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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2023-000239

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No.: 2021-CP-26-07330

Gloria Ormand-Ward by and through her
Guardian and Conservator, CDM Corporation,
Through its Representative, Stephen Mantell. . . . . Appellant

vs.

David Litt, Homedebone, LLC, Rosaria A. Alagna aka
Rose Alagna; Chris Parker; Chicago Land Agency Services,
Inc.; Chicago Title Insurance Company; Pereira Partners,
LLC; NB Labor LLC d/b/a Newman Brothers General
Contractors; John Newman; and Toorak Capital, LLC . . . . . Defendants

Of which,

Chicago Title Insurance Company is the . . . . . Respondent

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellant Gloria Ormand-Ward, by and through her Guardian and Conservator, CDM Corporation, through its Representative, Stephen Mantell ("Appellant"), respectfully petitions this Court for rehearing pursuant to Rules 221(a) and 240, SCACR, from the Court's Opinion affirming the circuit court's dismissal of Chicago Title Insurance Company ("Chicago Title") for lack of personal jurisdiction. Rehearing is warranted because the Opinion misapprehends controlling law and legislative context concerning consent-based jurisdiction under S.C. Code Ann. § 38-5-70 ("§38-5-70") and the proper weight of South Carolina and federal authority bearing on that statute.

I. STANDARD FOR REHEARING

Under Rule 221(a), SCACR, a petition for rehearing is warranted when the Court has overlooked or misapprehended points of law or fact material to its decision. Rehearing is not sought to reargue matters already considered, but to address discrete misapprehensions concerning the governing legal framework applied by the Court.

In addition to the Court's interpretation of consent-based jurisdiction under §38-5-70, Appellant seeks rehearing to address the Court's application of specific-jurisdiction principles at the Rule 12(b)(2) stage. On a motion to dismiss for lack of personal jurisdiction, a plaintiff need only make a *prima facie* showing of personal jurisdiction, with all reasonable inferences drawn in the plaintiff's favor. See *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 611 S.E. 2d 505 (2005). To the extent the Opinion resolved disputed inferences or required proof beyond a *prima facie* showing, rehearing is appropriate to correct that misapprehension of the governing standard.

II. ARGUMENT AND CITATION OF AUTHORITIES

1. THE OPINION MISAPPREHENDS THE LEGISLATIVE INTENT AND HISTORICAL LEGAL CONTEXT IN WHICH § 38-5-70 WAS ENACTED

The Court's analysis misapprehends the historical legal framework governing personal jurisdiction at the time § 38-5-70 and its predecessor statutes were enacted. When those statutes were adopted, personal jurisdiction jurisprudence was governed by *Pennoyer v. Neff*, 95 U.S. 714 (1878), under which a state court could not exercise personal jurisdiction over a nonresident defendant unless the defendant was served with process within the forum state. There was no analytical distinction between service of process and personal jurisdiction; in-state service was personal jurisdiction. As a result, statutes prescribing how a foreign corporation could be served in South Carolina necessarily determined whether that corporation could be subjected to suit in South Carolina at all.

South Carolina courts applied that framework explicitly. In *Littlejohn v. Southern Ry. Co.*, 45 S.C. 96, 22 S.E. 761 (1895), the Supreme Court of South Carolina explained the governing principle in unmistakable terms:

> If an individual comes within the limits of the state, and thus places himself within reach of the jurisdiction of our courts, he surely can be made a party to an action by serving him with process while here; and we do not see why the same principle should not be applied to a foreign corporation.

45 S.C. at 103, 22 S.E. at 763. In the same decision, the Court emphasized statutory language providing that "the service of a legal process upon any agent of any railroad, telegraph, **insurance**, or express company, within the limits of this state, shall be taken and held to be a valid service upon such corporation." *Id.* at 102–03, 22 S.E. at 763

[emphasis added]. The Court did not treat such provisions as mere procedural conveniences; rather, it recognized them as the means by which South Carolina courts obtained jurisdiction over foreign corporations, including and specifically insurance companies. As stated above, in-state service was personal jurisdiction.

This historical concept explains the function of §38-5-70 and its predecessors. At the time of their enactment, foreign insurers could not be subjected to suit in South Carolina unless they could be served within the State. By requiring insurers, as a condition of doing business in South Carolina, to appoint an in-state official to receive service of process, the General Assembly ensured that insurance companies would be subject to jurisdiction in South Carolina courts. The statute was thus jurisdiction-creating, not merely a mechanism for notice or service of the summons and complaint.

