RECEIVED
Dec 13 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G.D. Morgan, Jr., Circuit Court Judge

James Dustin Lucas, ...Appellant,

v.

State Farm Mutual Automobile Insurance Company, ...Respondent.

Appellate Case No.: 2023-000870

APPELLANT'S FINAL REPLY BRIEF

---

s/Joshua T. Hawkins

Joshua T. Hawkins, S.C. Bar #78470
Helena L. Jedziniak, S.C. Bar #100825
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
Attorneys for Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

REPLY

In its response, State Farm's argument is that it may, through lawyers hired to litigate wreck cases, make any representation it likes to gain a benefit, even if the representation is false – a misrepresentation. That cannot be the law. An insurer cannot appear after months of its insured being in default, promise to negotiate above its reserve at mediation in exchange for being let out of default, and then willfully violate the promise it made for the benefit it received while simultaneously knowingly violating the ADR rules.

The effect of accepting State Farm's position would be that, in practice, no lawyer could ever trust any promise made by an insurance defense lawyer on behalf of the insurance company. It, quite literally, would mean that an insurance company could lie with impunity. Such a result would prevent attorneys from trusting their colleagues to comply with the terms of agreements made during litigation. Accepting State Farm's position would also allow parties to willfully ignore and intentionally violate this state's ADR rules without any consequence. If there are no consequences for willful, planned violations of our ADR rules, then we do not have mandatory mediation but a meaningless statute that insurance companies may choose to disregard for their convenience. For these reasons, this Court should reverse the lower court's ruling.

I. SCRCP 43(k) does not apply to the facts of this case.

State Farm has argued repeatedly that South Carolina Rule of Civil Procedure 43(k) bars a contract claim by a party if the claim has any ties to pending litigation. That is simply incorrect. SCRCP 43(k) states:

> **Agreements of Counsel.** No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless **made in open court** and noted upon the record, or **reduced to writing and signed by the parties and their counsel**. However, where the parties reach a settlement agreement during a mediation governed by the South Carolina Court-Annexed Alternative Dispute Resolution Rules and the settlement agreement involves payment by an insurer, the signature of counsel retained by an insurer

> on behalf of the Defendant(s) or third party administrator shall suffice in place of the signature of the insured party. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP. (Emphasis added)

State Farm's offer and acceptance is reduced to written emails, which clearly document offer and acceptance by counsel for an insurer, who Rule 43(k) specifically allows to bind a party. State Farm's counsel acknowledged, in open court, the parties' agreement during the hearing on State Farm's motion for summary judgment. (R. p. 158:1-10). Further, State Farm's counsel referenced emails that dispositively show that State Farm entered into the contract at issue. The emails contained signature blocks for both parties: the undersigned on behalf of Lucas and defense counsel on behalf of State Farm. State Farm cannot genuinely argue that signatures in electronic mail are insufficient to comply with SCRCP 43(k) when every filing with the court is now submitted with electronic signatures. By State Farm's rationale, no email, phone conversation, or exchange of words between counsel can ever be binding. This is simply not how law is practiced and cannot be what the legislature intended with its adoption of SCRCP 43(k).

Further, Rule 43(k) also does not apply to this action because the fraud and breach happened in another case. This is not a motion to enforce a settlement, but is instead a separate suit for different damages caused by a different defendant than the underlying tort action. Nothing in SCRCP 43(k) prevents a damaged party from filing a lawsuit where an insurer has told an outright lie to obtain a benefit to the detriment of the damaged party. That prohibition does not exist, and the lower court did not have the authority to read that prohibition into the rule.

It is not only unpalatable but also legally unacceptable for State Farm to argue that its promise "doesn't count"[1] because SCRCP 43(k) allows a party, through its representatives and counsel, to engage in tortious conduct. On pages 3-4 of its brief, State Farm blatantly argues that

[1] This quotation is not from a document but is inserted to underscore the absurdity of State Farm's argument.

its lie and fraudulent procurement of a benefit is protected by SCRCP 43(k). This action arises from State Farm's knowingly false statements and promises, which were made in a non-confidential setting. The fact that part of State Farm's breach occurred during mediation does not change the fact that State Farm lied and breached a valid contractual agreement after it realized a benefit. The rules of civil procedure are not in place to protect deceit and fraud, and SCRCP 43(k) does not reach into separate cases with separate civil action numbers.

II. The circuit court improperly made factual determinations during the summary judgment hearing.

Genuine issues of material fact exist as to whether the parties entered into a valid contract, whether State Farm breached that contract, and what damages the plaintiff sustained as a result of the breach. The circuit court improperly determined these questions of fact, even after Lucas' counsel argued that the fact question on the issue must be determined by a jury. (R. p. 165:12-16). In doing so, it weighed the evidence in the record, including the emails documenting the creation of an agreement, State Farm's failure to comply with the South Carolina Rules of Alternative Dispute Resolution, and the plaintiff's claimed damages.

