THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. George M. McFaddin, Jr.
Presiding Circuit Court Judge

Appellate No. 2023 – 001845
Civil Action No.: 2022 – CP – 25 – 00269

Daniel A. Speights . . . . . Appellant,

vs.

Chubb Limited d/b/a Chubb National Insurance Company, Auto-Owners Insurance Company, and Bankers Standard Insurance Company . . . . . Defendants,

Of Whom Auto-Owners Insurance Company is the . . . . . Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This action surrounds an insurance contract between Speights & Solomons, L.L.C. (hereinafter, the "Law Firm") and Respondent Auto-Owners Insurance Company ("Auto-Owners"). (R. p. 334). Appellant Daniel A. Speights ("Speights") is a member of the Law Firm. (R. p. 34, ¶ 22-23). Through and under the direction of the Law Firm email account belonging to Speights, the Law Firm bookkeeper, Linda S. Herndon (the "Bookkeeper") was directed to transfer funds from Speights's *personal* bank account to an account in China. (R. p. 32, ¶ 6) (emphasis added). Following confirmation with Speights's email that the funds should be transferred from Speights's *personal* bank account, and not an account belonging to the Law Firm, the Bookkeeper transferred funds to China from Speights's personal account. (R. pp. 32-33, ¶¶ 7-11, 13) (emphasis added). Unbeknownst to the Bookkeeper, the Plaintiff's email account had been hacked by a third party with the purpose of acquiring money. (R. p. 2). This scheme was not discovered until after the money had been successfully transferred. (R. p. 2).

Speights filed a claim with Auto-Owners as a loss to the Law Firm. Auto-Owners denied coverage for the Plaintiff's claim because it was a voluntary parting of funds through false pretenses. (R. p. 4). Speights brought this action as an individual seeking coverage for his loss from this incident and alleging breach of contract, negligence, and bad faith or breach of implied covenant of good faith and fair dealing against this Defendant. (R. pp. 4-5). The Law Firm made no claim.

This appeal arises from the entry of Summary Judgment in favor of Auto-Owners and denial of Speights' Motion to Reconsider. (R. pp. 1 & 15). Auto-Owners filed its Motion for Summary Judgment on August 3, 2023. (R. pp. 47-56). The Circuit Court heard arguments on the Motion on September 25, 2023. (R. p. 78). During the course of the hearing and his arguments,

Speights did not state that he would submit any further arguments or materials to the Circuit Court for its consideration. (R. pp. 78-91). At no point during the hearing did the Circuit Court request further submissions of any kind from either party to assist in its ruling, and at the conclusion took the Motion under consideration, but again did not request any further submissions from the parties. (R. p. 89, lines 18-22). Speights did not file any memorandum or affidavits in opposition to the Motion prior to the September 25, 2023 hearing and nothing was filed with the Circuit Court on Speights's behalf. (R. pp. 376-380).

On September 27, 2023, the Circuit Court provided its ruling on Auto-Owners' motion for summary judgment and requested Auto-Owners to draft an order for the Circuit Court (R. pp. 381-382). Following the email from the Circuit Court, Mr. Gibson Solomons, the attorney for Speights, alerted the Circuit Court that he had mailed via USPS to the Circuit Court, the day before (and thus prior to the issuance of the Order), his purported summary of his argument in opposition to Auto-Owners' motion for summary judgment. (R. p. 384). This purported summary of arguments, some of which were made during oral argument, but the majority of which was an expansion of the brief oral argument that was made during the hearing, was then provided to counsel for Auto-Owners only after the Circuit Court ruled. (R. p. 376-380). However, that submission was never filed with the Circuit Court or entered into evidence as an exhibit.

The Circuit Court entered judgment in favor of Auto-Owners on October 5, 2023. (R. p. 1). In its Order, the Circuit Court found that:

> 1.) Speights was not an insured under the Policy because the Law Firm was the named insured, and, even if he could be considered an insured, the Policy provides coverage to the property of the Law Firm in the course of its business, and not the personal property of Speights;

2.) The Circuit Court interpreted the Policy language as a matter of law and found that there was a voluntary parting, as unambiguously stated in the Policy, the Policy did not apply to Speights, as he was not an insured, and did not apply to his personal property.

(R. pp. 1-14). Speights filed a Motion to Reconsider on October 12, 2023. (R. pp. 57). The Circuit Court denied that Motion to Reconsider on November 9, 2023. (R. p. 15). In its Order, the Circuit Court denied the motion to reconsider on the following grounds:

1.) New Arguments raised in a Motion to Reconsider are improper;
2.) Further discovery did not prevent Summary Judgment as there was no showing of a genuine issue of material fact nor did Speights demonstrate an inability to oppose the motion nor how further discovery would uncover additional relevant evidence;
3.) Novel issues, whether factual or legal, do not bar Summary Judgment when there is no genuine issue of material fact;
4.) The Circuit Court correctly interpreted the Voluntary Parting clause of the Policy and ruled, as a matter of law, that it was not applicable to Speights as he was not the named insured under the Policy.

(R. pp. 15-22). Speights filed his notice of appeal on November 27, 2023 (R. p. 75) and filed his Initial Brief on March 6, 2024 (Appellant Initial Brief). This Reply Brief follows.

