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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

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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SUMMARY OF THE ARGUMENT

In their Initial Brief, Respondents proffer an interpretation of South Carolina's insurance policy nonrenewal statutes that is unsupported by the plain language of the statutes and that contravenes the public policy behind the statutes. Nationwide then urges the Court to conclude as a matter of law that both Grier and Grier's insurance agent, Parks, received a non-renewal notice in January 2011, despite evidence to the contrary.

Next, Nationwide urges the Court to find as a matter of law that GMAC and Nationwide did not renew Grier's insurance policy, despite that in a telephone call on March 11, 2011, Nationwide promised to GMAC it would renew coverage that would have covered Grier's loss, and despite the fact that Nationwide negotiated a GMAC premium check toward that coverage. Although Nationwide insists that, as a matter of law, GMAC was not Grier's agent, the question of GMAC's agency is a *question of fact* supported by evidence in the record. Moreover, Nationwide failed to contest Grier's argument that even if GMAC was not an agent, Grier was still a third-party beneficiary to the March 11, 2011, agreement to renew.

Nationwide insists that its denial of Grier's insurance claim was not in bad faith; however, the fact that Nationwide accomplished a renewal on March 11, 2011, and that Grier received both the returned premium and notice of non-renewal for the first time *after* the date of loss should be sufficient for Grier's bad faith claim to survive summary judgment and reach a jury.

Lastly, the denial of Grier's motion to amend was an abuse of discretion because the denial resulted from the Trial Court's significant delay in ruling on the motion to

amend. The motion was not futile because GMAC's agency for Grier is a question of fact supported by evidence in the record.

ARGUMENTS

I. S.C. CODE ANN. §§ 38-75-740 AND 38-75-1160 ARE CUMULATIVE NONRENEWAL NOTICE REQUIREMENT STATUTES AND AN INSURER'S COMPLIANCE WITH BOTH IS NECESSARY TO EFFECTIVELY NON-RENEW A SOUTH CAROLINA HOMEOWNER'S INSURANCE POLICY.

The South Carolina Code sections at play are §§ 38-75-740 and 38-75-1160.

Section 38-75-740 reads as follows:

> (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.

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

Section 38-75-1160 reads:

> (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. . . .

S.C. Code Ann. § 38-75-1160 (emphasis added).

Analyzing the plain language of both statutes demonstrates that § 38-75-1160 is intended to operate as *cumulative* with, rather than to the *exclusion* of, § 38-75-740. Section 38-75-740 states that a policy ***"may be nonrenewed by"*** providing notice to *both* the insured *and* the insurance agent of record. S.C. Code Ann. § 38-75-740. On the other hand, § 38-75-1160 states that a refusal to renew is ***"not effective unless"*** a notice

is given to the insured in the form approved by the Director of the Department of Insurance informing the insured of certain rights and options for alternate coverage.

The significant interplay of these two clauses lies in the conditions/requirements that follow the clause "may be nonrenewed by," under § 38-75-740, which can logically be read as a complete list of conditions the insurer must meet in order to effectuate nonrenewal of an insurance policy. By contrast, the conditions that follow the clause "not effective unless," under § 38-75-1160 cannot be logically read as comprising the complete set of requirements for effective nonrenewal; rather, the more logical reading of § 1160 is that it places *additional* requirements on the insurer by mandating certain content to be included in any nonrenewal or cancellation notice provided to an insured. In sum, the plain language of the statutes demonstrates the Legislature's intent that § 38-75-1160 *supplement* § 38-75-740 as to South Carolina property owners, not replace it, as Nationwide contends. Had the Legislature intended to replace § 38-75-740 with § 38-75-1160 with respect to South Carolina property owners, it would have used language to show that the conditions listed in § 38-75-1160 were the only conditions/requirements for effective nonrenewal.

This argument further supports the notion that the Legislature granted an added layer of protection for South Carolina property owners when it enacted § 38-75-1160. (See Brief of App. at 13.) As Nationwide itself notes, "[t]he legislature is clearly more concerned about property within the State than it is about property elsewhere." (See Brief of Resp. at 29.) To conclude, as Nationwide does, that § 38-75-1160 provides the complete conditions for nonrenewing in South Carolina would be to conclude that South Carolina property owners are now less protected.

Perhaps the simplest, yet most elucidating, distinction between §§ 38-75-740 and 38-75-1160, and one which wholly supports their supplementary/complementary relationship, lies in their respective mechanisms. Section 38-75-1160 is a statute governing the *content* of cancellation and non-renewal notices, not one governing the procedural mechanics of whether and to whom such notices must be sent. It was enacted to provide additional protections to insureds when their homeowner's insurance policy is slated for cancellation or nonrenewal. Section 38-75-1160 specifically exempts from its application policy cancellations for an insured's non-payment of premiums, a basis for cancellation wholly within the insured's control. The remaining reasons for which an insurer may attempt to cancel or non-renew a homeowner's insurance policy are subjective to the insurance company, and without the notice content requirements of § 38-75-1160, homeowners would be at a much higher risk of unwittingly leaving their greatest asset unprotected.

