THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

D. Craig Brown, Circuit Court Judge

Court of Appeals Case No. 2013-002578
Circuit Court Case No. 2012-CP-07-1352

Bruce R. Hoffman,

Appellant,

v.

Seneca Specialty Insurance Company; CRC Insurance Company; CRC Insurance Services, Inc. d/b/a Southern Cross Underwriters of Sumter; Aydlette Services of Lowcountry, Inc., and Capstone ISG, Inc.,
Defendants,

Of whom Seneca Specialty Insurance Company is the Respondent.

APPELLANT'S REPLY BRIEF

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ARGUING IN THE ALTERNATIVE/ASSUMING FOR THE SAKE OF DISCUSSION IS NOT ADMITTING ANYTHING

Arguing in the alternative/assuming for sake of discussion is not admitting anything. Respondent uses "arguendo" in several places in their opening brief, which is another form of arguing in the alternative/assuming for the sake of discussion, so apparently they can argue two sides of an issue, but Appellant cannot. That Appellant argued both that the clause was ambiguous, but even if not ambiguous, raccoons are not included in the clause anyway, is an admission of nothing, and Respondent knows that since they do the same thing themselves in their own opening brief. For example, they argue "assuming, arguendo, the doctrine of ejusdem generis applies" does this constitute an admission by Respondent that the clause is ambiguous, so that the ejusdem generis doctrine does apply, or is it arguing in the alternative, obviously the latter. If Respondent can argue in the alternative, so can Appellant, and for Respondent to somehow suggest otherwise is completely ludicrous.

Saying "ok I will move on" is also not conceding the issue, it is acknowledging that the Judge is ruling against me and I will move on to another issue, conceding an issue would require a clear, explicit statement of concession and there was none (R204). In fact I kept arguing the point I had purportedly just conceded, and Judge Brown did not stop me from doing so (not that, ultimately, he listened much to what I had to say or wrote anyway) (R 22-33). I certainly would not be putting so much time, money and effort into an issue I had conceded.

JUDGE BROWN DID RULE ON APPELLANT'S EJUSDEM GENERIS ARGUMENT BY (ERRONEOUSLY) FINDING THE PRE-REQUISITE TO ITS APPLICATION, AN AMBIGUITY IN THE CLAUSE AT ISSUE, DID NOT EXIST, THEREBY BOTH WHETHER THERE WAS AN AMBIGUITY AND HOW THE EJUSDEM GENERIS DOCTRINE WOULD THEN RESOLVE THE AMBIGUITY WERE PRESERVED FOR APPELLATE REVIEW

In insurance policy when they meant to say all they said all (R223-4), so if they meant all animals in the clause at issue, they would have said all animals, and further "animal(s)" was

never defined anywhere in the policy at issue. Lower court Judges supplying a definition for animals when one didn't exist in the policy and/or saying the clause meant all animals, when the word all could have been used but wasn't, was plain, obvious error (R 22-33), since the Court was supposed to favor the insured not the insurance company, and resolve all doubts in favor of coverage, not the other way around as happened here. See, e.g., Stringer v State Farm, 687 SE2d 58 (2009).

And that the word "animal(s)" was not defined anywhere in the policy was another ambiguity that should have allowed for the application of the ejusdem generis doctrine to define it, and then the raccoon damage and all the damage resulting from the raccoon damage, from mice, snakes, weather, etc., would have been covered too. So not only was "and other animals" ambiguous, "animals" was also ambiguous, but the Judges below erred in finding no ambiguity (R 3, 7, 22-33) and thus never even getting to the application of the ejusdem generis doctrine to resolve these ambiguities in favor of coverage, i.e. Judge Brown's order did resolve/reject the ejusdem generis argument because he found, incorrectly, there was no ambiguity to allow for the application of the doctrine.

So not just whether there was an ambiguity, but also thus whether ejusdem generis applies upon the finding of ambiguity, as Appellant argues, to require coverage, are both issues preserved for appellate review, as Judge Brown ruled on both by the terms of his order. Hubbard v Rowe, 5 SE2d 187 (1939). Issues resolved by the terms of an order are also preserved for appellate review, not just issues explicitly ruled upon. See Flanagan, SC Civil Procedure, 542.

If Judge Brown didn't find an ambiguity, there was no point in then asking him for an explicit ruling on an issue that first required him to find an ambiguity, when he didn't find there to be an ambiguity, it would have been a completely futile act, and the law does not require the doing of futile acts. Shupe v Settle, 445 SE2d 651 (1994).

