THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court Of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case No: 2016-000867

Darhyl Taylor, as the Personal Representative
of the Estate of Ruth T. Simpson.....Respondent,

v.

Johnson & Johnson Preferred Financing, ProCentury Insurance Company, FINCO Premium Finance Co., Inc. and Carolina Independent Automobile Dealers Association, Dealers Risk and Insurance Services, Independent Dealers Insurance Management..... Defendants,

Of Whom ProCentury Insurance Company is the .....Appellant.

INITIAL BRIEF OF APPELLANT

Phillip E. Reeves (S.C. Bar No. 4672)
Nicholas A. Farr (S.C. Bar No. 78769)
GALLIVAN, WHITE & BOYD, P.A.
P.O. Box 10589
Greenville, South Carolina 29601
(864) 271-9580

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

ARGUMENTS 5

I. Standard of Review..... 5

II. The Circuit Court erred in granting the respondent's motion for summary judgment on the grounds that the timing requirements for cancellation under S.C. Code § 38-39-90 were not followed 5

III. The Circuit Court erred in granting the respondent's motion for summary judgment on the grounds that the unearned premium was not returned to the insured prior to the accident.....9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Bowman v. State Roofing Co., 365 S.C. 112, 616 S.E.2d 699 (2005)..... 9, 10

Dawson v. S.C. Power Co., 220 S.C. 26, 32, 66 S.E.2d 322, 325 (1951) 5

Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)..... 5

S. Carolina Ins. Co. v. Brown,
280 S.C. 574, 575-76, 313 S.E.2d 348, 348-49 (Ct. App. 1984)..... 7, 8

Statutes

S.C. Code Ann. § 38-39-90.....5-10

S.C. Code Ann. § 38-27-100 (1976)..... 7, 8

STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN FINDING THAT THE TIMING REQUIREMENTS OF S.C. CODE § 38-39-90 WERE NOT FOLLOWED?

2. DID THE CIRCUIT COURT ERR IN FINDING THAT THE FAILURE TO RETURN UNEARNED PREMIUMS PRIOR TO THE DATE OF THE ACCIDENT RENDERED THE CANCELLATION INEFFECTIVE?

STATEMENT OF THE CASE

The respondent, Darhyl Taylor, as the Personal Representative of the Estate of Ruth T. Simpson, initiated this action against Johnson & Johnson Preferred Financing and ProCentury Insurance Company, by filing a summons and complaint in the Court of Common Pleas for Anderson County on March 5, 2014. (Summons and Compl.). On May 8, 2014, ProCentury filed an answer to the complaint and counterclaimed against the respondent, seeking a judicial declaration that an insurance policy had been properly cancelled prior to a motor vehicle accident in which the respondent's decedent was killed. (Answer and Counterclaim). The respondent filed an answer to the counterclaim on June 18, 2014. (Answer to Counterclaim).

On November 10, 2014, the respondent filed an amended complaint in which it added FINCO Premium Finance Co., Inc. and Carolina Independent Automobile Dealers Association, Dealers Risk and Insurance Services, Independent Dealers Insurance Management as defendants. (Amended Compl.). ProCentury filed an answer to the amended complaint on January 16, 2015, and, again, asserted a counterclaim against the respondent. (Answer to Amended Compl.). On August 12, 2015, ProCentury moved for summary judgment as to the issue of whether the insurance policy at issue in this action was properly cancelled. (Appellant Mtn. Summary Judgment). Likewise, on September

23, 2015, the respondent moved for summary judgment. (Respondent Mtn. Summary Judgment).

The pending motions were heard by Judge J. Cordell Maddox, Jr. on February 18, 2016. Judge Maddox, after hearing the arguments of the parties and reviewing the record, issued an order on March 30, 2016, granting the respondent's motion for summary judgment and denying ProCentury's motion. (Order Granting Respondent's Mtn. Summary Judgment).

Thereafter, ProCentury timely filed its Notice of Appeal on April 22, 2016.

STATEMENT OF FACTS

This matter arises out of an automobile accident which occurred on July 17, 2011, on Highway 187 in Anderson County, South Carolina. Involved in that accident was an automobile owned and being operated by Ruth Simpson and an automobile owned by Autos Nex Store, LLC, and being operated by Mazen Zein. The accident allegedly occurred when Mr. Zein crossed the center line and struck Ms. Simpson's vehicle. Ms. Simpson was killed as a result of the accident. (Amended Compl.).