STANDARD OF REVIEW

There are two applicable Rules before the Court for review on this appeal: summary judgment under Rule 56(c) and reconsideration under Rule 59(e), S.C.R.C.P.

I. SUMMARY JUDGMENT

When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under summary-judgment rule, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (quoting Rule 56(c), S.C.R.C.P.). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Id.

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Singleton v. Sherer, 659 S.E.2d 196, 202 (S.C. Ct. App. 2008). The Supreme Court of South Carolina has recently held the "mere scintilla of evidence" standard is inapplicable overruling Hancock v. Mid-South Mgmt. Co., 673 S.E.2d 801, 803 (S.C. 2009). Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 460, 892 S.E.2d 297, 300 (S.C. 2023). To withstand summary judgment, there must be a "genuine issue of material fact." Id. "A jury issue is created when there is material evidence tending to establish the issue in the mind of a reasonable juror." Jackson v. Bermuda Sands, Inc., 677 S.E.2d 612, 616 (S.C. Ct. App. 2009). "However, this rule does not authorize submission of speculative, theoretical, and hypothetical views to the jury." Id. "It is not sufficient that one create an inference which is not reasonable or

an issue of fact that is not genuine." Thompkins v. Festival Centre Group, I, 410 S.E.2d 593, 594 (S.C. Ct. App. 1991).

II. RULE 59(e) MOTION FOR RECONSIDERATION

The South Carolina Rules of Civil Procedure contemplate two situations in which a party should consider filing a Rule 59(e) motion. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004). A party may wish to file such a motion when the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. Id. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Id. A party cannot use Rule 59(e), S.C.R.C.P, to present to the lower court an issue the party could have raised prior to judgment but did not. Gartside v. Gartside, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009). Rule 59(e) motions are not vehicles for bringing new theories or arguments, nor can a party use a Rule 59(e) motion to present to the lower court an issue the party could have raised prior to the judgment but did not. See Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (citing Natural Resources Defense Council v. U.S. E.P.A., 705 F. Supp. 698, 701 (D.D.C. 1989)). "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).

STATEMENT OF THE FACTS

On September 25, 2019, the Bookkeeper for the Law Firm was sent an email from Speights's email address directing her to wire money to a specified bank account. The email asked for $250,000.00 to be sent by wire transfer to an account with the Bank of China in Hong Kong. (R. p. 32, ¶ 6). In a reply email, the Bookkeeper asked, "Is this DAS Personal?" to ascertain whether it was a personal account belonging to Speights from which the funds should be transferred. (R. p. 32, ¶ 7.). Believing that it was Speights who had sent the email, the Bookkeeper requested a wire transfer in the amount of $250,000.00 to be sent out of the Speights's *personal account* with Palmetto State Bank to a bank account in China. (R. p. 33, ¶ 9) (emphasis added). Unbeknownst to the Bookkeeper, the Speights's email account had been hacked by a third party with the purpose of acquiring money. This scheme was not discovered until after the money had been successfully transferred. (R. p. 2). The Bookkeeper never called Mr. Speights to confirm prior to making the transfer. (R. p. 110, lines 7-18).

Auto-Owners provided the Law Firm with a policy of insurance under policy number 51-639377-00. (R. pp. 334-365). The Policy was issued to the Law Firm as an entity and not to Speights as an individual. (R. p. 2). The relevant sections of the Policy are as follows:

BUSINESSOWNERS SPECIAL PROPERTY COVERAGE FORM

A. COVERAGE

We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.

2. Property Not Covered
Covered Property does not include:
b. Bullion, money or securities;

3. Covered Causes of Loss

RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

a. Excluded in Section B., Exclusions;

5. Additional Coverages

b. Personal Property Off Premises
You may extend the insurance that applies to Business Personal Property to apply to covered Business Personal Property, other than money and securities, while it is in course of transit or temporarily at a premises you do not own, lease or operate. The most we will pay for loss or damage under this Extension is $1,000.

f. Business Income
We will pay for the actual loss of Business Income you sustained due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or damage to property at the described premises, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from any Covered Cause of Loss.

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

h. False Pretense: Voluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense.

G. OPTIONAL COVERAGES

If shown as applicable in the Declarations, the following Optional Coverages also apply. These coverages are subject to the terms and conditions applicable to property coverage in this policy, except as provided below.

3. Money and Securities

a. We will pay for loss of money and securities used in your business while at a bank or savings institution, within your living quarters or the living quarters of your partners or any employee having use and custody of the property, at the described premises, or in transit between any of these places, resulting directly from:

(1) Theft, meaning any act of stealing;
(2) Disappearance; or
(3) Destruction.

> **b.** In addition to the Limitations and Exclusions applicable to property coverage, we will not pay for loss:
>
> **(1)** Resulting from accounting or arithmetical errors or omissions;
>
> **(2)** Due to the giving or surrendering of property in any exchange or purchase; or
>
> **(3)** Of property contained in any money operated device unless the amount of money deposited in it is recorded by a continuous recording instrument in the device.

