RECEIVED
Aug 14 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

---

Gregory Muxlow and Charlotte Muxlow.....Appellants,

v.

Scottsdale Insurance Company; South Wind Ranch Holdings, LLC;
Ronald Hakala; and Ashley Black…….....Respondents.

---

Appellate Case No. 2022-000576

---

**RESPONDENT SCOTTSDALE INSURANCE COMPANY'S RETURN TO APPELLANTS' PETITION FOR REHEARING**

---

*s/ Jordyn N. D'Andrea*
Jordyn N. D'Andrea (S.C. Bar No. 104953)
5 Exchange Street, P.O. Box 999 (29402)
Charleston, South Carolina 29401
*Telephone:* (843) 722-3400
*Email:* Jordyn.DAndrea@wbd-us.com

***Attorney for Respondent Scottsdale Insurance Company***

Respondent Scottsdale Insurance Company ("Scottsdale") respectfully submits this Return to Appellants' Petition for Rehearing. Pursuant to S.C. App. Ct. R. 221, "a petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Appellants' Petition for Rehearing fails to state with particularity the points they allege the court has misinterpreted, and instead continues to set forth the same arguments the Court has previously analyzed, without citations to any rules or case law for the Court to reconsider.

## FACTS

In the interest of judicial economy, Respondent Scottsdale Insurance Company ("Scottsdale") incorporates by reference the Statement of Facts from its Response Brief filed on December 28, 2022, and the Background in its Return to Appellants' Motion to Consolidate filed on March 23, 2023. Specific facts and procedural history relevant to the Petition for Rehearing appear below.

On January 26, 2021, Appellants brought a lawsuit against Scottsdale's insured, which did not name Scottsdale as a party ("Underlying Lawsuit"). (R. p. 15-24). Appellants later filed this declaratory judgment action with the trial court on August 26, 2021 (the "Coverage Action"), seeking "a declaration that Scottsdale must provide a defense for its insured in the underlying action and pay any settlement or verdict as to its insureds," and "a declaration that Scottsdale has acted in bad faith, and that its policy limit is now opened." (R. p. 37-43). On February 4, 2022, the trial court entered an Order dismissing, without prejudice, Appellants' claim for declaratory judgment in this matter, finding (1) direct claims brought by third parties are prohibited; (2) Appellants, as third parties to the contract, lacked standing to bring this declaratory judgment action; (3) Appellants' claims were not ripe for judicial determination; and

(4) Appellants' interpretation of the Declaratory Judgment Act was too broad. (R. p. 1-9). The court also found the Appellants' interpretation of the Declaratory Judgment Act would effectively eliminate the requirement of contractual privity. (R. p. 7, n. 2).

Appellants appealed the trial court's findings in both the Underlying Suit[1] and the Coverage Action to the South Carolina Court of Appeals. *See* Appellants' Notice of Appeal. In Scottsdale's Initial Brief, it reiterated its position that Appellants lacked standing, as the case at hand should not be considered unless there was a judgment in the Underlying Case. (Scottsdale's Br., p. 9-11).

This Court determined, in April 2024, the Circuit Court did not err in granting the Respondents' Motion for Summary Judgment in the Underlying case; the Appellants moved for a rehearing, which was denied on July 1, 2024. *Wienands v. S. Wind Ranch*, Op. No. 2024-UP-130 (S.C. Ct. App. filed Apr. 24, 2024) (per curiam) (unpublished opinion) (affirming the circuit court's grant of respondents' motion for summary judgment). Accordingly, the Appellate Court rendered a decision in the case at hand on August 5, 2024, dismissing the Coverage Action as moot. *Gregory Muxlow, et al. v. Scottsdale Ins. Co., et al.*, Op. No. 2024-UP-273 (S.C. Ct. App. filed Jul. 24, 2024) (per curiuam) (unpublished opinion). Now, Appellants have filed a Petition for Rehearing in the Coverage Action, and filed for a Writ of Certiorari with regard to the Underlying Case, appealing to the South Carolina Supreme Court.

## ARGUMENT

### I. Appellants still lack standing to bring the Coverage Action while the Underlying Lawsuit remains pending.

With regard to Appellants' first argument that the Petition for Certiorari was filed in the Underlying Lawsuit thus that case has not been fully disposed of, Scottsdale echoes its

[1] *See* Appellants' Notice of Appeal in *Christian Wienands, Charlotte Muxlow, and Gregory Muxlow v. South Wind Ranch, Ronald Hakala, and Ashley Black* (S.C. Ct. App. Case No. 2023-000081).

arguments made in its Final Brief filed on December 28, 2022, that this Coverage Action appeal is not ripe until a final decision ending the Underlying Lawsuit is rendered. *See generally* Scottsdale's Br.

