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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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Case No. 2011-CP-40-6103

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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, Appellant,

v.

Nationwide Property & Casualty Insurance Company; and Tonya D. Parks, Respondents.

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# BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

This is an appeal from the circuit court's Order, dated April 4, 2013, granting summary judgment in favor of an insurer and its agent in an insurance coverage dispute between Appellant, Chartrease Grier (hereinafter "Grier" or "Appellant"), and Respondents, Nationwide Property and Casualty Insurance Company and Tonya D. Parks (referred to hereafter, collectively, as "Respondents" or, respectively, as "Nationwide" and "Parks") arising out of a house fire that destroyed Appellant's residence on April 6, 2011. The matter was originally initiated on September 14, 2011, as an action to foreclosure on the damaged property, with the filing of the Complaint and related documents by The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank N.A. sbm Bank One National Association as Trustee for RAMP 2002RS5 (hereinafter "Bank of New York" or "mortgage servicer" or "mortgagee").[1]

On November 22, 2011, Appellant responded to the Complaint by filing an Answer and Third-party Complaint against Respondents, Nationwide and Parks; wherein she (1) requested a jury trial, (2) raised several defenses against Bank of New York and (3) alleged causes of action against Respondents, based on breach of contract and bad faith refusal to pay insurance benefits, resulting in the foreclosure action and other damages. The causes of action in the Answer and Third-party Complaint were based on allegations of improper non-renewal of Nationwide Policy No. 6139-HP-3430377, which purported to provide insurance limits of $101,600.00 for the structure and $71,120.00 for

[1] Although the original action named Palmetto Health Alliance and Palmetto Richland Memorial as additional defendants, neither made an appearance, and default was entered against them upon the motion of Bank of New York, filed November 7, 2013.

the contents of Appellant's residence, located at 6515 Easter Street, Columbia, South Carolina. (R. pp. 29A-41) Alternatively, the Answer and Third-party Complaint contained allegations of facts supporting Appellant's claim that communications between GMAC and Nationwide served to, either, reinstate the policy or create a new policy. Id. The alternative arguments for coverage resulted in the same conclusion: Nationwide was the underwriter of an insurance policy on Appellant's property that was in effect at the time of the fire, and Nationwide's failure to pay benefits owed under such policy had resulted in damages, including the underlying foreclosure action. Appellant also alleged that she was entitled to punitive damages and attorney's fees for bad faith refusal to pay benefits. Id.

On February 6, 2012, Respondents filed an answer in which they denied that a contract was in existence at the time of the fire and asserted a number of affirmative defenses, including defenses based on allegations that Appellant was in breach of contract, waiver and/or estoppel, failure to mitigate damages and unconstitutionality of Appellant's claim for punitive damages. (R. pp. 29A-41) Respondents also reserved the right to assert additional defenses as may be "disclosed during the course of additional investigation and discovery." Id.

Also of note, in the Answer to Third-party Complaint, Respondents admit that Parks is an authorized agent for Nationwide. However, Respondents specifically deny that Parks was a party to a contract with Appellant, and state that Parks owed no duty of care to Appellant and, therefore, allege that the causes of action against Parks be dismissed. Id. at ¶¶ 49-52.

In early March 2012, Appellants served discovery requests on Respondents which, pursuant to an agreement between the parties, were due on May 11, 2012. One day prior to the deadline, Respondents filed a motion for a Protective Order, objecting to producing documents requested regarding Nationwide's criteria for determining "whether to renew and/or cancel a homeowners insurance policy ... based on identification of hazards on or part of the property through the Home Care review process or otherwise" claiming they were protecting "trade secrets." (R. pp. 53-66) The proposed Protective Order, consisting of seven pages and attached to the motion, was to apply to all types of discovery including documents, written responses for information, deposition testimony, and exhibits. (R. pp. 58-64) The parties did not consent to the proposed Protective Order and, therefore, the motion was pending throughout the next few months of discovery. In fact, the record is unclear whether a ruling was made on the Motion for Protective Order. (R. pp. 242-363)[2]

On June 11, 2012, Appellant filed a motion to amend answer and third-party complaint which included a proposed amended pleading, in order to include allegations of negligent misrepresentation against both Nationwide and Parks. .

On September 21, 2012, Bank of New York filed a Motion to Sever the foreclosure action from the coverage action, which was opposed by Respondents by way of memorandum filed November 8, 2012. Regardless, Bank of New York settled out of

[2] Respondents creatively claim that the Trial Court's silence on the issue creates a presumption of a ruling that the issue is moot. (R. pp. 229-237) However, despite making similar rulings on other motions in a Form 4 Order, the court appears to have left this issue unresolved. (R. p. 3) (specifically ruling on the mootness of two other motions). Despite Respondents' eleventh hour justifications, the more obvious inference that can be drawn from the court's failure to specifically rule on this Motion for Protective Order is that the motion was never heard, and no resolution was reached as to the question of whether Respondents were justified in withholding relevant documents, which may have changed the outcome of this case.

action and an Order Granting Bank of New York's Voluntary Dismissal without Prejudice as to Complaint was entered on November 27, 2012.

In October 2012, the matter appeared on the trial roster for a November trial date, prompting a Joint Motion for Continuance and proposed scheduling order that was agreed to by all parties. All parties were in agreement that the case was not ready to be tried and that there was significant discovery left to be done by all involved. (R. p. 107) The Trial Court denied the request for continuance with Proposed Scheduling Order, and the case was called to trial the last week in November.

Due to the rapidly approaching trial date, Appellant filed a Motion for Summary Judgment, requesting a ruling on the issues of construction of statutory provisions governing the nonrenewal of homeowner's insurance policies and a decision regarding Nationwide's attempted nonrenewal of Appellant's policy based on the same. (R. pp. 115-116) The next day, Respondent filed its own Motion for Summary Judgment as to all issues in the case. Between those two motions alone, the parties filed a combined six briefs and one affidavit.[3] [4]

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[3] Respondents filed the following briefs dealing with the Motions for Summary Judgment: Third-party Defendants' [Nationwide and Parks] Memorandum in Support of Motion for Summary Judgment, filed Nov. 6, 2013; Third-party Defendants' [Nationwide and Parks] Memorandum in Opposition to Grier's Motion for Summary Judgment, dated November 8, 2013 ; Third-party Defendants' [Nationwide and Parks] Supplemental Memorandum in Opposition to Grier's Motion for Summary Judgment, dated Nov. 13, 2013; Third-party Defendants' [Nationwide and Parks] Supplemental Memorandum in Support of Motion for Summary Judgment, dated Nov. 13, 2013; and Affidavit of Tonya Parks in Support of Motion for Summary Judgment of Third- Party Defendants, dated Nov. 13, 2013.

