, 582 S.E.2d 432, 444–45 (Ct. App.2003) (describing the distinct elements of fraud as including both "(7) the hearer's reliance on the truth" and "(8) the hearer's right to rely thereon.").

Because Hoffman has not alleged or presented any evidence of reliance, it would be error for this Court to find a genuine issue of fact with respect to equitable estoppel.

Actual reliance is a foundational element of equitable estoppel. For example, in *Cruz v. City of Columbia,* this Court, in listing the elements of equitable estoppel, enumerated the three elements "the *relying party* must prove." 437 S.C. 204, 212, 877 S.E.2d 479, 482-83 (Ct. App. 2022) (emphasis added). Reliance is just as critical when equitable estoppel is applied to a statute of limitations. For example, the Supreme Court held summary judgment on the statute of limitations must be affirmed over a defense of equitable estoppel where "there was no showing that the plaintiff had delayed filing suit **in reliance on the defendant hospital's conduct**." *Black v. Lexington School Dist. No. 2*, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997) (emphasis added) (discussing *Vines v. Self Memorial Hospital*, 314 S.C. 305, 443 S.E.2d 909 (1994)). And this Court rejected claims of equitable estoppel to assert the statute of limitations, even in the face of intentional "misconduct," where there was no evidence a plaintiff's delay in filing suit was due to reliance on that misconduct. *Maher v. Tietex Corp*., 331 S.C. 371, 381-82, 500 S.E.2d 204, 209 (Ct. App. 1998) ("A necessary element of equitable estoppel is Maher's reliance on the misconduct of Tietex…. Maher did not rely on any misrepresentation or deception as to the financial information, and thus any claim of equitable estoppel based on this misconduct fails for lack of this essential element."); s*ee also, Kleckley v. Nw. Nat. Cas. Co*., 338 S.C. 131, 137, 526 S.E.2d 218, 221 (2000) ("In the instant case, Northwestern is estopped from asserting the statute of limitations defense because their lack of communication with Kleckley was the **sole reason** she allowed the statute of limitations to elapse.") (emphasis added)

There is a good reason Hoffman has failed to argue detrimental reliance: there is none. Though Hoffman provided a host of reasons for her delay in submitting her claim for items and in

filing her lawsuit, none were caused by State Farm; certainly, she cannot establish State Farm's conduct was the "sole reason she allowed the statute of limitations to lapse." *Id.* In addition to the volume of items and the difficulty in listing them, Hoffman attributed her delays to her fibromyalgia, migraine headaches, shingles, asthma, being sick a lot, being very afraid of spiders, getting insect bites all over her face and neck, taking care of her uncle when he was hospitalized and after he passed away, going through a lot with her daughter, preparing grant applications for her daughter's college, having heart issues, and getting medical tests related to her heart issues. (R. 68 and 75 (Hoffman Dep., p. 51:12-52:6 and 78:21-79:18)). In 184 pages of deposition testimony, she never claimed State Farm induced her to delay filing suit or delay submitting her claim.

Despite the many excuses, it is apparent the primary reason Hoffman did not file suit until four years and nine months after the loss was her belief the statute of limitations was five years.

> Q. Okay. All right. Was there anything else going on that kept you from doing this first 50 items any quicker?
>
> A. I mean just -- No. I mean, like, I just thought that -- honestly, in my mind, I thought the time to have this done was five years, and I don't know why I thought that. I just assumed if, you know, if it was coming to an end, they would let me know, so...
>
> Q. Just to be clear, when you thought that the time to get this done was five years, that did not come from anything anyone said at State Farm, did it?
>
> A. No.
>
> Q. Do you know whether you thought that because of --
>
> A. No. I just -- I mean, when I look at -- like, I have a lot of stuff, you know, but when I -- when I look at what it would be like to do a whole house, I can't imagine that you only have three years, but, you know, I guess that depends on how much stuff you have, you know.

