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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2022-000576

Gregory Muxlow and Charlotte Muxlow….....Petitioners,

v.

Scottsdale Insurance Company, South Wind Ranch Holdings, LLC, Ronald Hakala and Ashley Black, Defendants

Of which Scottsdale Insurance Company is the .....Respondents.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

CERTIFICATE OF COUNSEL

Counsel submits that, upon information and belief, he has preserved the issues discussed herein for appeal and that he timely filed a petition for rehearing after the Court of Appeals issued an opinion in this case.

QUESTIONS PRESENTED

I. Whether Petitioners were deprived of their constitutional right to a trial by jury.

II. Whether the Trial Court erred in granting summary judgment notwithstanding Petitioners' submission of voluminous evidence showed that fact questions central to the case existed.

STATEMENT OF THE CASE

This is an appeal of a trial court's dismissal of a declaratory judgment action. After Petitioners filed a tort action, they discovered an insurance policy which provides coverage for the causes of action set forth in the tort action. The insurer, Scottsdale Insurance Company, refused to provide a defense or to agree to indemnify the defendants in the tort action. Petitioners therefore filed a declaratory judgment action to determine the rights and obligations of the parties. The trial court granted Respondents' motions to dismiss. Petitioners timely filed a Rule 59(e) motion, which the trial court denied. Petitioners then timely filed a notice of appeal of the trial court's order. The Court of Appeals decided the case without oral argument and dismissed the appeal.

FACTUAL BACKGROUND

In 2019, Petitioners visited South Wind Ranch, toured the venue, met with staff, and booked the venue for the planned wedding of Charlotte Wienands and Gregory Muxlow. Petitioners secured their date by paying a deposit and later agreed to pay additional fees to Ashley Black in exchange for her wedding planning services. After COVID-19 prevented Muxlow's wedding as planned, Petitioners contacted South Wind Ranch to discuss the possibility of rescheduling the event they paid for. Black told Petitioners they would be able to move their

wedding to a new date and that she would reach out to provide potential dates. Petitioners attempted to contact Black multiple times over the following weeks but were unable to reach her. When Petitioners were finally able to speak with Black, they learned that South Wind Ranch unilaterally doubled the agreed-to price of the wedding to be rescheduled for the following year. South Wind Ranch refused to resolve the issue with Petitioners or to refund their deposit, even though the venue performed no services, mislead Petitioners, and sought to profiteer by changing the terms of the agreement between the parties, none of which was authorized by the contract.

After repeated attempts to resolve the dispute, South Wind Ranch ultimately threatened Petitioners with its legal team. As a result, Petitioners filed suit against South Wind Ranch for, *inter alia*, the venue's deception, its unlawful retention of the appellants' funds, and its attempt to profit from the pandemic.

While conducting discovery in the underlying action for, among other things, breach of contract, Petitioners learned that South Wind Ranch is insured by Scottsdale Insurance Company for acts of negligence and other conduct which is the subject of that action. South Wind Ranch submitted the claim to Scottsdale, which refused to defend and indemnify its insured, despite the applicable policy providing coverage for alleged acts of negligence and the law requiring Scottsdale to provide coverage. Because Scottsdale's refusal to defend South Wind Ranch directly affects Petitioners, they filed a declaratory judgment action against Scottsdale and its insureds pursuant to *S.C. Code* § 15-53-20. The trial court dismissed the action without prejudice, stating that Petitioners could bring a declaratory judgment action at a later date if they obtained a verdict in the underlying action. This frustrated the purpose of establishing a duty to defend during the time Scottsdale had a duty to defend the tort action. Petitioners filed a motion to alter or amend the judgment, which the trial court denied. Petitioners then filed an appeal with the Court of

Appeals. The Court of Appeals decided the case without oral argument, dismissing the appeal. Petitioners then filed this petition for writ of certiorari.

ARGUMENTS

I. WHETHER THE TRIAL COURT ERRED IN RELYING UPON *KLECKLEY* IN DISMISSING A CASE THAT DID NOT INVOLVE THIRD-PARTY INSURANCE BAD FAITH.

a. *Kleckley* and *Tranick* are third-party bad faith cases, they are completely unrelated to declaratory judgment actions, and the trial court incorrectly relied on those cases in adopting the respondents' proposed order.

