

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County Master-In-Equity

Case No.: 2007-CP-10-3224
Appellate Case No.: 2015-001383

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SC Court of Appeals

Jana Wright, as Guardian ad Litem for Travis M.,
a minor over the age of 14 years. Plaintiff,

v.

Tema Brown. Respondent,

v.

GeoVera Specialty Insurance Co. Appellant.

**APPELLANT'S RETURN TO RESPONDENTS' MOTION
TO STRIKE & TO STAY THE TIME TO FILE THEIR
BRIEF UNTIL THE MOTION TO STRIKE IS DECIDED**

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Respondents seek an order striking Appellant's argument that, under South Carolina law, a default judgment does not have preclusive effect. See Kunst v. Loree, 404 S.C. 649, 655-56, 746 S.E.2d 360, 363-64 (Ct. App. 2013), cert. denied (Aug. 21, 2014). Respondents contend that this argument was not preserved because it was not raised in Appellant's answer, its summary judgment briefing, at the summary judgment argument, and because it was not ruled on.

To summarize the pertinent background, this action was originally filed in 2007 alleging that Travis Milligan, a minor, was injured when a dog owned by Respondent Tema Brown attacked him. Complaint, ¶¶ 2, 8. (Ex. A) Brown's insurer, Appellant GeoVera Specialty Insurance Company, denied coverage and declined to defend on the ground that the dog was an American Pit Bull Terrier, a breed for which liability was specifically excluded under the policy. April 7, 2008 letter to Tema Brown. (Ex. B) Brown did not answer the Complaint and went into default. Order of Default. (Ex. C) After a hearing in which Appellant GeoVera did not participate, the Special Referee entered an order of default judgment against Brown in the amount of \$100,229 on September 11, 2009. Sept. 11, 2009 Order of Judgment. (Ex. D) Brown thereafter assigned her claim against Geo Vera to the plaintiff Jana Wright, as Guardian ad Litem for Travis Milligan. Assignment. (Ex. E)

Respondent Brown thereafter filed a third-party complaint in the aforementioned action against Appellant GeoVera seeking a judicial declaration that the claim against Respondent Brown was covered under the subject policy. Amended Third-Party Complaint. (Ex. F, without exhibits thereto) Appellant GeoVera answered, denying same. Amended Answer to Amended Third-Party Complaint. (Ex. G) Appellant

GeoVera moved for summary judgment on May 12, 2014 and filed a memorandum in support on May 19, 2014. (Ex. H) Respondent Brown moved for summary judgment on May 16, 2014. (Ex. I) Both motions were heard by the Master-In-Equity for Charleston County on May 19, 2014, after which the Master granted Respondent Brown's motion and denied Appellant GeoVera's motion. Order of March 24, 2015. (Ex. J) Appellant GeoVera timely moved for reconsideration and to alter or amend the judgment. (Ex. K) That motion was heard on May 13, 2015 and denied by order of June 3, 2015. (Ex. L) This appeal followed.

Among Appellant GeoVera's grounds for summary judgment were that (1) under Rule 14, SCRCF, the third-party complaint was untimely and prejudicial to third-party defendant because the case had previously been adjudicated, without appeal, in the form of a default judgment; and (2) the court lacked personal jurisdiction over third-party defendant because the action had been terminated in the form of a final adjudication prior to the filing of the third-party complaint. Among the grounds contained in Respondent Brown's motion were that (1) the issue upon which coverage depends was raised before the Special Master and necessarily adjudicated in the underlying action and (2) third-party defendant could not, after failing to defend the underlying action, raise issues or present defenses inconsistent with the judgment against its insured.

In short, Respondent Brown contended, among other things, that the default judgment included a finding that is binding on Appellant GeoVera, about which it cannot complain because it declined to defend. Appellant GeoVera contended, among other things, that there was no such finding and that, in any case, the third-party complaint was improper, the original action having been adjudicated, without appeal, in the form of a

default judgment, and the action was thereby terminated prior to the filing of the third-party complaint.

Respondent Tema Brown argues in her motion to strike that the issue of whether the alleged findings in the default judgment are binding on Appellant GeoVera was not properly preserved because it was “never raised by GeoVera in its argument or summary judgment briefing before the lower court and not ruled upon by the lower court.” Neither is the case.