(R. pp. 342-358). The Policy provided coverage of "direct physical loss of or damage to Covered Property… caused by or resulting from any Covered Cause of Loss." (R. p. 342). Covered property did not include "bullion, money, or securities." (R. p. 343). Additional coverages included personal property off premises and business income. Personal property off premises compromised "covered Business Personal Property… in the course of transit or temporarily at a premises you do not own, lease, or operate" but this excluded money and securities. (R. pp. 344-345). Business income compromised "actual loss… sustained due to necessary suspension" caused by "direct physical loss of or damage to property at the described premises." (R. p. 345).

The Policy did provide coverage for money and securities, albeit in a limited manner. The loss of money and securities "used in your business" were covered "while at a bank or savings institution" or "in transit between any of these places" as a direct result from "theft, meaning any act of stealing," "[d]isappearance," or "[d]estruction." The Policy further excluded coverage for any loss resulting from "accounting or arithmetical errors or omissions" or "the giving or surrounding or property in any exchange or purchase" (R. p. 358).

The Policy had one notable exclusion from coverage: false pretense. Loss due to a false pretense was excluded "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (R. p. 347). The Policy describes a false pretense as "[v]oluntary parting with any property by you or anyone else to whom you have entrusted the property if induced to do so by any fraudulent scheme, trick, device or false pretense." (R. p. 350).

The Policy did not provide coverage for money or securities nor a loss due to false pretenses and had limited coverage for property off premises. (R. p. 4). Any loss of business income would be covered only if it were a result of a suspension of operations from a covered cause of loss. (R. p. 4). An exclusion to coverage in the policy included a loss resulting from false pretenses. (R. p. 4). Here, the Defendant denied coverage for the Speights's claim, as it was a voluntary parting of funds through false pretenses. (R. p. 4). Speights brought this suit seeking coverage for his loss from this incident and alleging breach of contract, negligence, and bad faith or breach of implied covenant of good faith and fair dealing against this Defendant. (R. pp. 31-39). Auto-Owners filed its Answer on December 22, 2022, denying Speights's allegations. (R. pp. 40-46).

ARGUMENT

The Circuit Court properly granted summary judgment in favor of Auto-Owners because it correctly found that there was no genuine issue of material fact. Summary judgment was granted because the Circuit Court, interpreting the Policy as a matter of law, found the Law Firm, not Speights as an individual, is the named insured under the Policy. Further, Speights's claim with Auto-Owners under the Law Firm Policy was for his personal property, which the Circuit Court found to not be covered under the Policy because it was the personal property of Speights and thus not property of the Law Firm. Additionally, Speights, in his motion for reconsideration and initial brief, attempts to raise new issues that he did not previously raise before summary judgment was granted, and therefore did not preserve them for appeal.

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE SPEIGHTS FIRST RAISED ISSUES IN HIS MOTION TO RECONSIDER AND THUS FAILED TO PRESERVE THEM FOR THIS APPEAL.

Rule 59(e) motions are not vehicles for bringing new theories or arguments, nor can a party use a Rule 59(e) motion to present to the lower court an issue the party could have raised prior to the judgment but did not. See Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (citing Natural Resources Defense Council v. U.S. E.P.A., 705 F. Supp. 698, 701 (D.D.C. 1989)). Here, Speights did not provide a memorandum or other filings in opposition prior to the hearing on Auto-Owners' Motion, nor did Speights file any affidavits with the court prior to the hearing. (R. p. 16). Speights's arguments were not presented to the Circuit Court during the hearing (R. pp. 78-91). Thus, these issues were not properly raised and not preserved for review and should not be considered by the Court.

Speights did not present any evidence in opposition of summary judgment and only presented an oral argument during the hearing. (R. pp. 78-91). After the Court ruled on September

27, 2023, Speights provided what he described as his summary of oral arguments made during the hearing. (R. pp. 376-380). But, the letter was not a summary of his oral arguments but an expansion of them with additions. (R. pp. 376-380). This submission was never filed. (R. p. 68). The purported summary, with new arguments added, became the basis of Speights's motion to reconsider. (R. pp. 57-66). The Circuit Court, in its order denying reconsideration, denied in part because new arguments were improperly raised in the motion to reconsider, which runs afoul of Rule 59(e) of the S.C.R.C.P. (R. pp. 15-17). Specifically, Speights did not raise the following during his oral argument but later raised them in his motion to reconsider:

1.) Demonstrate a need for further discovery;

2.) Speights's personal affidavit was first presented as an exhibit to the motion to reconsider;

3.) The dictionary definition of voluntary parting; and

4.) Speights's standing to bring suit.

(R. pp. 78-91). Thus, Speights did not present these arguments to the Circuit Court for the Circuit to rule on them, which conflicts with Rule 59(e) of the S.C.R.C.P. and should not be considered by the Court.

The South Carolina Rules of Civil Procedure contemplate two situations in which a party should consider filing a Rule 59(e) motion. Elam, 361 S.C. at 25, 602 S.E.2d at 780. A party may wish to file such a motion when the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. Id. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Id. A party cannot use Rule 59(e), S.C.R.C.P, to present to the lower court an issue the party could have raised prior to judgment but did not. Gartside, 383

S.C. 35, 677 S.E.2d 621. Here, neither situation is present. (R. p. 16). Speights attempted to raise new issues.

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT WHEN THERE WAS NO GENUINE ISSUE OF MATERIAL FACT IN AN UNAMBIGUOUS CONTRACT OF INSURANCE.

