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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.

RETURN TO PETITION FOR REHEARING

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Introduction

State Farm Fire and Casualty Company ("State Farm") submits this Return to Appellant's Petition for Rehearing. Appellant's Petition should be denied because it primarily raises issues (1) not raised to the circuit court; (2) not ruled upon by the circuit court; (3) not raised in Appellant's Motion to Reconsider; and (4) not raised in this appeal until after the Court's February 28, 2024 Opinion (the "Opinion"). Additionally, each of her new arguments fails on the merits.

Argument

Appellant seeks a rehearing as to this Court's affirmance of summary judgment on her bad faith and fraud causes of action. With respect to her bad faith claim, Appellant offers five arguments, four of them new: (1) State Farm did not articulate reliance on Appellant's failure to protect her items at the time of denial; (2) Appellant's failure to protect many of her items did not extend to all her items; (3) State Farm has not issued a replacement check for the uncashed check originally made to Appellant on March 4, 2016; (4) S.C. Code § 38-59-40 prevents a court from awarding summary judgment on bad faith; and (5) State Farm's reliance upon the statute of limitations was "unreasonable per se." With respect to her fraud claim, she argues, for the first time, Judge Dickson found her in contempt and summary judgment constituted an improper "sanction." Each argument fails and is addressed below.

A. Appellant's Petition should be denied, first of all, because it raises new arguments not previously asserted to this Court.

"The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Toal, Jean, *Appellate Practice in South Carolina,* 309 (1999). *See also, Liberty Loan Corp. of Darlington, S.C. v. Mumford*, 283 S.C. 134, 141, 322

S.E.2d 17, 22 (Ct. App. 1984) (Shaw dissenting) ("It is firmly established that if questions presented by the petition for rehearing were not properly raised by any exception on appeal, they cannot be considered on rehearing.").

To prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument. Rule 221(a), SCACR. Necessarily, the argument must have been made to the Court for the Court to overlook or misapprehend it. Here, Appellant's Petition must be denied, as she is presenting arguments that were never made, and this Court could, therefore, not have misapprehended.

B. Appellant's two new "failure to protect" arguments are improper for rehearing because they were not previously raised to this Court and in any event were not preserved for appellate review.

1) Appellant has asserted two new arguments with respect to Judge Dickson's Order pertaining to Appellant's failure to protect.

Judge Dickson's Order held State Farm was entitled to summary judgment on bad faith for three different reasons: (1) Appellant's delay violated the statute of limitations; (2) Appellant did not comply with the policy's requirement she give "immediate notice of a loss"; and (3) Appellant failed to "protect the property from further damage or loss." (R. p. 4) ("In addition to violating the statute of limitations, [plaintiff's delay] also violated the contract of insurance which required the insured to provide 'immediate notice' to State Farm of the loss and to 'protect the property from further damage or loss.' By putting wet items in plastic bags and storing them for over three years before informing State Farm of their loss or even existence, the plaintiff did not comply with the contract of insurance, which serves as an additional reasonable ground to deny the plaintiff's claim.")

Prior to her Petition for Rehearing, Appellant did not contest the third, "failure to protect" ground relied upon by Judge Dickson, and the Court appropriately affirmed Judge Dickson on that

unappealed ground. *See*, *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010), *abrogated, on other grounds, by Repko v. Cnty. of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.")

Appellant now contests the "failure to protect" ground as a basis for the circuit court's grant and this Court's affirmance of summary judgment on her bad faith claim for two reasons. First, Appellant argues the "failure to protect" ground was improper because, according to Appellant, there is no evidence State Farm denied her claim based on her failure to protect any of the subject personal property. Second, she alleges that some of the items she submitted had not been damaged by storing them in the attic for over three years after the loss.

2) Appellant did not appeal the failure to protect ground for summary judgment relied upon by Judge Dickson.

Appellant never previously argued Judge Dickson's ruling with respect to her failure to protect was improper for these reasons, or any others. These new arguments were not referenced, much less discussed, in her statement of issues on appeal, her thirty-page appellate brief, her reply brief, or her oral argument in support of her appeal. Instead, prior to her Petition for Rehearing, Appellant only argued summary judgment on her bad faith claim was improper and should be reversed because the statute of limitations allegedly did not apply. (App. Br., p. 1; 27-29). Accordingly, to the extent Appellant preserved these new arguments below (and she did not, as discussed, *infra*), she abandoned them by failing to assert them in either her briefing or argument to this Court. A petition for rehearing cannot breathe new life into unpreserved or abandoned arguments.

3) Appellant did not preserve for appeal her arguments challenging the failure to protect ground for summary judgment.