[4] Appellant filed a Memorandum in Support of Grier's Motion for Summary Judgment, dated Nov. 9, 2013, and Third-party Plaintiff's Response to Third-party Defendants' Supplemental Memoranda Supporting and Opposing Summary Judgment, dated Nov. 27, 2013.

On the eve of trial, the Trial Court determined that the outstanding motions should be heard prior to trial and a hearing was held on November 28, 2012. At the hearing the parties were informed by the court that both summary judgment motions and Grier's Motion to Amend the Complaint would be heard. (R. pp. 242-363) Also of note, Respondents filed Third-party Defendants' Supplemental Memorandum in Opposition to Grier's Motion to Amend Answer and Third-party Complaint.

Trial court entered an Order on April 4, 2013, (1) denying Appellant's Motion to Amend the Complaint, (2) denying Appellant's Motion for Summary Judgment, and (3) granting Respondents' Motion for Summary Judgment as to all causes of action. The specific grounds upon which the trial court based the decisions was based in part on its decision that S.C. Code Ann. § 38-75-740 was inapplicable to non-renewal of the policy and, as a result, a contract of insurance was not in existence on the date of the loss as a matter of law. (R. pp. 5-15) Appellant timely filed a Motion to Reconsider the April 4th Order, denial of which was received on Sept. 30, 2013. (R. pp. 16-17) Appellant filed and timely served a Notice of Appeal on October 29, 2013.

## SUMMARY OF THE ARGUMENT

The right to notice is fundamental to our legal system. It is an integral part of due process and is statutorily required to protect a homeowner when an insurance company decides not to renew an insurance policy covering a home. An insurance company may not legally non-renew a policy without giving adequate notice to the homeowner and to the insurance agent.

The Trial Court obliterated this protection, leaving Ms. Grier without insurance coverage and without a means to recover for the complete loss of her home by fire. If this Court allows the summary judgment to stand, it will negate the intent of the legislature and leave South Carolina homeowners without the fundamental protection of notice when their policies are non-renewed.

In this case, Nationwide could not show that it provided requisite notice to the local agent, Tonya Parks, nor could Ms. Parks locate anything in her insurance file indicating that Nationwide had decided not to renew Ms. Grier's homeowners' policy, which she had held for nearly five years. (R. pp. 428-430) Further, the evidence establishes that before the fire Nationwide agreed with Ms. Grier's mortgage company to renew the insurance policy, accepted a check from the mortgage company for the premium for the next year, and then attempted, without notifying either Ms. Grier or the mortgage company, to issue a refund check to Ms. Grier. (R. p. 670) The refund check arrived in Ms. Grier's mailbox after the fire had destroyed her home. (R. p. 546, line 19) While she surveyed the charred ruins of her home from the front yard, slowly realizing

she had lost every possession, a Nationwide agent informed her she had no insurance coverage. (R. p. 546, line 24)

For these reasons, the Trial Court should not have granted summary judgment for the insurance company that, as a matter of law, Ms. Grier lacked insurance coverage. On these facts, the Trial Court should have granted summary judgment to Ms. Grier, finding that the insurance company failed to give proper notice of nonrenewal, that the policy was in full force and effect, and that Ms. Grier had coverage under the same.

## ARGUMENT

### I. THE TRIAL COURT ERRONEOUSLY CONSTRUED S.C. CODE ANN. § 38-75-740 AS INAPPLICABLE TO HOMEOWNER'S INSURANCE POLICIES IN CONTRAVENTION OF LEGISLATIVE INTENT AND PUBLIC POLICY

Interpretation of a statute is a question of law for the court. Univ. of S. California v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005); see also Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007), cert. denied, Oct. 1, 2007; Charleston County Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

This appeal involves interpretation and application of two statutes relating to the nonrenewal of property insurance policies, S.C. Code Ann. §§ 38-75-740 and 38-75-1160. These statutes are found, respectively, in Articles 9 and 13 of the insurance code. Generally speaking, both statues address notice requirements that insurers must meet in order to effectively nonrenew certain policies of insurance.

The Trial Court determined that the provisions of S.C. Code Ann. § 38-75-740 are inapplicable to an insurer's nonrenewal of homeowners insurance policies issued within the state. (R. pp. 5-15) Instead, the Trial Court determined that insurers need only

comply with the notice requirements set forth in S.C. Code Ann. § 38-75-1160 to effectively nonrenew such policies.

Respondents argue that S.C. Code Ann. § 38-75-740 in Article 9 was superseded and replaced by S.C. Code Ann. § 38-75-1160 in Article 13, thus reducing the notice requirements for nonrenewal of homeowner policies. To interpret Article 13 as replacing the provisions of 740 and Article 9, though, contravenes both public policy and the Legislature's purpose behind the enactment of Article 13 (and the concomitant revisions to Article 9). When enacted in 2004, these statutes were designed/revised expressly to expand protection for insured consumers, and the requirements set forth therein are *additional* requirements that an insurer must follow in order to legally nonrenew policies covering homeowners. Contrary to Respondents' position, these two statutes are intended to work in tandem, and both are applicable in this case.

The cardinal rule of statutory interpretation is to determine the intent of the legislature. Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Ct. App. 2005), cert. dismissed as improvidently granted, 374 S.C. 346, 649 S.E.2d 485 (2007); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003); Smith v. S.C. Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002); see also Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("The primary purpose in construing a statute is to ascertain legislative intent."). All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240,

242 (2002); Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998); State v. Morgan, 352 S.C. 359, 365-66, 574 S.E.2d 203, 206 (Ct. App. 2002); State v. Hudson, 336 S.C. 237, 246, 519 S.E.2d 577, 581 (Ct. App. 1999). "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." S.C. Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989).