The Court of Appeals dismissed the appeal as moot, citing *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) ("To state a cause of action under the Declaratory Judgments Act, a party must demonstrate a justiciable controversy.") The Court of Appeals should not have dismissed the appeal, though, because a justiciable controversy exists, and the rights and obligations of the parties must still be determined. Respondents relied on a number of cases in their motions to dismiss and in South Wind Ranch's proposed order, which was adopted by the trial court, which has nothing to do with declaratory judgment actions. *Kleckley v. Northwestern Vat'l Cas. Co*., 526 S.E.2d 218 (2000) and *Tranick v. USAA Ins. Co*., 581 S.E.2d 858 (Ct.App.2003) are cases concerning third-party insurance bad faith claims. At the hearing, South Wind Ranch confirmed that it relied on *Kleckley* in its motion to dismiss. (Hearing Trans. p. 6). Respondents confirmed at the hearing that they had not filed an action for third-party bad faith or any of the causes of action governed by *Kleckley* or *Gaskins v. Southern Farm Bureau Cas*., 581 S.E.2d 169 (Sup.Ct. 2003). [1] (Hearing Trans. pp. 8, 11). The error of the trial court and the Court of Appeals should be corrected because Kleckley and its progeny simply have nothing

[1] *Gaskins* held that a plaintiff may sue an insurer for fraud but must show the fraud is material.

to do with the D.J. action which as dismissed and because the issue is not moot – a Petition for Certiorari has been filed with this Court in the tort action, and the case has not been disposed of.

Respondents, and later the trial court and presumably the Court of Appeals, also relied on other cases completely unrelated to declaratory judgment actions in dismissing Petitioners' case. *Prof'l Bankers Corp. v. Floyd*, 285 S.C. 607, 612, 331 S.E.2d 362, 364- 65 (Ct. App. 1985) is a case involving a contract dispute. *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004), *Power v. McNair*, 255 S.C. 150, 153, 177 S.E.2d 551, 553 (1970), and *Holden v. Cribb*, 349 S.C. 132, 561 S.E.2d 634 (Ct. App. 2002) involve privity of contracts, a concept not referenced by the Uniform Declaratory Judgments Act ("UDJA"). In cases involving both the act and privity of contract, courts have ruled that individuals without privity of contract can file declaratory judgment actions when they are affected. See *Sloan v. Greenville Co*., 590 S.E.2d 338 (2003). This is, of course, consistent with the plain language of the UDJA. Because the trial court adopted a proposed order that relied on cases that have nothing to do with declaratory judgment actions, and because the issues giving rise to the appeal are not moot, the Supreme Court should reverse the trial court's order.

b. The trial court did not liberally construe the UDJA as required by the statute.

The trial court's ruling contradicts the holding in *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). Petitioners properly pled their declaratory judgment action under the statute and set forth facts that show they are affected as contemplated by the statute. The trial court's dismissal is not only at odds with *Stiles*, but also at odds with the statutory language of the UDJA.

The UDJA provides, in relevant part, that "courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not relief

is or could be claimed."[2] *S.C. Code Ann.* § 15-53-20. The statute "is to be liberally construed and administered." *S.C. Code Ann.* § 15-53-130. The trial court's adoption of Respondents' proposed order violated the requirement that the UDJA be liberally construed to allow parties like the appellants, who are "affected," to seek a declaration of coverage. That error should not be left uncorrected and the need for determination is not moot.

"It is well established that a declaration of parties' rights under an insurance policy is an appropriate use of the declaratory judgment mechanism." *United Capitol Ins. Co. v. Kapiloff,* 155 F.3d 488, 494 (4th Cir. 1998). "Questions of coverage and the duty of a liability insurance company to defend a claim brought against its insured are determined by the allegations of the complaint." *City of Hartsville v. SC Municipal Insurance,* 677 S.E.2d 574 (heard March 4, 2009, re-filed May 18, 2009) (citing *C.D. Walters Constr. Co. v. Fireman's Ins. Co. of Newark, N.J.*, 281 S.C. 593, 316 S.E.2d 709 (Ct.App.1984). See also *Ellett Bros., Inc. v. U.S. Fid. & Guar. Co.*, 275 F.3d 384, 387-88 (4th Cir. 2001) (citing *R.A. Earnhardt Textile Mack Div., Inc. v. S.C. Ins. Co.*, 277 S.C. 88, 90, 282 S.E.2d 856, 857 (1981).