Additionally, Appellant's new arguments challenging the failure to protect ground for summary judgment were neither raised to nor ruled upon by the circuit court. State Farm argued as early as its November 6, 2019, Motion for Summary Judgment that judgment as to bad faith was proper because Appellant's lengthy delay violated the statute of limitations and "also violated the contract of insurance which required the insured to provide 'immediate notice' to State Farm of the loss and to 'protect the property from further damage or loss.'" (R. p. 055). Prior to Judge Dickson's Order, Appellant had ample opportunity and more than a year to contest State Farm's argument with the points of contention she raises now, in her Petition for Rehearing. However, neither Appellant's 15-page memorandum in opposition to the motion for summary judgment, nor her oral argument before Judge Dickson referenced either of the arguments raised in her Petition with respect to the failure to protect. (R. p. 45-48; 114-128)

4) Appellant did not raise these arguments in a motion to reconsider.

After Judge Dickson's ruling, Appellant, for the first time, alluded to her failure to protect, arguing at paragraph 20 there was *no* evidence that she failed to protect her items. (R. 11 ¶ 20) ("there is no evidence of the 700 items the Plaintiff submitted in 2018 a relevant portion of the items, value were even wet items that had been placed in bags. There is no evidence placing the items in bags further damaged the property."). However, by this time it was too late. *See, e.g. Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.") Additionally, Appellant still did not articulate the grounds she now asserts in her motion for rehearing: *i.e.*, that her failure to protect was a partial one and/or that State Farm did not rely upon her failure to protect in its denial.

5) Appellant's new failure to protect arguments fail on the merits.

In addition to being unpreserved and otherwise abandoned, Appellant's new arguments challenging the failure to protect ground for summary judgment fail on the merits. State Farm's denial letter specifically referenced Appellant's duty to provide State Farm immediate notice of her losses and to protect the property from further damage or loss, quoting both policy provisions. (R. 173). Additionally, even if State Farm had not specifically quoted Appellant's duty to "protect the property from further damage or loss" in the denial letter, she was bound with knowledge of and compliance with the terms of the policy. *See, Walpole v. Great Am. Ins. Companies*, 914 F. Supp. 1283, 1291 (D.S.C. 1994), *aff'd*, 56 F.3d 63 (4th Cir. 1995) ("An insured has a duty to read the policy he purchases and to abide by its plain terms."). Moreover, whether there exists a reasonable basis for denying a claim is an objective standard, not a subjective one. *State Farm Fire & Cas. Co. v. Barton*, 897 F.2d 729, 731 (4th Cir. 1990) ("In South Carolina, an insurer cannot be liable for bad faith refusal to pay proceeds due under an insurance agreement if there exists an objectively reasonable basis for denying the . . . claim."); *Bank of New York Mellon Tr. Co. v. Grier*, 416 S.C. 63, 67, 785 S.E.2d 208, 210 (Ct. App. 2016) (affirming summary judgment because insurer "had a reasonable, objective basis for" the denial).

C. Appellant's argument that State Farm has not issued a replacement check for the uncashed payment is also an inappropriate basis for her requested rehearing.

1) Appellant's non-cashed check argument is not a proper ground for rehearing.

Appellant also argues, for the first time, "the ongoing and continued failure of State Farm to reissue a check not cashed by the Plaintiff … is further evidence of bad faith." (App. Pet., p. 4-5). This argument was never raised to this Court and it was not raised to or ruled upon by Judge Dickson. For the reasons discussed above, *see supra* sections A, B.2., B.3, B.4., it is not preserved for appeal and is not the proper subject of rehearing.

2) The non-cashed check argument fails on the merits.

On the merits, Appellant cites no authority to support her position that her non-cashing of a check could give rise to bad faith on State Farm's part. Appellant was sent the $10,627.30 check on March 4, 2016, and again the check was reissued by State Farm on September 28, 2016, when Appellant said she did not receive the first check. (R. 91; 154) (Hoffman dep., 142:14-143:09; Edwards dep., 102:4-15) The record shows at the time of her deposition, Appellant had not asked for a replacement check and had not spoken to anyone at State Farm about the check. (R., 80) (Hoffman dep, 97:08-12).[1]

D. Appellant's new argument that S.C. Code § 38-59-40 should save her bad faith claim is not a proper basis for rehearing.

1) Appellant's new argument concerning section 38-59-40 is not a proper ground for rehearing.

Appellant appears to argue S.C. Code § 38-59-40 somehow saves her bad faith claim. This new argument was not previously raised to this Court. It also was not raised to Judge Dickson and it was not ruled upon by Judge Dickson. Thus, this new argument is not proper for consideration in a rehearing, as discussed above, *see supra*, sections A, B.2., B.3, B.4.

2) This new argument also fails on the merits.