The circuit court reached its conclusion even though State Farm has never attempted to conclusively rebut the plaintiff's claim, such as by providing an affidavit regarding reserve information, submitting reserve information for *in camera* review, providing reserve information in discovery responses, or even producing a privilege log identifying the reserve information. During the hearing, Lucas' counsel informed the Court that production of the reserve amount would determine the issue. (R. p. 161:15-19, 183:1-4). State Farm, nevertheless, failed to offer any evidence of the reserve amount, despite making the reserve amount a key term of its agreement with Lucas.

State Farm's argument that it made no fraudulent statement is belied by the fact that State Farm has fought at all costs to keep reserve information from Lucas, even when Lucas' counsel stated to the circuit court, "…if [reserve information] is something that the Court would be more comfortable being offered *in camera*, then certainly we would be okay with that." (R. p. 138:1-4). Lucas' counsel stated at the hearing, "if we get an affidavit from anybody involved saying that the reserve was [$]1,000, then that's fine." The inference, of course (which must be weighed in favor of Lucas), is that State Farm cannot produce such an affidavit because it would force State Farm to admit that its statement, which Lucas relied upon, was fraudulent.

Just as State Farm's promise to negotiate above its reserve was fraudulent, so too was its promise to mediate. When State Farm agreed to attend mediation, it necessarily agreed to comply with the ADR rules. South Carolina's ADR rules unambiguously require attendance of all parties. State Farm refused to have its insured present at mediation and, therefore, did not participate in an ADR-compliant mediation. State Farm did not attend a mediation which satisfies mandatory ADR rules is another reason State Farm cannot hide behind confidentiality. No mediation ever took place because State Farm refused to comply with the basic elements necessary for mediation under ADR rules. Further, confidentiality does not shield the two parties to the mediation and this appeal from knowing what happened at mediation because they were both required to be there. State Farm's Rule 43(k) is a red herring to distract from the fact that State Farm engaged in tortious and dishonest conduct during mediation.

III. The Appellant's damages are not speculative.

The circuit court further violated the plaintiff's constitutional rights by refusing to allow a jury to determine damages. In *Shores v. Weaver,* 315 S.C. 347, 356, 433 S.E.2d 913, 917 (Ct. App. 1993), the South Carolina Court of Appeals held that an insurer must pay the minimum limits required by law even if it could prove substantial prejudice. State Farm's insured was in default, and State Farm entered

into a valid and enforceable contract to avoid its responsibilities under *Shores*. But for the valid and enforceable agreement between Lucas and State Farm, State Farm would have been required to pay minimum limits of $25,000.00. By entering into a valid contract, and then unilaterally refusing to perform, State Farm caused Lucas $25,000.00 in damages – $25,000.00 the plaintiff would have been entitled to but for State Farm's breach and fraud.

Had State Farm performed what it agreed to perform in exchange for Lucas letting its insured out of default, the case almost certainly would have been resolved. Instead, because State Farm did not produce its insured as required by the ADR rules and did not make any offers above its highest reserve, Lucas incurred several types of damages, including the cost of a worthless mediation that did not comply with ADR rules; potentially the cost of a second mediation so that the ADR rules are satisfied; the cost of continued litigation in the underlying wreck case and this case; the costs associated with Lucas' motion for a damages hearing, which was cancelled in reliance on State Farm's fraudulent statement; the difference in the amount offered in breach of the agreement at issue and the actual value of the plaintiff's case; attorney's time attending the non-compliant mediation; and other consequential damages. (R. p. 165:17-24).

IV. State Farm refuses to acknowledge the constitutional violation in this case.

State Farm begins its argument with the demonstrably untrue statement that the plaintiff, "for the first time on appeal," asserted his constitutional right to a jury trial. (Respondent's Br. 16). Lucas asserted his right to a jury trial in the first document ever filed in his lawsuit – the complaint. On page 8 of his complaint, Lucas invokes SCRCP 38, which guarantees the right to a jury trial when that right is secured by "the Constitution or […] a statute of South Carolina." The language in this rule mirrors the language of the South Carolina Constitution, Article I, §14. Notably, the United States Constitution requires that the right to a jury trial be preserved, while the South Carolina Constitution requires that the right be preserved "inviolate." After the trial court denied

him this constitutional right, the plaintiff filed a motion to reconsider, alter, or amend the judgment. In that motion, he highlighted the constitution's requirement that, "where the value in controversy shall exceed twenty dollars," a party is entitled to a jury. (U.S. Const. Amd VII).

The trial court's ruling clearly violated SCRCP 38, the South Carolina Constitution, and the United States Constitution by denying the plaintiff his constitutional right to a jury trial. What is unclear, however, is unclear why State Farm took the position that the plaintiff never raised this right when he asserted it in his complaint and based his motion to reconsider, alter, or amend on the fact of its violation.

