THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-000192
Circuit Court Case No. 2014-CP-40-0313

Raymond G. Farmer, as Director of the South Carolina Department of Insurance,

Petitioner,

v.

CAGC Insurance Company, in Liquidation,

Respondent.

South Carolina Property and Casualty Insurance Guaranty Association,

Appellant,

v.

CAGC Insurance Company, in Liquidation; Raymond G. Farmer, in his capacity as Ancillary Receiver of CAGC Insurance Company, in Liquidation; and CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc.,

Respondents.

FINAL BRIEF OF RESPONDENT COMPTRUSTAGC OF SOUTH CAROLINA A/K/A COMPTRUSTAGC OF SOUTH CAROLINA, INC.

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INTRODUCTION

This appeal arises in the context of ancillary receivership proceedings commenced on petition of Raymond G. Farmer, as Director of the South Carolina Department of Insurance (the "Director" and the "SCDOI," respectively), in respect of CAGC Insurance Company, in Liquidation ("CAGC"), a North Carolina-domiciled property and casualty insurer that was declared insolvent and ordered to liquidation in early 2014 via proceedings in its home state, prompting the Director's petition here. Specifically, it arises in the context of an action for declaratory judgment brought within these proceedings at the urging of Appellant South Carolina Property and Casualty Insurance Guaranty Association (the "Association") that it be allowed to intervene and to join CAGC; the Director, as ancillary receiver of CAGC; and CompTrustAGC of South Carolina a/k/a CompTrust AGC of South Carolina, Inc. ("CompTrust") as respondents to its claim for relief.

The Association's appellate challenge concerns the lower court's dismissal of CompTrust as a *party* to its action—not dismissal of its action—and, according to the Association, the issue now before the Court is this: "Did the trial court err by dismissing [CompTrust] from the Association's declaratory judgment action *because the Association is not statutorily liable for the purported 'transferred' claims*?" (App's Br. at p. 1 (emphasis added) (original bold print omitted).) This

non sequitur (set off in italics above) illustrates the problem with the *merits*—although, as explained elsewhere, other problems arise before they are reached—of the Association's appeal: No logical relationship is offered between the alleged error and its stated cause.

Before going further, some backstory would seem helpful at this point, at the least, to explain the Association's reference to "transferred" claims. South Carolina law[1] requires employers to either insure, or provide the state workers' compensation commission (the "Commission") with "satisfactory proof of . . . ability to pay directly," i.e., self-insure, their liabilities arising under the Law. S.C. Code Ann. § 42-5-20. With Commission approval, an employer may qualify as a self-insurer via membership in a group self-insurance fund. Id.; *see generally* S.C. Code Ann. Regs. 67-1501 to -1516. Section 42-5-20 grants the Commission "exclusive jurisdiction" over these group self-insurers and prohibits them from being deemed "insurance companies" or being regulated by the SCDOI.

Though now dissolved (as it was effective April 1, 2011), CompTrust, an unincorporated business trust, was established in 1982 for the specific purpose of fulfilling its member employers' obligations and liabilities under the Law. It operated as a Commission-approved group self-insurer for over 25 years until it closed June 30, 2009. At that time, CAGC was authorized to do business in South

[1] *See generally* The South Carolina Workers' Compensation Law (the "Law"), codified at S.C. Code Ann. §§ 42-1-10 to -19-50.

Carolina and able to write workers' compensation insurance policies to employers formerly self-insuring via CompTrust. (R. pp. 179-83, 190-200, 211-12.)

Effective December 30, 2010—following review and approval by the Commission and the North Carolina Department of Insurance (the "NCDOI")[2]—all of CompTrust's assets and liabilities were transferred to/assumed by CAGC under the terms of a Self-Insurance Loss Portfolio Transfer Assumption Agreement (the "LPT Agreement");[3] whereupon, CAGC became solely responsible for administration and disposition of all claims—past, present, and future—on account CompTrust's now-former liabilities. Claims arising out of these liabilities are the "transferred" claims to which the Association refers.

Notably, the Association also refers to these claims as *purportedly* transferred, perhaps suggesting the validity of their transfer is in question in this matter. Not so. While CompTrust certainly maintains the transaction is above reproach,[4] in point of fact, the Association's complaint for declaratory judgment

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[2] (R. pp. 322-57.)

[3] (R. pp. 202-09.)

