FORM 13
BRIEF OF APPELLANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUL 13 2015
SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2014-CP-04-0850

Willie Freeman, Michael Craft,
Kimberly Sanford & Antonio Craft, Appellants,

v.

United Auto Insurance Company, Respondent.

BRIEF OF APPELLANTS

July 6, 2015

Donald L. Smith, Esquire
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. WHETHER S.C. CODE § 38-77-120 PERMITS AN INSURANCE COMPANY TO ISSUE A NOTICE OF CANCELLATION FOR NONPAYMENT OF PREMIUM BEFORE A PAYMENT BECOMES DELINQUENT.

II. WHETHER RESPONDENT PROPERLY CANCELLED THE POLICY ON FEBRUARY 3, 2013 UNDER § 56-10-280.

STATEMENT OF THE CASE

The action that led to this appeal, civil action number 2013-CP-04-00771, was filed on April 4, 2013. Appellants brought suit against Antonio Craft and Kimberly Sanford for injuries suffered in an automobile accident that occurred on February 13, 2013. Neither defendant filed responsive pleadings. An Order of Default was entered, and Michael Craft and William Freeman were awarded $64,128.52 and $24,295.50 in damages, respectively. Respondent, the alleged insurer of the subject automobile, owned by Sanford, filed a Summons and Complaint on April 29, 2014, in which it sought a declaratory judgment that Sanford's automobile was not insured on the date of the accident.

On January 3, 2013, Sanford paid her first month's premium on a new automobile insurance policy with UAIC. The policy covered the automobile that was involved in the accident, a 1997 Ford Crown Victoria, with bodily injury coverage of $25,000/$50,000. On January 9, 2013, less than a week after Sanford paid her first month's premium, Respondent sent her a bill for the second month's premium. On January 22, 2013, still in the first month of coverage, Respondent sent Sanford a cancellation notice. Respondent canceled the policy on February 3, 2013, the same day that the second month's premium was due.

Respondent filed a Motion for Summary Judgment on December 4, 2014, based on its purported compliance with S.C. Code Ann § 38-77-120. The Honorable R. Scott Sprouse heard

the Motion on February 9, 2015. Judge Sprouse executed an Order Granting Motion for Summary Judgment on March 6, 2015. Specifically, Judge Sprouse found that Respondent properly cancelled the subject insurance policy on February 3, 2013, and thus did not cover the subject automobile on the date of the accident. After receiving the Order, Appellants timely served their Notice of Appeal on April 17, 2015.

ARGUMENT

I. WHETHER S.C. CODE ANN. § 38-77-120 PERMITS AN INSURANCE COMPANY TO ISSUE A NOTICE OF CANCELLATION FOR NONPAYMENT OF PREMIUM BEFORE A PAYMENT BECOMES DELINQUENT.

South Carolina courts have not yet ruled on the issue of whether a cancellation notice for nonpayment may be properly sent to an insured prior to a missed payment. S.C. Code Ann. § 38-77-120 concerns the requirements for notice of cancellation. The section provides:

> (a) No cancellation or refusal to renew by an insurer of a policy of automobile insurance is 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:
> (1) must be approved as to form by the director or his designee before use;
> (2) must state the date not less than fifteen days after the date of the mailing or delivering on which the cancellation or refusal to renew becomes effective;
> . . .

S.C. Code Ann. § 38-77-120(a)(1)-(2).

Respondent essentially argued, and the trial court apparently agreed, that § 38-77-120 affords insurers an anticipatory breach clause. While South Carolina courts have not ruled on this issue, other jurisdictions have. In Vietzen v. Victoria Auto. Ins. Co., the Court of Appeals of Ohio reversed the judgment of the trial court granting summary judgment in favor of the insurance company. Vietzen v. Victoria Auto Ins. Co., 9 N.E.3d 500, 506. In that case, Vietzen was injured in an automobile accident, involving a vehicle owned by Paulette Henry and allegedly insured by Victoria Automobile Insurance Company (the insurance company), on

September 6, 2009. Id. at 501. The insurance company had mailed Ms. Henry a billing statement on August 24, 2009 indicating a payment due on September 5, 2009, and attached to it a "Cancellation Notice" that said "If the Minimum Due is not received by or on the Payment Due date, your policy cancels on the date and time shown above for nonpayment of premium." Id. at 503. Ms. Henry failed to make the payment by September 5. Id. The issue to be decided by the Ohio courts was "whether the cancellation notice sent to Ms. Henry by [the insurance company] complied with the requirements of R.C. 3937.32." In pertinent part, the statute provides:

> No cancellation of an automobile insurance policy is effective, unless it is pursuant to written notice to the insured of cancellation. Such notice shall contain:
>
> . . .
>
> (E) Where cancellation is for nonpayment of premium at least ten days notice from the date of mailing of cancellation accompanied by the reason therefor shall be given;

Ohio Rev. Code Ann. § 3937.32(E).