Appellant does not explain how this statute forecloses insurers from being granted summary judgment on breach of contract, fraud, or bad faith causes of action. The cases cited by Appellant do not support such a theory. In *Ocean Winds Council of Co-Owners v. Auto Owners*, the court *denied* a motion for summary judgment as to bad faith and, accordingly, held attorneys' fees under

[1] Appellant's Petition argues, outside of the record, that State Farm's "ongoing and continuing failure" to reissue a check is evidence of bad faith. Although it is also outside of the record, an additional replacement check was made out to Appellant in August 2022 and deposited by her in September 2022.

section 38-59-40 was a matter for the trial judge. 241 F. Supp. 2d. 572, 578 (D.S.C. 2002) ("As explained above, a genuine issue of material facts [sic] exists as to whether defendant acted in bad faith in its processing of plaintiff's claim. **Thus,** the court will determine the issue of attorney's fees at trial.") (emphasis added).[2] Conversely, had the court *granted* summary judgment on bad faith, the attorneys' fees statute would not (as Appellant argues) save that claim from dismissal. To accept Appellant's undeveloped argument with respect to section 38-59-40 is to conclude bad faith claims are never subject to summary judgment, an absurd result that runs afoul of Supreme Court precedent. *See Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004) (affirming circuit court's grant of summary judgment in favor of insurer because it had a reasonable ground for contesting the insurance claims). Accordingly, there is no merit to Appellant's contention that section 38-59-40, standing alone, precludes the Court's affirmance of summary judgment on her bad faith claim.

E. Appellant's new argument concerning sanctions and contempt does not support a rehearing.

Appellant now claims Judge Dickson's dismissal of her fraud claim was a "contempt order" in which the "judge simply struck the pleadings as a form of sanction." (App. Pet. p. 6). Besides being inaccurate, this argument was not previously made to this Court and was never raised to nor ruled upon by Judge Dickson.

1) Appellant's sanctions/contempt argument was not previously made to this Court.

[2] *University Medical Associates of MUSC v. Unumprovident Corp.*, the other case cited by Appellant on this point, was essentially the same, as it involved a district judge *denying* an insurer's summary judgment motion as to bad faith and holding that the trial judge would determine availability of attorneys' fees under section 38-59-40 at trial. 335 F. Supp. 2d 702, 710-11 (D.S.C. 2004).

Even if she had argued it below, Plaintiff abandoned her argument at this Court. Neither her briefs nor her oral argument even suggested Judge Dickson's Order was an improper contempt order. Similarly, she never presented any argument to provide the Court or Respondent with notice she was alleging an abuse of discretion with respect to sanctions. In fact, the word contempt is absent, and the word sanction appears one time, within 40 pages of briefing. (App. Br. p. 26) ("Finally, the striking of the Plaintiff's pleadings under the circumstances would amount to unjust sanctions since the Plaintiff alleged all the essential elements in her complaint to put the Defendant on sufficient notice of all the allegations of fraud as required by Rule 12 and Rule 9 and the striking of the pleadings resulted in an unjust Order of the Court."). Appellant offered no case law or other authority to support this statement and she did not argue or explicate how she arrived at this conclusion.

"South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). *See also, State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.") Appellant's one sentence reference to sanctions in her initial brief is in great contrast to the more than two pages of argument concerning sanctions and contempt and citation to some eight cases on these subjects in her petition for rehearing. If Appellant preserved this issue in the trial court—which she did not—she would have abandoned the issue in this Court.

2) Appellant did not raise to Judge Dickson, and Judge Dickson did not rule upon, her sanctions/contempt argument.

Appellant now contends Judge Dickson held her in contempt and ordered sanctions without ever saying so. If Appellant believed his ruling had those effects at the time, she should have

informed Judge Dickson and Respondent of those beliefs. However, Appellant did not argue to the circuit court the standards for imposing contempt sanctions or whether her conduct fell within those standards. She never argued the distinction between "willful disobedience" and "inadvertent failure" that she now tries to make. (App. Pet. 5-6). She never argued dismissal was an improperly harsh sanction, nor did she urge the trial court to consider whether lesser sanctions could achieve justice. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

3) Appellant's new contempt/sanctions argument also fails on the merits.

Appellant contends her noncompliance with Judge Manning's Order is of no consequence because "the Order was an incorrect statement of the Judge at the hearing." (App. Pet. p. 5). She argues a transcript of the hearing would show an oral ruling inconsistent with the written one. *Id.* However, even if Appellant were correct (which Respondent does not concede) she ignores the fact that an unwritten order is not final, and if it conflicts with a subsequent written order, the written order is what controls:

> South Carolina law is clear that "[n]o order is final until it is written and entered." *Corbin v. Kohler Co.,* 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct. App. 2002). "Until written and entered, the trial judge retains discretion to change his [or her] mind and amend his [or her] oral ruling accordingly." *Id.* at 621, 571 S.E.2d at 96. **A written order may be issued which is inconsistent with a prior oral ruling, and to the extent the two conflict, the written order controls**. *Id.* at 621, 571 S.E.2d at 97. "The written order ... constitutes the final judgment of the court." *Id.*

Simpson v. Simpson, 377 S.C. 519, 525, 660 S.E.2d 274, 277–78 (Ct. App. 2008) (emphasis added).