Further, Article 13 could not have been intended as a "specific statutory provision" exempting homeowner's insurance policies covering property within this state from the notice requirements of Article 9, thereby relieving insurers from the inconvenient burden of notifying their agents in addition to the insured. Section 1160 does not mention agents because they are not the intended beneficiaries of the content requirements set forth therein. Insurance agents, as representatives of insureds, nevertheless remain a necessary conduit between the insurance company and these individuals. To view Article 13 as replacing Article 9, thereby diminishing the insurance company's notice requirements for policy cancellation or nonrenewal, contravenes the entire purpose of Article 13 and public policy in general.

II. MATERIAL ISSUES OF FACT REMAIN AS TO WHETHER PARKS, THE AGENT OF RECORD, RECEIVED NONRENEWAL NOTICE, AND AS TO WHETHER GRIER, THE INSURED, RECEIVED NOTICE OF NONRENEWAL.

The Trial Court is not to grant summary judgment unless the moving party demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. 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).

Both Nationwide and the Trial Court misrepresented Grier's position at the hearing with respect to whether or not Grier, herself, actually received notice. (See Brief of Resp. at 8, 22; R. pp. 5-15) At the hearing, Grier merely conceded the Court's legal argument that "the statute doesn't require receipt" if there is sufficient proof of mailing. (R. p. 277, line 17-p. 278, line 10) In fact, Grier maintained that she did not actually receive notice of nonrenewal. (R. p. 277, lines 17-23) ("The Court: What do you mean 'there's evidence that goes both ways?' Ms. Moon: Ms. Grier is – there's testimony that Ms. Grier said that she did not receive – The Court: But the statute doesn't require receipt, does it? Ms. Moon: Right.") [1]

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[1] Respondents also improperly assert, and the Trial Court incorrectly inferred, that Appellant's counsel's statement at the November 2012 hearing that notice to Grier was not in dispute served as a concession of Grier's receipt of the January 24, 2011, nonrenewal notice. (Brief of Resp. at 8, 22; R. p. 10) To the contrary, this statement by Grier's counsel was merely to clarify the scope of the argument immediately at bar, which was Grier's Motion for Summary Judgment, and nothing more. (R. p. 277, line 11-p. 278, line 17) It

Respondents take issue with Appellant's reliance on Edens v. South Carolina Farm Bureau Mutual Ins. Co., 279 S.C. 377, 308 S.E.2d 670 (1983) because that case dealt with cancellation rather than non-renewal and interpreted insurance policy language rather than statutory language. (See Brief of Resp. at 33-4.) Appellant relies on Edens solely to point out that the South Carolina Supreme Court refuses to view "mailing written notice" and "giving written notice" as synonymous or even substantially similar. Id. at 379, 308 S.E.2d at 671. As a concept so general is bound to have wide application, it should be of no consequence whether the "notice" being given relates to cancellation or nonrenewal, nor should it matter whether the notice at issue in any particular situation is mandated by contract or statute. As with Moore v. Palmetto Bank & Textile Ins. Co., 238 S.C. 341, 120 S.E.2d 231 (1961), and South Carolina Nat'l Bank v. Lumbermen's Mut. Cas. Co., 526 F.Supp. 94 (D.S.C. 1981), Edens provides support for the notion that cancellation or non-renewal of an insurance policy is an affirmative defense, and the party attempting to truncate an insurance policy bears the burden of proving strict compliance with established procedures. Id. at 380, 308 S.E.2d at 671.

In the instant case, Nationwide had the burden to prove that it either mailed or gave notice to its agent, Tonya Parks. Nothing in the record indicated that notice was actually mailed to Parks, and there is myriad conflicting testimony regarding Parks' receipt of the same prior to the date of Grier's loss. (R. pp. 408-414; R. pp. 416-418; R. pp. 428-434; R. pp. 437-445; R. pp. 448-457; R. p. 465) Thus, the Trial Court erred in

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would be improper to construe this statement as any global concession or waiver made on Grier's behalf.

holding that, as a matter of law, Respondents satisfied their burden of strict compliance with the provisions contained in S.C. Code Ann. § 38-75-740.