(R. 75-76 (Hoffman Dep., p. 80:18—81:12)). It is inescapable from this testimony Ms. Hoffman's four year and nine-month delay in filing suit was *not* due to State Farm, but was due to her own

belief concerning the length of the statute of limitations. A party's own mistaken belief in the length of the statute of limitations cannot support an equitable estoppel defense to that statute. *See, e.g. United States v. Sosa,* 364 F.3d 507, 512 (4th Cir. 2004) ("ignorance of the law is not a basis for equitable tolling.") This is further supported by the fact State Farm's last contact with Ms. Hoffman was in January 2018, when it informed her the claim for items submitted in November 2017 was denied. Yet, Hoffman waited an additional 9 months, until October 12, 2018, to file suit against State Farm. Clearly, this further nine-month delay could not have been in reliance upon anything State Farm said or did. Instead, Ms. Hoffman "thought the time to have this done was five years, and I don't know why I thought that." (R. 75-76).

B. The evidence of State Farm's inducement is not sufficient to support a claim for equitable estoppel to assert the statute of limitations.

Even if Hoffman presented this argument to the trial court, and even if she presented sufficient evidence of detrimental reliance, State Farm's conduct still cannot support equitable estoppel. In *Moates v. Babb*, this Court held equitable estoppel was not supported as a matter of law where a defendant's insurer: (1) provided plaintiff with a $24,225 "advance" to purchase a new home for the injured party; (2) "communicated many times" with the plaintiff over "two years"; (3) "[t]hrough telephone calls and letters, [] continually requested information so the parties could 'settle' the case"; (4) met with plaintiff's counsel personally to encourage him to cooperate "so they could resolve the matter." 322 S.C. 172, 174-5, 470 S.E. 2d 402, 403 (Ct. App. 1996). There, the trial court held equitable estoppel tolled the statute of limitations, due to the insurer's repeated reference to "settlement" and its $24,225 "advance towards settlement." *Id.* This Court reversed, holding the insurer was merely trying to obtain "essential medical information … so the parties could "get moving toward the settlement of the case." *Id.* at 176, 470 S.E. 2d at 403-04. The Court noted the "important public policy considerations" embodied in statutes of

limitations, "in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Id.* at 176, 470 S.E. 2d at 404. Thus, although the plaintiffs had "suffered a terrible tragedy" the Court held "it would be highly unfair to expose Bobb now to the immense potential liability … after the Moatses 'slept on their rights.'" *Id.*

State Farm's alleged "inducement" here is nothing next to the alleged "inducement" in *Moates.* In this case, State Farm simply processed the new information sent by Hoffman in October 2017 and communicated with her concerning the details of that new information. In other words, State Farm was trying to obtain information to adjust the claim. If mere information gathering was sufficient to support equitable estoppel, insurers would be faced with a Catch-22. If they do not review information or adjust the claim, they could be subject to suits for bad faith; if they do adjust the claim, they could be estopped from asserting valid defenses. This cannot be the law, just as mere unconsummated settlement negotiations cannot support equitable estoppel to assert the statute of limitations.

If State Farm's conduct were all that is necessary to support a claim of equitable estoppel, the *Moats* case and many pervious appellate cases would have come out differently. *See, Black v. Lexington Sch. Dist. No. 2,* 327 S.C. 55, 488 S.E.2d 327, 332 (1997) (no equitable estoppel despite "series of discussions and correspondence" with defendant's counsel leading plaintiff to believe the defendant was "interested in settling the case"); *Vines v. Self Mem'l Hosp.,* 314 S.C. 305, 309, 443 S.E.2d 909, 911 (1994) (no equitable estoppel despite where defendant employees assisted plaintiff in filling out claims forms); *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88, 89 (1995) (no equitable estoppel where defendant failed to respond to numerous communications, but did provide the requested mortgage, which bore no recording stamps or marks); *Gadsden v. S. R. R.,* 262 S.C. 590, 592, 206 S.E.2d 882, 883 (1974) (no equitable estoppel despite where a "fair

summary of the record reveals nothing more nor less than the fact that negotiations for a settlement were undertaken but never finalized."); *Harvey v. S.C. Dept. of Corr.,* 338 S.C. 500, 509, 527 S.E.2d 765, 770 (Ct. App. 2000) (no equitable estoppel despite ongoing negotiations leading plaintiffs to believe the matter could be solved out of court).