First, Appellant GeoVera’s amended answer to Tema Brown’s third-party complaint includes the following:

FOR AN EIGHTH DEFENSE

19. This action was terminated upon entry of judgment against Third-Party Plaintiff on or about September 11, 2009.

* * *

FOR A TENTH DEFENSE

21. GeoVera has been substantially and unfairly prejudiced by the assertion of the Third-Party Complaint almost four years after the entry of default against Third-Party Plaintiff in this action, in that GeoVera has thereby been deprived of its rights under Rule 14(a), SCRCF.

Amended Answer to Amended Third-Party Complaint. (Ex. G)

It was thus clear from the outset that Appellant GeoVera denied that it was bound by the judgment that had been entered against its insured, Tema Brown.

Moreover, Appellant GeoVera's motion for summary judgment included the following ground:

- (4) under Rule 14, SCRPC, the third-party complaint is untimely and prejudicial to Third-Party Defendant because this action was terminated in the form of a final adjudication prior to the filing of the Third-Party Complaint; and this Court therefore lacks personal jurisdiction over Third-Party Defendant.

GeoVera's Motion for Summary Judgment, p. 2. (Ex. H)

In addition, Appellant GeoVera's memorandum of law in support of its motion for summary judgment includes the following:

IV. There has been no factual finding that the Third-Party Plaintiff's dog was not a Pit Bull, and even if there were, it is not binding on GeoVera.

Third Party Plaintiff's position is that, because GeoVera did not retain counsel to appear and defend Ms. Brown, it is bound by the factual findings contained in the September 11, 2009 order of default judgment entered after the damages hearing. This argument fails for two reasons.

* * *

Second, Third-Party Plaintiff argues that there is law to the effect that a liability insurer that declines to defend an action against its insured is bound by the material facts established against its insured at the trial; however, under South Carolina law,

any such rule has no application to the case at bar, by virtue of Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965).

GeoVera's Memorandum in Support of Summary Judgment, p. 19. (Ex. H).

GeoVera's memorandum then goes on to discuss the Sims case, in which the South Carolina Supreme Court held that an insurer that had declined to defend its insured in a tort action on the ground that his actions were intentional and not negligent was not bound by the finding of the court that the insured's conduct was negligent and not intentional. GeoVera's memorandum included the following quote from Farm Bureau Mutual Ins. Co. v. Hammer, et al., 4th C.C.A., 177 F.2d 793, which was quoted with approval by the South Carolina Supreme Court in Sims:

It is, however, obvious that the binding effect of a judgment against the insured does not extend to matters outside the scope of the insurance contract, and that the Insurance Company is neither obligated to defend **nor bound by the findings of the court** if the claim against the insured is not covered by the policy

GeoVera's Memorandum of Law in Support of Summary Judgment, p. 21. (Ex. H) (emphasis added).

GeoVera also quoted the following from Ranta v. The Catholic Mut. Relief Soc. of America, 492 Fed.Appx. 373 (4th Cir. 2012):

[T]he South Carolina tort judgment does not bar [insurer] from asserting that [insured's] conduct was intentional and, therefore, outside the scope of insurance coverage.

GeoVera's Memorandum of Law in Support of Summary Judgment, p. 22. (Ex. H) (emphasis added in memorandum of law).

Thus, Appellant GeoVera's position from the beginning has been that, under South Carolina law, it is not bound by the judgment entered against its insured. The fact that Sims and other cases cited and quoted by Appellant GeoVera in its memorandum in support of summary judgment and argued before the Master-in-Equity involved judgments entered after a trial or summary judgment motion shows that Appellant GeoVera preserved this argument. The fact that the cases did not involve judgments entered as a result of a default is no indication that Appellant GeoVera failed to make such an argument. There is no reason that the rule that a liability insurer is not bound by a judgment under these circumstances would be any different if the judgment were by default, rather than as a result of a trial or summary judgment. Indeed, in Kunst v. Loree, this Court held that "South Carolina jurisprudence overwhelmingly supports the position that the doctrine of collateral estoppel cannot be applied to default judgments to preclude subsequent litigation." 404 S.C. 649, 655, 746 S.E.2d 360, 363 (Ct. App. 2013), cert. denied (2014).

