

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

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

Case No.: 2007-CP-10-3224

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

v.

Tema Brown, RESPONDENTS

v.

GeoVera Specialty Insurance Co., APPELLANT.

RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION TO STRIKE

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SC Court of Appeals

Tema Brown and Jana Wright, as Guardian *ad Litem* for Travis Milligan, a minor over the age of 14 years ("Respondents"), reply to the opposition of Appellant, GeoVera Specialty Insurance Co. ("GeoVera") as follows:

Respondents filed a motion to strike certain portions of the Appellants brief as, in its initial brief, Appellant argues that the findings of Mr. Wills are not binding on GeoVera because default judgments do not have preclusive effect. (Appellant's brief p. 13). It is this argument that Respondents moved to strike as the issue was not properly preserved for appellate review as: (1) this defense was not raised in GeoVera's pleading (Exhibit A to motion to strike); (2) this defense was not raised in GeoVera's summary judgment briefing (Exhibit B to motion to strike); (3) this issue was not argued at summary judgment (Exhibit C to motion to strike); and (4) this issue was not ruled on by the lower court. (Exhibits D and E to motion to strike). In response to the motion to strike, Appellant concedes it did not argue specifically that default judgments have no preclusive effect (Appellant's Response to Motion to Strike p.7). Rather, Appellant claims that when it generally challenged the effect of the underlying judgment in the declaratory judgment this preserved the issue for appeal.

A reference to Appellant's exchange with the lower court illustrates what Appellant's argument below was:

3 THE COURT: Well, let me just ask that question.

4 Don't they have the right to bring a future action or to

5 defend under a reservation of rights?

6 MR. DAVIS: They do, but by the same token it

7 doesn't mean that they have to.

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

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

(Exhibit C to Motion to Strike, p 31, lines 3-11).

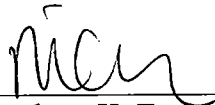
Appellant's argument has consistently been that nothing in the underlying trial is binding in a declaratory judgment concerning coverage. Respondents have consistently met this argument by responding by saying in certain circumstances the underlying result may influence coverage determinations in a declaratory judgment coverage. At no point during the summary judgment proceeding did Appellant argue the underlying was a default, and therefore, of no preclusive effect. The words "default judgment" are nowhere in any of the lower court's orders.

Appellant's response to the motion to strike fails under *State v. Stone*, 376 S.C. 32, 665 S.E.2d 487 (2007). In *State v. Stone*, the court found that an issue was not preserved where the appellant argued the relevance of the testimony at trial, but then argued the effect of testimony on the jury in the appeal. True, Appellant challenged the evidence generally, but the grounds were different. In this case, the Appellant did not claim the judgment was not preclusive because it was a default judgment. Rather, Appellant claimed the issues tried before Mr. Wills were not a determination in the coverage action pursuant to *Sims v. Nationwaide Mut. Ins. Co.*, 145 S.E.2d 523, 247 S.C. 82 (S.C. 1965). The issues raised on appeal must be the same as the issues raised below. *Appellate Practice in South Carolina*, third edition, Jean Hoefer Toal, Amelia Waring Walker, Margaret E. Baker (2016). Where the appellant argument differs from the ground for a party's trial objection, the issue is not preserved. *Id citing Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997); *State v. Ward*, 374 S.C. 606, 649 S.E.2d 145 (Ct. App. 2007).

For the reasons set forth above, Respondents respectfully request this Court strike from Appellant's brief all argument related to the preclusive effect of default judgments. (See Appellant's initial brief p. 13).

Respectfully Submitted By:

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On this 3 day of March 2016
Charleston, SC

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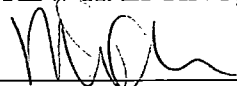
GeoVera Specialty Insurance Co., APPELLANT.

PROOF OF SERVICE

I certify that I have served Appellant with the Respondents' Reply in Support of Its Motion to Strike by delivering a copy via regular U.S. Mail on March 3, 2016, addressed to their attorneys of record as follows:

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