The insurance company argued that the Cancellation Notice had complied with § 3937.32(E) because the cancellation date identified in the Notice was at least ten days subsequent to the date of the Notice. In rejecting the argument, the court held that the statute was ambiguous, and looked at other statutes to determine the legislative intent. Vietzen, 9 N.E.3d at 504. The court considered Ohio Rev. Code Ann. § 3937.31, which sets forth the reasons for which an insurance policy may be canceled by the insurer, including the nonpayment of premium. Id. at 505. The Ohio statute defines nonpayment of premium as "[the] failure of the named insured to discharge when due any of the named insured's obligations in connection with the payment of premiums on a policy." Ohio Rev. Code Ann. § 3937.31(A)(3). The court reasoned that because anticipatory breach is not a reason for cancellation enumerated in the

statute, the insurance company could not cancel the policy based on its belief that Ms. Henry would not pay her premium when it was due. See Vietzen, 9 N.E.3d at 505.

In addition, the court pointed to public policy interests as evidence that an insurance company must wait until payment is delinquent to issue a cancellation notice. See id. The court referenced a case[1] in which the Ohio Supreme Court noted that public policy of Ohio is to ensure that motorists maintain coverage, and held that requiring notification of cancellation and other requirements within the statutory scheme is intended to protect insureds from lapses in coverage, and the public from uninsured motorists. See id.

The Court of Appeals of Ohio reasoned that Ohio Rev. Code Ann. § 3937.32(E) was intended to "include a grace period of ten days during which an insured may cure her failure to pay her premium by its due date before the insurance company may cancel her automobile insurance policy." See id. The court further reasoned that "an insurance company must wait until the insured has actually failed to pay her premium when due before mailing notice of cancellation of the policy which will take effect no fewer than ten days after the date of mailing of the notice." Id. Therefore, because the Ohio legislature intended a ten day grace period, and public policy was to ensure that motorists maintain coverage, the court held that the notice of cancellation mailed August 24, 2009 was "ineffective to give Ms. Henry the requisite notice of cancellation pursuant to R.C. 3937.32." See id. at 506.

S.C. Code Ann. § 38-77-120(a)(2) is nearly identical to Ohio Rev. Code Ann. § 3937.32(E). Both require that notice be given in advance of the cancellation of an insurance policy. In addition, the South Carolina legislature seems to have considered many of the public policy reasons that were considered by the Ohio legislature. One of the self-declared purposes of

[1] See Wolfe v. Wolfe, 725 N.E.2d 261 (Ohio 2000).

Title 38, Chapter 77 (Automobile Insurance) of the South Carolina Code is to provide "that every automobile insurance risk which is insurable . . . is entitled to automobile insurance." S.C. Code Ann. § 38-77-10(1). The chapter is to be liberally construed in order to achieve that purpose. S.C. Code Ann. § 38-77-20. The South Carolina legislature undoubtedly intended for the public to be free from the dangers of uninsured motorists. Therefore, based on the plain language of the relevant statutes, the legislature's intent, and public policy considerations, this Court should hold that Respondent could not have issued a cancellation notice until Kimberly Sanford's payment became delinquent, and thus provided insurance coverage on her vehicle on February 13, 2013.

II. WHETHER RESPONDENT PROPERLY CANCELLED THE POLICY ON FEBRUARY 3, 2013 UNDER § 56-10-280.

Section 56-10-280 refers specifically to the cancellation of a new insurance policy within sixty days of issuance. In pertinent part, the section provides:

> (A) [A] contract of policy may be canceled within the first sixty days only under one or more of the following circumstances:
> . . .
> (4) the insured fails to pay **when due** the premium for the policy, an installment of the premium, or an installment payment under a premium service contract. The contract or policy of insurance must remain in effect for at least thirty days.

S.C. Code Ann. § 56-10-280 (emphasis added).

Appellants contend that this section is ambiguous. Appellants interpret the section as requiring that an insurance policy remain effective for at least thirty days *after* a missed payment; the trial court found that the section merely prohibits the cancellation of a new insurance policy until the thirty-first day.

Assuming, *arguendo*, the Court holds that § 56-10-280 is unambiguous and merely prohibits the cancellation of a new policy until the thirty-first day, the language of the statute still supports coverage of Kimberly Sanford's automobile at least until

February18, 2013. According to § 56-10-280, an insurer can only cancel a new policy within sixty days if the insured fails to pay, **when due**, the premium for the policy. After a missed payment, the notification requirements of § 38-77-120 would become operative. Respondent has stated, and the trial court found, that the second installment was due February 3, 2013. Because of the required fifteen-day notice period, the policy could not have been canceled until February 18, 2013. Therefore, this Court should hold Respondent improperly canceled Kimberly Sanford's insurance policy on February 3, 2013, and that the coverage was effective until February 18, 2013.

CONCLUSION

For the reasons stated above, Appellants pray this Court reverse the trial court's judgment granting Respondent summary judgment. Specifically, Appellants pray the Court hold that Respondent could not have mailed Kimberly Sanford a notice of cancellation until her payment became delinquent, cancellation of the policy on February 3, 2013 was improper, and that Kimberly Sanford's insurance policy was effective on February 13, 2013.

Respectfully submitted,

July 6, 2015

Donald L. Smith, Esquire
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
Attorney for Appellants