THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-6103
Appellate Case No. 2013-002403

Bank of New York Mellon Trust Company, National Association f/k/a The Bank of New York Trust Company, N.A. as successor to JP Morgan Chase Bank N.A. s/b/m Bank One National Association as Trustee for RAMP 2002RS5, Plaintiff,

v.

Chartrease Grier, Palmetto Health Alliance; and Palmetto Richland Memorial, Defendants,

Chartrease Grier, Third-Party Plaintiff, ... Appellant,

v.

Nationwide Property & Casualty Insurance Company; and Tonya D. Parks, Third-Party Defendants, ... Respondents.

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STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court abused its discretion in denying Appellant's motion to amend to include a new cause of action on the eve of trial where the trial court aptly found that inclusion of the new claim would be futile and prejudicial, and no miscarriage of justice resulted to Appellant?

2. Whether the trial court erred as a matter of law in granting summary judgment in favor of Nationwide as to Appellant's breach of contract claim against Nationwide where the trial court correctly found that Appellant did not have an active policy with Nationwide at the time of her loss?

3. Whether the trial court erred as a matter of law in granting summary judgment in favor of Nationwide as to Appellant's claim for bad faith refusal to pay insurance benefits where the trial court correctly found that Appellant did not have an active policy with Nationwide at the time of her loss and there was no evidence of any bad faith on the part of Nationwide in denying her claim for benefits?

STATEMENT OF THE CASE

On September 14, 2011, Plaintiff, The Bank of New York Mellon Trust Company ("the Bank"), filed a foreclosure action against Defendant, Chartrease Grier.[1] (Summons & Compl., Lis Pendens, Notice of Foreclosure Intervention, R. at ___.) On November 22, 2011, Grier filed her answer and a third-party complaint against Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Parks"), who owns and operates an insurance agency in Richland County, South Carolina. (Summons, Answer & Third-Party Compl., R. at ___.) In her third-party complaint, Grier alleged causes of action against Nationwide and Parks for breach of contract, bad faith refusal to pay insurance benefits, and indemnity and contribution. (Answer & Third-Party Compl. ¶¶ 40–85, R. at ___.)

On February 6, 2012, Nationwide and Parks answered Grier's third-party complaint, denying all claims and asserting defenses to her claims. (Answer to Third-Party Compl., R. at ___.)

On May 10, 2012, Nationwide filed a motion for a protective order, requesting protection of the confidentiality of information that Grier requested in discovery.[2] (Mot. for Protective Order with Proposed Order, R. at ___.)

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[1] The Bank of New York Mellon Trust Company also named Palmetto Health Alliance and Palmetto Richland Memorial as Defendants because of the potential for those entities to claim a lien upon or interest in the subject property due to a judgment against Larry Grier. (Compl. ¶ 18, R. at ___.) The Bank subsequently filed a motion for entry of default against these entities. (Pl's Mot. for Default, R. at ___.) The trial court later dismissed these parties as part of a joint stipulation of dismissal. (Order, R. at ___.)

[2] Grier attempts to make an issue of the motion for a protective order in her statement of the case, (Brief of App. at 4); however, she never raises any argument related to this issue in her brief, and thus, has waived this issue on appeal. See Wright v. Craft, 372

On June 8, 2012, Grier filed a motion to amend her answer and third-party complaint, seeking to add a claim against Nationwide for negligent misrepresentation and against Parks for negligence. (Mot. to Amend, R. at ___.) Nationwide and Parks filed memoranda in opposition to Grier's motion to amend. (Third-Party Defs' Mem. In Opp. filed 7/6/12, R. at ___; Third-Party Defs' Supp. Mem. In Opp. filed 11/28/12, R. at ___.)

On July 6, 2012, Nationwide and Parks filed a motion to compel proper responses to their requests to admit served upon Grier. (Third-Party Defs' Mot. to Compel, R. at ___.)

On September 20, 2012, the Bank filed a motion to sever its foreclosure action from Grier's third-party complaint, (Pl's Mot. to Sever, R. at ___), which Nationwide and Parks opposed, (Third-Party Defs' Mem. In Opp. filed 11/8/12, R. at ___).

On November 2, 2012, Grier filed a motion for summary judgment as to the claims asserted in her third-party complaint. (Third-Party Pl's Mot. for Sum. J., R. at

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S.C. 1, 19, 640 S.E.2d 486, 497 (Ct. App. 2006) ("'An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.'") (quoting Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993)); see also Bell v. Bennett, 307 S.C. 286, 294, 414 S.E.2d 786, 791 (Ct. App. 1992) (holding that the appellant abandoned an issue because by failing to argue it in his appellate brief, and thus, "this unappealed ruling is the law of the case").

In any event, it is a non-issue in light of the trial court's order granting summary judgment in favor of Nationwide and Parks. Further, at the hearing before the trial court, Grier's counsel indicated that she did not object to the entry of a confidentiality order, but that she took issue with certain provisions of the proposed order. (Hearing Tr. at 4:24–5:25, R. at ___.) The trial court instructed the parties to consult and try to reach an agreement regarding a proposed protective order. (Id.) In the four months between the summary judgment hearing and the trial court's order, counsel for Grier never provided any alternative to the proposed protective order. The trial court's order granting summary judgment ended the case and rendered Nationwide's motion for a protective order moot.

___.) On November 6, 2012, Nationwide and Parks also filed a motion for summary judgment as to all claims asserted in Grier's third-party complaint. (Third-Party Defs' Mot. for Sum. J., R. at ___; see also Third-Party Defs' Supp. Mem. In Support filed 11/13/12, R. at ___; Third-Party Defs' Aff. In Support filed 11/13/12, R. at ___.) On November 8, 2012, Nationwide and Parks filed their memorandum in opposition to Grier's motion for summary judgment. (Third-Party Defs' Mem. In Opp., R. at ___; see also Third-Party Defs' Supp. Mem. In Opp. filed 11/13/12, R. at ___.) On November 26, 2012, Grier filed her opposition to Nationwide and Parks' motion for summary judgment. (Third-Party Pl's Resp. to Third-Party Defs' Supp. Mem., R. at ___.)

On November 16, 2012, Nationwide filed a motion for a protective order to preclude a second deposition of the company. (Mot. for Protective Order, R. at ___.) On November 19, 2012, Grier filed a motion objecting to Nationwide's notice of taking the 30(b)(6) deposition of the Bank. (Third-Party Pl's Obj. to Dep., R. at ___.)

On November 21, 2012, the parties filed a joint stipulation of dismissal without prejudice as to the Bank's claims against Grier, as well as the potential lien holders, and Grier's claims against the Bank. (Jt. Stip. of Dismissal, R. at ___.) The parties agreed to the dismissal because the Bank's insurance company retroactively placed an insurance policy on Grier's property, which covered the damage to the dwelling and resulted in a full satisfaction of Grier's mortgage loan. (Hearing Tr. at 74:9–19, R. at ___; Pl's Aff. at ¶ 4, R. at ___.) Thus, the Bank agreed to dismiss its foreclosure action against Grier. (Id.) On November 27, 2012, the trial court entered an order granting the voluntary dismissal without prejudice. (Order, R. at ___.)

On November 29, 2012, the trial court entered a form order denying Nationwide and Parks' motion to compel proper responses to their requests to admit, finding the Bank's motion to sever moot, and finding that Grier's motion for a protective order as to the 30(b)(6) deposition of the Bank was also moot. (Order, R. at ___.)

On April 4, 2013, the trial court entered an order denying Grier's motion to amend, denying Grier's motion for summary judgment, and granting Nationwide and Parks' motion for summary judgment. (Order, R. at ___.) On April 25, 2013, Grier filed a motion to alter or amend and/or for reconsideration, (Motion, R. at ___), which Nationwide and Parks opposed, (Third-Party Defs' Mem. In Opp. filed 5/31/13, R. at ___), and which the trial court denied on September 23, 2013, (Order, R. at ___). On October 29, 2013, Grier filed her notice of appeal of the order denying her motion to reconsider. On appeal, Grier only challenges the trial court's rulings as to Nationwide.

FACTS

In 2006, Grier purchased a homeowner's insurance policy from Nationwide through her insurance agent, Parks. Nationwide provided homeowner's insurance on Grier's property from March 24, 2006 to March 24, 2011. (Homeowner's Policy, R. at ___.) The Bank of New York Mellon Trust Company ("the Bank") was the mortgage holder on the property. (Compl. ¶ 10, R. at ___.) The Bank contracted with GMAC to service the mortgage on the Bank's behalf. During the time that the Nationwide policy was in effect, Grier made escrow payments to GMAC to cover her insurance premiums. (Grier Dep. at 28:20–29:21, R. at ___.) In March or April of each year, GMAC issued a check to Nationwide for the amount of the renewal

insurance premium, and Nationwide renewed the policy. (Grier Dep. at 31:5–32:7, R. at ___.)