The legislature's intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Stephen v. Avins Constr. Co., 324 S.C. 334, 339, 478 S.E.2d 74, 77 (Ct. App. 1996). The statutory language must be read in a sense that harmonizes with its subject matter and accords with its general purpose. Mun. Ass'n of S.C. v. AT & T Commc'ns of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004); Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); Morgan, 352 S.C. at 366, 574 S.E.2d at 206; Hudson, 336 S.C. at 246, 519 S.E.2d at 582.

If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Morgan, 352 S.C. at 367, 574 S.E.2d at 207; see also Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) ("[W]here a statute is ambiguous, the Court must construe the terms of the statute."). An ambiguity in a statute should be resolved in favor of a just, beneficial, and equitable operation of the law. Hudson, 336 S.C. at 247, 519 S.E.2d at 582; City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.

App. 1997); City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck, 330 S.C. 371, 376, 498 S.E.2d 894, 896 (Ct. App. 1998).

A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. See Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 621, 611 S.E.2d 297, 301 (Ct. App. 2005), cert. denied, June 2007; see also Georgia-Carolina Bail Bonds, 354 S.C. at 22, 579 S.E.2d at 336 ("A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute."). The real purpose and intent of the lawmakers will prevail over the literal import of the words. Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992).

Courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. See Liberty Mut. Ins. Co., 363 S.C. at 622, 611 S.E.2d at 302. "Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction." Id. (citing Tillotson v. Keith Smith Builders, 357 S.C. 554, 593 S.E.2d 621 (Ct. App. 2004)). These rules of statutory construction apply equally to statutes regulating insurance. See, e.g., Liberty Mut. Ins. Co., 363 S.C. at 622, 611 S.E.2d at 302.

### a. Article 9: Scope and non-renewal provisions

Article 9 of Chapter 75 of the South Carolina Insurance Law is entitled "Cancellation, Nonrenewal, and Renewal of Property and Casualty Insurance." Section 38-75-710 of Article 9 explains that "[t]his 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."

Sections 38-75-730 and 740 of Article 9 set forth the specific requirements an insurer must follow to cancel or non-renew a policy. Section 730(a) enumerates the only reasons for which an insurer may cancel or nonrenew a policy, which are in pertinent part (1) non-payment of premium, (2) material misrepresentation of fact by the insured, (3) substantial change in the risk assumed, (4) substantial breaches of contractual duties, conditions, or warranties, and (5) loss of the insurer's reinsurance. S.C. Code Ann. § 38-75-730.

Section 38-75-740 deals specifically with non-renewal, and provides the exclusive procedure an insurer must follow to nonrenew a policy for one of the reasons listed in section 38-75-730:

> (b) A policy written for a term of one year or less may be nonrenewed by the insurer at its expiration date by *giving or mailing written notice of nonrenewal to the insured and the agent of record*, if any, not less than sixty days prior to the expiration date of the policy for any nonrenewal that would be effective between November first and May thirty-first and not less than ninety days for any nonrenewal that would be effective between June first and October thirty-first.
>
> . . . .
>
> (d) The notice required by this section must be *given or mailed to the insured and the agent at their addresses shown in the policy or, if not reflected therein, at their last known addresses. Proof of mailing is sufficient proof of notice.*

S.C. Code Ann. § 38-75-740 (emphasis added).

This statute also states that "[n]o insurance policy may be nonrenewed by an insurer except in accordance with the provisions of this section . . . and any nonrenewal attempted which is not in compliance with this section . . . is ineffective." Thus, the notice must be given or mailed to both the insurer and the agent of record at their last known addresses.

**b. Article 13: Scope and non-renewal provisions**

The South Carolina Legislature enacted Act No. 290, the Property and Casualty Insurance Personal Lines Modernization Act, in 2004. See S.C. Code Ann. § 38-73-210, et seq. This Act provided for the addition of several new insurance provisions to Title 38, including Article 13 of Chapter 75, entitled "Property Insurance Cancellation and Nonrenewal." Like the other provisions in the 2004 Act, Article 13 is rooted in concerns about consumer protection. It applies only to property insurance on risks located in this state, and its primary purpose is to "promote the public welfare by regulating insurance rates to the end that they may not be excessive, inadequate, or unfairly discriminatory . . . ." S.C. Code Ann. §§ 38-75-1130(A)(1) and 38-75-1110(A)(1); see also S.C. Dept. of Ins. Report, *Coastal Property Insurance Issues in South Carolina* (Jan. 2007) (providing a general overview of property insurance reform and the 2004 Act).

Again, in the vein of consumer protection, the Legislature added S.C. Code Ann. § 38-75-1160, which provided requirements for the substantive content of any notice sent by an insurer in an attempt to cancel or nonrenew a policy on property covered by Article 13. The notice provisions of Article 13 are discussed in more detail below.

### c. The Omnibus Coastal Property Insurance Reform Act of 2007

In 2007, in response to growing concerns about damage resulting from recent hurricanes and other natural disasters affecting this state, the Legislature enacted the Omnibus Coastal Property Insurance Reform Act of 2007 ("Omnibus Act"). Act. No. 78, 2007 S.C. Acts 313; see also S.C. Dept. of Ins. Report, *Coastal Property Insurance Issues in South Carolina* (Jan. 2007). The Omnibus Act, among other things, provided tax credits for individual taxpayers who retrofit their properties to prevent hurricane loss, and it created limitations on insurance cancellation based on climatic conditions. See Act No. 78 at §§ 3, 14.

In addition, the Omnibus Act simultaneously revised the nonrenewal provisions of both Article 9 and Article 13 (in Sections 14 and 15 of the Omnibus Act, respectively). Act No. 78 at §§ 14-15. Specifically, both sections 38-75-740 and 38-75-1160 were updated to include identical, corresponding language regarding notices required for cancellations or nonrenewals that would become effective during hurricane season, which require a 90-day notice, versus those that would become effective otherwise, which require only a 60-day notice.