Judge Manning's written order ruled Appellant failed to state a cause of action for fraud with particularity, and she had 30 days to amend her complaint to do so. There is no other way to

read Judge Manning's Order. Well over a year passed between Judge Manning's August 16, 2019, Order and Judge Dickson's February 9, 2021, Order. Plaintiff has never amended her complaint, moved to reconsider Judge Manning's order, or appealed Judge Manning's order.

Judge Dickson did not find Appellant in contempt. Judge Manning's unappealed order found Appellant had not stated a cause of action for fraud with particularity. At the time of Judge Dickson's hearing Appellant had not amended the complaint within the time allotted by Judge Manning, or at any other time. Accordingly, Appellant could not prevail upon her cause of action for fraud, and summary judgment was appropriate.

F. The one ground raised in Appellant's Petition that has previously been argued fails on the merits.

It was not bad faith "per se" for State Farm to rely upon the statute of limitations on these facts. At a minimum, the application of the statute of limitations to these unusual facts is a novel one. This is illustrated by the fact that the two cases cited by the Court in footnote 2 of the Opinion *support* State Farm's position that the statute of limitations should bar Appellant's claim. It is further illustrated by the fact that there is at least judicial disagreement between this Court and Judge Dickson with respect to the application of the statute of limitations as to these facts. While this Court may have determined Judge Dickson's conclusion was incorrect, it has not determined his conclusion was *unreasonable.* And if Judge Dickson's conclusion was at least *reasonable,* so too was State Farm's.

This Court and others have consistently held that even where an insurer is wrong on a question of law, where the question is unsettled, complicated, or close, summary judgment as to bad faith is appropriate. *See, Jericho State Capital Corp. v. Chi. Title Ins. Co.*, 431 S.C. 437, 454, 848 S.E.2d 572 (Ct. App. 2020) (affirming summary judgment in favor of the insurer on bad faith because "the unusual nature of the [Horry County] Ordinance presented close policy interpretation

issues" and, therefore, the insurer had a reasonable, good faith basis for contesting the plaintiffs' claims despite there being coverage); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004) (affirming summary judgment as to bad faith, despite finding of coverage, where there were arguments both ways as illustrated by a Fourth Circuit decision); *Poston v. National Fidelity Life Ins. Co.*, 303 S.C. 182, 188, 399 S.E.2d 770 (1990) (insurer's interpretation of policy receipt was wrong; however, "the receipt is ambiguous and susceptible of more than one construction. Insurer's interpretation that the receipt limits its liability to $100,000 does not rise to the level of bad faith"); *Nelson v. United Fire Ins. Co.*, 275 S.C. 92, 97, 267 S.E.2d 604, 607 (1980) (reversing an award for attorney's fees premised on "bad faith" when the arguments involved novel issues of law and noting "we have legal principles of novel impression in this State" and "[c]ertainly in a free society, one is entitled to properly litigate without the fear of unequal punishment"); *Flexi-Van Leasing, Inc. v. Travelers Indem. Co.*, 837 F. App'x 141, 148 (4th Cir. 2020) (affirming summary judgment on bad faith where insurer "had reasonable grounds for believing coverage might not be a certainty under the exclusion"); *Remick v. Travelers Home & Marine Ins. Co.*, No. 7:19-CV-02524-DCC, 2022 WL 801871, at *5 (D.S.C. Feb. 24, 2022) (granting summary judgment as to bad faith although coverage was undecided, noting "this question is sufficiently complex such that it cannot be said that [the insurer] knowingly failed to exercise an honest and informed judgment in processing the claim"); *Agape Senior Primary Care, Inc. v. Evanston Ins. Co.*, 304 F. Supp. 3d 492, 500 (D.S.C. 2018) (finding insurance coverage but granting summary judgment as to bad faith where the "court's determination … was not an easy one," explaining "Because the call was so difficult for this court, it naturally follows that [the insurer] cannot be held to have acted in bad faith or unreasonably when it refused coverage").

Conclusion

For the foregoing reasons, Appellant's Petition for Rehearing should be denied with respect to the issues alleged in Appellant's Petition.

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PROOF OF SERVICE

I certify that I have served the **RETURN TO PETITION FOR REHEARING** on Appellant by electronic service on March 29, 2024, as reflected on email attached hereto and as referenced below:

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Attachments: Hoffman, Return to Petition for Rehearing.pdf; Hoffman - Proof of Service.pdf

Attached please find the following documents for service upon you:

1. Return to Petition for Rehearing
2. Proof of Service

Thank you.

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