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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2023-001708

Jasper County, Respondent-Appellant,

v.

Western Surety Company and Denise Smith, Defendants

Of which Western Surety Company is the Appellant-Respondent.

RESPONDENT-APPELLANT'S INITIAL BRIEF FOR CROSS-APPEAL

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April 17, 2024

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STATEMENT OF ISSUES ON CROSS-APPEAL

1. DID WESTERN SURETY COMPANY ACT WITHOUT REASONABLE CAUSE OR IN BAD FAITH BY ITS HANDLING OF JASPER COUNTY'S BOND CLAIM?

STATEMENT OF THE CASE

On July 27, 2023 the Honorable Carmen T. Mullen issued an Order finding in favor of Respondent-Appellant Jasper County on its breach of contract claim and awarded Jasper County \$374,759.09 (the amount of the bond claim plus pre-judgment interest). Judge Mullen found in favor of Appellant-Respondent Western Surety Company on the bad faith and attorney's fees claims. Appellant-Respondent Western Surety Company appealed the decision on the breach of contract claim. Respondent-Appellant Jasper County cross-appealed the portions of the July 27, 2023 Order that denied Jasper County's claims against Western Surety Company for bad faith and for attorney's fees.


STATEMENT OF FACTS

This lawsuit follows the theft of \$274,175.00 from Jasper County by a former employee, Denise Smith. Smith pled guilty to embezzlement of public funds greater than \$10,000 and was sentenced to prison. Denise Smith Guilty Plea Transcript (Plaintiff's Exhibit 3). Following the discovery of the theft, Jasper County made a timely and proper demand to Defendant Western Surety Company for \$274,175.00 under Public Employees Blanket Bond No. 70471756 issued by Western Surety. Bond Claim Proof of Loss; Trial transcript, p. 60, lines 17-21.

Western Surety admitted that the documents provided by Jasper County demonstrated that Ms. Smith's theft triggered the coverage provided by the bond. Trial transcript p. 23, lines 20-24. Western Surety did not have any issue with Jasper County's performance under the Bond. Trial transcript, p. 39, lines 12-19. Western Surety also did not contest the claim—only the amount it owed under the Bond. Trial transcript, p. 58, lines 4-23. As stated at trial, "Western Surety agrees that ... the

loss is covered by the bond” and the misdeeds by Ms. Smith triggered coverage under the Bond. Trial transcript, p. 91, lines 3-12.

Western Surety issued Public Employees Blanket Bond No. 70471756 on April 17, 2008. Bond. As shown below and on the face of the Bond, the plain language of the bond stated the “Limits of Liability” for “Insuring Agreement 4 Faithful Performance Blanket Position Bond Coverage” was \$285,000.00 Id.

 Western Surety Company <small>(A Stock Company, herein called Surety)</small>			
PUBLIC EMPLOYEES BLANKET BOND <small>Including Public School System</small>			
Bond No. <u>70471756</u>			
DECLARATIONS			
Item 1.	Name of Obligor: <u>Jasper County</u>		
Item 2.	Name of Insured: <u>Jasper County</u>		
Item 3.	Bond Period: From the beginning of the <u>17th</u> day of <u>April</u> , <u>2008</u> , to 12 o'clock night on the effective date of the cancellation or termination of this bond as an entirety.		
Item 4.	Table of Limits of Liability		
Insuring Agreement 1	Honesty Blanket Bond Coverage		
Insuring Agreement 2	Honesty Blanket Position Bond Coverage		
Insuring Agreement 3	Faithful Performance Blanket Bond Coverage		
Insuring Agreement 4	Faithful Performance Blanket Position Bond Coverage		<u>\$285,000.00</u>

Western Surety agreed that Bond No. 70471756 did not contain any ambiguities and that the face amount of the Bond and every written provision memorialized in the Bond stated that the available Limit of Liability for each employee is \$285,000. Trial testimony, p. 58, lines 1-12; page 61, lines 12-15. Western Surety’s corporate designee (Ginger Barnes) also conceded that the Bond was a contract between Western Surety and Jasper County. Trial transcript, p. 52, lines 22-25. As such, the Bond obligated Defendant Western Surety Company, as Surety, as follows: “The Surety [Western Surety Company], in consideration of the payment of the premium, and subject to the Declarations made a part hereof, the General Agreement, Conditions and Limitations and other terms of this Bond, agrees, in accordance with such of the Insuring Agreements hereof as are specifically

designated by the insertion of an amount of indemnity in the Table of Limits of Liability, to indemnify the Obligee [Jasper County] for the use and benefit of the Insured [Jasper County] for ... Faithful Performance Blanket Position Bond Coverage. Bond.