That there was no ambiguity was not and is not "the law of the case," that requires appeal court finding, and what Judge Dukes said was dicta, not a part of or necessary for his denial of Appellant's summary judgment motion, and thus not immediately appealable, even though so obviously wrong (R 141-3). See, e.g., denial of a motion for summary judgment, nor anything stated in said denial, is not considered a decision on the merits, does not establish law of the case, and thus is not immediately appealable. Ballenger v Bowen, 443 SE2d 379 (1994). Respondent would have you completely abdicate your appellate responsibilities to prevent plainly illegal rulings, by in essence claiming nothing was preserved for appellate review, no matter when an injustice has been done or not.

Questions of law, determinations on which reasonable minds may not differ, not fact, are reviewed de novo by the Court of Appeals, not for abuse of discretion. As Respondent said in their brief, whether a contract is ambiguous is a question of law, and the interpretation of an unambiguous contract is a question of law, so the lower court findings in this regard are all to be reviewed by the Court de novo. See, e.g., Moriarty v. Garden Sanctuary, 534 SE2d 672 (2000).

THE LAW DOES NOT REQUIRE FUTILE ACTS TO BE DONE

It is a maxim of jurisprudence, the law does not require futile acts. Given that Judge Brown signed/rubber stamped the bogus order submitted to him by Respondent without even one change, it would have been an objectively futile act to ask him to reconsider it. In a case where the Judge rubber stamped the proposed order submitted to him by Respondent, without any effort to personalize it whatsoever, asking for reconsideration and/or clarification would have been a futile act, if he didn't care at all what I said the first time, he was not going to care the second time either, any other conclusion would be the height of formalities/technicalities over substance.

Here, Respondent submits a completely one sided proposed order to the Judge, purposely written to minimize what I argued and the dismissing thereof, and to maximize what they argued and the

wholesale adoption thereof, who rubber stamps it as is without soliciting my input before doing so, and Respondent seeks to take advantage now of that fact now by alleging that the Judge's denial of my arguments weren't very clearly stated in the order they wrote. That would be having their cake and eating it too, I have to assume the appellate court will see through the absurdity of this situation and give all arguments of Appellant a full de novo hearing now.

On a summary judgment motion involving serious damage to my office building, the only insult is the complete lack of consideration the Judge gave to my case and to my arguments, as evidenced by him just rubber stamping what Respondent submitted to him, with no personalization whatsoever, or better yet, any effort to write his own order. Yes he was the judge, and I was the litigant, and I do respect his office, but we are both members of the Bar (so professional courtesy if not also judicial duty, mandated some actual consideration), and to just rubber stamp some completely self-serving/factually and legally inaccurate order, a month and a half after the hearing, submitted to him by insurance defense attorneys representing a big New York Wall Street insurance company, was unfair and should not be permitted by this Appellate Court.

Respondent slavishly insists in their brief that not a single issue Appellant raised was specifically ruled on, and thus every issue Appellant raised required a motion for reconsideration before this Court could consider it, when such is not the case nor the law. Since the lower court, erroneously, found the clause at issue not ambiguous (R 3, 7, 22), and as Respondent contends, only if the clause was found to be ambiguous would ejusdem generis come into play, then of course the lower court did not discuss the ejusdem generis argument that Appellant has been making virtually from the beginning of the case. There would have been no point whatsoever to ask the Judge whether he considered the ejusdem generis argument Appellant made or not, because once the Judge found, inexplicably, the subject clause was not ambiguous (R 25), he

would not have given any consideration to the use of the doctrine to clear up an ambiguity.

JUDGE BROWN HAD NO JURISDICTION TO PROCEED, WITH AN APPEAL ON THE SAME ISSUES HE WAS CONSIDERING PENDING

In any event, there was no jurisdiction for Judge Brown to have proceeded, with an appeal on the same issues then pending involving CRC (R 34, 133, 148, 196-198, 202), so his order is void. See, e.g., Bradley v. Hullander, 222 SE2d 283 (1976).

Appellant had alleged below, from the beginning of the case, that all the Defendants had acted together to deny Appellant the insurance benefits to which he was entitled (R 37-40). All Defendants had been sued on the same causes of action, so if one Defendant, CRC, had been granted summary judgment on those causes of action, obviously a decision by this appeals court on that grant of summary judgment would have had a bearing on the case against the rest of the Defendants, including Seneca, and Judge Brown should never have proceeded with this appeal then pending (R 34, 133, 148, 196-198, 202).