The construction of unambiguous insurance policies is a question of law for the Court. As such, when interpreting a clear and unambiguous contract, Courts will examine the policy as a whole and give the language its plain and ordinary meaning. Yet, Speights requests that the Court ignore South Carolina precedent and apply his own standard. Speights argues that his personal assets are covered by the Policy and that because of the nature of his relationship with the Law Firm he will always be covered by the Policy. Speights's arguments ignore the plain language of the Policy and well decided precedent.

"When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law." State Farm Mut. Auto. Ins. Co. v. Goyeneche, 429 S.C. 211, 217, 837 S.E.2d 910, 913 (Ct. App. 2019) (quoting Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 46, 717 S.E.2d 589, 592 (2011). The Policy was sold to a South Carolina entity through a South Carolina agent; thus, South Carolina law applies to its interpretation. S.C. CODE ANN. § 38 – 61 – 10. "Insurance policies are subject to the general rules of contract construction." M and M Corp. of S.C. v. Auto-Owners Ins. Co., 701 S.E.2d 33, 35 (S.C. 2010) (citations omitted). "The construction of a clear and unambiguous contract is a question of law for the court." BLG Enterprises, Inc. v. First Financial Ins. Co., 491 S.E.2d. 695, 697 (S.C. Ct. App. 1997). Courts will interpret policy language in accordance with its plain, ordinary, and popular meaning, except with technical language or where the context requires another meaning. Id. "Courts must enforce, not write, contracts of insurance, and their language

must be given its plain, ordinary[,] and popular meaning." Sloan Constr. Co. v. Cent. Nat'l Ins. Co. of Omaha, 269 S.C. 183, 185, 236 S.E.2d 818, 819 (1977). When construing the provisions of an insurance policy, the Court must examine the policy as a whole and adopt a construction that gives effect to the entire instrument and each of its various parts and provisions. Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976). "[T]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract." Id. at 593, 225 S.E.2d at 349; see also MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (Ct. App. 1999) ("[T]he law is clear that, in construing an insurance contract, all of its provisions must be considered together."). The burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract. Gamble v. Travelers Ins. Co., 160 S.E.2d 523, 525 (S.C. 1979). The insurer bears the burden of establishing exclusions to coverage. Sunex Int'l Inc. v. Travelers, 185 F. Supp.2d 614, 617 (D.S.C. 2001). Importantly, "[e]ach exclusion in the policy must be read and applied independently of every other exclusion." Auto-Owners Ins. Co. v. Newman, 684 S.E.2d 541 (S.C. 2009).

Here, the Circuit Court was provided a clear and unambiguous contract between the Law Firm and Auto-Owners. Because the Policy was unambiguous, the Circuit Court was free to decide its interpretation as a matter of law. In doing so, it reviewed the Policy as a whole, applied the plain and ordinary meaning of its language, and properly granted summary judgment when there was no genuine issue of material fact and ruled as a matter of law.

a. The Circuit Court Properly Ruled That Speights Was Not An Insured As To His Personal Property Under The Law Firm's Policy Of Insurance.

Speights asks the Court to believe that, as a member of the limited liability company that is the Law Firm, the Law Firm's Policy naturally extends to him individually and further to the

personal property he keeps separate from the Law Firm. The Policy was sold to the Law Firm. (R. p. 7). The Policy lists the Law Firm as the named insured. The Policy is called a "Businessowners Special Property Coverage Form." It says "[t]hroughout this policy the words 'you' and 'your' refer to the Named Insured shown in the Declarations." (R. p. 7). That is to mean the Law Firm. Speights is not the Named Insured under the Policy. (R. p. 7). It is undisputed that the funds lost were from Speights's personal account. (R. p. 7). Indeed, the Amended Complaint alleges directly in Paragraph 9, that the "bookkeeper . . . requested that a wire transfer in the amount of $250,000 be sent to HK Shining Transport Co Limited *out of Plaintiff's personal account with Palmetto State Bank*. (R. p. 33, ¶ 9) (emphasis added).

Speights argues that he qualifies as an insured under the Policy by virtue of his status as a member of the limited liability company that is the Law Firm. Speights asserts that he "has historically and frequently provided funds to the firm for the continuation of the firm's business" (R. p. 388) but that does not convert his personal accounts to the property of the Law Firm. (R. p. 7). Speights offers no authority that supports this position. (R. p. 7). It is undisputed from the Amended Complaint, the Affidavit of Daniel A. Speights, the testimony of the Bookkeeper, and the entirety of the Record before this Court that the funds transferred to China were Speights's personal funds from his personal account and not an account belonging to the named insured, the Law Firm. It may be that there are instances when Speights qualifies as an insured, such as a liability claim when he was acting pursuant to and in the course of his business, but Speights brought a property claim against the Law Firm's insurer for his own personal property, which is separate from the Law Firm's property.[1]

[1]The Court should note that Speights also sued Chubb Limited who was allegedly the personal insurer for Speights's personal assets. (R. p. 37, ¶¶ 37-40).