ProCentury issued a commercial lines policy of insurance to Autos Nex Store bearing policy number PIC112590 with effective dates of coverage from August 10, 2010 to August 10, 2011. The premium for the policy was financed by FINCO Premium Finance Company. The policy contains liability limits of $100,000.

The financing for the premium for the policy was provided by FINCO Premium Finance Company. (Premium Finance Agreement). Under the terms of that arrangement, the premium was paid by FINCO in the form of a loan made by it to Autos Nex. Thereafter, a payment schedule was arranged whereby Autos Nex had a

responsibility to repay the amount of the premium together with interest thereon to FINCO. That agreement contains a power of attorney permitting Defendant FINCO to cancel the insurance contract in the event Autos Nex did not timely make the required payment to it.

The original loan date was August 10, 2010, which corresponds with the initial effective date of the policy. After the account was established, Autos Nex made several payments to FINCO and Johnson & Johnson Preferred Financing which bought the accounts of FINCO during the applicable policy period. However, it did not make the payment due on May 10, 2011. That payment was due under the terms of a bill dated April 25, 2011. In that bill, it is noted that the last payment had been posted on April 19, 2011. That payment was in the amount of $220.11. According to the bill, the final payment due date was May 10, 2011, and the final amount due and owing was $204.87. The April 25, 2011, bill was thus for that amount.

It is undisputed that the April 25, 2011 bill was never paid. As such, Johnson and Johnson sent a notice to Autos Nex indicating that the May 10, 2011, payment had not been received. Although that notice is undated, it does indicate that payment needed to be received before May 15, 2011, to avoid a late charge. As such, it can be assumed that it was sent between May 10 and May 15, 2011.

After that payment was not made, on May 16, 2011, Johnson and Johnson forwarded an intent to cancel to Autos Nex Store at its appropriate address. (Notice of Intent to Cancel). In that notice, it is noted that the payment was past due and that if payment was not received within ten days, Johnson and Johnson would request cancellation of the policy, to be effective on May 26, 2011. Again, the payment was not

made. Subsequently, another bill was issued in due course on May 25, 2011, noting that the payment due May 10, 2011, had not been paid and late fees had been added to it. Once again, there was no response to that bill and no payment made.

Accordingly, Johnson and Johnson issued a cancellation notice effective May 31, 2011, to Autos Nex Store. (Cancellation Notice). The cancellation notice shows a mailing date of May 26, 2011, and notes that the policy was cancelled by the lender as a result of the non-payment of premium pursuant to the authority given to it by a power of attorney in the premium finance agreement. The notice also noted that Autos Nex would continue to receive monthly bills as long as there was a balance due on the account.

Autos Nex never responded to this cancellation notice. As such, Johnson and Johnson forwarded copies of the cancellation notice to Independent Dealers Insurance Management and to Dealers Risk and Insurance Services, Autos Nex's agent, showing that the policy was to be cancelled effective May 26, 2011. Subsequently, by email dated July 29, 2011, Leslie Waslo of Independent Dealers emailed Century and requested that the policy be cancelled for non-payment of premium in accord with the May 26, 2011, request. (Correspondence to Century).

Immediately upon receipt of the cancellation notice, Century endorsed the policy noting that it had been cancelled effective May 31, 2011, and $382.00 in unearned premium returned. (Cancellation Endorsement). That notice was sent via email dated July 29, 2011, from Noland Reilly, a garage underwriting assistant at Century, to Leslie Waslo at her email address. The policy was thus cancelled at that time effective May 31, 2011. Thereafter, Century returned the premium refund to FINCO by August 17, 2011.

(August 17, 2011 Correspondence). On that same date, FINCO issued a check refunding the premium, minus agency fees, to Autos Nex for $166.89.

ARGUMENTS

I. Standard of Review

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Fleming, 350 S.C. at 493-94, 567 S.E.2d at 860. However, when the facts are not in dispute, the question before the court is one of law. Dawson v. S.C. Power Co., 220 S.C. 26, 32, 66 S.E.2d 322, 325 (1951) (holding that when only one reasonable inference can be drawn from a contested issue of fact, the question becomes one of law for the court).

II. The Circuit Court erred in granting the respondent's motion for summary judgment because the timing requirements for cancellation under S.C. Code § 38-39-90 were followed.