Respondent Brown complains that Kunst was not cited by Appellant GeoVera until it filed its motion for reconsideration and to alter or amend the judgment. However, whether the judgment was by default or as a result of a trial, Appellant GeoVera's position has always been that it is not bound by the judgment. Moreover, Appellant GeoVera specifically referenced the default judgment in its amended answer:

FOR A SECOND DEFENSE

13. Coverage for the Plaintiff's claim against Tema Brown and the default judgment entered in connection therewith is not available under the subject policy because the

claimant's injuries and damages arose out of a dog owned by or in the care of Tema Brown that was a Staffordshire Bull Terrier or an American Pit Bull Terrier as defined by the policy, as a result of which the "Vicious Dogs" exclusion applies

Amended Answer of Third-Party Defendant Geo Vera Specialty Insurance Company to Amended Third-Party Complaint, p. 3. (Ex. G) (emphasis added).

Respondent Brown's own motion for summary judgment included the following ground:

(3) GeoVera cannot now, after failing to defend in the underlying action, raise issues or present defenses inconsistent with the judgment against its insured

Motion for Summary Judgment of Defendant/Third-Party Plaintiff Tema Brown, p. 1 (Ex. I).

In short, Respondent's position was, and continues to be, that Appellant GeoVera is bound by the default judgment, in response to Appellant GeoVera's position, which was, and continues to be, that it is not. Respondent did not file a memorandum of law in support of her motion for summary judgment, but, at the May 19, 2014 hearing, her counsel argued in part as follows:

Rather the insured [sic] has two options, defend the suit under reservation of rights or seek a declaratory judgment. If the insurer takes neither of these steps and is found to have wrongfully denied coverage the insurer is estopped from raising policy defenses to coverage.

Transcript, May 19, 2014 Hearing, p. 28, l. 21–p. 29, l. 1 (Ex. M).

The following exchange later took place between the Court and undersigned counsel arguing on behalf of Appellant GeoVera:

THE COURT: Well, let me just ask that question. Don't they have the right to bring a future action or to defend under a reservation of rights?

MR. DAVIS: They do, but by the same token it doesn't mean that they have to.

THE COURT: And so if they fail to do so it's your argument that they're not bound by those factual findings?

MR. DAVIS: Yes, Sir. And I believe that's what Simms says and Leranta [sic] case.

Transcript, May 19, 2014 Hearing, p. 31, ll. 3-11 (Ex. M).

It was therefore clear during the oral argument, as in the pleadings, motions and memorandum, that Respondent Brown took the position that Appellant GeoVera was bound by the “findings” in the default judgment and, while Appellant GeoVera denied that there was any “finding” as to the breed of the dog, it contended that, under South Carolina law, it would not be bound by any such finding anyway.

In the proposed order submitted by Respondent's counsel, and which was ultimately signed by the Master-In-Equity, Respondent's counsel stated that, “[I]t is movant's position that the insurer may not raise as a coverage defense an issue of fact that was determined by the trial of the underlying action.” Corrected Order of March 24, 2015, last line of p. 6 – first line of p. 7. (Ex. J). After quoting from Williston on Contracts, that proposed order provides that, “I find persuasive those cases that hold an insurer is bound by the underlying trial as to issues and facts actually litigated.” *Id.*, last para. of p. 8. Cases from Georgia, California and Pennsylvania are cited thereafter. *Id.*, p.

8–9. Neither of the controlling South Carolina cases¹ is cited. In its motion for reconsideration and to alter or amend judgment, Appellant GeoVera cited both Sims and Kunst. Motion for Reconsideration or to Alter of Amend Judgment, pp. 1, 15, 16, 18. (Ex. K).

