

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2013-002133

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SC Court of Appeals

Stephanie A. Smith, on behalf of herself and all others similarly situated..... Appellant

v.

Progressive Halcyon Insurance Company, n/k/a Progressive Direct Insurance Co.,
Progressive Max, and Progressive Casualty Insurance Respondents

MEMORANDUM REGARDING APPEALABILITY

STATEMENT OF THE CASE

This class action, filed on November 8, 2010, seeks redress for improper adjustment and underpayment of automobile insurance med pay claims to South Carolinians. After nearly three years of extensive discovery, the Plaintiff's Motion for Class Certification was granted by Order dated February 14, 2013. The Defendants filed a Motion to Reconsider, Alter or Amend on February 22, 2013. After the May 27, 2013 Motion to Reconsider hearing, the Court's issued its ruling on August 20, 2013.

In its Order entitled "Reconsideration Order On Motion For Reconsideration And To Alter Or Amend The Court's Order Granting Class Certification" (hereinafter "Order"), the Court made a complete reversal of its prior decision, vacated class certification and concluded, on a summary basis, that Plaintiff has no individual claims.

Thereafter, the Plaintiff filed a Motion To Reconsider And To Alter Or Amend The Court's Order Denying Class Certification. The Notice of Intent to Appeal was subsequently filed as the Order contains appealable issues.

This Memorandum is submitted pursuant to the written request of the Court of Appeals for Appellant to discuss the appealability of the aforementioned Order. The unusual finding at the class certification stage that the Plaintiff had no individual claims makes the Order appealable.

ARGUMENT

I. The Order is appealable because it ends the Plaintiff's individual claims.

An order denying a motion for class certification is considered interlocutory and only appealable in certain circumstances. Eldridge v. City of Greenwood, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992). However, if an order involving class certification contains other appealable issues, the appellate court may review it. Ferguson v. Charleston Mercury, Inc., 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002). Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in the statute governing appellate jurisdiction in law cases. Baldwin Const. Co., Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (S.C. 2004).

Under S.C. Code Ann. §14-3-330 (1) and (2), the Court has appellate jurisdiction. The Order involves the merits of Plaintiff's claims, and it affects a substantial right as it determines the action. The Order is appealable because the Court summarily determined Plaintiff has no viable claim. Order, p. 8. The Order discusses the Plaintiff's individual

claims for four pages before making such a specific finding. “Because Plaintiff has no viable claim against Progressive in her own right, she cannot adequately represent the purported class.” Citations omitted, Order, p. 11.

On its face, the Order addressed the merits of Plaintiff’s causes of action and ended her claim. “Moreover, ruling on the legal sufficiency of Ms. Smith’s claim now, in connection with deciding whether she can adequately represent the proposed class, will resolve Plaintiff’s individual claim without implicating due process concerns associated with binding the absent class members.” Citations and quotations omitted, Order, p. 10-11. The Court considered the merits of Plaintiff’s individual claims and rendered a factual determination as to their basis despite Plaintiff’s request for a jury trial. In essence, the Court used the Motion to Reconsider as a summary judgment vehicle to dismiss Plaintiff’s individual claims. The Order’s finding is a ruling for summary judgment which was neither argued nor briefed¹. The Order affects a substantial right as it determined the action.

CONCLUSION

The Order is appealable under S.C. Code Ann. §14-3-330 (1) and (2).

NATE FATA, P.A.



Nate Fata, Esq. (SC No. 009866)

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and

¹The Defendants have a pending Motion For Summary Judgment, but that matter has been held in abeyance until after the class certification issues have been addressed.

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October 30, 2013

Attorneys for Appellant

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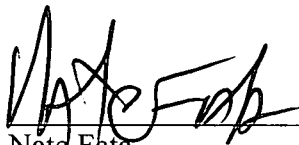
v.

Progressive Halcyon Insurance Company, n/k/a Progressive Direct Insurance Co.,
Progressive Max, and Progressive Casualty Insurance Respondents

PROOF OF SERVICE

I certify that I have served the Memorandum Regarding Appealability on Progressive Halcyon Insurance Company n/k/a Progressive Direct Insurance Co., Progressive Max, and Progressive Casualty Insurance by depositing a copy of same in the United States Mail, postage prepaid, on October ~~30~~, 2013, addressed to their attorneys of record Thomas C. Brittain, Esq., A. Preston Brittain, Esq., The Brittain Law Firm, P.A., 4614 Oleander Drive, Myrtle Beach, SC 29577.

October 30, 2013



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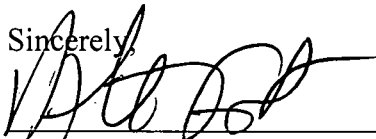
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Stephanie A. Smith vs. Progressive Halcyon Insurance
Appellate Case No. 2013-002133

Dear Ms. Kitchings:

Enclosed please see Appellant's Memorandum Regarding Appealability for filing with a Proof of Service of the Memorandum Regarding Appealability on the Respondents.

Sincerely,



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Enclosure

cc: Thomas C. Brittain, Esq.
Andrew Preston Brittain, Esq.
Charles V. Leonard, Esq.