The handling of cancellation of insurance contracts by a premium service company is governed by South Carolina Code § 38-39-90. That statute provides that if a premium service agreement contains a power of attorney enabling the premium service company to cancel the policy, the insurance contract may not be cancelled unless such cancellation is effectuated in accordance with that section. Specifically, S.C Code 38-39-

90 sets forth the following timeline for the cancellation of insurance policies by a premium finance company:

> (b) The premium service company shall deliver to the insured *at least ten days written notice of its intent to cancel the insurance contract* if there is a default. This notice must be mailed or delivered not more than ten days before the due date.
>
> (c) *Not less than five days after the expiration of the notice required pursuant to the provisions of subsection (b),* the premium service company may after that time request in the name of the insured cancellation of the insurance contract *by delivering to the insurer a notice of cancellation.* The insurance contract must be cancelled as if the notice of cancellation had been submitted by the insured himself, but without requiring the return of the insurance contract. The premium service company also *shall deliver a notice of cancellation to the insured at his last address as provided for in its records by the date the notice of cancellation is delivered to the insurer.* It is sufficient to give notice either by delivering it to the person or by depositing it in the United States mail, postage prepaid, addressed to the last address of the person. Notice delivered in accordance with the provisions of this section is sufficient proof of delivery. If a notice of cancellation effected in accordance with this chapter is issued, a nonrefundable cancellation charge is permitted. The amount of the cancellation charge must be filed with and promulgated by the department.

(Emphasis added).

Under section (b), the premium service company shall deliver to the insured at least ten (10) days written notice of its intent to cancel if there is a default. It is also provided that the notice must be mailed or delivered not more than ten (10) days before the due date. Here, Johnson and Johnson, acting on behalf of FINCO, mailed the intent to cancel on May 16, 2011, which is ten (10) days before the purported cancellation date of May 26, 2011. Accordingly, Johnson and Johnson, acting on behalf of FINCO, complied with section (b).

Thereafter, section (c) of the statute provides that not less than five (5) days after the expiration of the notice required, the premium service company may request in the

name of the insured, cancellation of the insurance contract by delivering to the insurer a notice of cancellation. Johnson and Johnson notified Century of the cancellation, effective May 31, 2011, on July 28, 2011. As such, the notice to the insurer was provided by the premium service company "not less than 5 days" after the expiration of the notice required.

In granting the respondent's motion for summary judgment, the Circuit Court held that the premium finance company did not comply with section (c) because it mailed the cancellation notice to the insured not less than 5 days after the expiration of the notice of intent. In reaching its decision, the Circuit Court, citing South Carolina Ins. Co. v. Brown, 280 S.C. 574, 575-76, 313 S.E.2d 348, 348-49 (Ct. App. 1984), stated that section (c) requires a "five day waiting period" before the premium finance company may deliver to the "insurance company and the insured" the notice of cancellation. Neither the statute nor Brown stands for that position.

As discussed above, section (c) requires the premium finance company to deliver the notice of cancellation to the insurer not less than five days after expiration of the notice. Under section (c), the premium finance company must deliver notice of cancellation to the insured "by the date the notice of cancellation is delivered to the insurer." In other words, notice of cancellation may not be sent to the insurer until 5 days after the expiration of the notice, but can be sent to the insured by the date the cancellation is delivered to the insurer. Here, where the notice of cancellation was delivered to Century on July 28, 2011, and sent to the insured on May 26, 2011, prior to the delivery, the requirements of section (c) are satisfied.

Moreover, while the Court in Brown did find, under the facts of that case, that a cancellation was not effective when the notice of cancellation was sent to the insured one day after the expiration of the notice of intent, Brown is distinguishable from the facts present here for a couple of reasons. First, Brown was decided under S.C. Code §38-27-100 (1976), the former version of §38-39-90. While §38-27-100 (1976) and §38-39-90 share much of the same language, they differ in one key aspect. Section 38-27-100 does not contain any specific timing requirements regarding the mailing of the notice of cancellation to the insured. Specifically, §38-27-100(c) provides, in relevant part, as follows:

> (c) *Not less than five days after the expiration of such notice*, the premium service company may thereafter request in the name of the insured, cancellation of such insurance contract *by mailing to the insurer a notice of cancellation*, and the insurance contract shall be cancelled as if such notice of cancellation had been submitted by the insured himself, but without requiring the return of the insurance contract. The premium service company *shall also mail a notice of cancellation to the insured at his last address as set forth in its records, and such mailing shall constitute sufficient proof of delivery.*

(emphasis added). Notably, §38-27-100, unlike §38-39-90, does not provide that the notice of cancellation shall be delivered to the insured "by the date the notice of cancellation is delivered to the insurer." As such, §38-27-100 lacks any distinction between the timing of notice to the insurer and the notice to the insured.