V. The circuit court erred in ignoring the at-issue doctrine.

When State Farm agreed to negotiate above its reserve as a condition of Lucas letting its insured out of default, its reserve became directly at issue. Likewise, when State Farm engaged in fraudulent conduct and breached its agreement during mediation, it put the facts related to its tortious conduct directly at issue. Reserve information contains facts directly related to State Farm's fraud and breach, and facts are always discoverable, even if they are contained in a privileged document. *See e.g., Savino v. Luciano*, 92 So.2d 817 (Fla. 1957) (holding that "when a party has filed a claim, based upon a matter ordinarily privileged, the proof of which will necessarily require that the privileged matter be offered in evidence, we think that he has waived his right to insist that the matter is privileged."); *Pittston Co. v. Allianz Insurance Co.*, 143 F.R.D. 66 (D.N.J. 1992) (noting that "the 'in issue' doctrine is operative when the party has asserted a claim or defense that he intends to prove by use of the privileged materials."); *State v Hydrite Chemical Co.*, 220 Wis.2d 51, 582 N.W.2d 411, 416 (Ct. App. 1998) (adopting the *Pittston* court's analysis). In this case, State Farm put its reserves directly at issue when it agreed to negotiate between its reserves and policy limit. Whether or not State Farm lied in its negotiations and

fraudulently breached its valid and enforceable contract is directly at issue in this case. At the core of that issue is the reserve amount.

VI. State Farm ignores the transcript-verified fact that the lower court allowed improper testimony during the summary judgment hearing.

Now that State Farm's decision to offer improper witness testimony during a summary judgment hearing is – appropriately – under appellate review, State Farm has sought to recast the witness's testimony as "provided information." (Respondent Br. 17). That State Farm argues with the Oxford Language definition of the word "testimony" is telling. State Farm's argument with the cases cited in Lucas' Initial Brief and the Oxford Language definition of the word testimony confirms 1) that the statements offered in court by the witness were in fact testimony, and 2) that testimony is not allowed during a summary judgment hearing where opposing counsel has no notice of the testimony and no opportunity to cross-examine the witness.

State Farm next argues that, because it acknowledged that the testimony was improper, the court's allowance of the testimony is not reversible error. (Respondent Br. 18). This, of course, makes no sense. As if it cannot resist, State Farm also attempts to sneak in an argument that, because the witness was not sworn in, the testimony does not count. (Respondent Br. 18). If a swearing in were required for testimony, that argument might work, but swearing in is not part of the definition, and the court's allowance of the testimony is reversible error.

The case law is clear that a trial court may grant a motion for summary judgment based upon the "pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any." *Madison ex rel. Bryant v. Babcock Center, Inc.*, 317 S.C. 123, 638 S.E.2d 650 (2006) (citing *Rule 56(c), SCRCP*); *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997)). Live witness testimony is not listed in SCRCP 56, and Lucas' counsel did not have any

notice of the witness testimony, a chance to cross-examine the witness, or a chance to present witnesses himself. As a result, it was improper for the circuit court to grant summary judgment, at least in part, based upon Jeanmarie Tankersly testimony.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that this Court reverse the circuit court's order granting summary judgment in favor of the respondent and remand this case for trial.

Respectfully submitted,

s/ Joshua T. Hawkins_____
Joshua T. Hawkins, S.C. Bar #78470
Helena L. Jedziniak, S.C. Bar #100825
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
josh@hjllcsc.com
helena@hjllcsc.com
Attorneys for Appellants

Greenville, South Carolina
December 12, 2023

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G.D. Morgan, Jr., Circuit Court Judge

James Dustin Lucas, ...Appellant,

v.

State Farm Mutual Automobile Insurance Company, ...Respondent.

Appellate Case No.: 2023-000870

CERTIFICATE OF COUNSEL

The undersigned certified that this Appellant's Final Reply Brief complies with Rule 211(b), SCACR.

December 12, 2023

s/Joshua T. Hawkins

Joshua T. Hawkins, S.C. Bar #78470
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
Attorney for Plaintiffs/Appellants

RECEIVED
Dec 13 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G.D. Morgan, Jr., Circuit Court Judge

James Dustin Lucas, ...Appellant,

v.

State Farm Mutual Automobile Insurance Company, ...Respondent.

Appellate Case No.: 2023-000870

PROOF OF SERVICE

I certify that I have served this Appellant's Final Reply Brief on counsel for the Respondent by e-mail to the addresses indicated below, on December 12, 2023.

Charles R. Norris, Esq. , S.C. Bar #4238
Whelan, Mellen, & Norris, LLC
89 Broad Street
Charleston, SC 29401
(843) 998-7099 (telephone)
charles@whelanmellen.com

December 12, 2023

s/Joshua T. Hawkins

Joshua T. Hawkins, S.C. Bar #78470
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
Attorney for Plaintiffs/Appellants