However, Nationwide non-renewed Grier's policy prior to the end of the term that expired on March 24, 2011. (Notice of Non-renewal, R. at ___.) On March 17 and April 9, 2010, Nationwide conducted inspections of Grier's property and discovered that Grier had allowed numerous hazards and risks to develop on the property, including the following:

- "Curling shingles curling and buckling shingles present"
- "Warped/Bowed Sub floor of roof warped and bowed"
- "Other damage . . . Roof over front porch appears to be sagging"
- "Gutters . . . Full of debris Full of pine straw"
- "Masonry cracks greater than ½ inch Abundance of cracks, mostly patched"
- "Junk/Debris accumulated on premises . . . Appears to be from repairs"
- "Combustible materials/items within 36" Combustible items within 36" of fireplace"

(Nationwide Inspection Report, R. at ___.) Nationwide decided to non-renew Grier's homeowner's policy upon its expiration on March 24, 2011, unless Grier corrected these deficiencies. (Jefferies Aff. ¶¶ 4-5, R. at ___.) Accordingly, Nationwide set Grier's policy for non-renewal and sent a notice of non-renewal to Grier and her agent, Parks, on January 14, 2011.[3] (Notice of Non-Renewal, R. at ___; Jefferies Aff. ¶¶ 6–7, R. at ___; Parks Dep. 102:5–23, R. at ___; Parks Aff. ¶¶ 4–5, R. at ___.) On the same day, Nationwide sent a separate notice informing GMAC that the policy would

[3] The notice of non-renewal is addressed to Grier and shows a carbon copy ("CC") sent to 0026043-39, which is the Nationwide agency identification number for Parks. (Parks Dep. at 102:5–23, R. at ___.) As part of its "go green" initiative, Nationwide used an internal messaging system, rather than external mail, to communicate with its agents, including sending notices of non-renewal such as the one sent to Grier. (See Parks Aff. ¶¶ 4–5, R. at ___.)

not be renewed when it expired on March 24, 2011. (Notice to GMAC, R. at ___.) Nationwide provided proof of mailing of the notice of non-renewal.[4] (Proof of mailing, R. at ___.)

The notice of non-renewal expressly provided, in relevant part, as follows:

> We sincerely regret we are unable to continue your property insurance beyond the current policy term. This is notice that your policy is non-renewed effective March 24, 2011, 12:01 a.m. local time. The reason(s) for this action is due to the conditions listed below. You may be eligible if you take the actions needed listed below.
>
> **Conditions**
> Hazard: Attractive nuisance
> Condition: Miscellaneous debris on premises
>
> **Action(s) Needed**
> Remove miscellaneous debris from premises
>
> **Conditions**
> Hazard: Eaves
> Condition: The eaves are rotting.
> The eaves are severely weathered.
>
> **Action(s) Needed**
> Repair the damaged soffits, eaves, overhangs or fascia boards on the dwelling.
>
> **Conditions**
> Hazard: Gutters
> Condition: The gutters are full of debris.
>
> **Action(s) Needed**
> Remove debris from gutters.

[4] The proof of mailing only lists Grier and GMAC because Nationwide does not use external mail to send correspondence to its agents; but rather, uses its internal messaging system. The "CC" on Grier's letter documents that Nationwide sent the notice to Parks, through the internal messaging system, on the same day that it sent the notice to Grier. See *supra* note 3.

Conditions
Hazard: Roof
Condition: The roof has damage.

Action(s) Needed
Replace existing roofing materials with acceptable roofing materials.

Conditions
Hazard: Siding, stucco, brick, block
Condition: The siding, stucco, brick or block is cracking greater than ½ inch.

Action(s) Needed
Repair the damaged siding, stucco, brick or block.

Once the above actions have been taken, we ask that you forward verification to your agent. This can be done with a photograph or a copy of the work contract showing the work has been completed. It will be necessary for you to provide this information prior to the cancellation date noted above.

(Notice of Non-renewal, R. at ___.) Although Grier disputed below whether she actually received the notice, she conceded at the summary judgment hearing that she does not dispute that Nationwide properly provided her with notice of non-renewal. (Hearing Tr. at 35:22–37:10 (Grier's counsel stating, "I would say that we're not disputing notice with Ms. Grier at this point."), R. at ___; see also Order at 6, R. at ___.) Grier also does not challenge on appeal the fact that Nationwide sent her a proper notice of non-renewal. (See Brief of App. at 19–24.)

Grier failed to correct the hazards and risks on her property, and her policy expired on March 24, 2011. The day after the policy expired, GMAC sent a check to Nationwide for the same amount that GMAC submitted the prior year for renewal of

the policy.[5] (Payment records, R. at ___.) Nationwide received the check, but because there was no active policy to which the payment could be applied, Nationwide returned the money, issuing a check to Grier on April 1, 2011. (Return of payment, R. at ___; Grier Dep. 80:14–21, 85:13–16 (Grier admitting that Nationwide issued the check to her on April 1, 2011), R. at ___.)

On April 6, 2011, Grier's home and its contents were destroyed by a fire. (Answer & Third-Party Compl. ¶ 61, R. at ___.) Grier attempted to submit a claim to Nationwide for property damage; however, Nationwide denied coverage because there was no insurance policy or coverage in effect at the time of the loss, based upon the expiration of the policy on March 24, 2011 and non-renewal. (Irick Aff. ¶ 8, R. at ___; Jefferies Aff. ¶¶ 8–10, R. at ___.)

The Bank subsequently commenced the underlying foreclosure action against Grier, which was its second foreclosure action for the property that is the subject of this action. (Compl., R. at ___; see also Foreclosure 2009-CP-40-07312, R. at ___.) Notably, Grier began a pattern of defaulting on her mortgage well before the fire. (GMAC default notices to Grier, R. at ___; Grier Dep. at 70:11–72:4 (admitting to receiving default notices on the following dates, prior to the fire: 11/2004, 8/2005,

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[5] On March 11, 2011, a representative of GMAC called Nationwide, and a Nationwide representative stated that the renewal period for Grier's policy would be March 24, 2011 to March 24, 2012 and that the renewal premium would be $993.00. This telephone conversation does not affect the notice of non-renewal that Nationwide sent to Grier on January 14, 2011, as explained *infra* in Argument II.B.2. At the time of the call, Grier's policy was not yet expired, and Grier still had until March 24, 2011 to correct the hazards and risks on her property in order to seek renewal. The renewal period and premium identified to GMAC were the terms if the policy became properly renewed before its expiration, which it did not. GMAC was not Grier's agent and did not act on Grier's behalf. (Pl's Resp. to Third-Party Defs.' Interrogs. at 7–9, ¶¶ 9–12, R. at ___.)

7/2006, 11/2006, 8/2008, 10/2008, 11/2008, 1/2009, 2/2009, 4/2009, 5/2009, 8/2010, and 9/2010), R. at ___.) Further, after the fire, Grier attributed her inability to make her mortgage payments to her being out of work and not receiving her disability benefits. (Servicer notes, R. at ___.)

Viewing the facts and inferences in the light most favorable to Grier, the record in this case leaves no doubt that the trial court correctly found that Grier did not have a Nationwide property insurance policy in effect at the time of her loss, and thus, Nationwide properly denied coverage.

SUMMARY OF ARGUMENT

In her appellate brief, Grier does not advance any meritorious basis for this Court to reverse the trial court's order. On appeal, Grier only challenges the trial court's rulings as to her claims against Nationwide. Specifically, Grier seeks reversal of the following three portions of the trial court's order: (1) the trial court's denial of Grier's motion to amend her answer and third-party complaint to include an additional claim against Nationwide for alleged negligent misrepresentation; (2) the trial court's grant of summary judgment in favor of Nationwide as to Grier's alleged breach of contract claim against Nationwide; and (3) the trial court's grant of summary judgment in favor of Nationwide as to Grier's alleged bad faith claim against Nationwide.

First, as to the denial of Grier's motion to amend, the trial court did not abuse its discretion in finding that Grier's purported negligent misrepresentation claim against Nationwide would be futile and prejudicial to Nationwide. The trial court's ruling did not result in any manifest injustice to Grier.

Second, as to the grant of summary judgment on Grier's breach of contract claim against Nationwide, the trial court correctly found that South Carolina Code Section 38-75-1160 governs non-renewal of homeowners' insurance policies for property located in South Carolina and that Nationwide properly mailed a notice of non-renewal to Grier, as required by that statute. Alternatively, even if the more general Section 38-75-740 governed, this Court should find that Nationwide properly provided a notice of non-renewal to both Grier and her agent, Parks. Accordingly, Nationwide properly issued a notice of non-renewal, as required by South Carolina statutory law, and thus, Grier did not have an active policy with Nationwide at the time of her loss. Under these circumstances, the trial court correctly found that no genuine issues of material fact existed as to Grier's purported breach of contract claim against Nationwide and correctly granted summary judgment in favor of Nationwide.