REQUESTS FOR ADMISSIONS WERE TIMELY RESPONDED TO, IN GOOD FAITH, IN WRITING, WITH NO MOTION FOR FURTHER RESPONSES MADE, THE REQUESTS COULD NOT JUST BE DEEMED ADMITTED UNDER THESE CIRCUMSTANCES

And even if the judge decided that he could proceed despite the appeal pending on the very same issues he was considering, Appellant had timely and in good faith responded to the requests for admissions in writing, objecting to them because of the then pending appeal (R 135), and the Judge could not then deem requests for admissions admitted under Rule 36 that had been responded to in good faith, in writing, or at worst, he could have ordered further responses to be made if he thought the written response technically deficient, though no one moved for that (R 22-32), see, e.g, JZ Buckingham Investments v US, 2007 Court of Federal Claims.

That he rubber stamped an order that deemed the requests for admissions admitted despite the timely, good faith, written response, shows how little consideration he gave the case and the text of the order he was signing. Asking a Judge to reconsider an order that he gave no consideration

to in the first place, again would have been a futile act and for Respondent to suggest otherwise, is completely ridiculous but par for the course (to avoid consideration of the merits as Respondent has done the entire case).

PLAIN ERROR FOR JUDGE BROWN TO DENY FILING OF SUPPLEMENTAL COMPLAINT TO ALLOW FACTUAL MATTERS ALLEGED THEREIN TO PROCEED TO TRIAL

Further, if he was going to proceed despite the pending appeal on the same issues he was considering that day, then he should have allowed Appellant to file the supplemental complaint, which all parties had been advised that Appellant intended to file previously, so there was no surprise (R 143-146, 160-1, 203-4). There was no trial date set at that time, so no prejudice to any party by him permitting the filing of the supplemental complaint. He also did not seem to grasp the distinction between a supplemental complaint for events that occurred after the filing of the initial complaint, and an amended complaint amending the allegations made against the parties originally (R 203-4). Assuming he denied the filing of a supplemental complaint because he thought it was an amended complaint, as he stated on the record, then this was plain error, see, e.g., Tanner v Florence County Treasurer, 521 SE2d 153 (1999).

This plain error harmed Appellant because the supplemental complaint and the allegations therein were thus not considered in the arguments on Seneca's summary judgment motion and Appellant's summary judgment motion, prejudicing Appellant thereby, one such argument being that Appellant had discovered that Seneca's agents, and thus Seneca, purposely sold Appellant an inappropriate policy for his location (R 144-6), and this was a fact question that should have gone to a jury and resulted in Seneca's all or nothing summary judgment motion being denied. Likewise the ensuing loss exception argument, that even if raccoon damage was excluded, ensuing losses from the raccoon damage could be covered by the language of the policy, that disputed issue (R 206), could not be resolved on an all or nothing summary judgment motion, it

had to go to trial and the summary judgment motion had to be denied for at least this reason. And again, it would have been objectively futile to ask a Judge that gave absolutely no consideration to Appellant's arguments in the first place, to reconsider them, it would have been a waste of time, money and paper, there is no way a rubber stamping Judge is going to admit he was hasty about rubber stamping and reconsider anything.

The only legitimate option Appellant had was to appeal, to go to a different forum, not to waste more time and money in a forum that had adopted, verbatim, every single argument Respondent had made on every single issue in the case, without changing so much as one word in Respondent's proposed order, after I waited a month and a half for a ruling. This was not consideration, let alone thoughtful consideration, by a Judge, it was a travesty, and for Respondent to suggest that such a Judge should have been asked to reconsider anything under these circumstances, and Respondent trying to benefit now from such an argument, is insulting and disingenuous. Rule 501, Canon 3, SC Rules of Court requires that in disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard, that did not happen in this case.

Last, Judge Brown, as aforesaid, denied all sorts of disputed fact questions that should have been permitted to go to the jury (R 22-33); there were also causes of action against Seneca, following therefrom, that had nothing to do with the purported exclusion, and these causes should have been allowed to go to trial (R 22-33), such that Respondent's all or nothing summary judgment motion could not possibly have been granted.

CONCLUSION

For all the foregoing reasons, as well as those stated in Appellant's initial brief, the summary judgment entered in favor of Respondent Seneca must be reversed, summary judgment entered in favor of Appellant instead, or such other and further relief in favor of Appellant entered as this

Court deems just and proper.

Respectfully submitted,

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