As discussed above, § 38-75-1160 mandates that certain content be included in a notice of cancellation or nonrenewal of an insurance policy covering property included in the scope of Article 13. This statute, in its current form as revised by the Omnibus Act, provides as follows:

> (A)(1) Except 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. This notice must:
>
> (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.

Nationwide argued, and the Trial Court agreed, that because § 38-75-1160 also includes language related to the nonrenewal of property insurance policies, it supersedes the nonrenewal provisions found in Article 9. This, the Trial Court reasoned, is because section 1160 is a "specific statutory provision" governing nonrenewal, thus it is exempted from the scope of Article 9, as set forth in § 38-75-710.

Appellant maintains, however, that § 38-75-1160 is not a specific nonrenewal provision within the meaning of § 38-75-710, precisely because it lacks the specificity

contained in §§ 38-75-730 and 740 limiting the reasons for nonrenewing insurance policies. "Where there is a statute dealing with a subject in general terms and another statute dealing with a part of the same subject in a more minute and definite way, the special statute will be considered as an exception to, or qualification of, the general statute and will be given effect. See Wilder v. South Carolina State Highway Dept., 228 S.C. 448, 90 S.E.2d 635 (1955). For example, § 38-75-730 sets forth a list of reasons for which a property or casualty insurance policy can be cancelled or nonrenewed, and insurers must cite one of those reasons. Section 38-75-1160, however, requires only that the insurer state the reason for nonrenewal and places no limit on the reasons for which a policy may be nonrenewed or cancelled. As such, Section 730 is more specific and cannot be supplanted by a generalized requirement in § 38-75-1160 that the insurer must simply state the reason. Likewise, § 38-75-740 specifies that proof of mailing is proof of notice, which suggests some burden on the insurer to show its compliance. Section 38-75-1160, however, is silent in this regard. Further, if the Trial Court's view that the statutes are in conflict were to stand, the substantive requirements and notification protections included in §§ 38-75-730 and 38-75-740 would no longer restrict an insurer's ability to cancel or non-renew homeowner's insurance policies covering property *within* this state. Surely the legislature did not intend this bizarre result.

In interpreting the interplay of these statutes, it is important to emphasize the Legislature's 2007 amendments, which concurrently revised the nonrenewal provisions at issue by, among other things, adding identical/corresponding language regarding the time for notice. The 2007 Omnibus Act also amended § 38-75-1160 to make it explicit that the provisions of § 38-75-730 form an exception to the terms contained in the newer

provision. The intent of the Legislature in making a statutory amendment is determined in light of the overall climate in which the legislation was amended. Stardancer Casino Inc. v. Stewart, 347 S.C. 377, 556 S.E.2d 357 (2001). In particular, a subsequent statutory amendment may be interpreted as clarifying original legislative intent. Stuckey v. State Budget and Control Board, 339 S.C. 397, 529 S.E.2d 706 (2000). In this instance, one need look no further than the plain language of the Omnibus Act, which only reiterates the fact the Legislature never intended § 38-75-1160 to supersede § 38-75-740:

> AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ENACTING THE "OMNIBUS COASTAL PROPERTY INSURANCE REFORM ACT OF 2007" . . . TO AMEND SECTION 38-75-740, RELATING TO THE NONRENEWAL BY AN INSURER OF A POLICY, SO AS TO MAKE THIS PROVISION CONSISTENT WITH THE PROVISIONS OF SECTION 38-75-730; TO AMEND SECTION 38-75-1160, RELATING TO NOTICE REQUIREMENTS AND EXCEPTIONS BEFORE CANCELLATION OR REFUSAL TO RENEW A POLICY OF INSURANCE, SO AS TO INCREASE THE TIME PERIOD FOR NOTIFYING AN INSURED OF THE CANCELLATION OR REFUSAL TO RENEW A POLICY OF INSURANCE, ADD OTHER PROVISIONS WHICH MUST BE INCLUDED IN THE NOTICE, AND PROVIDE OTHER EXCEPTIONS TO THIS PROVISION.

Act No. 78, 2007 S.C. Acts 313.

Shortly after the passage of the Omnibus Act, the South Carolina Department of Insurance (the "Department") weighed in on the matter and issued a bulletin harmonizing the statutes and determining that notice requirements are cumulative and not mutually exclusive. See S.C. Dept. of Ins. Bulletin No. 2007-05 (June 11, 2007). 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 nonrenewal 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 days prior to the expiration of the policy." Id. at 7 (emphasis added). At the conclusion of the explanation the Department restates the language of § 38-75-710, confirming that the "revised cancellation and notice requirements apply 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." Id. at 9. Clearly the Department does not share the Trial Court's view that § 38-75-1160 is excluded from the scope of Article 9 and/or supersedes § 38-75-740. Rather, the Department is aligned with Appellant in that these notice and nonrenewal notice provisions are cumulative, not exclusive.[5]

This interpretation of the Act by the Department carries significant weight. South Carolina has long recognized the rule that an opinion or construction of a statute by an agency that is in charge of enforcing the statute should be given great deference. The construction of a statute by the agency charged with its administration will be afforded the most respectful consideration and will not be overruled absent compelling reasons. Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, (2006), quoting Brown v. South Carolina Dep't of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002); see also Nucor Steel, a Div. of Nucor Corp. v. South Carolina Public Serv. Comm'n, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992) ("Where an agency is charged

[5] *See also* Department of Insurance Frequently Asked Questions (showing that non-renewal *notice* is governed by § 38-75-740), *http://doi.sc.gov/faqs/Pages/Homeowners.aspx* (last visited Mar. 18, 2014).

with the execution of a statute, the agency's interpretation should not be overruled without cogent reason.").

Given that issues regarding the initial implementation of Article 13 were brought to the Department's attention after the passage of the 2004 Act and subsequently addressed by both the Department's bulletins and reports, and the legislative amendments three years later, it is reasonable to conclude that if the Legislature had intended Article 13 to replace and be exempted from the scope of Article 9, it would have said so. In the absence of legislative discourse on this subject, and in light of the rule requiring harmonization of competing statutory provisions, the intent of the Legislature cannot be furthered by allowing insurance companies to cancel or non-renew homeowner policies by providing less notice than that required by § 38-75-740. The Legislature intended, and the express language of § 38-75-740 requires, that for nonrenewal to be effective the insurance company must give or mail notice of nonrenewal to both the insured and the agent.