Although he failed to argue the issue initially prior to his motion for reconsideration, Speights cites S.C. Code § 33 – 44 – 301 *et seq.*, which allows any member of a limited liability company to act and have standing to sue on behalf of the limited liability company. (Appellant Brief, pg. 11). Yet, this unrelated law does not alter the Circuit Court's decision because Auto-Owners had not argued a lack of standing. Instead, Auto-Owners had argued, and the Circuit Court agreed, Speights is not insured for the loss of his own personal property. (R. p. 16). Speights does not provide any authority holding that a limited liability company's member(s) under the limited liability company's insurance policy are covered for their personal losses. Speights's Affidavit filed with the Motion to Reconsider further confirms that the money transferred was from Speights's personal account. (R. p. 388).

No case has been provided that would qualify Speights as an insured under the Law Firm's insurance policy for the loss of his personal property. The Circuit Court ruled, as a matter of law, that Speights was not an insured, individually, under the contract for the loss of his personal property. "To recover for a breach of contract, the plaintiff must prove: (1) a binding contract entered into by the parties; (2) a breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach." Fung Lin Wah Enter. Ltd. v. East Bay Import Co., 465 F. Supp.2d 536, 542 (D.S.C. 2006). The contract at issue, the Policy, is between the Law Firm and Auto-Owners, not between Speights and Auto-Owners. Auto-Owners did not provide a policy of insurance to Speights and, thus, did not insure Speights and because no benefits were due and payable under the (nonexistent) contract of insurance, no breach of duty occurred. See Tadlock Painting v. Maryland Cas. Co., 322 S.C. 498, 500-01, 473 S.E.2d 52, 53 (1996) ("The elements of an action for bad faith refusal to pay benefits under an insurance contract include: (1) the existence of a mutually binding contract of insurance between

the plaintiff and the defendant; (2) refusal by the 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; (4) causing damage to the insured."). Therefore, the Circuit Court properly granted summary judgment because Speights could not be considered the named insured, and thus had no contract with Auto-Owners, and consequently there was no bad faith in the denial of coverage. Id.

Speights's next quest is to prove ambiguity by creating an interpretation of conflict in the Policy language by focusing on what property the Policy lists as being covered, ignores the key language "used in your business." (R. p. 20). The property that Speights lost was personal property, from his personal bank account. (R. p. 20). Following Speights's theory, any insurance policy in South Carolina that insures a business is converted to insure the personal property (including money and personal bank accounts) of each of its employees. Had there been a direct transfer from Speights's personal account to a Law Firm account before being wired to an account in China, then Speights's theory might have some validity. Yet, that did not occur as Speights's personal property was directly and voluntarily parted with without commingling his personal property with that of the actual insured.

As the Policy states, the "loss of money and securities used in your business while at a bank or savings institution, within your living quarters or the living quarters of your partners or any employee having use and custody of the property, at the described premises or in transit between any of these places, resulting directly from: theft, meaning any act of stealing . . ." (R. p. 21) is not applicable to the personal property of Speights, because the money was not stolen at the bank or stolen while in transit to the bank. Instead, it was voluntarily wired to China. Speights wants the Court to ignore the Supreme Court of South Carolina's mandate that "[e]ach exclusion

in the policy must be read and applied independently of every other exclusion." Auto-Owners v. Newman, 684 S.E.2d 541. The voluntary parting exclusion is unambiguous and applies and operates to exclude this loss, which is of an uninsured' s personal property.

Coverage exists in the Policy for forgery but as it applies to property of the insured. Speights is not an insured and his personal property is not covered in the Policy. As it has been noted throughout these proceedings, the account involved in this incident did not belong to the Law Firm but was the personal account of Speights. After confirming via email that the account to be used was "DAS Personal," the Bookkeeper transferred the funds from Speights's personal account to the account in China. (R. pp. 32-33, ¶¶ 7-9). Although this exchange occurred over the Law Firm's emails, it was not unusual for Speights to email the Bookkeeper to ask her to transfer funds from his personal account and for other investments that Speights made. (R. pp. 110, lines 19-25; 111, lines 1-6; & 116, lines 16-18). The Policy covered the Law Firm and even though the email exchange was between the Bookkeeper and Speights Law Firm email accounts, the nature of the loss being from the Speights's personal account instead of a Law Firm account place it outside the Policy's coverage.

Although Speights argues that the adjuster for Auto-Owners discussed that "optional coverages" were contained in the Policy and "could be forgery or alteration" (Appellant Brief, pg. 8), that does not explain away the fact that Speights is not an insured under the contract for loss of his personal property and that the analysis of an unambiguous contract is a question for the Court. "An insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" Schulmeyer v. State Farm Fire & Cas. Co., 579 S.E.2d 132, 134. "The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject

matter of the insurance contract." Id. "[P]arties have a right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties." Torrington, 216 S.E.2d at 550. The Circuit Court properly granted summary judgment based on its analysis of who and what was covered in an unambiguous insurance contract.

b. The Circuit Court Properly Interpreted The Voluntary Parting Exclusion In The Policy By Applying The Plain And Ordinary Language Of The Policy.

