THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2024-001004

Saundra R. Hoffman, ... Appellant,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Introduction

State Farm Fire and Casualty Company ("State Farm") submits this Return to Saundra Hoffman's Petition for Writ of Certiorari. Hoffman'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 Hoffman's motion to reconsider to the circuit court; and (4) not raised to the court of appeals until after that Court's February 28, 2024 Opinion (the "Opinion"). Additionally, each of her arguments fails on the merits.

Argument

Hoffman seeks a writ of certiorari as to the court of appeals' affirmance of summary judgment on her bad faith and fraud causes of action. With respect to her bad faith claim, Hoffman offers four arguments, the first three of which are new and unpreserved: (1) State Farm did not articulate reliance on Hoffman's failure to protect her items at the time of denial; (2) Hoffman's failure to protect many of her items did not extend to all her items; (3) State Farm has allegedly not issued a replacement check for the uncashed check originally made to Hoffman on March 4, 2016; and (4) State Farm's reliance upon the statute of limitations was "unreasonable as a matter of law." With respect to her fraud claim, her argument that Judge Dickson found her in contempt and summary judgment constituted an improper "sanction" was never raised to the circuit court and was not raised to the court of appeals until *after* its February 28, 2024, opinion. Each argument fails and is addressed below.

A. The one ground raised in Hoffman's Petition that was preserved and argued below—that State Farm's invocation of the statute of limitations had no reasonable basis--fails on the merits.

Hoffman continues to argue State Farm's mere "assertion of the statute of limitations" was unreasonable as a matter of law and supported her bad faith claim. (Pet., p. 5). Hoffman argues

State Farm's position that the statute of limitations ran before Hoffman's submission of 700 new items well over three years after she made her claim with State Farm was "incorrect" and that "incorrect knowledge of the law … is clear evidence of unreasonable conduct." *Id.*

There are two fundamental problems with this argument: First, State Farm's position was not incorrect, in fact, Judge Dickson found the statute of limitations did bar Hoffman's claim, and the court of appeals did not disturb that portion of his ruling;[1] and second, even if State Farm's position was incorrect, it was, at a minimum, a reasonable interpretation of the law with respect to these facts. This is illustrated by Judge Dickson's agreement with State Farm's position. Even if the court of appeals found equitable estoppel barred the statute of limitations defense, reasonable disagreement between the appellate courts and a trial court concerning unique facts is not unusual.[2] Finding a trial court's conclusion was incorrect is a far cry from finding its conclusion was *unreasonable.* And if Judge Dickson's belief the statute of limitations applied to Hoffman's claim 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, Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631,

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[1] The court of appeals did not disturb Judge Dickson's determination that under these unique facts the statute of limitations began running when Hoffman suffered her loss and knew or should have known her items were damaged. Instead, it held the doctrine of equitable estoppel could preclude State Farm from relying on the statute. The court of appeals' original opinion contained a footnote stating the three-year statute of limitations could not have begun before State Farm denied her claim for 700 items she did not disclose for over three years. However, after State Farm submitted a petition for rehearing, noting the cases in the footnote supported the statute running on the date of the loss when Hoffman knew or should have known those items were damaged, the court withdrew its original opinion and deleted the footnote from the refiled opinion.

[2] State Farm contends the court of appeals erred in finding that equitable estoppel (which was never argued to the circuit court) saves Hoffman's claims and has filed a petition for certiorari with respect to that ruling.

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"); *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); *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").

B. Hoffman's "failure to protect" arguments are not preserved for appellate review and fail on the merits.

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

Judge Dickson's Order held State Farm was entitled to summary judgment on bad faith for three different reasons: (1) Hoffman's delay violated the statute of limitations; (2) Hoffman did not comply with the policy's requirement she give "immediate notice of a loss"; and (3) Hoffman 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, Hoffman did not contest the third, "failure to protect" ground relied upon by Judge Dickson, and the court of appeals appropriately affirmed Judge Dickson on that basis. *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.")

Hoffman now contests the "failure to protect" ground as a basis for the circuit court's grant and the court of appeals' affirmance of summary judgment on her bad faith claim for two reasons. First, Hoffman argues the "failure to protect" ground was improper because, according to Hoffman, 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) Hoffman did not preserve her arguments challenging the failure to protect ground for summary judgment.