[4] As a duly qualified, registered group self-insurer under the Law, CompTrust was, while it lasted, effectively an "insurer" issuing "insurance" policies as defined by S.C. Code Ann. § 38-1-20 (25). *See* S.C. Prop. & Cas. Ins. Guar. Ass'n. v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund, 315 S.C. 555, 446 S.E.2d 442 (1994). It was the shared intention of the parties to the LPT Agreement to transfer all CompTrust policies to CAGC via novation—with the Commission and the NCDOI understanding and approving the transaction as such—as found to have occurred in Bowles v. BCJ Trucking Servs., Inc., 172 N.C. App. 149, 615 S.E.2d 724 (N.C. Ct. App. 2005), as well as in CAGC's domiciliary

simply does not challenge it. Indeed, the Association framed its case in terms that necessarily assume valid transfer of liability to CAGC, asking that—and only that—the Court declare it not liable for the claims, i.e., notwithstanding the fact of their transfer to CAGC, doing so solely on the basis of statutory-construction arguments with no bearing on the validity of the LPT Agreement or its effect insofar as CompTrust is concerned.

CompTrust is dissolved, has no assets, and serves no legal purpose—and the Association has not actually sought any relief against it in this case. Assuming, *arguendo*, this Court has appellate jurisdiction, and also that affirmance of CompTrust's dismissal is not mandated by rules of error preservation alone, there is no reversible error here, and the circuit court should be affirmed.

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proceedings. (*See* R. pp. 368-81, 383-86, 388-39.)

COUNTER-STATEMENT OF THE ISSUE ON APPEAL

Assuming, *arguendo*, this appeal should not be dismissed for lack of appellate jurisdiction, has the Association preserved for review and affirmatively identified to the Court reversible error in the circuit court's dismissal of CompTrust from the Association's declaratory judgment action?[5]

COUNTER-STATEMENT OF THE CASE

On January 17, 2014—the effective date on which CAGC was ordered into liquidation in domiciliary proceedings—the Director petitioned the Court of Common Pleas for Richland County to be appointed ancillary receiver of CAGC in South Carolina. (R. pp. 61-89.) On March 10, 2014, the circuit court (the Honorable L. Casey Manning presiding) found commencement of ancillary proceedings to be appropriate and appointed the Director ancillary receiver of CAGC. (R. pp. 1-4.)

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[5] *See* Jinks v. Richland County, 355 S.C. 341, 344, 585 S.E.2d 281, 283 n. 3 (2003) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); Watson v. Underwood, 407 S.C. 443, 452, 756 S.E.2d 155, 160 n. 9 (Ct. App. 2014) ("'[A]ppellants have the responsibility to identify errors on appeal, not the [c]ourt.' '[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.'") (citations omitted); McCall v. IKON, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error); First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"); Cont'l Ins. Co. v. Shives, 328 S.C. 470, 474, 492 S.E.2d 808, 811 n. 2 (Ct. App. 1997) (an issue not raised in the appellant's principal brief may not be raised via reply brief).

On May 7, 2014, the Association moved to intervene in the ancillary proceedings and to assert therein a claim for declaratory relief, with CAGC; the Director, as receiver of CAGC; and CompTrust joined as respondents thereto. (R. pp. 213-60.) Specifically, the Association wanted to pursue a judicial declaration that

> it has no statutory obligation for any claims arising out of the Self-Insured Coverage [i.e., liabilities transferred to/assumed by CAGC under the LPT Agreement] because such claims are not "covered claims" as defined by the [South Carolina Property and Casualty Insurance Guaranty] Act; CAGC did not issue any policy of insurance by assuming the Self-Insured Coverage under the LPT Agreement; and/or the LPT Agreement would be "insurance written on a retroactive basis to cover known losses" for which the Association is not responsible.

(R. p. 221.) The circuit court (the Honorable Deandra G. Benjamin presiding) heard the motion on June 9, 2014,[6] and granted it that same day, allowing the Association to intervene and to assert its claim for the above-referenced declaratory relief, with CAGC; the Director, as receiver of CAGC; and CompTrust joined as respondents thereto. (R. pp. 5-7.)

Thus the Association's declaratory judgment action was brought within the ancillary receivership proceedings, its complaint, directed at the newly added respondents, seeking the same declaratory relief as stated in its motion to

[6] (R. pp. 421-26.)

intervene. (R. pp. 90-138.) Following its responsive pleading, CompTrust made a motion to quash the Association's discovery requests and then later moved for dismissal. (R. pp. 143-212, 261-79, 358-97.)

The circuit court (the Honorable G. Thomas Cooper, Jr., presiding) heard CompTrust's motions on September 18, 2015, and granted them by order filed September 30, 2015, dismissing CompTrust from the Association's action. (R. pp. 8-23, 427-82.) The circuit court thereafter denied the Association's motion to reconsider by order filed January 26, 2016. (R. pp. 58-60, 398-406.)