"If the underlying complaint creates a possibility of coverage under an insurance policy, the insurer is obligated to defend." *Isle of Palms Pest Control Co. v. Monticello Ins. Co.*, 319 S.C. 12, 15, 459 S.E.2d 318, 319 (Ct.App.1994) (citing *Gordon-Gallup Realtors, Inc. v. Cincinnati Ins. Co.*, 274 S.C. 468, 471, 265 S.E.2d 38, 40 (1980). In an intervention context, the Fourth Circuit has recognized that an intervenor who has separate litigation against an insured has a "significantly protectable interest" in "a dispute between an insurer and its insured even when the intervenor's interest is contingent on the outcome of other litigation." *Teague v. Bakker,* 931 F.2d 259, 261 (4th Cir. 1991). Petitioners' interests are affected by the determination of coverage, and they have a

[2] See Hearing Trans. p.10

"significantly protectable interest" in whether Scottsdale discharges its duty to defend and indemnify South Wind Ranch.

Because both coverage and whether Scottsdale discharges its duty to South Wind Ranch directly and significantly affects the appellants, they have a "stake in the subject matter" of this action, and the appellants have a right to file a declaratory judgment action pursuant to the plain language of the statute. *Newman v. Richland County Hist. Preserv. Comm'n*, 480 S.E.2d (1997). The complaint in the tort action contains allegations of negligence, violation of the South Carolina Unfair Trade Practices Act, and breach of contract accompanied by fraudulent act. These claims create a "possibility of coverage." *Isle of Palms.* After Petitioners filed the tort action, South Wind Ranch turned the claim over to Scottsdale. Scottsdale's refusal to provide coverage to South Wind Ranch in bad faith directly affects the appellants, who seek recovery from South Wind Ranch.

II. WHETHER SCOTTSDALE IS JUDICIALLY ESTOPPED FROM TAKING THE POSITION THAT LACK OF PRIVITY DEPRIVES THE APPELLANTS OF THEIR RIGHT TO BRING A DECLARATORY JUDGMENT BECAUSE IT HAS REPEATEDLY TAKEN AN OPPOSITE POSITION IN LITIGATION.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 592 S.E.2d 629 (Sup.Ct. 2004). "The purpose or function of the doctrine is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries." *Hayne Federal Credit Union v. Bailey*, 489 S.E.2d 472, 327 S.C. 242, 251 (S.C. 1997) (citing 31 C.J.S. *Estoppel & Waiver* § 139, at 593 (1996).

Scottsdale routinely files declaratory judgment actions against third parties to insurance contracts to avoid defending claims and paying damages. See *Scottsdale Ins. Co. v. Flowers*, 513 F. 3d 546 (6th Cir. 2008); *Scottsdale Ins. Co. v. Roumph*, 211 F.3d 964 (6th Cir. 2000); *Scottsdale*

Ins. Co. v. Travis, 68 SW3d 72 (Tex. Ct.App., 5th Dist. 2001).[3] As a result, it should not now be allowed to take a position that is in complete contradiction to the position taken in such suits, as doing so would harm the integrity of the judicial system. It should also be noted that in the tort action, negligence, and other causes of action triggering Scottsdale's duty to defend and indemnify have already survived a motion to dismiss. This means that in addition to Scottsdale taking a position in complete opposition to its position in cases it has filed naming third parties like Petitioners in declaratory judgment actions, Scottsdale has based its decision to deny coverage on a contention that the tort action is purely for breach of contract, when the trial court has ruled that the negligence and other causes of action go forward. Breach of contract is not even alleged in the tort action.