The Missouri statute, upheld in *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917), is materially indistinguishable, in structure and function, from §38-5-70. Both statutes condition a foreign insurer's authority to do business on the appointment of a state official as agent for service of process; both provide that service on that official has the same force and effect as service on the insurance company itself; and both tie the duration of that appointment to the existence of outstanding liabilities in the forum state. Missouri courts construed their statute as consent to be sued in Missouri courts, and the United States Supreme Court deferred to that construction and held it consistent with due process.

Like the Missouri statute, §38-5-70 was enacted in a legal regime—confirmed by *Littlejohn*—in which in-state service and personal jurisdiction were analytically inseparable. The absence of modern "consent to general jurisdiction" terminology in

§38-5-70 is, therefore, historically immaterial. Properly understood in its statutory and doctrinal context, § 38-5-70 performs the same jurisdiction-creating function as the statute upheld in *Pennsylvania Fire.*

Modern principles of statutory interpretation require courts to construe statutes in light of the evil they were designed to remedy and the purpose to be accomplished. *Meyer v. Paschal,* 330 S.C. 175, 179, 498 S.E.2d 635, 637 (1998).

2. THE OPINION UNDERVALUES SOUTH CAROLINA AUTHORITY INTERPRETING INSURANCE STATUTES AS JURISDICTION-CREATING

The Opinion acknowledges *Wofford v. Prudential Ins. Co. of Am.,* 65 F.Supp. 637 (D.S.C. 1946), *Equilease Corp. v. Weathers*, 275 S.C. 478, 272 S.E.2d 789 (1980), and *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 753, S.E.2d 537 (2014) but recasts them as addressing only the mechanics of substituted service. That characterization cannot be reconciled with the language of those decisions, each of which describes South Carolina's insurance statutes as legislative mechanisms to obtain jurisdiction over foreign insurers. In that respect, the Opinion's treatment of the cases materially departs from the way our Supreme Court has historically understood the statute.

In particular, the Opinion's treatment of *Wofford, supra*, correctly notes that federal district court decisions are not binding on South Carolina courts, but it overlooks *Wofford's* substantive understanding of the predecessor to §38-5-70: the court recognized that, by complying with the statute, the insurance company had "consented to be sued" in South Carolina. No one suggests *Wofford* is binding authority on the modern general-versus-specific jurisdiction taxonomy; it is, however, probative of how

§38-5-70's predecessor was understood—as a mechanism by which foreign insurance companies consented to the jurisdiction of South Carolina courts, not merely the service of papers.

Likewise, in *Equilease, supra,* and *White Oak Manor, supra*, the Supreme Court described the insurance statutory scheme as a method of obtaining jurisdiction over foreign insurance companies. The Opinion treats these cases as addressing only substituted-service mechanics in particular factual contexts, without engaging their broader and consistent characterization of the statutory scheme as jurisdiction-obtaining.

Although none of these cases resolved the modern distinction between general and specific jurisdiction, they reflect a consistent understanding that compliance with §38-5-70 carries jurisdictional consequences. To the extent the Opinion characterizes these authorities as addressing only service mechanics, Appellant respectfully submits that the Opinion misapprehends their doctrinal significance.

In construing § 38-5-70, the Opinion departs from settled principles of statutory interpretation articulated by the Supreme Court. In *Meyer v. Paschal*, the Court reaffirmed that "the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature," and that legislative intent must be determined by considering "the language of the statute, its purpose, and the policy it seeks to advance." 330 S.C. 175, 179, 498 S.E.2d 635, 637 (1998). The Court further explained that statutes must be construed "in light of the evil they are designed to remedy and the purpose to be accomplished." *Id.* Section 38-5-70 and its predecessors were enacted when, under *Pennoyer v. Neff*, foreign insurers could not be subjected to personal

jurisdiction absent in-state service. The statute's mandatory appointment of a South Carolina official to receive process was the mechanism by which jurisdiction over foreign insurers was made possible; it is not merely a service of process statute.