~~upon termination or cancellation to be effective as of the date this bond becomes effective.~~

The Surety, in consideration of the payment of the premium, and subject to the Declarations made a part hereof, the General Agreement, Conditions and Limitations and other terms of this Bond, agrees, in accordance with such of the Insuring Agreements hereof as are specifically designated by the insertion of an amount of indemnity in the Table of Limits of Liability, to indemnify the Obligee for the use and benefit of the Insured for:

INSURING AGREEMENTS

Honesty Blanket Bond Coverage

1. Loss sustained by the insured through any fraudulent or dishonest act or acts committed by any of the Employees, acting alone or in collusion with others, during the Bond Period, to an amount not exceeding in the aggregate the amount stated in the Table of Limits of Liability applicable to this Insuring Agreement 1.

Honesty Blanket Position Bond Coverage

2. Loss sustained by the insured through any fraudulent or dishonest act or acts committed by any of the Employees, acting alone or in collusion with others, during the Bond Period, the amount of indemnity on each of such Employees being the amount stated in the Table of Limits of Liability applicable to this Insuring Agreement 2.

Faithful Performance Blanket Bond Coverage

3. Loss caused to the insured through the failure of any of the Employees, acting alone or in collusion with others, to perform faithfully his duties or to account properly for all monies and property received by virtue of his position or employment during the Bond Period to an amount not exceeding in the aggregate the amount stated in the Table of Limits of Liability applicable to this Insuring Agreement 3.

Faithful Performance Blanket Position Bond Coverage

4. Loss caused to the insured through the failure of any of the Employees, acting alone or in collusion with others, to perform faithfully his duties or to account properly for all monies and property received by virtue of his position or employment during the Bond Period, the amount of indemnity on each of such Employees being the amount stated in the Table of Limits of Liability applicable to this Insuring Agreement 4.

Bond No. 70471756 defined “Faithful Performance Blanket Position Bond Coverage” as “Loss caused to the Insured through the failure of any of the Employees, acting alone or in collusion with others, to perform faithfully his duties or to account properly for all monies and property received by virtue of his position or employment during the Bond Period, the amount of indemnity on each of such Employees being the amount stated in the Table of Limits of Liability applicable to this insuring agreement.” Bond.

Bond No. 70471756 defined “Employee” for the “Faithful Performance Blanket Position Bond Coverage” as “a person while in the employ of the Insured during the Bond Period who is not required by law to furnish an Individual Bond to qualify for office and who is a member of the staff or personnel of the Insured but does not mean any Treasurer or Tax Collector by whatever title known.” Bond, page 2 “Definitions”. Western Surety did not dispute that Ms. Smith qualified as an “Employee” under

Bond No. 70471756 during all relevant times. Trial transcript, p. 58, lines 13-18. Barnes also conceded at trial that Jasper County filed the lawsuit timely. Trial transcript, p. 60, lines 17-21.

Importantly, Western Surety admitted that nothing on the face of the Bond limited the coverage to less than what Jasper County claimed. Trial transcript, p. 61, lines 8-11; page 94, line 24 – page 95, line 2. Western Surety also conceded that “the way the bond reads,” Western Surety’s total liability under Insuring Agreement 4 is to each employee and to the applicable amount of the limit of liability of \$285,000. Trial transcript, p. 58, lines 4-10. As shown below, the “Limits of Liability” section of the Bond clearly indicates that Western Surety, as Surety under the Faithful Performance Blanket Position Bond Coverage,” has “total liability” ... “as to each Employee ...[that] is limited to the applicable amount of indemnity specified in the Table of Limits of Liability,” which is \$285,000 according to the Bond.

LIMITS OF LIABILITY

Section 4. Indemnification by the Surety for any loss under Insuring Agreement 1 or 3 shall not reduce the Surety's liability for other losses under the applicable Insuring Agreement, whenever sustained; provided, however, that the Surety's total liability under each such Insuring Agreement for any loss caused by any Employee or in which such Employee is concerned or implicated is limited to the applicable amount of indemnity specified in the Table of Limits of Liability.

Indemnification by the Surety for any loss under Insuring Agreement 2 or 4 shall not reduce the Surety's liability for other losses under the applicable Insuring Agreement, whenever sustained; provided, however, the Surety's total liability under each such Insuring Agreement as to each Employee is limited to the applicable amount of indemnity specified in the Table of Limits of Liability.