Hoffman'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 Hoffman'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, Hoffman had ample opportunity and more than a year to contest State Farm's argument with the points of contention she now asks this Court to consider. However, neither Hoffman'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)

3) Hoffman did not raise these arguments in a motion to reconsider.

After Judge Dickson's ruling, Hoffman, 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."). Hoffman still did not articulate the grounds she now asserts: *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. Even if she had, 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.")

4) Hoffman did not appeal the failure to protect ground for summary judgment relied upon by Judge Dickson; accordingly, even if she raised the issues below, she abandoned them.

"An argument that is not raised to an intermediate appellate court is not preserved for review by this Court. *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) At the court of appeals, Hoffman never argued Judge Dickson's ruling with respect to her failure to protect was improper, prior to her March 14, 2024, petition for rehearing. 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, Hoffman 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 Hoffman preserved these new arguments below (and she did not), she abandoned them by failing to assert them in either her briefing or argument to the court of appeals, prior to its opinion. A petition for certiorari cannot breathe new life into unpreserved or abandoned arguments.

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

In addition to being unpreserved and otherwise abandoned, Hoffman's new arguments challenging the failure to protect ground for summary judgment fail on the merits. State Farm's denial letter specifically referenced Hoffman'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 Hoffman'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. Hoffman's argument that State Farm has not issued a replacement check for the uncashed payment is also unpreserved.

1) Hoffman's non-cashed check argument is not preserved.

Hoffman argues "the ongoing and continued failure of State Farm to reissue a check not cashed by the Plaintiff … is further evidence of bad faith." (Pet., p. 4). This argument was never raised to nor ruled upon by Judge Dickson, and it was never raised to the court of appeals prior to Hoffman's March 2024 petition for rehearing. For the reasons discussed above, *see supra* sections A, B.2., B.3, B.4., it was not preserved for appeal, and even if it had been, Hoffman abandoned this argument by not making it prior to the court of appeals' Opinion.

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

On the merits, Hoffman cites no authority to support her position that her own non-cashing of a check could give rise to bad faith on State Farm's part. Hoffman 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 Hoffman 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, Hoffman 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).[3]

D. Hoffman's new argument concerning sanctions and contempt does not support a rehearing.

Hoffman 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." (Pet. p. 6). Besides being inaccurate, this argument was never raised to nor ruled upon by Judge Dickson and was not raised to the court of appeals prior to the issuance of the court of appeals' Opinion.

1) Hoffman did not raise to Judge Dickson, and Judge Dickson did not rule upon, Hoffman's sanctions/contempt argument.

Hoffman now contends Judge Dickson held her in contempt and ordered sanctions without ever saying so. If Hoffman believed his ruling had those effects at the time, she should have informed Judge Dickson and Respondent of those beliefs. However, Hoffman 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. (Pet. 7-8). 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

[3] Hoffman'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, Hoffman cannot contest that an additional replacement check was made out to Hoffman in August 2022 and deposited by her in September 2022.

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).

2) Hoffman's sanctions/contempt argument was not made at the court of appeals until after its opinion was issued.

Even if she had argued it to the circuit court, which she did not, Hoffman abandoned her "sanctions" argument by not making it to the court of appeals prior to her petition for rehearing. 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."). Hoffman 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.") Hoffman's one sentence reference to sanctions in her initial appellate brief is in great contrast to the more than two pages of argument concerning sanctions and contempt

and citation to some nine cases on these subjects in her Petition. If Hoffman preserved this issue in the trial court—which she did not—she would have abandoned the issue at the court of appeals.

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

Hoffman 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." (Pet. p. 6). She argues a transcript of the hearing would show an oral ruling inconsistent with the written one. *Id.* However, even if Hoffman 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 Hoffman 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 Hoffman in contempt. Judge Manning's unappealed order found Hoffman had not stated a cause of action for fraud with particularity. At the time of Judge Dickson's hearing, Hoffman had not amended the complaint within the time allotted by Judge

Manning, or at any other time. Accordingly, Hoffman could not prevail upon her cause of action for fraud, and summary judgment was appropriate. Thus, even if Hoffman's new sanctions/contempt argument had been preserved and was not then abandoned, it would fail on its merits.

Conclusion

For the foregoing reasons, Hoffman's Petition for Certiorari should be denied.

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