The Circuit Court properly granted summary judgment as it ruled on the interpretation of language in an unambiguous insurance contract and applied its plain and ordinary meaning. Although not properly preserved for the motion to reconsider nor this appeal, Speights seeks to argue the definition of "voluntary" be considered when construing the insurance policy advancing the theory the word is ambiguous. This approach violates South Carolina's long-standing rules of construction pertaining to insurance policies. "An insurance contract is read as a whole document so that 'one may not, by pointing out a single sentence or clause, create an ambiguity.'" Schulmeyer, 579 S.E.2d at 134. "The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and subject matter of the insurance contract." Id. "[P]arties have a right to make their own contract and it is not the function of this Court to rewrite it or torture the meaning of a policy to extend coverage never intended by the parties." Torrington, 216 S.E.2d at 550. Speights's attempt to "torture" the language to create an ambiguity is improper. Regardless, it does not change the fact that the Bookkeeper, while tricked, voluntarily executed the wire transfer.

As both parties conceded, this issue has yet to be decided in South Carolina, similar cases from other jurisdictions were cited by the Circuit Court. In Midlothian Enterprises, Inc. v. Owners Insurance Company, 439 F.Supp.3d 737 (E.D. Va. 2020), a Federal Court in Virginia ruled that

there was no coverage because a voluntary parting exclusion barred coverage after a similar email scheme caused an insured to wire money. In Midlothian, an employee mistakenly wired money from a Midlothian company account because of a fraudulent email. The employee believed her employer sent her an email instructing her to do so, but the email was sent by a hacker. The claim was denied due to a voluntary parting exclusion in Midlothian's policy. The Court ruled that, although it was not the actual employer who sent the email and wire request, the scheme did "not change the voluntariness of the transfer itself." Id. at 742 (quoting Martin, Shudt, Wallace, Dilorenzo & Johnson v. Travelers Indem. Co. of Conn., 2014 WL 460045, at *3 (N.D.N.Y. Feb. 5, 2014) (collecting cases and concluding that the fact "[t]hat [the] [p]laintiff wired the money in reliance on misrepresentations or false pretenses does not alter the voluntariness of that parting"). The Midlothian court went further to describe the voluntariness of the transfer, as the employee "had the authority to make these types of transfers" based on normal business practices and she "freely transferred the money once she believed she had received instructions to do so." Id. That the email was fraudulent did "not negate the voluntariness of the transfer or the authority." Id. at 743. Here, it is undisputed that the Bookkeeper had authority to initiate the wire transfer for Speights as per the Bookkeeper's testimony.

Like Midlothian, the Law Firm's employee had the authority to transfer money from Speights's personal account and did so voluntarily. (R. p. 9). The Bookkeeper received an email from Speights's email address with the Law Firm asking her to make a transfer from his personal account to the account in China. (R. p. 32, ¶ 6). It was not unusual for the Speights to ask the Bookkeeper to wire money from his personal account and to communicate with her solely through email. (R. pp. 109, lines 19-24 & 110, lines 1-6, 12-18). Through the email exchange with Speights's email address with the Law Firm, the Bookkeeper "thought he was authorizing it" and

at all times believed that she was under Speights's direction to wire the funds. (R. p. 128, lines 1-9). Unfortunately, Speights's Law Firm email address had been hacked and the email was only purportedly from Speights. (R. p. 33, ¶ 12). Although the email and request were fraudulent, much like in Midlothian, that does not negate voluntariness of the act nor that the Bookkeeper had authority to make such a transfer. The scheme to which the Bookkeeper fell victim did not alter the voluntary nature of her actions. The Bookkeeper had the authority to make the transfer on Speights's behalf based on her understanding of the emails. The email exchange and transfer were also a part of the normal business practice within her role at the Law Firm and for Speights. As the transfer by the Bookkeeper was voluntary, it was not covered by Auto-Owners.

In Schmidt v. Travelers, 101 F. Supp.3d 768 (S.D. Ohio 2015) (applying Ohio law), a law firm sued the carrier for refusing to pay claims where it lost money due to a fraudulent check scheme. The facts are similar in that the firm wired money following a settlement to the client. Only after the wire occurred did they learn that the cashier's checks were fraudulent. In granting summary judgment to the insurer, the court relied upon the voluntary parting exclusion. That policy excluded "voluntary parting with any property by you or anyone else to whom you have entrusted the property." Plaintiffs argued in that case that fraud made exclusion inapplicable because the voluntary decision to part with the money was shrouded in fraud. The court held that while the scheme was fraudulent it "does not alter the voluntariness of the parting" of the money. The court relied heavily on another case involving similar facts, Martin, Shudt, Wallace, DiLorenzo & Johnson v. Travelers, 2014 WL 460045 (N.D.N.Y. 2014) (applying New York law). In Martin, the court held the voluntary parting exclusion unambiguous where the firm wired money to a foreign client only to learn thereafter the cashier's check was fraudulent. As the court explained, "that

Plaintiff wired the money in reliance on misrepresentations or false pretenses does not alter the voluntariness of that parting." Id. at *4.

In Washington, a court held that a law firm transferring funds to a client after being provided a fraudulent check was not entitled to coverage because it was a voluntary parting of money. Schweet Linde & Coulson v. Travelers, 2015 WL 3447242 (W.D. Wash 2015) (applying Washington law). The policy holder argued this was tantamount to a theft and should be covered. The court held the exclusion clear and unambiguous and even though the lawyers had an obligation to transfer the funds when demanded, it did not change the voluntary nature of the act.