III. WHETHER A DECLARATORY JUDGMENT ACTION MAY PROCEED WHILE A TORT ACTION IS PENDING.

"Declaratory judgment actions seeking determination of insurance coverage issues are routinely allowed to proceed even while the underlying litigation regarding liability is ongoing." *State Farm Fire & Cas. Co. v. Wade*, No. 12-CV-0148-CVE-PJC, 2012 WL 2524859 (N.D. Okla. June 29, 2012) (citing *State Farm Fire & Casualty Co. v. Mhoon*, 31 F.3d 979 (10th Cir.1994) ("we see no reason why the declaratory judgment action should not have proceeded" while the underlying action was ongoing); *Hartford Fire Ins. Co. v. Gandy Dancer*, LLC, No. CIV–10–0137 JB/RHS, 2011 WL 1336523 (D.N.M. Mar. 30, 2011). "In an insurance coverage action, the necessary and interested parties are the insurer, insured, and claimants." *Hudson Specialty Ins. Co. v. Magio's Inc*., Case No. 18-80299-CIVCOHN/MATTHEWMAN, 2018 WL 8259544, at *3

[3] Both South Wind Ranch and Scottsdale filed motions to dismiss. The trial court adopted the proposed order submitted by South Wind Ranch because the Court instructed South Wind Ranch to prepare a proposed order. (Hearing Trans. p. 25)

(S.D. Fla. June 14, 2018) (unpublished)(quoting *Tower Ins. Co. of New York v. Aledith Enterprises, Inc.*, 12-22689-CIV, 2013 WL12064483, at *2 (S.D. Fla. Sept. 30, 2013).

The tort action is not disposed of and is the subject of a Petition for Certiorari with this Court. The cases cited above make it crystal clear that in a declaratory judgment action related to coverage, the insured, the claimant, and the insurer are all necessary parties. That means each one of them has standing to bring a declaratory judgment action, and South Wind Ranch's and Scottsdale's arguments that Petitioners' case should be dismissed for lack of standing is flatly wrong. Scottsdale and South Wind Ranch relied heavily on standing and made it clear at the hearing that standing was the basis of their motion, arguing they "just don't think [Petitioners] have standing." (Hearing Trans. p. 12). The trial court based its ruling on standing, stating "I'm going to declare that you don't have standing at this point." (Hearing Trans. p. 23). Since "the necessary and interested parties are the insurer, the insured, and the claimants" in a declaratory judgment action, Petitioners, as "claimants" have a right and standing to bring a declaratory judgment action. *Hudson Specialty Ins. Co*.[4]

In a federal context, the Fourth Circuit has "frequently approved the use of federal declaratory judgment actions to resolve disputes over liability insurance coverage, even in advance of judgment against the insured on the underlying claim for which coverage is sought." *Auto-Owners Ins. Co. v. Madison at Park W. Prop. Owners Ass'n, Inc.*, 834 F. Supp. 2d 437, 442 (D.S.C. 2011) (quoting *Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 375–76 (4th Cir. 1994) (citing cases, *abrogated in part on other grounds by Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995); see also *State Farm Fire & Cas. Ins. Co. v. Sproull*, 329 F. Supp. 3d 238, 243 (D.S.C. 2018). The Fourth Circuit ruled in *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488 (4th Cir. 1998) that a

[4] The appellants, or "claimants," also named the other two necessary parties – Scottsdale, "the insurer" and South Wind Ranch, "the insured."

"declaration of parties' rights under an insurance policy is an appropriate use of the declaratory judgment mechanism." The Fourth Circuit's logic in *Auto-Owners Ins. Co.* and other cases is consistent with South Carolina law and provides further support for reversal of the trial court's dismissal of this action.

There is no need to litigate the underlying action to a verdict, only to have another battle after the verdict about coverage. That appears to be the primary reason the legislature made explicitly clear that "*all* persons *shall* be made parties *who have or claim* any interest which would be affected by the declaration" and that the statute "*shall* be construed liberally." *S.C. Code Ann.* §§ 15-53-80 and 15-53-130, respectively (emphasis added). The statute makes no mention of a requirement that a party be a party to a contract or an insured under the policy at issue. The UDJA exists for the very purpose of determining coverage and eliminating uncertainty.

IV. WHETHER THE TRIAL COURT VIOLATED PETITIONERS' CONSTITUTIONAL RIGHT TO A JURY TRIAL AND EQUAL PROTECTION UNDER THE LAW.

The South Carolina Constitution, United States Constitution, and the UDJA each gives Petitioners a right to a jury trial. "The right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved…" U.S. CONST. amend. VII. The UDJA contains a provision stating that, "all existing rights to jury trials are hereby preserved" with respect to declaratory judgment actions. *S.C. Code Ann*. § 15-53-90. The United States Supreme Court has "…considered the applicability of the constitutional right to a jury trial in actions enforcing statutory rights 'as a matter too obvious to be doubted.'" *Curtis v. Loether,* 415 U.S. 189 (1974) quoting *Parsons v. Bedford*, 3 Pet. 433 (1830). See also *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) and *Hepner v. United States*, 213 U.S. 103 (1909).