## II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF NATIONWIDE ON THE ISSUE OF THE EXISTENCE OF A CONTRACT BECAUSE NATIONWIDE DID NOT COMPLY WITH THE STATUTORY REQUIREMENTS FOR NONRENEWAL OF GRIER'S INSURANCE POLICY UNDER S.C. CODE ANN. § 38-75-740

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court under Rule 56(c), SCRCP. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009). Rule 56(c) provides that summary judgment shall be granted where "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." In ascertaining whether any triable issue of fact exists, the

evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004).

Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. Id.

Both the South Carolina Supreme Court and the Fourth Circuit have ruled that the party asserting cancellation of an insurance policy bears the burden of proving strict compliance with the established procedure for cancellation. Moore v. Palmetto Bank & Textile Ins. Co., 238 S.C. 341, 120 S.E.2d 231 (1961); South Carolina Nat'l Bank v. Lumberman's Mut. Cas. Co., 526 F.Supp. 94 (D.S.C. 1981) (applying South Carolina law and holding the insurer failed to carry its burden of proving that notice was actually placed in the mail and thus, even if mere proof of mailing of notice of cancellation were sufficient to relieve insurer of liability under the policy, loss payee was entitled to judgment against insurer); see also 45 C.J.S. Insurance § 821 (2012) ("[t]he burden of proving that there has been a cancellation of a policy rests on the party asserting it. So, where the company, in an action on the policy, defends on the ground that the contract or policy had been canceled, it has the burden of proving cancellation, and incidentally of proving its compliance with conditions precedent to the right to cancel.").

If S.C. Code Ann. § 38-75-740 does apply, then Nationwide had the burden of proving that it "gave or mailed" notice of nonrenewal to both Ms. Grier and the agent of

record -- Tonya Parks. As set forth in subsection (a) of § 38-75-740, "[n]o insurance policy may be nonrenewed by an insurer except in accordance with the provisions of this section . . . and any nonrenewal attempted which is not in compliance with this section . . . is ineffective." The South Carolina Supreme Court has addressed the respective meanings of *giving* and *mailing* notice in the context of insurance policies, noting that the terms "mailing written notice" and "giving written notice" are not "necessarily synonymous or substantially similar." Edens v. S.C. Farm Bureau Mut. Ins. Co., 279 S.C. 377, 308 S.E.2d 670 (1983).

To comply with language mandating that notice shall be "given," the intended recipient "shall personally receive the notice in such manner that the insured becomes aware of having received it." Edens, 279 S.C. at 379, 308 S.E.2d at 671. "The provision involves a physical delivery to the insured of a document of which he becomes personally aware." Id. (quoting Selken v. Northland Insurance Company, 249 Iowa 1046, 90 N.W.2d 29 (1958)). In Edens, the Court noted that policy cancellation is an affirmative defense that must be proved by the preponderance of the evidence. Id. at 380, 308 S.E.2d at 671. The Court ultimately held that where language required only the "giving" of notice, the insurance company's failure to offer any proof that the cancellation notice was *received* rendered cancellation ineffective. Id.

Nationwide has provided no evidence that notice was mailed to Parks, the agent of record. Nationwide pointed only to the fact that Parks' agent number was shown in the "CC" section of the January 14, 2011, non-renewal letter mailed to Ms. Grier. (R. pp. 708-712; R. p. 413, lines 9-20; R. p. 414, lines 13-25; R. p. 430, lines 7-21; R. p. 434, lines 8-19; R. p. 465, lines 5-22) The obvious purpose of requiring notice to be sent to

the agent of record is so that the agent can notify the insured directly, for the mail is not an infallible delivery system. However, Nationwide failed to produce any reliable evidence whatsoever proving that the letter was actually mailed to Parks. In fact, the mailing log from January 14, 2011, produced by Nationwide contains entries allegedly showing that the non-renewal notice was mailed to Ms. Grier and to GMAC, but it contained no corresponding entry for Parks. (R. pp. 666-668)

The affidavit of Franklin Jefferies, the Nationwide underwriter responsible for making the decision not to renew Ms. Grier's policy, further undermines Nationwide's attempt to prove it delivered or mailed notice to the agent of record. (R. pp. 560-562) In his affidavit, Jefferies provided the following testimony regarding his actions with respect to the non-renewal of Ms. Grier's policy:

> When I create a non-renewal letter to be sent to a policyholder, my normal business practice is to check the box in the software macro that automatically sends a notice to the Nationwide agent for the policy. I do this approximately 240 times per year, and I have no reason to believe I did it any differently when I created the non-renewal letter on April 21, 2010. In this case the agent was Tonya Parks.

(R. p. 561)

Mere testimony of compliance with routine business practices to demonstrate compliance with procedures regarding notice, without actual proof of mailing or receipt by the intended party, is insufficient to satisfy the insurer's burden of proving strict compliance with relevant nonrenewal provisions. See, e.g., Lumberman's Mut. Cas. Co., 526 F.Supp. at 96. Nationwide's reliance on Mr. Jefferies' testimony regarding his normal business practices, without any other evidence to support the actual mailing of this notice, is insufficient to satisfy the requirements of § 38-75-740.

As for delivery of the notice of nonrenewal to the agent of record, the record contains conflicting evidence regarding whether Parks actually received any notice of nonrenewal more than 60 days prior to the end of the policy period. As discussed above, to comply with a requirement that notice be *given*, the burden is on the insurer to prove actual receipt. The testimony given by Parks in her September 12, 2012, deposition indicated she had no record of the January 14, 2011, non-renewal letter and, in fact, she could not state with certainty that she had seen it – or any other notice of non-renewal - prior to the date of loss. (R. pp. 408-414; R. pp. 416-418; R. pp. 428-434; R. pp. 437-445; R. pp. 448-457; R. p. 465)

On November 13, 2012, two weeks before the dispositional hearing in this matter, Parks filed an Affidavit stating she had received notice of the nonrenewal via Nationwide's internal messaging system "at some time prior to when Ms. Grier's claim arose in April 2011". (R. pp. 579-580) Notably, no copy of the notice of nonrenewal is in the insurance file kept by Ms. Parks on Ms. Grier. Ms. Parks does not state in her affidavit that she received the notice at least 60 days prior to the end of the policy period, a glaring omission.