Finally, as to the grant of summary judgment on Grier's bad faith claim, the trial court correctly found that Nationwide properly denied coverage because Grier did not have an insurance contract with Nationwide at the time of her loss. Finding no evidence of bad faith or the other elements required to prove a claim for bad faith refusal to pay insurance benefits, the trial court correctly granted summary judgment in favor of Nationwide.

For these reasons, and those explained more fully below, this Court should affirm the trial court's judgment in its entirety, finding that the trial court acted within its discretion in denying Grier's motion to amend her complaint and that the trial court correctly granted Nationwide's motion for summary judgment, under the facts and circumstances of this case.

ARGUMENTS

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DENIAL OF GRIER'S MOTION TO AMEND, FINDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION.

A. Standard of Review of a Trial Court's Order Denying a Motion to Amend

"It is well established that a motion to amend is addressed to the discretion of the trial judge." Stanley v. Kirkpatrick, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004). On appeal, the trial judge's finding will not be overturned absent an abuse of discretion or unless a manifest injustice has occurred. Berry v. McCloud, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). Thus, the trial court's decision to deny an amendment "will rarely be disturbed on appeal." Id.

B. The Trial Court Did Not Abuse Its Discretion in Denying Grier's Motion to Amend.

In her motion to amend her third-party complaint, Grier sought to add two new causes of action—one against Nationwide for negligent misrepresentation and one against Parks for negligence. (Proposed Am. Answer & Third-Party Compl. ¶¶ 81–90, R. at ___.) The trial court denied the motion to amend as to both claims. (Order at 2–5, R. at ___.) On appeal, Grier only challenges the trial court's denial of her motion to amend to assert a negligent misrepresentation claim against Nationwide. (Brief of App. at 31–34 (only seeking reversal as to her proposed claim against Nationwide).)[6]

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[6] Because Grier does not argue in her appellate brief for reversal of the trial court's denial of her motion to amend as to her proposed negligence claim against Parks, Grier has waived her appeal as to that portion of the trial court's order. See Wright, 372 S.C. at 19, 640 S.E.2d at 497; Bell, 307 S.C. at 294, 414 S.E.2d at 791.

Rule 15 of the South Carolina Rules of Civil Procedure provides that "if more than thirty days have elapsed from the time a responsive pleading is served, a party may amend his pleading only by leave of court or by written consent of the adverse party." Rule 15, SCRCP. Rule 15 further provides that "[l]eave shall be freely given when justice so requires and does not prejudice any other party." Rule 15, SCRCP.

A court has the authority to deny a motion seeking leave to file an amended complaint if it would be futile because the causes of action in the amended complaint would fail as a matter of law. See Coral Gables, Inc. v. Palmetto Brick Co., 183 S.C. 478, 482, 191 S.E. 337, 338 (1937) ("The court will not do a useless and a futile thing, by allowing an opportunity for setting up a new cause of action by amendment, which is barred by the statute of limitations."); see also Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 632–33, 743 S.E.2d 808, 813 (2013) (affirming denial of plaintiff's motion to amend because the "inexplicable" seven-year lapse would prove futile); Higgins v. Med. Univ. of S.C., 326 S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997) (noting that even though plaintiffs are generally granted leave to amend following a Rule 12(b)(6) dismissal, amendment would have been futile because of the defendants' statutory immunity). The court may also deny a motion to amend where the opposing party is prejudiced by "a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." Pool v. Pool, 329 S.C. 324, 328–29, 494 S.E.2d 820, 823 (1998).

In her proposed amended complaint, Grier alleged that Nationwide had a duty to exercise reasonable care in providing information to Grier and her agents because Nationwide had a pecuniary interest in Grier's insurance policy. (Proposed Am.

Answer & Third-Party Compl. at 12, ¶ 82, R. at ___.) Grier further alleged that Nationwide breached its duty by representing to GMAC that Grier's insurance policy would be renewed upon payment of the policy premium. (Id. at 12, ¶ 83, R. at ___.) Nationwide argued that the proposed amendment would be futile because the claim failed to set forth the mandatory elements of a negligent misrepresentation claim, and thus, would fail as a matter of law. Nationwide also argued that it would suffer prejudice if the court allowed the amendment at the late stage in the litigation.

In order to recover for negligent misrepresentation, a plaintiff must allege that (1) the defendant made a false representation ***to the plaintiff***, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997) (citing Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993)) (emphasis added). Thus, a representation allegedly made to a person or entity other than the plaintiff fails to state a claim for negligent misrepresentation. Moreover, as Grier acknowledged below, "[a] cause of action for negligent misrepresentation is based upon the existence of a contract or business transaction." (Reply to Third-Party Defs.' Mem. In Opp. to Grier's Mot. to Amend at 4 (citing Evans v. Rite Aid Corp., 324 S.C. 269, 274, 478 S.E.2d 846, 848 (1996)).)

The trial court denied Grier's motion to amend, finding that "[t]he proposed cause of action would be futile because it would fail as a matter of law." (Order at 5,

R. at ___.) The trial court explained that "Grier has not alleged that Nationwide made a misrepresentation to her; rather, she alleges that Nationwide made a misrepresentation to GMAC, a third party," and "GMAC was not acting on Grier's behalf." (Id.) The trial court further held that that Nationwide "would suffer prejudice if the amendment were allowed at this state of the litigation" because "[t]he negligent misrepresentation cause of action is fundamentally different from the existing causes of action." (Id.) The trial court explained that "Nationwide has already taken Grier's deposition and conducted extensive written discovery" and "[t]his case has been on the jury trial roster." (Id. at 4, R. at ___.) Therefore, the trial court concluded that Nationwide would be prejudiced by allowing the new cause of action "because they lack the opportunity to defend against it by conducting additional discovery." (Id.)

As to the futility ruling, Grier argues that the trial court abused its discretion in denying her motion to amend because she alleges that GMAC was acting as her agent. Grier asserts that "[b]y alleging that GMAC was [her] agent, [she] effectively pleaded that Nationwide's misrepresentation to GMAC was also a misrepresentation to [her]." (Brief of App. at 32–33.)

Grier's argument fails on appeal, as it did below, because GMAC was not acting on Grier's behalf.[7] In written discovery responses, the Bank specifically stated that GMAC did not intend to act as Grier's agent, did not intend to act in the interest of Grier, did not intend to act on behalf of Grier, and did not intend to act for the benefit of Grier with regard to the Nationwide homeowner's insurance policy at issue in this case. (Pl's Resp. to Third-Party Defs.' Interrogs. at 7–9, ¶¶ 9–12, R. at ___.) There

[7] See *infra* Argument II.B.2. for a detailed discussion of why Grier's agency argument must fail, as a matter of law.

is also no evidence that GMAC ever undertook to obtain or renew insurance, but even if it had, GMAC would have been acting on behalf of the lender and for the lender's benefit only. Thus, Grier would have no control over GMAC in that process. As explained more fully below, GMAC was not acting as Grier's agent for purposes of attempting to procure or renew insurance on her behalf or for her benefit, as a matter of law. See e.g., Peoples Fed. Savs. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 144, 425 S.E.2d 764, 773 (Ct. App. 1992). Accordingly, Grier's argument that GMAC acted as her agent and that Nationwide's alleged misrepresentation to GMAC was effectively a misrepresentation to her fails to establish any abuse of discretion in the trial court's finding that her amendment would be futile.

As to the finding of prejudice, Grier argues that the trial court abused its discretion in finding that prejudice would result to Nationwide because Nationwide was on notice of her desire to add the claim for negligent misrepresentation as early as June 8, 2012, before it deposed Grier. The trial court considered and rejected Grier's argument. (Order at 4 (noting that "Grier argues that the amendments would not be prejudicial, as Nationwide . . . ha[s] been on notice of the Motion to Amend and the proposed . . . claim would not require any additional evidence"), R. at ___.)

Grier's argument that Nationwide knew of her desire to add the claim does not demonstrate any abuse of discretion by the trial court in finding prejudice to Nationwide. At the time of Grier's deposition, the negligence misrepresentation claim was not a part of Grier's operative complaint and not an issue in the case. Further, at the time of the summary judgment hearing, when the case was approaching trial, the claim was not part of the case. Under these circumstances, the trial court acted within

its discretion in finding that prejudice would result to Nationwide. See Holland ex rel. Knox v. Morbark, Inc., 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014) (affirming denial of a motion to amend because of the possible prejudice caused to the defendant in the form of increased discovery costs related to reopening discovery on the new claim); see also Health Promotion Specialists, LLC, 403 S.C. at 632, 743 S.E.2d at 813 (finding circuit court properly denied party's motion to amend where the amendment did not occur until after extensive discovery, particularly when there were no significant factual developments that warranted the untimely amendment).