The Opinion's emphasis on the absence of an express reference to "general jurisdiction" misapprehends the governing interpretive framework. Section 38-5-70 was enacted long before the modern taxonomy of general and specific jurisdiction emerged. At the time of its enactment, a statute requiring appointment of an in-state official to receive process was, by definition, jurisdiction-conferring. The General Assembly could not have employed terminology that did not yet exist, and South Carolina law does not require the legislature to anticipate later doctrinal labels in order for a statute to have jurisdictional effect. See *Meyer v. Paschal, supra*. The relevant inquiry is legislative intent and historical function—not whether the statute contains words coined decades later.

3. THE OPINION OVEREXTENDS FIDRYCH TO AN INSURANCE-SPECIFIC STATUTE

Fidrych v. Marriott Int'l, Inc., No. 18-2030 (4th Cir. 2020) interpreted South Carolina's general foreign-corporation registration statute, §33-15-101, not an insurance-specific consent statute. That statute is silent on consent to jurisdiction and was enacted in a different historical and regulatory context, only addressing the registration of ordinary foreign corporations.

By relying on *Fidrych* ,as if it controlled the interpretation of §38-5-70, the Opinion conflates two materially different legislative schemes: a modern general corporate-registration statute and a pre–*International Shoe* insurance-specific statute

designed to ensure that insurance companies are subject to the jurisdiction of South Carolina courts. The question presented here is not whether a general registration statute implies consent, but what the General Assembly intended when it required foreign insurers to appoint the Director of Insurance to receive process "in any action or proceeding" while insurer liabilities remain outstanding in this State.

4. THE OPINION MISAPPREHENDS THE PERSUASIVE WEIGHT OF THE AFFF DECISION

The Opinion relies, in part, on In re *Aqueous Film-Forming Foams Products Liability Litigation,* No. CV-2:18–2873-RMG, 2023 WL 6846676 (D.S.C. Oct. 17, 2023) ("AFFF") to support its conclusion that §38-5-70 does not confer consent to general jurisdiction. Although the Opinion correctly acknowledges that *AFFF* is not binding on South Carolina courts, it nonetheless treats that decision as persuasive evidence of judicial "reluctance" to construe the statute as Appellant urges.

Critically, the *AFFF* court did not acknowledge or discuss *Wofford*, *Equilease*, or *White Oak Manor*, each of which characterizes South Carolina's insurance statutes as jurisdiction-creating mechanisms. Nor did it address the *Pennoyer*-era origins of §38-5-70 or the consent-by-appointment doctrine recognized in *Pennsylvania Fire* and reaffirmed in *Mallory v. Norfolk Southern Railway Co.*, 600 U.S. 122 (2023). To the extent the Opinion relies on *AFFF* to demonstrate a broader "reluctance of courts" to construe §38-5-70 as a consent statute, it substitutes a single federal court's nonbinding analysis—one that did not consider relevant South Carolina precedent—for this Court's independent obligation to construe a South Carolina statute in light of its text, history, and the State's own jurisprudence.

5. *BUILDERS MART V. FIRST UNION CORP.* DOES NOT RESOLVE THE STATUTORY CONSENT QUESTION PRESENTED HERE.

The Opinion notes that *Builders Mart v. First Union Corp.*, 349 S.C. 500, 563 S.E.2d 352 (2002), does not settle the jurisdictional issue raised by Appellant. This observation is correct, but the decision warrants brief clarification to avoid misapplication. *Builders Mart* construed South Carolina's general foreign-corporation registration statute, S.C. Code Ann. §33-15-101 *et seq.*, not the insurance-specific consent statute at issue here, §38-5-70. The general corporation registration statute lacks the regulatory structure, historical pedigree, and jurisdictional language—such as appointment of a state official to receive process "in any action or proceeding" and continuing consent tied to outstanding in-state liabilities—found in §38-5-70.

Moreover, the *Builders Mart* Court emphasized that the defendant bank had not conducted business in South Carolina, a fact central to its analysis. 349 S.C. at 508–09, 563 S.E.2d at 356–57. Chicago Title, by contrast, is licensed, admitted, and actively doing business in South Carolina and remains subject to §38-5-70 so long as liabilities remain outstanding in this State. Accordingly, *Builders Mart* neither controls or resolves whether §38-5-70 operates as a consent-to-jurisdiction statute for foreign insurers. At most, it confirms that this Court has not previously decided that question—underscoring that the Opinion's treatment of §38-5-70 presents a matter warranting rehearing.