This appeal followed by notice served February 2, 2016.

ARGUMENT

I. This appeal is required to be dismissed for lack of appellate jurisdiction, but assuming, *arguendo*, such is not the case,[7] the Association's argument that the order dismissing CompTrust improperly reversed a prior circuit court order is not preserved for review, but even assuming, *arguendo*, that, too, is not the case, the order dismissing CompTrust did not in fact improperly reverse a prior circuit court order.

First off, the notion, advanced by the Association, that Judge Benjamin's "ruling [is] 'the law of the case[]'"[8] is misguided. The Association points to the lack of a motion to reconsider or an appeal by CompTrust, but overlooks or disregards the fact—which it expressly acknowledged at the hearing before Judge Benjamin—that CompTrust was not at that time a party to the case. (R. p. 424, line 25 - p. 425, line 12.) CompTrust had no obligation—indeed no ability—to seek reconsideration or take an appeal. Insofar as the law-of-the-case doctrine is concerned, there can be no *unappealed* ruling where there is no *appealable* ruling to begin with, and the Association's invocation of the doctrine is plainly misplaced.

But, on the other hand, the doctrine may well be applicable—even dispositive—against the Association. As the Association observes, "right or wrong" an unappealed ruling is the law of the case. (App's Br. at p. 8 n. 3); *see*

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[7] In light of the nature of this argument, this assumption is carried over and incorporated throughout this brief as needed for the sake of addressing arguments that would implicate the Court's exercise of appellate jurisdiction.

[8] (App. Br. at p. 8 n. 3.)

also Soden, 333 S.C. at 566, 511 S.E.2d at 378. CompTrust believes the argument that its dismissal would improperly reverse a prior order was raised for the first time in the Association's motion asking Judge Cooper for reconsideration.[9] Regardless, Judge Cooper denied that motion on two separate grounds: (1) he was unpersuaded on the merits; (2) "[i]n addition, [he] was not served with a copy of the [motion] as . . . required under Rule 59(g) of the South Carolina Rules of Civil Procedure." (R. p. 60.)

The Association has not presented any appellate challenge to the second ground for Judge Cooper's decision—that the Association's motion to reconsider was invalid because he was not served with a copy as required; consequently, any such challenge has been abandoned,[10] and it is the law of the case. And because it constitutes an independent ground for the judge's decision, it requires affirmance of the decision under the two-issue rule. Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on

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[9] This alone would render the argument unpreserved for this Court's review. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (argument must be "sufficiently specific to inform the trial court of the point being urged . . . ."); Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider.").

[10] *See* Jinks, 355 S.C. at 344, 585 S.E.2d at 283 n. 3 (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); Shives, 328 S.C. at 474, 492 S.E.2d at 811 n. 2 (an issue not raised in the appellant's principal brief may not be raised via reply brief).

more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *see also* Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255, n. 1 (1996).

Moreover, in consequence of Judge Cooper's order denying reconsideration having to be affirmed—as mandated by a doctrine requiring this result without regard, as the Association itself pointed out, to whether it is "right or wrong"—application of the relevant principles of error preservation would, under the circumstances, require affirmance of Judge Cooper's prior order of dismissal as well, or else effectively violate the commandment against reversing the reconsideration order—and especially so since the reconsideration order itself expressly reiterates the correctness of CompTrust's dismissal on the merits. *Cf.* Elam, 361 S.C. at 25, 602 S.E.2d at 780 (instructing that South Carolina's preservation requirements are "mandatory"); Rule 103, SCRE (expressly rejecting the plain-error rule as "inconsistent with the law in South Carolina"); Hendrix v. E. Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995) (granting a writ of certiorari to review the Court of Appeals' decision, affirming the decision in result only, and vacating the decision to the extent it addressed an issue that was not preserved, explaining, "Since the issue . . . . was not preserved for review, it should not have been addressed.").

Then there is this: Timely service of a notice of appeal is a jurisdictional requirement, and the effectiveness of a motion, like the Association's motion for reconsideration, in staying the time for appeal depends on the propriety of the motion.[11] Because such a motion must be timely served to stay the time for appeal, and here it is the law of the case that the Association's motion was invalid, beset by a fatal procedural defect for not serving the judge with a copy at all, as required, the force of logic compels the conclusion that the Associations' motion did not stay the time for appeal and, in turn, that the Association did not timely serve its notice of appeal, leaving this Court without jurisdiction and requiring dismissal of the appeal. *See* Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC, 413 S.C. 642, 646-47, 776 S.E.2d 575, 577-78 (Ct. App. 2015).