Western Surety did not have any issue or objection with Jasper County’s performance for the 11-year period of the Bond until Western Surety cancelled the Bond. Jasper County timely paid all bond premiums as they came due over those 11 years. In response to the Bond claim, Western Surety immediately cancelled the Bond by letter dated March 1, 2019. Plaintiff Exhibit 8.

ARGUMENT

Under South Carolina law, insurance policies are interpreted according to general rules of contract construction. A court must give the clear policy language its “plain, ordinary, and popular” meaning. Nationwide Mut. Ins. Co. v. Commercial Bank, 325 S.C. 357, 479 S.E.2d 524, 526 (1996).

“If language used by a bond is plain and unambiguous the bond should be interpreted like any other contract to determine the intention of the parties.” Employers Ins. of Wausau v. Constr. Mgmt. Eng’rs of Florida, Inc., 297 S.C. 354, 357, 377 S.E.2d 119, 121 (Ct. App. 1989). Further,

In construing and determining the effect of a written contract, the parties' intention and the meaning are gathered from the document itself. When the language of the contract is clear and unequivocal its meaning must be determined by its contents alone. The language determines the full force and effect of the document when it is perfectly plain and capable of legal construction. Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E. (2d) 445 (1984) (extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible).

Id. See also Preservation Capital Consultants, LLC v. First Am. Title Ins. Co., 406 S.C. 309, 751 S.E.2d 256, (2013).

The plain language of the Bond clearly states that the “Faithful Performance Blanket Position Bond Coverage” was \$285,000.00. According to the Bond, this “Faithful Performance Blanket Position Bond Coverage” applied to

Loss caused to the Insured through the failure of any of the Employees acting alone or in collusion with others, to perform faithfully his duties or to account properly for all monies and property received by virtue of this position or employment during the Bond Period, the amount of indemnity on each of such Employees being the amount stated in the Table of Limits of Liability applicable to this insuring agreement for.

Further, under “Limits of Liability:” “The Surety’s total liability under each such insuring agreement as to each Employee is limited to the applicable amount of indemnity specified in the Table of Limits of Liability.” Accordingly, Jasper County presented sufficient proof to substantiate the loss of \$274,175.00 from the acts committed by Denise Smith. And, Western Surety did not offer any complaint that the claimed amount of \$274,175 was inflated or incorrect. Trial transcript, p. 65, lines 14-20. The amount claimed by Jasper County was the same amount to which Ms. Smith pled guilty. Denise Smith Guilty Plea transcript.

Following a bench trial, Judge Mullen awarded Jasper County the face amount of the bond and pre-judgment interest. Jasper County appealed the decision denying Jasper County’s claims against Western Surety for bad faith and for attorney’s fees.

1. THE TRIAL COURT ERRED BY FINDING FOR WESTERN SURETY ON THE BAD FAITH CAUSE OF ACTION AND THE CLAIM FOR STATUTORY ATTORNEY’S FEES.

South Carolina courts have held that, “[b]ad faith refusal to pay first party benefits under a contract of insurance includes: (1) the existence of a mutually binding contract of insurance between plaintiff and defendant; (2) refusal by an insurer to pay benefits due under the contract; (3) resulting from the insurer’s bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; [and] (4) causing damage to the insured.” Howard v. State Farm, 316 S.C. 445, 450 S.E.2d 582 (1994) (emphasis added); see also Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666, 541 S.E.2d 269 (Ct. App. 2000). Bad faith means “not based on honest disagreement or innocent mistake.” See Topsail Reef Homeowners Ass'n v. Zurich Specialties London, Ltd., 11 F. App'x 225, 237 (4th Cir. 2001). “An insurer acts in bad faith where there is no reasonable basis to support the insurer’s decision.” Doe v. S.C. Med. Malpractice Liability Joint Underwriting Ass’n, 557 S.E.2d 670, 674 (2001).

Western Surety conceded that it owed a duty of good faith to Jasper County. Trial transcript, p. 51, line 19 – p. 55, line 8. Yet, once it received Jasper County’s

Bond claim, Western Surety used a claims department employee (Ms. Ginger Barnes) to allegedly investigate the claim even though Ms. Barnes (a) had never written a bond, (b) had never worked for the underwriting department, (c) was not an underwriter, and (d) was not involved with Western Surety's decision to issue the Bond or to renew the bond each year from 2009 to 2018, when Western Surety cancelled the Bond after Jasper County made the claim. Trial transcript, p. 40, line 14 – p. 42, line 11.