Speights briefly cites a few cases from other jurisdictions to argue the notion that any conflict within a policy, particularly between the general policy and an exclusion, creates ambiguity. (Appellant Brief, pgs. 7-8). But these cases are inapplicable to the facts of our case. Here, the property lost was not the property of the named insured (the Law Firm), but it belonged to Speights, but the cases Speights cites relate to accounts owned by the covered business and funds from those accounts were transferred by employees acting fully within the scope of their normal business

Speights cites Morris James LLP v. Continental Casualty Co., a Federal District Court case out of Delaware, and suggests it is similar to this action. 928 F.Supp.2d 816 (D. Del, 2013). (Appellant Brief, pg. 8). In Morris, a law firm fell victim to a counterfeit check scheme during the course of its business representing what it thought was a client and brought an action against the law firm's insurer. Id. at 819. Specifically, an unknown actor posing as a client engaged the law firm to help it to collect a debt from a third party and the law firm took on the purported client. Id. This client went so far as to sign an engagement letter and provided documents regarding the supposed debt in furtherance of its scheme against the law firm. Id. The client offered a counterfeit

check to the law firm, claiming that the check was the result of the settlement that client had asked the law firm to resolve. Id. The client offered the counterfeit check for the law firm to keep in trust and receive some of that amount as payment for services rendered in the course of the law firm representing the client. Id. But, the scheme unfolded when the client requested the law firm pay the remaining amount to an account in Japan. The law firm did so, using its own bank account to pay the sum. Only after the law firm transferred its own money to the account in Japan did it learn that the check provided to it by its client was counterfeited and it would not receive any of the funds promised by its client's check. Id. The insurer denied the claim based on a similar voluntary parting exclusion and claimed the check was not forged because it was counterfeit, which was not covered in the forgery and alteration endorsement. Id. The District Court ruled that the law firm's claim was covered because 1.) the counterfeit check fell within the policy's definition of forgery, 2.) fraud occurred because the law firm was induced to voluntarily part with the lost amount from its account; and thus 3.) the policy was ambiguous because the provisions and the exclusions could both apply, which created conflict. Id. at 822-26. Because there was ambiguity over which applied, the Delaware District court ruled that the policy should be read in favor of the law firm. Id. Yet, property that was lost, the amount the firm transferred to an account in Japan, was both property belonging to the law firm as well as this occurring in the course of the law firm's business and thus covered under their policy, which was not at issue before that court.

Speights cites that Court's ruling that the exclusion and policy were conflicting and thus the Policy should be read in favor of Speights to provide coverage. But this ignores the question of whether the property sought under the claim was covered under the applicable policy, which was not at issue in Morris. The law firm in Morris was acting in the course of its business by representing a client. The law firm in Morris was acting under the direction of a client, even if the

client was engaged in a scheme against it. Importantly, the law firm transferred money from its *own account*. Speights had funds transferred out of his own personal account, and not an account owned by the Law Firm, which is wholly different from the facts in Morris. Unlike Morris, the property lost was not covered under the Law Firm's Policy.

Speights also cites Central Mutual Insurance Co. v. Reliance Property Management., Inc., No. 05-21-00071-CV, 2022 WL 1657031 (Tex. App. May 25, 2022), another case involving a voluntary parting exclusion forgery endorsement. Again, this case is also distinguishable from the facts involved here as the property claimed in the loss was property owned by the insured business in the normal course of its business. In Central, the bookkeeper of Reliance received an email purportedly from the owner of Reliance asking her to make online wire transfers. Id. at *1. Over the period of a week, she corresponded with her purported boss as he instructed her to get approval to make wire transfers. Id. This included sending instructions to Reliance's bank and her, which further required her to receive signatures in person from the real president, which the bookkeeper did. Id. Once the bookkeeper had followed the instructions from her fake boss and was approved to make the transfers, the fake boss requested that she transfer funds from Reliance's account to an account in China, which she did. Reliance made a claim for those funds it owned and lost but was denied. Id. The Court of Appeals in Texas cited Morris because the issues were identical: a loss of property belonging to the insured was covered despite a conflict in the policy between an exclusion (voluntary parting) and a provision in the policy (fraud or forgery endorsement). Id. at *5-6. Similar to Morris, Central is not applicable because the property lost was never at issue because it belonged to Reliance, was lost in the course of its normal business, and the claim was brought by Reliance against the insurer of its own policy. Speights brought a claim against Auto-

Owners for the loss of his personal property and his personal property was not insured by Auto-Owners.

Both cases that Speights cites can be easily distinguished from the issues here: Speights was not covered by the Law Firm's Policy when funds were transferred from his private account. The Policy covered the Law Firm and even though the email exchange was between the bookkeeper and Plaintiff's Law Firm accounts, the nature of the loss being from the Plaintiff's personal account instead of a Law Firm account place it outside the policy's coverage. (R. p. 10).

III. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AND NEITHER THE EXISTENCE OF NOVEL ISSUES NOR THE STATE OF DISCOVERY PRECLUDE THE CIRCUIT COURT FROM CONSIDERING SUMMARY JUDGMENT.

The Circuit Court properly considered Auto-Owners' motion for summary judgment as the existence of novel issues, whether factual or legal, and the state of discovery in the case do not automatically preclude the Circuit Court from considering summary judgment. Additionally, Speights never argued nor demonstrated a need for further discovery nor how further discovery could possibly lead to a genuine issue of material fact at the time the motion was heard. Thus, it was not preserved.