Although the Trial Court may have been correct in its legal argument that the statute is met if mailing is proven, this argument is merely legal in nature and not factual. The fact that Grier contested actually receiving notice is nevertheless probative on the *factual* question of whether mailing occurred. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 410, SCRE. It is common knowledge that letters, when actually mailed, generally reach the intended recipients. Moreover, it is important to reiterate that the burden is on Respondent Nationwide to prove that it mailed the notice to Grier. Moore, 238 S.C. at 344, 120 S.E.2d 231; Lumbermen's, 526 F.Supp. 94. Although § 38-75-740(d) provides that "proof of mailing is sufficient proof of notice," it is well established that this merely creates a rebuttable presumption of Nationwide's compliance with the relevant provisions. See Glenn v. Western Union Telegraph Co., 84 S.C. 155, 65 S.E. 1024 (1909) (holding that evidence of proper mailing raises a presumption of receipt, but when receipt is denied, a strong presumption is raised in favor of recipient and the question becomes one for the jury).

If a jury were to believe that Grier did not receive this notice prior to the date of loss, then the jury may consider this evidence as relevant to the question of whether Nationwide actually mailed it, and must weigh it against whatever contrary evidence Nationwide may proffer, including Nationwide's "proof of mailing." Grier's denial that

she received the nonrenewal notice created a question of fact, which, if viewed in the light most favorable to her as the nonmoving party, should have precluded summary judgment in favor of Nationwide on the issue of compliance with either provision (and the resulting effectiveness of the nonrenewal of Grier's policy). Because the Trial Court should have resolved this question in Grier's favor on Nationwide's motion for summary judgment, it erred in granting Nationwide's motion for summary judgment.

III. GMAC AND NATIONWIDE RENEWED GRIER'S INSURANCE POLICY ON MARCH 11, 2011, AND GRIER HAD RIGHTS UNDER THAT RENEWAL.

It is undisputed that on March 11, 2011, GMAC, Grier's mortgage servicer, engaged in a telephone call with Nationwide in which Nationwide instructed GMAC that a renewal for Grier's policy was set to run "from 3-24-11 through 3-24-12[,]" which would have covered Grier's loss. (R. p. 555, lines 5-14; R. p. 556, line9-p. 557, line 3; R. p. 738) Nationwide does not dispute that this call took place, nor does it dispute that the telephone call contained all the essential terms of a contract to renew. (See Brief of Resp. at 35-41.)

Nationwide also does not dispute the fact that it negotiated a check from GMAC for $993–the amount of the premium as confirmed in the March 11, 2011, telephone recording. Id. All of these undisputed facts lend considerable weight to the conclusion that Nationwide effectively renewed Grier's policy through its interactions with GMAC, despite its prior purported attempt to nonrenew.

Nationwide relies heavily on outside jurisdictions to support its contention that as a matter of law, GMAC could not have been Grier's agent. See id. However, under

South Carolina law, agency is a question of fact. Gathers v. Harris Teeter Supermarkets, Inc., 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984). Thus, where facts support that an agency relationship exists, the agency question can only be determined by submitting the question to the jury. Nationwide argues that no agency existed because GMAC denied in discovery that it had such a relationship.[2] However, despite a person's express contentions, an agency relationship can nevertheless be *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). The fact remains that the Mortgage granted GMAC the authority to act on Grier's behalf with respect to insurance policy renewals (R. p. 585) Nationwide also argues that the Mortgage provides Grier with "no control" over GMAC. (See Brief of Resp. at 39.) This argument is disingenuous, because no one can legitimately conclude that, if Grier had instructed GMAC not to obtain insurance for her, it could have legitimately resisted her instruction. The fact that an agency relationship might be limited in scope does not obliterate that relationship.

Nationwide offers *no argument* to rebut Grier's contention that Grier was a third-party beneficiary to the renewal contract. Nationwide objects to the March 11, 2011 renewal contract, generally, by contending that the renewal was ineffective because it was not in writing, as required by S.C. Code Ann. § 38-75-750. (See Brief of Resp. at

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[2] Grier objects to Nationwide's inclusion in the Record on Appeal discovery that was never submitted to the Trial Court because the inclusion violates Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."). Despite this objection, Grier will respond to the argument on its merits.

40.) Nationwide therefore espouses the dual position that both nonrenewals and renewals must be in writing to be effective, which begs the question of what occurs when neither the renewal nor nonrenewal are in writing. The answer is that the insured then has the remedy of cancelling the renewal at his/her own option under S.C. Code Ann. § 38-75-750(e). Nationwide also contends that its oral telephone call to GMAC to renew Grier's contract was ineffective because it violated a provision in Nationwide's policy with Grier requiring renewals to be mailed to Grier in a notice. (See Brief of Resp. at 40.) However, nothing in the policy holds a renewal to be void or invalid for Nationwide's own failure to deliver said notice. (R. pp. 595-634) Such a result would be absurd. Nationwide cannot invalidate the GMAC renewal contract by virtue of its own breach of the policy with Grier.