The trial testimony showed that Barnes did not communicate with any person in the underwriting department who was involved in writing the Bond in 2008. Trial transcript, p. 42, line 15 – p. 44, line 1; p. 92, line 9 – p. 100, line 16. Specifically, no one from Western Surety contacted the person who wrote the Bond (Scott Reinke), who Western Surety listed as a witness in its discovery responses with a Nashville, Tennessee address. Id. A 10-second internet search showed that Reinke still worked in Nashville for the same company identified by Western Surety in its discovery responses. Yet, Barnes testified that she had not talked to Reinke about the Bond. Id.

Western Surety produced no meaningful documents from the underwriting file about what process Reinke followed and what information he considered. The only information from Reinke about the bond writing process introduced by Western Surety was a short fax exchange between Reinke and broker Stolte about several changes Reinke wanted to the Bond. Trial transcript, p. 206, line 14 – p. 212, line 3.

Barnes also admitted that she did not talk with either the Western Surety corporate officer who sealed the Bond before it was issued or the Senior Vice President of Western Surety (Paul Bruflat, Sr.), who signed the Bond for Western Surety. Trial transcript, p. 50, line 6 – p. 51, line 11. Barnes admitted that she did not make any efforts to speak with either, even though she was assigned to investigate the claim. Id.

In addition, Barnes conceded that Western Surety would have undertaken a review process each year when it renewed the Bond. Trial transcript, p. 100, lines 17-25. Yet, Barnes did not speak with any person employed by Western Surety who

was involved with renewing the Bond in 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, or 2018 (before the company cancelled the bond after Jasper County filed the claim) or determine what any of those employees who renewed the Bond reviewed. Trial transcript, p. 44, line 2 – p. 47, line 9; p. 101, line 1 – p. 123, line 20; p. 131, line 7 – p. 134, line 20. In each of those ten years, Western Surety employees reviewed the Bond and reviewed the charged premium before Western Surety submitted the Bond for renewal to Jasper County. None of those Western Surety employees ever informed Jasper County that Western Surety would not write the Bond, the bond amount was too high, or that there was some “mistake” with how Western Surety wrote the Bond. Moreover, Western Surety did not offer any documentation about what the company reviewed or the process the company undertook during the review process. The only credible inference that can be drawn is that Western Surety employees approved the \$285,000 face amount of the bond and the bond premium charged to Jasper County for ten consecutive years and then accepted the payments for each of those 10 years made by Jasper County.

In sum, Western Surety offered no testimony about the decisions behind the issuance of the Bond or the ten year renewals of the Bond. In addition, Western Surety did not provide Jasper County any information about how Western Surety calculated the original premium in 2008 or for the eleven yearly renewals until after Jasper County made the Bond claim. Trial transcript, p. 159. Lines 5-23.

After Jasper County made the Bond claim and at the trial of this matter, Western Surety’s repeated defenses to not paying the Bond claim for several years were that (a) Western Surety would not write a bond for what was stated as the face amount of the Bond; and (b) the transmittal letter and premium invoices showed Jasper County that the stated bond amount was not correct. Both of those claimed defenses were shot down easily at trial.

Ms. Barnes immediately pivoted from the defense that the company would not write a bond for \$285,000 as soon as Judge Mullen stated that she had experience with Western Surety writing bonds for larger dollar amounts. Trial transcript, p. 28, line 9 – p. 30, line 19. Ms. Barnes then conceded to questioning from Western Surety’s

attorney that she did not know and “couldn’t tell” the court what the largest amount Western Surety would have written in regard to a blanket liability policy in 2008 when it issued the Bond to Jasper County. Trial transcript, p. 145, line 19 – p. 146, line 4.

With regards to the alleged transmittal letter defense, Cheryl Stolte (Western Surety’s witness) clearly and unequivocally rejected that defense in the span of approximately five questions. Stolte testified that cover letters and invoice billing statements had no significance. Stolte stated “a billing notice has no legal – it doesn’t mean – to me it doesn’t mean anything legally because it’s a bill.” Trial transcript, p. 169, lines 6-22. Stolte ignored those statements and went to the bond document itself when asked the amount of the coverage for a bond. Trial transcript, p. 172, lines 6-21. Overall, when Ms. Stolte was asked by Western Surety’s counsel about two specific premium invoices for prior bonds, Ms. Stolte went immediately to the face of the bonds to determine the amounts of the bonds, ignoring the cover pages. Trial transcript, p. 170, line 1 - p. 174, line 16.