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[11] *See* Elam, 361 S.C. at 14-15, 602 S.E.2d at 775 ("The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment. The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice. A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.") (internal citations omitted); id. at 20, 602 S.E.2d at 778 ("An appeal may be barred due to untimely service of the notice of appeal when a party-instead of serving a notice of appeal-files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment. An appeal also may be barred due to untimely service of the notice of appeal when a party-instead of serving a notice of appeal-recaptions a written JNOV/new trial motion, which has been ruled on, and resubmits it as a virtually identical, written Rule 59(e) motion.") (internal citations omitted).

Still, assuming, *arguendo*, the foregoing analysis is of no moment and the Association's argument is properly addressed on the merits, it is nonetheless unavailing. Again, CompTrust was not a party to the case when the Association's motion to intervene was made and decided, as the Association then acknowledged; the position CompTrust advanced in support of dismissal was not at all addressed in the order allowing intervention; and, of course, it is not the case that a procedural ruling allowing joinder of an absent party prohibits the party from thereafter seeking dismissal upon appearing in the case. Judge Cooper's holding—that CompTrust should be dismissed—did not have the effect of reversing an earlier substantive order; therefore, it did not improperly reverse the earlier order. *See* Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986).

II. Judge Cooper did not otherwise commit reversible error in dismissing CompTrust from the Association's declaratory judgment action—i.e., in any way besides the claim refuted above.

The transferred CompTrust policies all predate July 2009. The applicable statute of limitations expired no later than July 2012. *See* S.C. Code Ann. § 15-3-530. And the notion that the discovery rule is of aid to the Association in this regard is false, for, as explained in the introduction (which is incorporated by reference herein), the Association has not actually alleged a *claim* for relief against CompTrust that it supposedly discovered, which, in turn, shows that CompTrust

was correctly dismissed in any event because of its needless inclusion in the case. (R. pp. 95-101.) CompTrust's dismissal from the action will not affect the outcome of the ancillary receivership or the Association's claim for the declaratory relief it seeks—the Association is not seeking to establish any contested fact, impose liability, or recover damages; CompTrust's dismissal cannot constitute reversible error.

Moreover, as explained above, CompTrust lawfully transferred all of its liabilities to CAGC via a contractual novation under the LPT Agreement, which had received the full, objective review and prior approval of both the Commission—the authority expressly designated as having "exclusive jurisdiction" over it—and the NCDOI. Indeed, it was at the insistence of these authorities that the terms of the LPT Agreement substituted CAGC as the liable party *ab initio* for any causes of action that would have arisen under the transferred policies to another insurer licensed to transact business in South Carolina. (R. pp. 322-57.)

Also, CompTrust is not subject to suit under S.C. Code Ann. §§ 33-14-105 and -107. It was formed as an unincorporated business trust in 1982, before the South Carolina Business Corporation Act of 1988, S.C. Code Ann. §§ 33-1-101 to -57-200 (the "BCA"). While the BCA acknowledges the prior existence of such trusts, the few provisions that specifically address them, §§ 33-53-10 to-50,

primarily address real property ownership and records. The BCA does not state that unincorporated business trusts are to be treated as incorporated entities; nor does it impose on them any of the filing, notice, or other requirements imposed on incorporated entities; nor does the BCA impose upon them any post-dissolution liability other than that which would normally exist under common law.

A business trust is created by the voluntary act of the parties. 12A C.J.S. Business Trusts § 12. A written declaration of trust is often necessary; however, there is no special form or language that is required to form a business trust other than the parties' intention to create a trust or by showing the intention to beneficially own another party's property. Id. None of the BCA's provisions set any firm requirements for a business trust's foundational trust agreement. One important thing BCA does specify is that the declaration of trust for a business trust may limit the individual liability of shareholders and trustees, S.C. Code Ann § 33-51-40, and, indeed, Article VI, § 8 of CompTrust's declaration does so. (R. pp. 190-200).

CONCLUSION

For the foregoing reasons, either the appeal should be dismissed or CompTrust's dismissal from the Association's action should be affirmed.

Respectfully submitted,

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CERTIFICATION FOR FINAL BRIEF ON BEHALF OF RESPONDENT COMPTRUSTAGC OF SOUTH CAROLINA A/K/A COMPTRUSTAGC OF SOUTH CAROLINA, INC.

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I, Russell G. Hines, do hereby certify that the Final Brief of Respondent CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc. complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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