6. THE OPINION MISAPPREHENDS THE *PRIMA FACIE* STANDARD GOVERNING SPECIFIC JURISDICTION AND ERRONEOUSLY REJECTS SPECIFIC JURISDICTION

The Opinion further warrants rehearing because it misapprehends the *prima facie* standard governing specific jurisdiction under Rule 12(b)(2), SCRCP. The Opinion requires more than South Carolina law demands at this procedural stage.

A. The Opinion Applies Outcome-Determinative Language Inconsistent with the *Prima Facie* Standard

The Opinion states: "Based on the foregoing, we hold Ormand-Ward has failed to set forth facts showing the existence of a partnership and thus failed to establish that CLAS acted as Chicago Title's agent in recording the fraudulent deed." The Opinion further concludes: "We hold the circuit court did not err by finding Ormand-Ward failed to satisfy her burden of establishing specific jurisdiction over Chicago Title." This language reflects an adjudication of disputed factual questions rather than an assessment of whether Appellant presented facts sufficient to permit reasonable jurisdictional inferences.

At this stage, Appellant's burden was only to make a *prima facie* showing, with all reasonable inferences drawn in her favor. *Cockrell*, 363 S.C. at 491–92, 611 S.E.2d at 508. Agency may be established by circumstantial evidence and implied from the conduct of the parties. *Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 71, 393 S.E.2d 914, 916 (1991). By requiring Appellant to "establish" agency and partnership as a matter of fact at the pleading stage, the Opinion collapses the prima facie inquiry into a merits determination.

B. The Opinion Improperly Narrows the Scope of the Alleged Joint Enterprise

The Opinion reasons: "Regardless of whether the recording of the deed constituted a general business of a particular kind or a single transaction, no evidence shows CLAS and Chicago Title joined together for the purpose of recording deeds." Chicago Title and CLAS prominently announce their joint venture partnership home page of their web site:

> Chicago Land Agency Services, known in the title insurance industry as CLAS, was formed in 1997. CLAS is a joint venture partnership with Chicago Title Insurance Company, the marquee name in title insurance.[1]

This constitutes *prima facie* evidence of their partnership.

This analysis is unduly restrictive and misapprehends the nature of joint-enterprise and agency principles at the jurisdictional stage. The relevant inquiry is whether the challenged conduct falls within, or is incidental to, the scope of the alleged enterprise.

Appellant alleged and supported that CLAS publicly represents itself as having a "joint venture partnership" relationship with Chicago Title and that CLAS provides title insurance-related services.

Recording a deed is a foreseeable component of the closing and title process and bears directly on title consequences. Requiring proof that the parties "joined together for the purpose of recording deeds" fragments the alleged enterprise transaction-by-transaction and resolves inherently factual scope questions on a Rule 12(b)(2) record.

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[1] This is found on their website, www.ctclas.com. The reasonable inference based on the domain name is that "ctclas" is the abbreviation for "Chicago Title" and also "Chicago Land Agency Services".

C. The Opinion Erroneously Treats Corporate Ownership Structure as Dispositive

The Opinion also states: "Further, because Chicago Title owns 49.9% of the shares in CLAS, it cannot also be in a partnership with CLAS." Minority ownership does not, as a matter of law, preclude a partnership, joint venture, or agency relationship; at most, it is one factor in a functional analysis. Treating a 49.9% ownership interest as dispositive improperly forecloses jurisdiction based on corporate form alone and is particularly inappropriate at the *prima facie* stage.

D. The Long-Arm Statute Expressly Contemplates Jurisdiction Based on Acts Committed "By an Agent"

South Carolina's long-arm statute authorizes personal jurisdiction over a defendant who acts "directly or by an agent" as to a cause of action arising from the defendant's "commission of a tortious act in whole or in part in this State" and from causing tortious injury in this State. S.C. Code Ann. § 36-2-803(A)(3)–(4). The statute presupposes that agency may be shown inferentially based on the relationship between the entities and the conduct at issue; it does not require conclusive proof of agency at the pleading stage.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court grant rehearing, withdraw its Opinion, and reverse the circuit court's order dismissing Chicago Title Insurance Company for lack of personal jurisdiction.

Respectfully submitted,

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PROOF OF SERVICE

I, the undersigned Attorney of the Law Offices of John M. Leiter, PA, attorneys for Appellant, do hereby certify that I have served the **Petition for Rehearing** and a copy of this Proof of Service, by emailing a copy of the same to the following:

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