Without doubt, the trial court's dismissal of Petitioners action violated Petitioners' right to

a jury trial guaranteed by the South Carolina Constitution and the UDJA, but it also violated the right guaranteed by the Seventh Amendment of the United States Constitution. The right to a jury trial guaranteed by the United States Constitution is so important that it should be scrutinized with utmost care. *Dimick* v. *Schiedt*, 293 U. S. 474, 486, (1935). Although the analysis of whether a litigant received a fair trial is a Due Process analysis, a jury trial guarantee meant to apply to all United States citizens is contained in the Seventh Amendment.

The Seventh Amendment has not yet been incorporated as to the states, but it is crystal-clear that the Seventh Amendment's jury trial guarantee applies to all "Suits at common law, where the value in controversy shall exceed twenty dollars," and is clear that the guarantee is not limited to suits in federal court. Suits can only be brought in federal court in limited circumstances, and in fact, most suits cannot be brought in federal court. The framers included the jury trial guarantee in the body of the United States Constitution and the Bill of Rights.[5] It is clear that the right to a jury trial is guarantee to all citizens in all courts where the amount in controversy exceeds twenty dollars, and the trial court violated Petitioners Seventh Amendment right when it dismissed their case.

Currently, Respondents like those in this case can argue that the Seventh Amendment does not guarantee a jury trial in state court[6], which is the exact opposite of what the United States Constitution says. The framers might describe it as outrageous. When the Seventh Amendment was enacted, most claims exceeding twenty dollars could not be brought by common citizens because federal district courts were not created until 1789, two years after the Constitution was

[5] See *Neder v. United States*, 527 U.S. 1, 30, 119 S.Ct. 1827, 1844 (1999), which acknowledges that the right to a jury trial is so important that it is the only right to appear in both places in the Constitution.

[6] This also leads to the result of a jury trial being guaranteed by the U.S. Constitution when a negligence claim is litigated in federal court, say, in a diversity car wreck case, but not if the same case is litigated between two South Carolina residents.

ratified. The Seventh Amendment does not contain an exception or language limiting the right to cases litigated in federal court. Alexander Hamilton noted in 1788 that both "friends and adversaries of the plan of the constitutional convention" all agreed on the fundamental importance of the right to trial by jury. Tony respectfully requests that the Court issue a written opinion establishing that the Seventh Amendment of the United States Constitution guarantees a jury trial in "Suits at common law," regardless of where those suits are litigated.

Dismissal also violates the Equal Protection Clause. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Cleburn v. Cleburne Living Center, Inc.,* 473 U.S. 432 (1985) citing *Plyler* v. *Doe,* 457 U. S. 202, 216 (1982). Insurance companies, including Scottdale, are allowed to bring declaratory judgment actions all the time which name claimants like Petitioners. Numerous examples are cited above. See also, *Hartford Fire Insurance Company et al. v. Christopher Toates,* Dist. South Carolina, 6:21-cv-4049-HMH, dismissed on other grounds. If the trial court's dismissal stands, it means the State, through a Circuit Court, has treated Petitioners differently from insurers who file D.J. actions all the time and failed to apply UDJA fairly and in a uniform way.

The courts should not treat claimants differently than other contemplated parties to declaratory judgment actions – insurance companies – which are allowed to bring declaratory judgment actions in similar scenarios. This Court should reverse the trial court's dismissal to correct the violation of Petitioners' rights under the Equal Protection Clause.

CONCLUSION

Because the trial court dismissed Petitioners' case, which was ripe at the time of dismissal and which is not moot now, the trial court erred and in so doing, violated the constitutional

requirement that Petitioners' right to have a jury decide their case be preserved, inviolate. Petitioners therefore respectfully request the Supreme Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Of which Scottsdale Insurance Company is the .....Respondent.

PROOF OF SERVICE

I certify that on this date, November 7, 2024, I filed the foregoing Petition for Writ of Certiorari with the South Carolina Court of Appeals via electronic filing, to supctfilings@sccourts.org. A copy was also served on Respondents via electronic service, addressed to the attorney of record below by email:

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