In order to defeat summary judgment, under the standard iterated by the courts of this state, the burden is on the Respondent to show the absence of any triable facts. Further, at the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact, "[n]or does the judge make credibility determinations with respect to statements made in affidavits . . . or depositions." L&W Wholesale, Inc. v. Gore, 305 S.C. 250, 470 S.E.2d 658 (Ct. App. 1991) (quoting T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)). See

also ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 320 S.C. 143, 463 S.E.2d 618 (Ct. App. 1995), rev'd in part on other grounds, 327 S.C. 238, 489 S.E.2d 470 (1997).

Ms. Grier, as the non-moving party, need only point to the existence of triable facts regarding whether an insurance contract could have been in place on April 6, 2011, the date of loss. Even if Ms. Parks' undocumented statement in her affidavit were to be admissible despite contradicting her prior deposition testimony, the conflicting testimony creates a triable issue of fact about whether notice was actually "given" or "delivered" to the agent of record within the time period required. As a consequence, the grant of summary judgment in favor of Nationwide should be reversed.

## III. THE TRIAL COURT ERRED IN CONCLUDING THAT GRIER'S BREACH OF CONTRACT CLAIM AGAINST NATIONWIDE FAILS AS A MATTER OF LAW

Even if this Court determines that Nationwide produced conclusive evidence that it complied fully with the notice requirements for nonrenewal, Nationwide renewed the insurance policy at the request of Ms. Grier's mortgage servicer and accepted the premium for such renewal. As such, there was a renewed insurance policy in effect on the date of loss.

### a. Nationwide and GMAC Agreed to Renew the Insurance Policy in March 2011

In South Carolina, an insurance policy is a contract like any other, and must be construed according to the rules applicable to contracts. Equitable Trust Co. v. Epling, 168 S.C. 494, 167 S.E. 820 (1933). Under South Carolina contract law, two parties create a binding contract if there is a mutual manifestation of assent to the terms. Edens v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). "The 'meeting of minds' required to make a contract is not based on secret purpose or intention on the part

of one of the parties . . . but must be based on purpose and intention *which has been made known*[.]" Clardy v. Bodolosky, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (quoting Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)) (emphasis supplied).

The record includes evidence that Nationwide, despite allegedly noticing nonrenewal in January 2011, agreed afterward to renew Grier's insurance policy. On March 11, 2011, four weeks before the fire, a representative of GMAC, the servicer of Grier's mortgage, called Nationwide to confirm renewal of Grier's insurance policy. (R. pp. 216-221; R. p. 555, lines 5-14; R. p. 556, line 9-p. 557, line 3; R. p. 738) When GMAC asked about renewal, Nationwide replied that "the renewal is running from 3-24-11 through 3-24-12." Id. Thus, although Nationwide alleges it gave notice of nonrenewal in January 2011, in March 2011 Nationwide unequivocally informed GMAC that Nationwide was renewing the policy. Id.

In the recorded conversation of March 11, 2011, between GMAC and Nationwide, the Nationwide representative also confirmed the coverage amounts, the types of coverage, and confirmed that GMAC was included as an additional insured on the policy. Id. Thus, all the material terms of the renewed insurance policy were "made known" in this telephone call. Nationwide cannot now contend that it may have had a contrary, subjective intent to non-renew the policy at that time. See Clardy, 383 S.C. at 425, 679 S.E.2d at 530. The fact remains that Nationwide manifested assent to the terms of the renewal with the March 11, 2011 phone call.

Further confirming the policy renewal, several days later GMAC sent to Nationwide a check for $993.00–the amount of the premium as confirmed in the audio

recording. (R. p. 461; R. pp. 216-221) Nationwide negotiated the check and accepted the funds before returning them to Grier, as evidenced by the fact that it drew the check on its own account. (R. p. 670) This fact, too, supports the inference that Nationwide agreed to renew the insurance policy, despite its previous attempt at non-renewal.

The Trial Court ignored this evidence in granting Nationwide's Motion for Summary Judgment on Grier's breach of contract claim. (R. pp. 5-15) ("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."). On the contrary, the evidence of the GMAC phone call and Nationwide's acceptance of funds supports a conclusion that insurance was in place on April 6, 2011, either through Nationwide's withdrawal of the nonrenewal notice, or through the issuance of a new policy. Thus, the Trial Court erred in ruling as a matter of law that Ms. Grier has no breach of contract claim against Nationwide.

**b. GMAC was Grier's Agent and Renewed the Contract on Grier's Behalf**

In South Carolina, "[a]gency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." Froneberger v. Smith, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006)). Agency is a question of fact, and it can arise by express appointment or by implication. Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984).

Here, GMAC had express authority to act on Grier's behalf to renew the insurance policy with Nationwide. This authority arose from the Mortgage, executed by Grier in 2002, to Aegis Mortgage Corporation, predecessor-in-interest to Bank of New

York Mellon Trust Company ("BNY Mellon"). (R. pp. 21-22) Section 5 of the Mortgage states, "If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense." (R. p. 22) The Mortgage further provides that the replacement coverage "shall cover lender, but might or might not cover Borrower[,]" thus plainly granting Lender, in this case BNY Mellon, authority to purchase insurance that covers Grier. Id. GMAC, as servicer of the mortgage, was the authorized agent of BNY Mellon to carry out BNY Mellon's rights under the Mortgage. (R. p. 35; R. p. 36) Thus, the Mortgage expressly authorized BNY Mellon–and GMAC by extension–to obtain insurance coverage on Grier's behalf. The record supports that GMAC acted in this capacity when it confirmed renewal in the March 2011 phone call to Nationwide.