Finally, Grier argues that the trial court's denial of her motion to amend results in a miscarriage of justice because "she was left without insurance upon the asset most prized by almost every citizen, and no legal redress." (Brief of App. at 34.) To the contrary, Grier was without insurance on her home because she failed to correct the hazards and risks on her property, and consequently, Nationwide decided to non-renew her homeowner's policy, consistent with its contractual and statutory rights.

For these reasons, this Court should find that the trial court did not abuse its discretion, and thus, affirm the trial court's denial of Grier's motion to amend.

II. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF NATIONWIDE AS TO GRIER'S BREACH OF CONTRACT CLAIM, FINDING THAT THE TRIAL COURT CORRECTLY CONCLUDED THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO THAT CLAIM.

A. Standard of Review of a Trial Court's Order Granting a Motion for Summary Judgment.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When the party moving for summary judgment satisfies the burden of showing that there is no genuine issue of material fact, the opposing party cannot simply rest on mere allegations or denials contained in the pleadings. Woodson v. DLI Props., LLC, 406 S.C. 517, 529, 753 S.E.2d 428, 434 (2014) (citing Rule 56(e), SCRCP). Rather, the nonmoving party "must come forward with specific facts showing there is a genuine issue for trial." Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct. App. 2003). If the evidence taken as a whole is susceptible to only one reasonable inference, there is no jury issue, and the motion for summary judgment should be granted. Hopson v. Clarey, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (1995).

"In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP." Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005) (citing Trousdell v. Cannon, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002)). Under Rule 56(c), this Court may affirm the trial court's grant of summary judgment "if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Id. "'On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party.'" Id. (quoting Cantrell v. Green, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990)).[8]

[8] This standard of review also applies *infra* to Argument III and is not restated there to avoid burdening this Court with duplication.

B. The Trial Court Correctly Granted Summary Judgment as to Grier's Purported Breach of Contract Claim Against Nationwide.

In her complaint, Grier asserted a breach of contract claim against both Nationwide and Parks, alleging that their "refusal to provide coverage under the policy constitutes a breach of contract for insurance between Third-party Defendants' and Third-party Plaintiff." (Answer & Third-Party Compl. ¶ 71, R. at ___.) The trial court granted summary judgment in favor of Parks and Nationwide. Grier only appeals the trial court's order as to Nationwide.[9]

To state a breach of contract claim against Nationwide, Grier must produce evidence to establish the existence of an insurance policy with Nationwide on April 6, 2011, the date her claim arose. (Order at 6, R. at ___.) The trial court correctly noted that "[i]t is undisputed that the term of Grier's insurance policy ended on March 24, 2011." (Id.) Grier bases her breach of contract claim against Nationwide on two theories of liability. First, she claims that an insurance policy existed at the time of her loss because Nationwide's notice of non-renewal was ineffective. (See Brief of App. at 8–24.) Second, Grier alleges that, even if the notice of non-renewal was effective, Nationwide subsequently agreed with her loan servicer, GMAC, that it would renew the policy upon receipt of the premium. (Id. at 24–28.) The trial court correctly rejected both theories, finding that "there is no genuine issue of material fact as to whether there was a contract for insurance between Grier and Nationwide at the time of

[9] Grier does not argue in her appellate brief for reversal of the trial court's grant of summary judgment in favor of Parks, and thus, Grier has waived her appeal as to Parks. See Wright, 372 S.C. at 19, 640 S.E.2d at 497; Bell, 307 S.C. at 294, 414 S.E.2d at 791.

Grier's claim," and thus, "Nationwide is entitled to summary judgment on the breach of contract claim." (Order at 10, R. at ___.)

1. **Nationwide Complied with the Statutory Requirements in Notifying Grier of Its Non-Renewal of Her Policy; Thus, No Policy Existed at the Time of Grier's Loss.**

    a. **Section 38-75-1160 governs notice of non-renewal of homeowners' insurance policies covering property located in South Carolina, and Nationwide complied with that provision.**

The trial court properly concluded that Section 38-75-1160 governs the question of whether Nationwide effectively issued a notice of non-renewal of Grier's homeowner's insurance policy. (Order at 6–8, R. at ___.) Section 38-75-1160 provides that

> [e]xcept for a cancellation pursuant to Section 38-75-730, a cancellation or refusal to renew by an insurer of a policy of insurance covered in this article is not effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew.

S.C. Code Ann. § 38-75-1160(A)(1). Thus, a notice of non-renewal of a homeowner's policy is effective as long as the notice delivered or mailed to the insured satisfies the following statutory requirements:

> (a) be approved as to form by the director or his designee before use;
> (b) state the date not less than sixty days for any cancellation or refusal to renew that is effective between November first and May thirty-first and not less than ninety days for any cancellation or refusal to renew that is effective between June first and October thirty-first after the date of the mailing or delivering on which the cancellation or refusal to renew becomes effective;
> (c) state the specific reason of the insurer for cancellation or refusal to renew and provide for the notification required by Section 38-75-1180(B);

> (d) inform the insured of his right to request in writing within thirty days of the receipt of notice that the director review the action of the insurer. The notice of cancellation or refusal to renew must contain the following statement in bold print to inform the insured of this right:
>
> "IMPORTANT NOTICE: Within thirty days of receiving this notice, you or your attorney may request in writing that the director review this action to determine whether the insurer has complied with South Carolina laws in canceling or nonrenewing your policy. If this insurer has failed to comply with the cancellation or nonrenewal laws, the director may require that your policy be reinstated. However, the director is prohibited from making underwriting judgments. If this insurer has complied with the cancellation or nonrenewal laws, the director does not have the authority to overturn this action."
>
> (e) inform the insured of the possible availability of other insurance which may be obtained through his agent, or through another insurer; and
> (f) state that the Department of Insurance has available a buyer's guide regarding property insurance shopping and availability, and provide applicable mailing addresses and telephone numbers, including a toll-free number, if available, for contacting the Department of Insurance.

S.C. Code Ann. § 38-75-1160(A)(1).

As the trial court found, the notice of non-renewal that Nationwide sent to Grier complied with the requirements of Section 38-75-1160.

> The form that Nationwide used to mail notice was approved by the director of the South Carolina Department of Insurance prior to use. Nationwide mailed the notice to the address shown in Grier's policy, 6515 Easter Street, Columbia, South Carolina, 29203-5171, not less than sixty days prior to the expiration of the policy. The notice stated the specific reasons for non-renewal and provided the notification required by Section 38-75-1180(B). The notice informed Grier of her right to request a review and urged her to act promptly to secure other coverage from another carrier. The notice also informed Grier that her representative could provide her with information on a consumer buyer's guide for

> property insurance and provided contact information for the Department of Insurance. Nationwide provided proof of the mailing notice to Grier. Section 38-75-1160 does not require proof that Grier actually received the notice but Grier does not dispute that she received notice. Rather, Grier disputes whether Parks received notice. However, Section 38-75-1160 does not require that notice be given to Parks.
>
> As a matter of law, Nationwide satisfied the requirements of Section 38-75-1160 for non-renewal of Grier's policy by mailing written notice to Grier of the non-renewal. Therefore, Grier's policy expired on March 24, 2001, and there was no insurance policy on the date of Grier's claim.

(Order at 8, R. at ___.)

Grier does not dispute that Nationwide provided ***her*** with proper notice of non-renewal. (Brief of App. at 19–24; see also Order at 6 (noting that "[a]t the November 28, 2012 hearing, Grier did not dispute that she received notice of non-renewal"), R. at ___; Hearing Tr. at 35:22–37:10, R. at ___.) Instead, Grier argues that Nationwide had to comply with the requirements of both Section 38-75-1160 and Section 38-75-740, even though those two sections contain different requirements.[10] (Brief of App. at 9.) While Section 38-75-1160 only requires the insurer to provide notice of non-renewal to the insured, Section 38-75-740, when applicable, imposes the additional requirement that the insurer provide notice of non-renewal to both the insured and the

[10] Grier also argued below that Nationwide did not comply with the requirements of Section 38-75-730. However, the trial court rejected this argument, explaining that "Section 38-75-730 addresses cancellation of a policy before the expiration of the policy term," and "Nationwide did not cancel Grier's policy; rather, the policy was non-renewed and expired on March 24, 2011." (Order at 5, R. at ___.) Grier does not raise this argument in her appellate brief, and thus, has waived the argument for appeal. See Wright, 372 S.C. at 19, 640 S.E.2d at 497; Bell, 307 S.C. at 294, 414 S.E.2d at 791.

insured's insurance agent. Compare S.C. Code Ann. § 38-75-1160(A)(1) with S.C. Code Ann. § 38-75-740.