III. The Court erred in holding State Farm is "precluded" from asserting the statute of limitations.

The third sentence of the Opinion's "Law/Analysis" section reads: "We reverse summary judgment on the breach of contract claim because we find State Farm is precluded from asserting the defense of the statute of limitations for that claim." This Court should not have reached a legal conclusion as to the applicability of equitable estoppel where there is no evidence in the record to support such a finding, as discussed above. Additionally, this conclusion was inappropriate where the estoppel defense was never raised below, and Hoffman never presented any evidence or argument for equitable estoppel. As a result, State Farm did not brief, argue, or present evidence as to equitable estoppel below. Nevertheless, Appellant may now argue this Court has essentially *granted summary judgment in Appellant's favor*, by ruling that "State Farm is precluded from asserting the defense of the statute of limitations." This is not a fair, just, or proper result and this language should be removed from the Opinion.

IV. Footnote 2 of the Opinion states law inapplicable in this case, as is demonstrated by the cases cited in the footnote.

Though footnote 2 appears to be *dicta*, its application in this case would run counter to the principles underlying the statute of limitations. In effect, the Court utilizes principles underlying the discovery rule—which is only available to the prompt and diligent—to enable litigants who are the opposite of prompt and diligent to extend the statute of limitations indefinitely. Applying the *dicta* in footnote 2 to Hoffman's facts would enable Hoffman to maintain sole control of the

statute of limitations and start a new three-year period running every time she chose to reveal the existence of damaged items to her insurance company.[2]

Importantly, both cases cited by the Court in footnote 2 support State Farm's position—absent application of the discovery rule, the statute of limitations begins to run on the date Hoffman's property was damaged. In *S.C. Farm Bureau Mut. Ins. Co. v. Kelly*, an insurer sued a homeowner seeking reimbursement for amounts paid after a house fire. The homeowner argued the statute of limitations began to run on the date of the loss. *Id.* at 236-37, 547 S.E.2d 871, 873 ("Kelly contends Farm Bureau failed to file its action **within three years of the first fire**, and therefore the action should have been dismissed.") (emphasis added). This Court appeared to accept the proposition that—absent the discovery rule—the statute of limitations under S.C. Code Ann § 15-3-530 would begin to run on the date of the loss. Indeed, in the second paragraph discussing the statute of limitations, the Court listed three dates: the date of the first loss, the date of the second loss, and the date the suit was filed. *Id.* at 237, 547 S.E.2d at 873. However, it held the discovery rule altered these dates, and therefore the statute of limitations "runs *not from the date of injury* but rather from the date the injured party knew or should have known a cause of action existed." *Id.* (emphasis added). The Court then analyzed plaintiff's "reasonable diligence" and, finding the plaintiff had been reasonably diligent, the Court held the discovery rule extended the statute of limitations for more than three years after the loss.

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[2] Ironically, application of the dicta in footnote 2 to this case would run counter to the textual sentence immediately following the footnote: "[S]tatutes of limitations provide potential defendants with certainty that after a set period of time, they will not be hailed [sic] into court to defend time barred claims." (Order, p. 5) (quoting *Carolina Marine Handling, Inc. v. Lasch,* 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (Ct. App. 2005). Under the *"Hoffman* rule," if adopted, insurers would have no certainty about when they could be haled into court, as only their insureds would know whether they have informed the insurer of all of their losses.

Application of *Kelly* to the dicta in footnote 2 reveals an internal contradiction. Encouraging a plaintiff to sit on her hands for years and years while controlling whether and when the statute of limitations begins to run, turns the discovery rule on its head. Instead of extending the time to file suits where a plaintiff *was* reasonably diligent, the "*Hoffman* rule" would extend the time to file suit, indefinitely, when the plaintiff is the opposite of diligent. It is clear from *Kelly,* that had the plaintiff not been reasonably diligent, the statute of limitations would have run from the date of the loss (the fire); under this same rule, Judge Dickson's order in favor of State Farm should be affirmed.