Further, an objective review of the invoices do not show any notice to the County that the amount listed on the Bond is not correct. The invoice does not indicate that the terms or amount of coverage offered by the Bond have changed, nor does the Bond contain any language that says the Limits of Liability can be changed by a subsequent document or billing invoice. Very simply, the Bond did not make any reference that the face amount of the Bond was controlled by any “description” on any invoice or that the face amount would be reduced by any factor.

In addition, the “Description” in the invoices changed over time. For example, the first invoice for the 2008 time period had a completely different “Description” of the Bond than what the “Description” for the Bond was on the invoices for years 2017 and 2018. Further, these invoices certainly did not alert Jasper County that the coverage afforded by the Bond was not the amount on the face of the Bond of \$285,000, which Western Surety conceded was “unambiguous,” but was rather some different amount. Jasper County cannot be held to understand the internal labeling done by Western Surety with its invoices to the county when no one from Western Surety

informed Jasper County that the face amount of the Bond was incorrect or that Jasper County somehow needed to decipher the invoice each year to understand the limits of the bond.

In Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 473 S.E.2d 52 (1996), the South Carolina Supreme Court extended the law of bad faith in this state. As part of that decision, the Court wrote:

In Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983), we recognized the existence of a cause of action against an insurance company for bad faith refusal to pay first party benefits due under an insurance contract. In so doing we cited with approval the reasoning used in the seminal case of Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032 (1973), that there is an implied covenant of good faith and fair dealing in every insurance contract "that neither party will do anything to impair the other's rights to receive benefits under the contract." Nichols, 279 S.C. at 339, 306 S.E.2d at 618. We further stated, "We hold today that if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action." Id. at 340, 306 S.E.2d at 619 (emphasis added).

Id., 473 S.E.2d at 53. The Court further adopted the reasoning of Deese v. State Farm Mut. Auto. Ins. Co., 838 P.2d 1265 (Ariz. 1992) that "benefits due to an insured are not limited solely by those expressly set out in the contract." As stated in Deese, "*the insured also is entitled to receive the additional security of knowing that she will be dealt with fairly and in good faith. That security comes not from the express contractual terms, but from the implied covenant of good faith and fair dealing.*" Id. (emphasis in the original).

Here, the bad faith was the lack of any objective investigation into why the Bond was written, the lack of contact with any relevant company employee for input about the original issuance and then the renewals of the Bond for ten consecutive

years, and the continued use of the defenses that the company would not write that amount for a bond and/or the billing invoices gave notice that the Bond was less than written when the bond company's own witnesses at trial unequivocally rejected those defenses.

South Carolina law requires an insurance company to do more than simply respond to a claim and make a settlement offer. If that were the law, then every automobile, property, and casualty insurer in this state could avoid a bad faith claim by merely responding to a claim and making an offer. Our appellate courts most likely would not allow, for example, a homeowner's carrier who made a \$5000 offer on a \$750,000 fire loss to avoid a bad faith verdict based on questions about the scope and thoroughness of its investigation when the insurer defends by saying it contacted the insured timely made an offer. The insurance company must act in good faith and fair dealing, which requires, at a minimum, a thorough investigation with employees involved in issuing and renewing the policy. Additionally, good faith and fair dealing requires defenses that would not be rejected by the only objective witness called at any trial and by the company itself when questioned by the trial judge. That is why Western Surety's conduct in this matter constituted bad faith under South Carolina law. Accordingly, the trial court erred in finding in favor of Western Surety on this issue.

Likewise, S.C. Code Ann. § 38-59-40 allows for a party to recover reasonable attorney's fees if the refusal to pay a claim "was without reasonable cause or in bad faith." Jasper County's counsel submitted an affidavit showing attorney fees of \$30,157.00 at that time. Based on the evidence discussed above, the trial court respectfully erred by not awarding those fees. Jasper County seeks to recover those fees plus additional attorney's fees incurred as a result of this appeal pursuant to S.C. Code Ann. § 38-59-40(2).

CONCLUSION

For these reasons, Jasper County is entitled to recover damages and attorney's fees pursuant to the bad faith cause of action and S.C. Code Ann. § 38-59-40.

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PROOF OF SERVICE

The undersigned, an attorney in this matter for Respondent-Appellant Jasper County, certifies that I have on April 16, 2024 served a copy of **Respondent-Appellant's Initial Brief and Designation of Matter To Be Included In The Record on Appeal** upon other counsel of record by electronic mail and by depositing a copy with sufficient postage in the United States mail to:

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