The trial court correctly rejected Grier's argument and found that Section 38-75-1160 is "the applicable statute in this case." (Order at 6, R. at ___.) The trial court explained that

> Section 38-75-740 is a general provision setting forth requirements for non-renewal of insurance policies. Section 38-75-740 "applies to all property and casualty insurance, as defined in Section 38-1-20, ***except for . . . property or casualty insurance as to which there are specific statutory provisions of law governing cancellation, nonrenewal, or renewal of policies.***" S.C. Code Ann. § 38-75-710 (emphasis added).

(Id. (emphasis added by court).) The trial court correctly concluded that Section 38-75-1160 is a "specific statutory provision[]," applicable to nonrenewal of homeowners' policies for property located in South Carolina. (Id.)

Grier incorrectly states that Nationwide argues that Section 38-75-740 "was superseded and replaced by" Section 38-75-1160. (Brief of App. at 9.) To the contrary, Article 9 expressly provides that Section 38-75-740, and the other provisions of Article 9, do not apply ***where a specific statutory provision exists***. See S.C. Code Ann. § 38-75-710 ("This article applies to all property insurance and casualty insurance, as defined in Section 38-1-20, ***except*** for . . . property or casualty insurance as to which there are ***specific statutory provisions*** of law governing . . . nonrenewal, or renewal of policies.") (emphasis added). Section 38-75-1130 defines the scope of Article 13 of Chapter 75 as applying "only to property insurance on risks located in this State," which is a subset of the policies governed by Article 9, as established by

Section 38-75-710. See S.C. Code Ann. § 38-75-1130(A). Grier's homeowner's policy provided "property insurance on risks located in this State." Id. Thus, non-renewal of such homeowner's insurance on property located in South Carolina is expressly excepted from the requirements of Section 38-75-740 because it is governed by the specific statutory provisions of Section 38-75-1160, contained in Article 13. Nationwide did not argue, and the trial court did not find, that Article 13 superseded, repealed, or replaced the provisions of Article 9. Instead, both Nationwide and the trial court agreed that insurance governed by a specific statutory provision of Article 13 is excepted from the requirements of Article 9, as expressly provided by the language of the statutory provisions.

A review of Article 13 clearly reveals that Section 38-75-740 of Article 9 does not apply to the homeowner's insurance policy at issue in this case. Prior to the enactment of Article 13, Article 9 governed nonrenewal of property insurance for property located in South Carolina. However, as contemplated by the scope restrictions of Article 9, the South Carolina Legislature enacted a specific statutory provision of law governing cancellation and nonrenewal, but not renewal, of a subset of policies consisting of "property insurance on risks located in this State." S.C. Code Ann. § 38-75-1130(A). On March 1, 2005, the Property and Casualty Insurance Personal Lines Modernization Act went into effect. The General Assembly codified this Act with 2004 Act No. 290, which specifically provided that one purpose of the Act was to add a new article to the South Carolina insurance code, "SO AS TO PROVIDE REGULATION OF PROPERTY INSURANCE, ***CANCELLATION AND NONRENEWALS***." (2004 Act No. 290, R. at ___ (emphasis added).)

The Act added new Article 13 to Chapter 75, Title 38 of the South Carolina Code, which governs the nonrenewal at issue in this case. Article 13 is entitled Property Insurance Cancellation and Nonrenewal. The legislature expressly defined the scope of the Article 13 as follows:

> (A) This article applies only to property insurance on risks located in this State.
>
> (B) This article does not apply to automobile insurance nor to insurance against liability arising out of the ownership, maintenance, or use of motor vehicles. The director or his designee may exempt from this article various specialty lines of insurance.

S.C. Code Ann. § 38-75-1130. In contrast, the broader Article 9 applies generally to the following types of insurance:

> This article applies to all property insurance and casualty insurance, as defined in Section 38-1-20, ***except for*** automobile insurance and any other type of property or casualty insurance as to which there are specific statutory provisions of law governing cancellation, nonrenewal, or renewal of policies. This article further applies to policies issued by licensed insurers and to policies issued by eligible surplus lines insurers.

S.C. Code Ann. § 38-75-710 (emphasis added). Thus, Article 13 created a narrow class of insurance policies (*i.e.,* those that cover property located in South Carolina) that are ***not*** governed by the cancellation and non-renewal provisions of Article 9, as indicated in the "except for" provision quoted above.[11] Grier's homeowner's policy

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[11] However, for example, as discussed further *infra*, ***renewal*** of a property insurance policy covering property located in South Carolina, as opposed to cancellation or non-renewal, is still governed by Section 38-75-750 of Article 9 because there is no "specific statutory provision[]" in Article 13 that governs ***renewals***. See S.C. Code Ann. § 38-75-710; see also S.C. Code Ann. §§ 38-75-1110 to -1240 (providing that the title of Article is "Property Insurance ***Cancellation*** and ***Nonrenewal***") (emphasis

covered her property located in South Carolina and falls squarely within the scope provisions of Article 13. In contrast, if Grier owned property located in another state, but obtained insurance from a South Carolina insurer, Article 9 would govern any notice of non-renewal of her insurance policy. Likewise, if Grier had a non-auto casualty insurance policy, which includes a broad range of insurance defined in Section 38-1-20(11), Article 9 would govern any notice of non-renewal for that policy.

By adding Article 13 to the Insurance Law, the legislature expressly included a new, specific provision narrowly tailored to govern the "[n]otice requirement prior to cancellation or refusal to renew" an insurance policy covering property located in South Carolina. S.C. Code Ann. § 38-75-1160. Since the enactment of Section 38-75-1160, the prior requirements of the earlier statute, Section 38-75-740, do not apply to non-renewal of property insurance policies for property located in the State. As expressly provided by Section 38-75-710, Article 9 does ***not*** apply to any "property or casualty insurance as to which there are specific statutory provisions of law governing cancellation, nonrenewal, or renewal . . . ." S.C. Code Ann. § 38-75-710. Thus, Section 38-75-740 is merely a default provision and is not applicable where there is another statute that expressly addresses nonrenewal, such as Section 38-75-1160.

The South Carolina Department of Insurance ("SCDOI") issued several official bulletins regarding the Property and Casualty Insurance Personal Lines Modernization Act. The first was Bulletin 2004-09, dated August 18, 2004. (Bulletin 2004-09, R. at ___.) In this bulletin, the SCDOI officially confirmed that the Act implemented

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added). Thus, the general ***renewal*** provision of Article 9, applicable to the broader class of insurance, applies to ***renewals*** of homeowners' insurance policies for property located in South Carolina.

"requirements for insurers to change cancellation and non-renewal forms with an effective date of March 1, 2005." (Bulletin 2004-09 at 1, R. at ___.) Nationwide complied with this requirement and created the form of notice at issue in this case, which was specifically structured to comply with Section 38-75-1160 and was specifically approved by the SCDOI. (Pagan Aff., R. at ___.) The second bulletin regarding the Act was Bulletin 2004-11, dated October 25, 2004. (Bulletin 2004-11, R. at ___.) In this bulletin, the SCDOI officially confirmed that the new requirements of Section 38-75-1160 apply to non-renewals of homeowners' insurance policies by providing as follows:

> Please provide further clarification on the Property Insurance Cancellation and Non-renewal provisions.
>
> In Section 38-75-1160, the requirements of the notice are listed. ***These requirements apply to homeowners, mobile homeowners*** and dwelling fire. . . . A cancellation or non-renewal is not effective unless the following verbiage is included in bold print:
>
> "IMPORTANT NOTICE: Within fifteen days of receiving this notice, you or your attorney may request in writing that the director review this action to determine whether the insurer has complied with South Carolina laws in canceling or non-renewing your policy. If this insurer has failed to comply with the cancellation or non-renewal laws, the director may require that your policy be reinstated. However, the director is prohibited from making underwriting judgments. If this insurer has complied with the cancellation and non-renewal laws, the director does not have the authority to overturn this action."
>
> The ***insured*** must be informed regarding the possible availability of other insurance. The notice must state the Department of Insurance has available a buyer's guide regarding property insurance shopping and provide applicable mailing addresses and telephone numbers,

> including a toll-free number for contacting the insurance department.

(Bulletin 2004-11 at 1–2, R. at ___ (emphasis added).) Bulletin 2004-11 clearly indicates, consistent with the express language of Section 38-75-1160, that the insurer is only required to send the notice of non-renewal to the insured, and not also to the agent.