A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing. *Sloan v. Sch. Dist. of Greenville County*, 342 S.C. 515, 518, 537 S.E.2d 299, 301 (Ct. App. 2000). To have standing, a party must have a personal stake in the subject matter of a lawsuit. *Newman v. Richland County Hist. Preserv. Com'n*, 325 S.C. 79, 82, 480 S.E.2d 72,74 (1997).

In Appellants' first argument, they struggle to cite to relevant and mandatory case law regarding mootness, resorting to unpublished cases from Oklahoma. (Appellants' Pet. for Reh'g, p. i-ii). Instead, well-established South Carolina law holds Appellants have no standing, and thus, their current claims are moot. *See, generally, Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.").

One who is not in privity of contract has no right to seek enforcement of that contract. *See Kleckley v. Northwestern Vat'l Cas. Co*., 338 S.C. 131, 135-136, 526 S.E.2d 218, 220 (2000)) ("[a] tort action for an insurer's bad faith refusal to pay benefits does not extend to third parties who are not named insureds."); *see also Trancik v. USAA Ins. Co.,* 354 S.C. 549, 554, 581 S.E.2d 858, 861 (Ct. App. 2003) ("South Carolina contract law carries a presumption that an individual who is not a party to a contract lacks privity to enforce it.") (internal citations omitted).

In their lone citation to South Carolina case law, Appellants cite *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (Ct. App. 2002) without any explanation of the underlying facts of *Holden*. In *Holden,* the South Carolina Court of Appeals found the court could hear a case that was moot because the potential offense was repeatable. *Id.* at 137, 637. The plaintiff in *Holden* wanted to stop a judicial sale, but before the court could hear the controversy (the application of the homestead exception), the sheriff withdrew the sale. *Id.* However, the court found that even though the controversy was moot due to the withdrawal of the sale, the issue controversy could be considered because the issue was repeatable, as the sheriff could re-start the judicial sale. *Id.* at 138, 638. Here, there are no repeatable facts – Scottsdale properly denied Appellants' insurance claim because they were not insureds.

Accordingly, the trial court did not err in determining Appellants lack standing and the Court of Appeals did not err in dismissing the Coverage Action as moot due to the decisions from the courts in the Underlying Lawsuit.

**II. Appellants' cited cases are irrelevant to the case at hand.**

Appellants cite *Kitchen Planners, LLC v. Friedman,* 440 S.C. 456, 892 S.E.2d 297 (2023), in support of their argument that they should not be "punished by losing their right to have obligations, rights, and statuses of the parties determined pursuant to S.C. Code § 15-53-20, which should have been liberally construed." (Appellants' Pet. for Rehearing, p. ii). In *Kitchen Planners*, the Supreme Court of South Carolina affirmed the respondents were entitled to summary judgment on the trial court level. *Kitchen Planners*, at 464, 302.

The first issue with *Kitchen Planners* is none of the case's facts could be construed to relate to the Coverage Action, or even in the Underlying Lawsuit, in any way. The case's appeal is from an order granting a Motion for Summary Judgment, whereas the Coverage Action is on

appeal for an order granting multiple Motions to Dismiss filed by the Respondents. Though both motions are dispositive of a case and appealable, the standard of review differs, and such should not be intertwined in the way Appellants intend to by citing this irrelevant case. Further, the general facts of *Kitchen Planners* arise from a construction contract that led to a mechanic's lien, and the Court interprets the South Carolina mechanic's lien statute (S.C. Code Ann. § 29-5-90); it is unreasonable for anyone to interpret a construction contract for cabinet installation the same way a contract for a wedding vendor would be interpreted. *Kitchen Planners*, at 459, 299.

Lastly, *Kitchen Planners* does not reference S.C. Code Ann. § 15-53-20 at all, nor does it interpret such statute. It is unclear why Appellants incorporated this case into their Petition for Rehearing, or why they think it is applicable in any way to the case at hand.

Further, by citing a case with no explanation of its applicability, Appellants have requested the Court do their work for them—to develop an argument. "[I]t is not the court's duty to comb the record and develop an argument for Plaintiff." *Brinston v. City of Easley, S.C.*, No. 8:20-cv-3660-TMC, 2023 WL 2643837, at *11 (D.S.C. Mar. 27, 2023); *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, No. CIV.A. 4:09-1379-RBH, 2014 WL 2169075, at *5 (D.S.C. May 23, 2014). Accordingly, the Court should decline Appellants' request for the Court develop their argument for them and deny the Petition for Rehearing.