Speights argues that the Circuit Court erred in granting summary judgment because this action is both factually novel and legally novel, and novel issues should not be decided on summary judgment. Speights cites Schmidt v. Courtney (Appellant Brief, pg. 12), a case involving a novel issue of law in South Carolina at the time, as "no South Carolina cases discuss the issue of personal injury from the impact of errant golf shots." 357 S.C. 310, 318, 592 S.E.2d 326, 331 (Ct. App. 2003). Particularly, the injury was not novel but the application of law to the facts was in dispute and thus novel. The Court in that case thought summary judgment was premature because there was a genuine issue of material fact that could only be determined by further discovery.

Specifically, the Court looked to the Affidavit of the Plaintiff's attorney submitted during the hearing on the Motion for Summary Judgment, which clearly demonstrated that expert testimony was necessary to ascertain a genuine issue of material fact and requested that discovery continue so that the Plaintiff could hire an expert.

Speights made no such request. (R. pp. 78-91). Speights makes no attempts in his Motion to Reconsider nor his Initial Brief to demonstrate how additional discovery could lead to a genuine issue of material fact. (R pp. 57-66 & *See Generally*, Appellant Brief). As noted above and in Auto-Owners' Memo in Opposition to Speights's Motion to Reconsider, Speights's failure to preserve this issue for appeal bars him for arguing it. (R pp. 67-74). Further, the standard is more than a scintilla and no such evidence was presented at the time of the Circuit Court. (R. pp. 78-91).

Even still had such a request been made, it does not supplant the fact that it is up to the Circuit Court to decide whether a contract of insurance is ambiguous. "The construction of a clear and unambiguous contract is a question of law for the court." BLG Enterprises, 491 S.E.2d. at 697. "Insurance policies are subject to the general rules of contract construction." M and M Corp., 701 S.E.2d at 35. Courts will interpret policy language in accordance with its plain, ordinary, and popular meaning, except with technical language or where the context requires another meaning. Id. "Courts must enforce, not write, contracts of insurance, and their language must be given its plain, ordinary[,] and popular meaning." Sloan Constr., 269 S.C. at 185, 236 S.E.2d at 819.

The Circuit Court is not automatically precluded from granting summary judgment when addressing a novel issue in South Carolina. The mere fact that a case involves a novel issue does not render summary judgment inappropriate. Houck v. State Farm Fire Cas. Ins. Co., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005) (citing The Medical University of South Carolina v. Arnaud, 360 S.C. 615, 602 S.E2d 747 (2004). The Circuit Court ruled as a matter of law as there was no genuine

issue of material fact, regardless of whether there was established case law on the issue in South Carolina. The Circuit Court was provided and considered numerous cases from other jurisdictions on the issue, and none, applying those cases which are cited herein, would allow Speights to be covered under the Law Firm's insurance policy for the loss of his personal property.

Speights likewise argues that summary judgment was improper because discovery was ongoing. Speights's argument disregards the South Carolina Rules of Civil Procedure and precedent. A motion for summary judgment can be filed "at any time" by a defending party pursuant to Rule 56(b), S.C.R.C.P. There is no requirement that discovery be completed. At no time did Speights argue his inability to oppose Auto-Owners' Motion for Summary Judgment pursuant to Rule 56(f), S.C.R.C.P., and cite a need for further discovery on any particular topic. (R p. 18). Further, had Speights done so, Speights would have to demonstrate the likelihood that further discovery would uncover additional relevant evidence and that Speights was "not merely engaged in a 'fishing expedition." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). Where the nonmoving party relies solely upon the pleadings, files no counter affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56 to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law. Garrett v. Reese, 262 S.C. 327, 329, 204 S.E.2d 432, 433 (1974). Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins, at 69, 580 S.E.2d at 438 (citing George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). Indeed, the Supreme Court of South Carolina has recently clarified the "mere scintilla of evidence" standard is inapplicable overruling Hancock, 673 S.E.2d at 803.

Kitchen Planners, 440 S.C. at 463, 892 S.E.2d at 301 (S.C. 2023). To withstand summary judgment, there must be a "genuine issue of material fact." Id.

There is no genuine issue of material fact that the funds transferred to China were from Speights's own personal account. That it was Speights's personal account is undisputed and is even cited throughout his pleadings, including in Speights's own Affidavit, and is supported by the Bookkeeper's testimony. No amount of discovery will change this undisputed fact. (R. p. 18).

CONCLUSION

For the foregoing reasons set forth herein, Appellant Daniel A. Speights fails to set forth any evidence of error by the Circuit Court. Accordingly, this Honorable Court should affirm the judgment below.

Date: July 1, 2024

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. George M. McFaddin, Jr.
Presiding Circuit Court Judge

Appellate No. 2023 – 001845
Civil Action No.: 2022 – CP – 25 – 00269

Daniel A. Speights . . . . . Appellant,

vs.

Chubb Limited d/b/a Chubb National Insurance Company, Auto-Owners Insurance Company, and Bankers Standard Insurance Company . . . . . Defendants,

Of Whom Auto-Owners Insurance Company is the . . . . . Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies the Final Brief of Respondent complies with Rule 211(b), S.C.A.C.R.

Dated: July 1, 2024

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