Moreover, prior to the enactment of the Property and Casualty Insurance Personal Lines Modernization Act, several published opinions applied Section 38-75-730 to cancellation of property insurance policies and Section 38-75-740 to non-renewal of property insurance policies. However, since the Act took effect, no published opinion of any court, South Carolina or otherwise, has applied Section 38-75-730 or Section 38-75-740 to any cancellation or non-renewal of a property insurance policy for property located in South Carolina. In light of Section 38-75-1160's specific statutory provision, Sections 38-75-730 and 38-75-740 no longer apply to cancellation or non-renewal of property insurance policies for property located in the State of South Carolina.

Grier incorrectly argues that, despite the clear scope provisions of Articles 9 and 13, Section 38-75-740 should apply because she alleges that it provides better consumer protection and that Section 38-75-1160 "places no limit on the reasons for which a policy may be nonrenewed or cancelled." (Brief of App. at 16.) To the contrary, like Article 9, Article 13 provides a list of prohibited grounds for nonrenewal of a policy. See S.C. Code Ann. § 38-75-1220 (setting forth a list of reasons and circumstances under which an insurer may not nonrenew a property insurance policy for property located in South Carolina).

Grier also argues that the trial court's application of Section 38-75-1160, as opposed to Section 38-75-740, produces a "bizarre result" not intended by the legislature because it means that the provisions of Article 9 do not apply to property located in South Carolina. This is exactly the intended scope of Article 13, as defined by the legislature in the express provisions of Article 13, which specifically state that Article 13 "applies only to property insurance on risks located in this State." S.C. Code Ann. § 38-75-1130. Other types of insurance, which do not fall within the scope of Article 13, are governed by the general provisions of Article 9. Similarly, insurance practices which are not governed by a specific provision of Article 13 are governed by the general provisions of Article 9. It is certainly not "bizarre" for the South Carolina Legislature to enact legislation specifically designed to govern insurance covering only property located in South Carolina. The legislature is clearly more concerned about property within the State than it is about property elsewhere.

Grier also relies heavily on the 2007 amendments to both Article 9 and Article 13, contained in the Omnibus Coastal Property Insurance Reform Act of 2007 (the "Omnibus Coastal Act"). While the Omnibus Coastal Act did amend provisions of Articles 9 and 13, it did not make any changes in the requirements of where the insurer must send a notice of non-renewal for property located in South Carolina. The title of the Omnibus Coastal Act expressly states the purpose of the amendments to Section 38-75-740 and Section 38-75-1160, as Grier acknowledges. (See Brief of App. at 17.) Nowhere in the Omnibus Coastal Act did the legislature amend Section 38-75-1160 to include a requirement, similar to that of Section 38-75-740, that the insurer send a non-renewal notice to the insured and the insurance agent for property located in South

Carolina. Moreover, Grier erroneously represents the contents of a 2007 insurance bulletin by stating the following:

> The 2007 Bulletin explains that "the notice requirements for cancellation and non-renewal have changed as follows," and goes on to group together the relevant notice and non-renewal provisions of both §§ 38-75-740 ***and*** 38-75-1160, stating that a policy may be nonrenewed by "giving or mailing notice to the insured *and* the agent of record . . . not less than 60 day prior to the expiration of the policy."

(Brief of App. at 17 (quoting S.C. Dept. of Ins. Bulletin No. 2007-05 (June 11, 2007) (emphasis added by Grier).) A comparison of the bullet points in the 2007 bulletin with the statutory provisions clearly reveals that the SCDOI was merely quoting the provisions of the two different statutes which may govern a notice of cancellation and non-renewal. See S.C. Dept. of Ins. Bulletin No. 2007-05, ¶ N at 7–8 (June 11, 2007). The first bullet point, which refers to sending the notice of non-renewal to both the insured and the agent, is merely a recitation of Section 38-75-740. Id. The second bullet point recites the statutory requirements of Section 38-75-730. Id. The third and fourth bullets, which do ***not*** refer to sending a notice of non-renewal to the insurance agent, recite the requirements contained in Section 38-75-1160(A)(1)(d) & (A)(1)(b), respectively. Id. Thus, nothing in the 2007 bulletin, or, more importantly, in the statutory language itself, supports Grier's argument that the provisions of Section 38-75-740 and Section 38-75-1160 are cumulative.

The foregoing discussion clearly demonstrates that Section 38-75-1160 did not supersede or replace Section 38-75-740; rather, the two provisions apply to different types of policies and/or under different circumstances. Because the statutes differ in

their requirements, this Court is charged with determining which statute applies and must reconcile the two statutes if at all possible. See Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 571–72, 703 S.E.2d 197, 201 (2010) (citing Ex parte Chase, 62 S.C. 353, 362–63, 38 S.E. 718, 724 (1901) (discussing the well-settled rule that where two portions of a statute appear on their face to be conflicting, every effort should be made to reconcile these apparently conflicting provisions, and bring them into harmony, if possible)). The legislature left no doubt that the statutes can be reconciled by clearly defining the scope of the provisions. Section 38-75-1160 applies to non-renewal and cancellation of insurance policies that provide "property insurance on risks located in this State," and Section 38-75-740 governs non-renewal and cancellation of all other property insurance policies (other than those expressly excepted). Grier's suggested interpretation of the two statues would eviscerate the notice provisions of Section 38-75-1160 and render that provision meaningless.

For these reasons, this Court should find that the trial court correctly held that Section 38-75-1160 governs Nationwide's notice of non-renewal of Grier's homeowner's insurance policy and that Nationwide complied with the notice requirements of Section 38-75-1160.

b. Alternatively, even if this Court finds that Section 38-75-740 governs notice of non-renewal of homeowners' insurance polices for property located in South Carolina, Nationwide also complied with that provision.

Even assuming, *arguendo*, that this Court disagreed with the trial court's application of Section 38-75-1160 and found that Section 38-75-740 applies, this Court should still affirm, finding that Nationwide provided the notice of non-renewal to both

Grier and her insurance agent, Parks. See Rule 220(c), SCACR; see also I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 420–21, 526 S.E.2d 716, 723–24 (2000) (holding that the "appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal").

In addition to proof of mailing the notice of non-renewal to Grier, the record clearly reveals that Nationwide also sent the notice of non-renewal to Parks, Grier's insurance agent, on January 14, 2011. (Notice of Non-Renewal, R. at ___; Jefferies Aff. ¶ 7, R. at ___.) The non-renewal notice identifies Tonya D. Parks as Grier's Nationwide representative and includes Parks, by her Nationwide agent number, as a "CC" recipient on the same non-renewal notice that Nationwide sent to Grier. (Notice of Non-Renewal, R. at ___.) In her deposition, Parks confirmed that the non-renewal notice indicated that Nationwide sent a "CC" copy to her. (See Parks dep. at 102:5–23 ("A. This is the letter that Nationwide sent to Ms. Grier dated January the 14th that, if she did not remedy the hazards on her property, that it would be non-renewing effective March 24th. . . . Q. Down toward the end, see where it says cc? A. Yes. . . . Q. What are those numbers? A. That's me. . . . Q. Does that indicate to you that this letter was sent to you? A. Yes. According to this, they cc-ed me on the letter."), R. at ___; see also Parks Aff. ¶¶ 4–5 (explaining that the notice of non-renewal shows a CC to her at her agent number and that she would have received the letter through Nationwide's internal memo system, called Lotus Notes), R. at ___.) The letter was not in Parks' file because Nationwide uses an internal messaging system to communicate with its agents, rather than using external mail. (Parks Aff. ¶¶ 4–5.) Thus, Parks would not have received a hard copy.

Although Parks also testified in her deposition that she did not specifically recall receiving Grier's notice of non-renewal, (Parks Dep. at 51:13–15 (when asked whether Nationwide sent her a copy of the notice of non-renewal, Parks testified, "I'm sure they probably did"), 71:8–19 (testifying that she does not specifically recall the notice), R. at ___), whether Parks recalls receiving the notice is irrelevant because the statute expressly provides that the policy may be nonrenewed "by giving or mailing written notice of nonrenewal to the insured and agent of record, if any," and that "[p]roof of mailing is sufficient proof of notice." S.C. Code Ann. § 38-75-740(d). Thus, even if this Court applies the requirements of Section 38-75-740, there is no dispute that Nationwide provided proof of mailing to both Grier and Parks, as indicated on the January 14, 2011 notice. The statute does ***not*** require Nationwide to establish that Parks recalls receiving it; Section 38-75-740 would only require Nationwide to establish that it sent the notice to Grier and Parks.

Grier incorrectly argues that Nationwide must prove that Parks actually received the notice in order to establish compliance with Section 38-75-740. (Brief of App. at 19–24.) Grier's reliance upon Edens v. South Carolina Farm Bureau Mutual Insurance Co., 279 S.C. 377, 308 S.E.2d 670 (1983) is misplaced. There, the policy did not specify the method for giving notice other than to state that cancellation by the insurer could be effected "by giving to the insured a five days' written notice of cancellation," which the court found was ambiguous "as to the method of giving notice." Id. at 379, 308 S.E.2d at 671. The insurer in Edens allegedly sent the notice of cancellation by regular mail, rather than certified or registered, and no return receipt was requested, and the insured denied receiving the notice. Id. Edens dealt only with a notice of

cancellation, not a notice of non-renewal, and the court only considered the cancellation clause contained in the policy, not any statutory provision.