Additionally, in *Lowcountry Block LLC, v. Cincinnati Insurance Companies,* a U.S. District Court opinion concerning an insurance claim for theft cited in footnote 2 of the Court's opinion, the district judge first noted the statute of limitations would run from the date of breach, not the date of loss. 2017 WL 3278878 at *2 (D.S.C. 2017).[3] However, reading further reveals that under very similar facts, the court came to the same conclusion as Judge Dickson and as is advocated by Respondent. The court noted the general application of the discovery rule to statutes of limitations. However, it then held the discovery rule could not apply given the plaintiffs' delay in pursuing their insurance claim: "But any allegation that through the exercise of reasonable diligence Plaintiffs were only able to discover the denial of their claim regarding a September 23, 2013 theft in or after September 2016 is simply implausible." *Id.* Then, apparently due to the

[3] Footnote 2 notes that *Lowcountry Block LLC* cites to *Maher v. Tietex Corp*. for this proposition. *Maher* dealt primarily with the discovery rule, a doctrine which *extends* the statute of limitations and which Judge Dickson held was inapplicable to Hoffman due to her lack of reasonable diligence. Additionally, even where the discovery rule is available to a diligent plaintiff, *Maher* observed "South Carolina's statute of limitations requires 'very little to start the clock.'" 331 S.C. 371, 500 S.E.2d 204, 208 (Ct. App. 1998) (*quoting Roe v. Doe*, 28 F.3d 404, 407 (4th Cir.1994)).

unavailability of the discovery rule to the plaintiffs, the court held the statute of limitations began to run *on the date of the loss:*

> Plaintiffs allege the **date of loss is September 23, 2013**. They allege no other dates relevant to the statute of limitations. They do not allege that anything concealed the fact or the date of the loss. They merely allege they "properly filed a claim with the Defendant" and on July 1, 2016 provided extensive documentation to the insurer. From the face of the complaint, therefore, **it is apparent the limitations period expired on September 22, 2016.** Plaintiffs filed this action on December 23, 2016. Plaintiffs' claims therefore are time barred.

Id. at * 3.[4]

Thus, Judge Gergel analyzed the issue in *LowCountry Block* in the same manner as Judge Dickson did: because the plaintiff was not reasonably diligent in pursuing her claim, the discovery rule would not apply and the statute of limitations ran from the date of loss. Additionally, it is noteworthy the plaintiff in *LowCountry Block* filed suit three years and three months after the loss. Here, Hoffman filed suit four years and nine months after the loss.

Thus, both cases cited by the Court in footnote 2 support Judge Dickson's holding that absent the discovery rule the statute of limitations for Hoffman's insurance claim began to run on the date of the loss.

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[4] The district court also discussed a term of the policy providing an action must commence within three years after the loss. However, because the contract could not shorten the statute of limitations, that provision would be inapplicable unless the statute of limitations began to run on the date of the loss. *Id.* at * 2 ("Contractual language providing for accrual from the date of loss is ineffective to the extent it results in a shorter limitations period than South Carolina contract law provides.") (citing *Johnston v. Commercial Travelers Mut. Accident Ass'n of Am.*, 242 S.C. 387, 131 S.E.2d 91, 94 (1963)). Hoffman's policy had essentially the same provision, as its one year "Suit Against Us" provision was brought into conformity with state law through the "Conformity to State Law Provision." (R. p. 111 and 112; Policy, p. 14 and 20).

CONCLUSION

For the forgoing reasons, Respondent respectfully requests this Court affirm the judgment in State Farm's favor.

Respectfully submitted,

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State Farm Fire and Casualty Company, ... Respondent.

PROOF OF SERVICE

I certify that I have served the **PETITION FOR REHEARING** on Appellant by electronic service on March 14, 2024, as reflected on email attached hereto and as referenced below:

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Attachments: 2024.03.14 Petition for Rehearing.pdf; 2024.03.14 Hoffman - Proof of Service.pdf

Attached please find the following documents for service upon you:

1. Petition for Rehearing
2. Proof of Service

Thank you.

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