Even if GMAC lacked express authority to renew the policy, an argument neither GMAC nor Ms. Grier is making, it nevertheless had the implied authority to do so. In South Carolina, the existence of an agency relationship "need not depend upon express appointment and acceptance thereof, but may be, and frequently is, *implied by the words and conduct of the parties and the circumstances of the particular case.*" Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 243; 597 S.E.2d 165, 168 (Ct. App. 2004) (emphasis supplied). GMAC, as servicer of Grier's mortgage, escrowed payments from Grier and used the escrow account to pay Grier's premiums to Nationwide. (R. p. 536, line 20-p. 537, line 11) Evidently, this authority extended to renewals, as a renewal in fact did occur for March 2010 through March 2011. (R. p. 35) Based on these facts, a jury could conclude that GMAC had the necessary authority to renew the Nationwide policy on Grier's behalf, and in fact did so in the March 11, 2011, phone call to

Nationwide. Because the record contains sufficient evidence for a jury to conclude that GMAC was authorized to and did renew the insurance policy for Grier, this Court should reverse the grant of summary judgment on Grier's breach of contract claim against Nationwide.

### c. Grier was a Third-Party Beneficiary to the Renewal Between GMAC and Nationwide

In South Carolina, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person. Wogan v. Kunze, 366 S.C. 583, 604, 623 S.E.2d 107, 119 (Ct. App. 2005) (quoting Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997).

As stated, the record unequivocally shows that GMAC spoke with Nationwide by telephone in March 2011 and confirmed the renewal, coverage period, and coverage types for an insurance policy on Grier's home. (R. pp. 216-221) The individuals on the phone call clearly discuss renewing a policy to which Grier was originally a party and in which she has a significant interest. Id. It cannot be legitimately disputed that, as the named insured and owner of the home being insured, Grier was a third-party beneficiary to the agreement to insure her home, which GMAC and Nationwide entered, and which was effectuated through the payment and acceptance of the premium.

As such, summary judgment should not have been granted to Nationwide on Grier's breach of contract claim based on the fact that she had no rights in the contract evidenced by the March 2011 phone recording.

## IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON GRIER'S BAD FAITH CLAIM AGAINST NATIONWIDE

A party can prevail on a bad faith claim by demonstrating that (1) there was a mutually binding insurance contract; (2) the insurer refused to pay benefits due under the contract; (3) the refusal resulted from insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing; and (4) the bad faith refusal to pay benefits proximately caused damages. Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996). "Bad faith is a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim." Doe v. S.C. Med. Mal. Liab. Joint Underwriting Ass'n, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001) (internal citations and quotation marks omitted). See also American Fire & Cas. Co. v. Johnson, 332 S.C. 307, 311, 504 S.E.2d 356, 358 (Ct. App. 1998). Moreover, "the covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed." Mixson, Inc. v. Am. Loyalty Ins. Co., 349 S.C. 394, 400, 562 S.E.2d 659, 662 (Ct. App. 2002).

The record supports that 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. (R. pp. 216-221) Thus, the evidence supports elements (1) and (2) from Cock-N-Bull Steak House. Element (4) is met, as well, because Grier would have recovered value for her loss, had Nationwide honored the renewed policy.

There is also evidence from which a jury could conclude that Nationwide refused to pay in bad faith. Despite its allegation that it attempted a non-renewal as of January 2011, Nationwide represented to GMAC in March 2011–two months later–that the renewal would in fact be effective from March 24, 2011 to March 24, 2012. (R. pp. 216-

221) Nationwide's self-contradiction supports the inference that Nationwide notified Grier of the non-renewal, reversed course when GMAC offered Nationwide money in March 2011, but then got buyer's remorse in April 2011, immediately after learning of the fire. If Nationwide opted to deny when coverage was in effect in order to avoid paying a legitimate claim, rather than because it had attempted a non-renewal, then Nationwide was not exercising honest judgment in denying Grier's claim.

The origin and timing of the evidence surrounding the fire's date casts doubt on Nationwide's election to deny based on non-renewal. Again, Nationwide negotiated the $993.00 GMAC check before returning the funds directly to Grier, as evidenced by the fact that Nationwide drew the check on its own account. (R. p. 670) Nationwide also received the GMAC check on March 22, 2011, nine days before the alleged April 1, 2011, issuance date on the refund check. (R. p. 45) Grier did not receive the check until after the fire. (R. p. 37) Although Nationwide offered proof of mailing for the January non-renewal letter, Nationwide offered no such proof with respect to the April 1, 2011, check to Grier.

Furthermore, the non-renewal notices that Jeffries allegedly sent to Parks in January 2011 were conspicuously absent from Parks' file for Grier's policy. (R. pp. 428-430) [6] Parks admitted in her deposition that prior to the date of the fire, her office file for Grier's policy contained no notice of non-renewal. Id. Parks testified further that she did not recall ever receiving a non-renewal notice from Nationwide until *after* the fire,

[6] In her deposition Parks testified regarding the renewal notice letters as follows: "Q. Before April 6, 2011 . . . you did not have a copy of these letters in your file; is that correct? . . . A. I could not find the letters in my file."

though she later altered her testimony with her summary judgment affidavit. Id. at 71. (R. pp. 579-580) [7] [8]

In sum, the facts Nationwide has proffered as evidence that it properly effectuated a nonrenewal, and that came from parties other than Nationwide, did not surface until *after* the date of the fire. As Nationwide's credibility is already in doubt due to its self-contradictory statements regarding renewal in January and March 2011, Nationwide's self-produced and self-serving evidence cannot foreclose the jury from considering the bad faith issue. Thus, the Trial Court erred, and Grier requests this Court to reverse the grant of summary judgment on her bad faith denial claim.

## V. THE TRIAL COURT ERRED IN DENYING GRIER'S MOTION TO AMEND

Ordinarily, a motion to amend a pleading is addressed to the discretion of the trial court. Porter Bros., Inc. v. Specialty Welding Co., 286 S.C. 39, 41, 331 S.E.2d 783, 784 (Ct. App. 1985). On appeal, however, a denial on a motion to amend can be overturned if the movant-appellant demonstrates that an abuse of discretion or manifest injustice has occurred. Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997).