The South Carolina Supreme Court explained that the policy language did ***not*** allow for "mailing written notice," but instead required "giving written notice," and held that those terms are not necessarily synonymous or substantially similar. Id. at 379–80, 308 S.E.2d at 671. To the contrary, Section 38-75-740, which Grier argues applies, expressly allows the insured to effect a non-renewal by "giving ***or*** mailing written notice." S.C. Code Ann. § 38-75-740 (emphasis added). As the Supreme Court noted in Edens, "[w]here a cancellation clause provides that the insurer may cancel by mailing the notice to the insured's address or where it contains substantially similar language, ***the mere mailing is sufficient*** to effect cancellation." Edens, 279 S.C. at 379, 308 S.E.2d at 671 (citing Moore v. Palmetto Bank, 238 S.C. 341, 120 S.E.2d 231 (1961)) (emphasis added); see also Penland v. State Farm Fire & Cas. Co., No. 2007-UP-355, 2007 WL 8327939, at *1–3 (S.C. Ct. App. filed July 17, 2007) (rejecting appellant's argument "that State Farm had to prove the cancellation notice was actually received by [the insured]" and holding that proof of mailing was sufficient proof of notice to effect a valid cancellation where the policy provided, "The mailing of notice shall be sufficient proof of notice").[12]

[12] Grier's reliance upon South Carolina National Bank v. Lumbermens Mutual Casualty Co., 526 F. Supp. 94, 96 (D.S.C. 1981) is similarly misplaced because in that case the policy merely required that plaintiff be given prior notification and no particular method of notice was specified. Thus, the court held that "[t]he generally accepted rule is that where an insurance policy simply requires notice, without stipulating any particular form, actual receipt of such notice is a condition precedent to cancellation by the insurer." Id. at 96. Lumbermens is distinguishable because the statute upon which Grier relies expressly provides that mailing is a proper method of providing notice and that "[p]roof of mailing is sufficient proof of notice." S.C. Code Ann. § 38-75-740.

For these reasons, if this Court finds that Section 38-75-740 governs an insurer's notice of non-renewal of a homeowner's policy for property located in South Carolina, this Court should still affirm, finding that Nationwide established compliance with the requirements of Section 38-75-740 by providing proof of mailing to both Grier and her insurance agent, Parks.

2. GMAC Did Not Create a New Contract with Nationwide or Reach an Agreement to Renew the Previous Policy with Nationwide, and Therefore, Grier Did Not Have a Policy in Place at the Time of Her Loss.

In the event this Court finds that Nationwide provided a proper notice of non-renewal, Grier alternatively argues that an insurance policy was in place on April 6, 2011 because Nationwide allegedly reached an agreement with her loan servicer, GMAC, that Nationwide would renew the policy if it received the required premium. (Brief of App. at 24–28.) However, as the trial court correctly held, "Grier has not provided evidence of any communication or agreement between GMAC and Nationwide where Nationwide agreed to renew the policy if GMAC paid the premium." (Order at 9, R. at ___.) In her deposition, Grier testified that she could not identify any agreement between GMAC and Nationwide to renew her homeowner's insurance policy. (Grier dep.at 102:22–103:14, R. at ___.) Further, the Bank expressly stated in its written discovery responses that GMAC did not even handle the premium payment made to Nationwide. (Pl's Resp. to Interogs. Nos. 14, 16–17 (the Bank confirming that "GMAC did not handle the payment made to Nationwide"), R. at ___.)

Grier argues that a telephone call between Nationwide and GMAC, as well as the premium payment sent to Nationwide, evidence an agreement to renew her homeowner's policy. (Brief of App. at 24-25.) Grier also incorrectly argues that Nationwide agreed to renew her policy because GMAC was acting either as her actual or apparent agent "when it confirmed renewal in the March 2011 phone call to Nationwide." (Brief of App. at 27.) Finally, Grier erroneously argues that she was a third-party beneficiary to the renewal agreement that GMAC allegedly reached with Nationwide. (Brief of App. at 28.) These arguments fail and do not support reversal of the trial court's order granting summary judgment in favor of Nationwide.

As a matter of law, GMAC could not create a new insurance contract or renew the previous insurance contract between Grier and Nationwide. GMAC never agreed to act for Grier's benefit or on her behalf in procuring insurance, and Grier never had the right to control GMAC's actions related to the procurement of insurance.

In South Carolina, agency is defined as "a fiduciary relationship which results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf." Peoples Fed. Savs. & Loan Ass'n, 310 S.C. at 144, 425 S.E.2d at 773 (citing Restatement (Second) of Agency § 1 (1958)); see also Peeples v. Orkin Exterminating Co., 244 S.C. 173, 180, 135 S.E.2d 845, 848 (1964) ("An agent is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted ***in the principal's name***, or on his account, and who brings about or effects legal relationships between the principal and third parties.") (emphasis added). Moreover, to demonstrate an agency relationship, ***"[t]he agent*** must have assumed to represent the principal and to

have performed the acts in his name and on his behalf." City of Greenville v. Wash. Am. League Baseball Club, 205 S.C. 495, 505, 32 S.E.2d 777, 781 (1945) (emphasis added); see also Restatement (Third) of Agency § 1.01 (2006) (explaining that agency arises when the principal consents "that the agent shall act on the principal's behalf and subject to the principal's control," and the agent consents to act on the principal's behalf).

Furthermore, where a general intention to create an agency is not present, one will not be created even if some elements of agency exist. Pennell & Harley v. Hearon, 169 S.C. 16, 21-22, 168 S.E. 188, 190 (1933) (citing DeShields v. Insurance Co., 125 S.C. 457, 466, 118 S.E. 817, 820 (1923)). "A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts." Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

Several jurisdictions have rejected the proposition that either a mortgage lender or its servicer is an agent for the borrower. In fact, the relationship between a lender and borrower is that of "adversaries, not fiduciaries," and "lenders are not agents or fiduciaries of a borrower." Weingartner v. Chase Home Fin., LLC, 702 F. Supp. 2d 1276, 1288 (D. Nev. 2010). The fact that a mortgage company is allowed to pay for services with funds from the borrower's escrow account does not mean that the mortgage company is the borrower's agent, and it does not give the mortgage company authority to create or renew a contract for the borrower. Telfair v. First Union Mortg. Corp., 216 F.3d 1333, 1340-42 (11th Cir. 2000). The Telfair court explained that the

lender's administration of the borrowers' escrow account did not create an agency relationship, and that:

> In the case of escrow funds held by a mortgagee for payment of tax and insurance payments on behalf of a mortgagor pursuant to a security agreement, the mortgagee does not act as agent because the mortgagee acts neither for the sole benefit of the mortgagor nor under the mortgagor's control.

Id. at 1342; see also Oliver v. Cent. Bank, 658 So.2d 1316, 1321 (La. Ct. App. 1995) (affirming summary judgment against plaintiffs on their claim that lender's action in purchasing flood insurance coverage created an agency relationship between the parties); Highlands Ins. Co. v. McLaughlin, 387 So.2d 118, 120–21 (Miss. 1980) (holding that the fact that mortgagee agreed that mortgagor's name could be included as a joint payee in draft issued by fire insurer did not justify agency relationship for delivery of the draft); Guar. Sav. & Loan Ass'n v. City of Springfield, 113 S.W.2d 147, 153–54 (Mo. Ct. App. 1938), aff'd, 346 Mo. 79, 139 S.W.2d 955 (1940) (declining to find agency relationship between mortgagor and mortgagee where actions were not done with express authority and consent).

Despite Grier's unilateral assertion, GMAC was not Grier's agent with authority to enter into a contract on her behalf. GMAC was merely a mortgage servicer, and its only relevant authority was to deliver funds that Grier had deposited into escrow to the insurance company for an insurance contract ***entered into by Grier***. (See Mortgage at 9, ¶ 20 (explaining that the loan servicer "collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law"), R. at ___.)

Further, the mortgage expressly provides that any insurance coverage that the lender obtains is for ***the lender's benefit***, and Grier had ***no control*** over the lender's choice as to insurance. (Mortgage at 5, ¶ 5, ("If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect."), R. at ___.)