## III. The dismissal of the appeal does not deprive Appellants of the constitutional right to a jury trial, as the Underlying Lawsuit is still pending, and the Coverage Action was dismissed by the trial court, without prejudice.

Scottsdale again echoes the previous arguments made in its Response Brief, specifically as to how Appellants have not been denied their right to a jury trial because, by dismissing the action without prejudice, the trial court did not foreclose Appellants from bringing their action, if and when it is ripe. (Scottsdale's Br., p. 18). Because the trial court dismissed Appellant's claim

without prejudice, and expressly told Appellants they could bring this action again should they prevail in the underlying action, Appellants are not deprived of their right to a jury trial on the declaratory judgment action. *See e.g. Truluck v. Snyder,* 362 S.C. 108, 606 S.E.2d 792 (Ct. App. 2004) (finding that a dismissal *without prejudice* "did not compromise a claimant's right to demand a jury trial" in a later proceeding), *abrogated on other grounds by Fulmer v. Cain,* 380 S.C. 466, 670 S.E.2d 652 (2008). Accordingly, as the fact the Underlying Lawsuit is still pending due to the Writ of Ceriorari, these circumstances have not changed.

Further, Appellants cite several cases, again without context or an explanation as to why Appellants allege such cases relate here. Appellants' cited cases are all U.S. Supreme Court cases – no cases set the precedent for how South Carolina courts would apply the rules. For example, *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. 433 (1830)[2] is a nearly 200-year-old case stemming from actions in Louisiana surrounding attachment against the property of the defendant in the suit; the case makes no mention to the Act or statute referenced by Appellants, and all facts are far from relatable to a contractual dispute.

Appellants have not established that they are entitled to a declaratory judgment, because they have failed to bring a justiciable controversy. To hold otherwise would besiege the South Carolina circuit courts with otherwise unmeritorious declaratory judgment actions, further adding to the backlog of pending civil court actions. This result should be avoided at all costs in the interest of upholding the intended meaning of the legislature, and in the interest of judicial economy.

For the reasons above, this Court should deny Appellants' Petition for Rehearing, and affirm the trial court's order.

[2] Notably, Appellants incorrectly cite this case in their Petition for Rehearing.

## CONCLUSION

As discussed, Appellants' Petition for Rehearing fails to meet the base requirements of S.C. R. App. Ct. R. 221(a), that a request "shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Instead, Appellants submitted their request that is devoid of argument, and fails to explain why the cited cases are appliable *at all*. As such, this Court should deny Appellants' Petition for Rehearing and uphold the trial court's Order finding this action is not ripe.

**WOMBLE BOND DICKINSON (US) LLP**

*s/ Jordyn N. D'Andrea*
Jordyn N. D'Andrea (S.C. Bar No. 104953)
5 Exchange Street, P.O. Box 999 (29402)
Charleston, South Carolina 29401
*Telephone:* (843) 722-3400
*Email:* Jordyn.DAndrea@wbd-us.com

***Attorney for Respondent Scottsdale Insurance Company***

RECEIVED
Aug 14 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

---

Gregory Muxlow and Charlotte Muxlow.....Appellants,

v.

Scottsdale Insurance Company; South Wind Ranch Holdings, LLC;
Ronald Hakala; and Ashley Black…….....Respondents.

---

Appellate Case No. 2022-000576

---

**PROOF OF SERVICE**

---

I certify that on this date, August 14, 2024, I filed the foregoing Respondent Scottsdale Insurance Company's Return to Appellants' Petition for Rehearing with the South Carolina Court of Appeals via electronic filing only, to ctappfilings@sccourts.org and served a copy on Appellants via electronic service, addressed to the attorneys of record below:

Joshua T. Hawkins
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
***Attorney for Appellants Gregory and Charlotte Muxlow***

Jay Anthony
Anthony Law, LLC
650 E. Washington Street
Greenville, South Carolina 29601
***Attorney for South Wind Ranch, Ashley Black, and Ronald Hakala***

*[Signature Page to Follow]*

**WOMBLE BOND DICKINSON (US) LLP**

*s/ Jordyn N. D'Andrea*
Jordyn N. D'Andrea (S.C. Bar No. 104953)
5 Exchange Street, P.O. Box 999 (29402)
Charleston, South Carolina 29401
*Telephone:* (843) 722-3400
*Email:* Jordyn.DAndrea@wbd-us.com

***Attorney for Respondent Scottsdale Insurance Company***

August 14, 2024
Charleston, South Carolina