In sum, the record is replete with evidence that Nationwide renewed Grier's insurance policy in a telephone call between GMAC and Nationwide on March 11, 2011–less than one month before Grier's date of loss. Whether as a party or third-party beneficiary, Grier had rights under that renewal contract, and the Trial Court erred in ruling as a matter of law that such a renewal contract was not supported by evidence.

IV. GRIER'S BAD FAITH CLAIM IS ALSO SUPPORTED BY SUFFICIENT EVIDENCE TO REACH A JURY.

Both Nationwide and the Trial Court relied heavily on the finding that no policy contract existed on the loss date to conclude that Grier's bad faith claim against Nationwide should fail as a matter of law. The Trial Court reached this conclusion because it erroneously found that "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." (R. p. 13) The Trial Court gave no consideration to the March 11, 2011 telephone call between GMAC and Nationwide in which Nationwide stated the provisions and conditions for a renewal year that would have covered Grier's loss. (R. pp. 5-15)

Nationwide contends that it effectuated a nonrenewal of Grier's policy in early January 2011. However, in the March 11, 2011 phone call to GMAC – which took place two (2) months later and which went undiscovered until litigation – Nationwide both expressed and accomplished a contrary result. To-date, Nationwide has proffered no explanation as to why the March 11, 2011, phone call ran contrary to Nationwide's purported intent to nonrenew Grier's policy. This duality, alone, casts significant doubt upon Nationwide's credibility. Nationwide's doubtful credibility, when coupled with the fact that Grier did not receive the return premium check or any notice of nonrenewal until April 11, 2011–five days after Nationwide received notice of Grier's loss–gives rise to the specter of a bad faith refusal to pay an otherwise legitimate insurance claim.

V. THE TRIAL COURT'S DENIAL OF GRIER'S MOTION TO AMEND WAS AN ABUSE OF DISCRETION.

As Nationwide notes, under Rule 15 of the South Carolina Rules of Civil Procedure, "leave shall be freely given [to amend] when justice so requires and does not prejudice any other party." Rule 15, SCRCP. Courts may deny a motion to amend where the motion is futile because the added claim fails as a matter of law. See Coral Gables, Inc. v. Palmetto Brick Co., 183 S.C. 478, 482, 191 S.E.2d 337, 338 (1937).

The Trial Court found, and Nationwide reiterated, that Grier's claim for negligent misrepresentation was futile and would fail as a matter of law because Grier alleged in

the proposed Amended Answer and Third-Party Complaint that "Nationwide made a misrepresentation to GMAC" and "GMAC was not acting on Grier's behalf." (See Brief of Resp. at 15; R. p. 9) The Trial Court ignored paragraph 58 of the proposed Amended Answer and Third-Party Complaint, which alleged that GMAC was Grier's agent. (R. p. 77) As set forth more fully above, there is ample evidence in the record to support that GMAC was acting as Grier's agent for the limited purpose of renewing her insurance policies.

As to prejudice, none would have resulted to Nationwide by adding Grier's claim. Based on the arguments found in the Brief of Respondents, there is a single point of contention with respect to Grier's negligent misrepresentation claim: whether GMAC was acting as Grier's agent. (See Brief of Resp. at 12-17.) This is a significant issue in Grier's breach of contract claim, which has been thoroughly argued and discovered. As such, Nationwide would have suffered no prejudice through the addition of Grier's claim for negligent misrepresentation. Secondly, the denial of the motion to amend only resulted from significant delay in the Trial Court's ruling on the Motion to Amend. It was nearly six (6) months from the date the motion was filed to the date on which it was heard. (R. pp. 67-68; R. pp. 242-363)

Based on the foregoing, the denial of the motion to amend resulted from unreasonable delay and an errant assessment of futility. As such, the Trial Court abused its discretion and caused injustice to Grier by denying her motion to amend.

CONCLUSION

For the foregoing reasons, Grier requests that this Court:

a) Enter a finding that S.C. Code Ann. § 38-75-740 applies to nonrenewal of Grier's policy with Nationwide;

b) Enter a finding that Nationwide did not comply with the requirements set forth in S.C. Code Ann. § 38-75-740;

c) Enter a finding that Grier's policy was renewed by virtue of Nationwide's communications with GMAC and acceptance of premium, which resulted in a contract of insurance on the date of loss;

d) Reverse the Trial Court's April 3, 2013, Order granting Respondents' Motion for Summary Judgment on the existence of an insurance contract;

e) Reverse the Trial Court's finding that Grier's cause of action for bad faith fails as a matter of law; and

f) Reverse the trial court's denial of 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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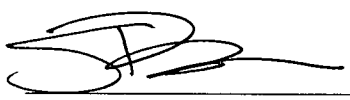
CERTIFICATE OF COUNSEL

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



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PROOF OF SERVICE

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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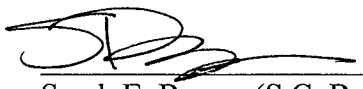

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