As the loan servicer, GMAC acted on behalf of the Bank, which held the mortgage on Grier's property and contracted with GMAC to service the mortgage. In written discovery responses, the Bank specifically stated that GMAC did not intend to act as Grier's agent, did not intend to act in the interest of Grier, did not intend to act on behalf of Grier, and did not intend to act for the benefit of Grier with regard to the Nationwide insurance policy at issue in this case. (Pl's Resp. to Third-Party Defs.' Interrogs. Nos. 9–12, R. at ___.) There is also no evidence that GMAC undertook the task of attempting to create or renew an insurance contract on Grier's behalf. GMAC, acting on behalf of the Bank, merely called Nationwide to inquire about the term and amount owed for the insurance. Further, the Bank specifically stated that GMAC did not handle the payment that was submitted to Nationwide after the policy was non-renewed. (Pl's Resp. to Third-Party Defs.' Interrogs. No. 14, R. at ___.)

Under the facts and circumstances of this case, the record clearly reveals that, as a matter of law, GMAC was not acting as Grier's agent for the purpose of

attempting to procure or renew insurance ***on her behalf*** or ***for her benefit***. GMAC never intended or agreed to act as Grier's agent for that purpose. Accordingly, this Court should affirm the trial court's finding that Grier did not produce any evidence of an agreement between GMAC and Nationwide that Nationwide would renew the policy upon receipt of the premium.

Regardless, and in any event, even if GMAC was somehow Grier's agent, the oral conversation between the representatives of GMAC and Nationwide could not effect a renewal of Grier's policy. Nationwide previously issued an effective, written notice of non-renewal. The subsequent, oral conversation cannot be used to contradict the written notice and cannot serve as an agreement to renew Grier's policy, as a matter of law. Nationwide's policy expressly provided that any renewal must be in the form of a notice mailed to Grier, which requires a writing to effect a renewal. (Homeowner's Policy at L1, ¶ 3(c) (requiring any renewal to be in a notice mailed to the named insured prior to the expiration of the policy period for which premium has been paid), ¶ 1(c) (requiring that changes in "this policy must be in writing by ***us*** to be valid" (emphasis in original)).) Moreover, the statute also requires renewals to be in writing. See S.C. Code Ann. § 38-75-750 (providing that the insurer must provide renewal terms and the premium amount by "mailing or delivering renewal terms and statement," which requires a writing).[13]

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[13] See *supra* note 11, explaining that Article 9's general ***renewal*** provision, Section 38-75-750, applies to renewal of a homeowner's insurance policy for property located in South Carolina because Article 13 does not contain a specific statutory provision regarding ***renewal***. By its express terms and title, Article 13 addresses "Cancellation and Nonrenewal." S.C. Code Ann. §§ 38-75-1110 to -1240.

For these reasons, this Court should find that the trial court correctly granted summary judgment in favor of Nationwide as to Grier's breach of contract claim and affirm the trial court's ruling. Nationwide provided an effective notice of non-renewal of Grier's policy, which expired prior to her loss. Further, the record does not contain any evidence to support a finding that Nationwide agreed to renew Grier's policy following the notice of non-renewal. Thus, the trial court correctly found that because no insurance policy existed at the time of Grier's loss, she could not establish any breach by Nationwide in denying her claim.

III. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF NATIONWIDE AS TO GRIER'S BAD FAITH CLAIM, FINDING THAT THE TRIAL COURT CORRECTLY CONCLUDED THAT NO GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO THAT CLAIM.

In her complaint, Grier asserted a claim against Nationwide for bad faith refusal to pay insurance benefits. (Answer & Third-Party Compl. ¶¶ 75–80, R. at ___.) The trial court correctly held that this claim "fails, as a matter of law, because there was no contract for insurance at the time of the claim and therefore, Nationwide's failure to pay insurance benefits was not in bad faith." (Order at 10, R. at ___.)

In order to establish a claim for bad faith refusal to pay insurance benefits, a party must present evidence to establish the following elements: (1) a mutually binding contract of insurance, (2) refusal by the insurer to pay benefits due under the contract, (3) the refusal resulted from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing, and (4) damages proximately caused by the alleged bad faith refusal to pay benefits. Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996).

The trial court found as follows:

> The record in this case lacks evidence to support the elements necessary to maintain this claim. There was no mutually binding contract of insurance at the time of Grier's claim. On its face, the policy expired on March 24, 2011 and was not renewed.
>
> Additionally, there is no evidence of bad faith. There can be no bad faith if the insurer has a "reasonable ground for contesting the claim." Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992). Nationwide denied coverage based on an objective determination that the policy was no longer in effect because it expired without being renewed. Nationwide sent a non-renewal notice on January 14, 2011, more than sixty days before the policy's expiration date, as required by statute. When Nationwide received a payment related to this policy from GMAC, Nationwide returned the payment to Grier because there was no policy in place.
>
> Accordingly, Nationwide had a reasonable basis to deny Grier's claim. Therefore, as a matter of law, the refusal to pay insurance benefits was not in bad faith.

(Order at 10, R. at ___.) The record in this case clearly reveals the correctness of the trial court's ruling.

Grier argues that the trial court erred in granting summary judgment in favor of Nationwide as to her bad faith claim because she alleges that "[t]he record supports a renewed insurance contract was in place on the date of the fire and when Nationwide refused to provide coverage to Grier for the fire." (Brief of App. at 29.) As demonstrated above, there is no evidence to support a finding that Grier had a Nationwide property insurance policy in place at the time of her loss. Nationwide effectively issued a notice of non-renewal of her policy, and thus, the policy terminated on March 24, 2011, prior to the fire. Further, neither the telephone conversation

between representatives of GMAC and Nationwide nor the returned premium payment served to create a new contract or renew the previous contract. For these reasons, Grier cannot establish "the existence of a mutually binding contract of insurance," as required to state a claim for bad faith refusal to pay insurance benefits. Cock-N-Bull Steak House, Inc., 321 S.C. at 6, 466 S.E.2d at 730.

Grier also argues that there is evidence "that Nationwide refused to pay in bad faith," based upon the telephone conversation between GMAC and Nationwide. (Brief of App. at 29.) Grier unsuccessfully attempts to demonstrate evidence of bad faith related to Nationwide's return of her premium in the amount of $993.00. As explained above, upon receipt of the premium, Nationwide immediately returned the full amount received because Nationwide had already issued Grier and her agent a valid notice of non-renewal of her policy, and Grier did not have an active policy to which the payment should be applied. (Payment Record, R. at ___.) There is simply no evidence to establish the required elements of any bad faith by Nationwide in the record in this case.

Accordingly, this Court should find that the trial court correctly granted summary judgment in favor of Nationwide as to Grier's bad faith claim and affirm the trial court's ruling.

CONCLUSION

For the foregoing reasons, Nationwide respectfully requests that this Court affirm the trial court's order in its entirety. The trial court did not abuse its discretion in denying Grier's motion to amend her complaint. Further, the trial court properly granted summary judgment in favor of Nationwide as to Grier's breach of contract

claim, based upon the trial court's correct finding that Grier did not have an active policy with Nationwide at the time of her loss. Finally, the trial court properly granted summary judgment in favor of Nationwide as to Grier's bad faith claim, correctly finding that Grier failed to establish the required elements to support a claim for bad faith refusal to pay insurance benefits.

Respectfully submitted,

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June 26, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

RECEIVED
JUN 26 2014
SC Court of Appeals

Case No. 2011-CP-40-6103
Appellate Case No. 2013002403

Bank of New York Mellon Trust Company, National Association f/k/a The Bank of New York Trust Company, N.A. as successor to JP Morgan Chase Bank N.A. s/b/m Bank One National Association as Trustee for RAMP 2002RS5, Plaintiff,

v.

Chartrease Grier, Palmetto Health Alliance; and Palmetto Richland Memorial, Defendants,

Chartrease Grier, Third-Party Plaintiff, ... Appellant,

v.

Nationwide Property & Casualty Insurance Company; and Tonya D. Parks, Third-Party Defendants, ... Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: RESPONDENTS' INITIAL BRIEF AND DESIGNATION OF MATTER

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June 26, 2014

Via: Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Bank of New York Mellon Trust Company, National Association f/k/a The Bank of New York Trust Company, N.A. as successor to JP Morgan Chase Bank N.A. s/b/m Bank One National Association as Trustee for RAMP 2002RS5, Plaintiff, v. Chartrease Grier, Palmetto Health Alliance; and Palmetto Richland Memorial, Defendants

Chartrease Grier, Appeallant v. Nationwide Property & Casualty Insurance Company; and Tonya D. Parks, Respondents
Appellate Case No. 2013-002403
Our File No. 18813/01510

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of Respondents' Initial Brief and Designation of Matter to be Included in Record on Appeal.

By copy of same, we are hereby serving all counsel of record.

Very truly yours,

Alana Odom Williams

AJO:jlt
Enclosures
cc: M. Allison Moon, Esquire
Sarah Brown, Esquire
Michael Geoffrey Wimer, Esquire