### a. Grier's Proposed Negligent Misrepresentation Claim Against Nationwide Was not Futile

To establish liability for negligent misrepresentation, a plaintiff must show the following by a preponderance of the evidence: (1) that the defendant made a false representation to the plaintiff; (2) that the defendant had a pecuniary interest in making

[7] Regarding knowledge of non-renewal Parks testified as follows: "Q. So you don't know whether or not you were ever mailed anything about the cancellation of this policy prior to April 7, 2011; is that correct? A. I don't recall. Q. Do you recall getting any emails about the cancellation of this policy prior to April 6, 2011. A. I can't recall. Q. Do you recall having any discussions with anyone about the cancellation of this policy prior to April 6, 2011? A. Not that I recall."

[8] In her affidavit, Parks testified, "At some point prior to when Ms. Grier's claim arose in April 2011, I received notice that the policy would not be renewed at the next renewal period due to specific hazardous conditions on the property."

the representation; (3) that the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) that the defendant breached that duty by failing to exercise due care; (5) that the plaintiff justifiably relied on the representation; and (6) that the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766 (2011).

In the proposed Amended Answer and Third Party Complaint, Grier sought to plead negligent misrepresentation based on Nationwide's phone call with GMAC in which Nationwide represented to GMAC that it would renew Grier's insurance policy for March 24, 2011 through March 24, 2012, a period which would have included the date of loss of Ms. Grier's home to fire. (R. pp. 69-83) The Trial Court ruled that Grier's proposed amendment to include negligent misrepresentation against Nationwide was futile based on a purported failure to plead the first element – that the false representation was made to Grier. (R. pp. 5-15) Specifically, the Trial Court held that Grier stated that the negligent misrepresentation was made to GMAC as a third-party and therefore was not made directly to Grier. Id. The Trial Court, however, failed to acknowledge that paragraph 58 of the proposed Amended Answer and Third-Party Complaint read that, "[a]t all times relevant hereto GMAC was acting agent for, in the interest of, on behalf of, and for the benefit of [Grier]." (R. p. 77) Beyond this document, ample facts support the conclusion that GMAC was an agent for Grier. (See previous discussion of GMAC's agency, *supra.*) By alleging that GMAC was Grier's agent, Grier effectively pleaded that Nationwide's misrepresentation to GMAC was also a misrepresentation to Grier. Thus, the proposed amendment was not futile for failing to state an essential element of the

claim.

**b. No Prejudice Would Have Resulted to Nationwide**

When considering a motion to amend, leave is to be "freely given when justice so requires and does not prejudice the other party." Rule 15(a), SCRCP. However, "the prejudice that Rule 15 envisions is 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, 494 S.E.2d 820, 823 (1998).

The Trial Court concluded that adding the negligent misrepresentation claim would have been prejudicial to Nationwide because of the procedural posture of the case, which was at the summary judgment stage and approaching trial. (R. pp. 5-15) The Court specifically cited the fact that Nationwide had already deposed Grier. Id. However, the Trial Court disregarded the fact that Nationwide had both ample notice of the new cause of action before deposing Grier, and ample opportunity to refute the claim.

Nationwide served discovery responses upon Grier on May 11, 2012, which prompted Grier to file her Motion to Amend on June 8, 2012, less than four (4) weeks later. (R. pp. 67-68) Thus, as of June 8, 2012, Nationwide was aware of Grier's intent to add the claim of negligent misrepresentation to the Third-Party Complaint. Nationwide deposed Grier on September 10, 2012, three (3) months *after* Nationwide received notice of the negligent misrepresentation claim. (R. pp. 534-551) Moreover, the summary judgment hearing took place at the end of November, thus granting Nationwide nearly six (6) months to prepare for, anticipate, and refute Grier's negligent misrepresentation claim. (R. pp. 5-15) As such, it is disingenuous for Nationwide to contend that it did not have notice of the misrepresentation and a chance to defend itself. There would have been no prejudice to Nationwide in allowing the claim to be added.

### c. The Trial Court's Decision Resulted In Injustice to Grier

Given the Trial Court's ruling that the March 11, 2012, conversation between Nationwide and GMAC did not create an agreement to renew the policy or a retraction of Nationwide's notice of non-renewal, disallowing Grier's claim for negligent misrepresentation caused the greatest injustice to Ms. Grier that could occur in this case – she was left without insurance upon the asset most prized by almost every citizen, and no legal redress.

When the actual non-futility of Grier's negligent misrepresentation claim is considered alongside the nonexistent "prejudice" allegedly suffered by Nationwide, the Trial Court did abuse its discretion and manifest injustice to Grier is the result. As such, Grier urges this Court to overturn the denial of her Motion to Amend.

## CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court:

a) Enter a finding that S.C. Code Ann. § 38-75-740 applies to the nonrenewal of homeowner's insurance policies;

b) Enter a finding that Nationwide did not comply with the requirements set forth in S.C. Code Ann. § 38-75-740 and a contract of insurance existed on the date of loss;

c) Enter a finding that Ms. Grier's policy was renewed by virtue of Nationwide's communications and acceptance of premium, thus resulting in a contract of insurance that existed on the date of loss;

d) Reverse the Trial Court's April 4, 2013, Order granting Respondents' Motion for Summary Judgment on the existence of a contract;

e) Reverse the Trial Court's finding that Ms. Grier's causes of action for bad faith is precluded as a matter of law;

f) Reverse the Trial Court's denial of Ms. Grier's Motion to Amend Answer and Third-Party Complaint and enter a finding that she is entitled to the same.

Respectfully submitted,

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September 25, 2014
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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Case No. 2011-CP-40-6103

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Bank of New York Mellon Trust Company, National Association f/k/a The Bank of New York Trust Company, N.A. as successor to JPMorgan 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,

v.

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

v.

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

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**CERTIFICATE OF COUNSEL**

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

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September 25, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals



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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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**PROOF OF SERVICE**

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I, the undersigned attorney at Moon Law Firm, attorneys for Appellant, do hereby certify that on the 25th day of September, 2014, counsel for Respondents in this action were served with copies of the documents specified below by placing a copy of the same in the U.S. Mail, with due and proper postage affixed thereto, to the following address(es):

Documents: APPELLANT'S FINAL BRIEF
APPELLANT'S FINAL REPLY BRIEF

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