In short, Appellant GeoVera has maintained from the beginning that (1) the default judgment against Tema Brown does not contain any “finding” that her dog was not a pit bull; and (2) even if there had been such a finding, it is not binding on GeoVera. Appellant GeoVera cited controlling South Carolina authority, Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965), as well as other authority. GeoVera’s arguments reflected its position that, under South Carolina law, an insurer that declines to defend its insured on the ground that the allegations against her are not covered is not bound by the findings of the court as contained in the judgment against the insured. That is, the judgment does not have preclusive effect. Thus, Appellant GeoVera properly preserved for appellate review the issue and the argument that the default judgment did not have preclusive effect on it because “a party is not required to use the exact name of a legal doctrine in order to preserve the issue.” Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). See also State v. Brannon, 388 S.C. 498, 501-02, 697 S.E.2d 593, 595-96 (2010) (finding that defendant preserved his argument even if he never used the terms “seizure” or “Fourth Amendment” by arguing an arrest was not being made when he ran from police); State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (finding it was clear from the argument presented in the record

¹ Sims v. Nationwide Mut. Ins. Co., 247 S.C. 82, 145 S.E.2d 523 (1965); Kunst v. Loree, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013), cert. denied (2014).

that defendant's motion for a directed verdict was based on the ground the State failed to establish the "corpus delicti" even if he did not use these exact words).

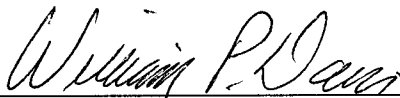
Further, Respondent cited out-of-state authority for the opposite proposition in her proposed order requested by the Master-In-Equity after the hearing on both sides' motions for summary judgment. When Respondent's proposed order was adopted by the Court, Appellant located additional, recent South Carolina authority further supporting the authority previously cited, and brought it to the Master's attention in its motion to reconsider and to alter or amend the judgment. Motion to Reconsider or Alter or Amend Judgment, p. 16. (Ex. K). The Sims court held that a judgment entered after a trial in which the defendant's liability insurer did not participate is not binding on the insurer. Similarly, the Kunst court held that collateral estoppel does not apply to a default judgment. Since the proposed order submitted by Respondent did not cite either case, but rather cited cases from other jurisdictions for the opposite holding, and that order was ultimately adopted by the Master, it was incumbent on Appellant to not only reiterate the controlling South Carolina Supreme Court case, but to also call to the Master's attention in its motion to reconsider that the South Carolina Court of Appeals had recently come to a similar conclusion. Appellant's having fulfilled that duty is not an indication that the issue of the preclusive effect of a judgment had not previously and repeatedly been presented and therefore preserved. Appellant merely offered additional authority in support of its position.

"[T]he ultimate goal behind preservation of error rules is to ensure that an issue raised on appeal has first been addressed to and ruled on by the trial court." S.C. Dept. of Motor Vehicles and Columbia Police Department. v. Tighe, 2008 WL 2362842 (S.C.

Admin. Law Judge Div.) (citing State v. Nelson, 331 S.C. 1, 6 n. 6, 501 S.E.2d 716, 718 n. 6 (1998)). As shown above, the issue of whether or not Appellant GeoVera is bound by the default judgment entered against Respondent was presented in various forms and argued by both sides. Respondent Brown's argument is essentially that, although this issue was contested from the beginning and even though she presented, and the Master-In-Equity adopted, an order citing out-of-state authority that is contrary to controlling South Carolina authority, this Court should not consider a more recent case from the Court of Appeals, even though it is supportive of precedent previously cited and even though Appellant brought it to the attention of the Master-In-Equity in its motion to reconsider. Such an argument "offend[s] 'the integrity of the adjudicative process.'" Id., at *9, quoting from Rule 407 SCACR, Rule 3.3(a)(2) cmt. 2.

As the above argument indicates, understanding the preservation issue raised in Respondents' Motion to Strike requires extensive review of the record and analysis of all the issues raised to and ruled upon by the Master-in-Equity, as Respondent implicitly recognizes in footnote 2 of her motion, where she attempts to differentiate between issues. For this reason, Appellant GeoVera believes this preservation issue would be better reviewed by the Court in the context of its entire brief rather than decided under Rule 240(j). Additionally, Appellant GeoVera is not aware of any cases where an argument was stricken from the initial brief on the ground of lack of preservation, but notes that the preservation issues are discussed in the opinions of the South Carolina courts, indicating that they were raised in the final briefs reviewed by the appellate court.

Therefore, Appellant GeoVera submits that, not only was the issue and argument addressed above preserved, but this preservation issue should be raised by Respondent in her brief. Thus, Appellant GeoVera asks that Respondents' Motion to Strike be denied.



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