Second, unlike the facts here, the premium finance company in Brown never sent notice of cancellation to the insurer and, thus, clearly did not comply with §38-27-100(c). The insurer in Brown also attempted to cancel the policy on its own accord, but was found not to have provided sufficient notice pursuant to S.C. Code. § 38-37-1450, which sets forth the requirements for an insurer, rather than a premium finance company, to cancel a policy. Here, the premium finance company clearly provided notice of

cancellation to the insured and Century, albeit a couple of months later, in compliance with §38-39-90(c).

The premium finance company, in mailing the notice of intent to cancel on May 16, 2011, ten days or more from the purported cancellation date, and delivering the notice of cancellation to Century on July 28, 2011, complied with the cancellation requirements of §38-39-90. As such, the Century policy was properly cancelled, effective May 31, 2011 and the lower court's decision to the contrary was in error and should be reversed.

III. The Circuit Court erred in granting the respondent's motion for summary judgment on the grounds that the unearned premium was not returned to the insured prior to the accident.

The Circuit Court also granted the respondent's motion for summary judgment on the grounds that the policy cancellation was not effective because Century failed to return the unearned premiums prior to the accident at issue pursuant to §38-39-90(e). While it is undisputed that Century returned the unearned premiums, the Circuit Court, citing Bowman v. State Roofing Co., 365 S.C. 112, 616 S.E.2d 699 (2005), found that the return of unearned premiums is a "condition precedent to an effective cancellation" and, thus, the cancellation was not effective until the unearned premiums were refunded on August 17, 2013. This conclusion stretches the limits of §38-39-90(e) and extends coverage well beyond what was contemplated in Bowman.

Section 38-39-90 does not contain any specific requirements as to when an insurer or premium finance company must return unearned premiums. Rather, §38-39-90 provides the following:

> (e) If an insurance contract is cancelled, the insurer shall return whatever gross unearned premiums are due under the insurance contract to the premium service company which financed the premium for the account of the insured. The gross unearned premiums due on personal lines insurance contracts financed by premium service companies must be computed on a pro rata basis.

> (f) If the crediting of return premiums to the account of the insured results in a surplus over the amount due from the insured, the premium service company promptly shall refund the excess to the insured or the agent of record. A refund is not required if it amounts to less than five dollars.

(Emphasis added.)

Here, there is no question that Century returned the unearned premiums to the premium financing company as soon as it was notified that the policy had been cancelled. While the unearned premiums had not been returned as of the date of the accident, once the unearned premiums were returned, the cancellation was valid effective May 31, 2011. Nothing in the statute dictates reaching the opposite result. If the statute were to be construed in the alternative, then it would result in the insured having extended coverage beyond the cancellation date.

While Bowman admittedly provides that the refund of premiums is a condition precedent, it does not offer any guidance in a situation where the unearned premium is, in fact, returned as is the case here. Rather, Bowman involves an insurer which never returned the unearned premiums and is thus distinguishable from this case. Even if Bowman stands for the position that a policy is not considered cancelled until the unearned premiums have been returned, it does not take any position as to when a cancellation is deemed cancelled once the premiums are returned. Simply put, Bowman does not decide the issues present in this case.

There is no case law construing §38-39-90(e) under the facts present here. As such, the matter is controlled by the statute itself which does not contain any language extending the effective date of a cancellation until the unearned premiums have been returned. Accordingly, the Circuit Court erred finding such an extension and in granting summary judgment to the respondents on those grounds.

CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court's decision, deny the motion for summary judgment of the respondents, and grant Century's motion for summary judgment.

Respectfully submitted,

October 20, 2016

Phillip E. Reeves (S.C. Bar No. 4672)
Nicholas A. Farr (S.C. Bar No. 78769)
GALLIVAN, WHITE & BOYD, P.A.
P.O. Box 10589
Greenville, South Carolina 29601
(864) 271-9580

Attorneys for Appellant,
ProCentury Insurance Company

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court Of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case No: 2016-000867

Darhyl Taylor, as the Personal Representative of the Estate of Ruth T. Simpson.....Respondent,

v.

Johnson & Johnson Preferred Financing, ProCentury Insurance Company, FINCO Premium Finance Co., Inc. and Carolina Independent Automobile Dealers Association, Dealers Risk and Insurance Services, Independent Dealers Insurance Management..... Defendants,

Of Whom ProCentury Insurance Company is the .....Appellant.

PROOF OF SERVICE

I certify that I served copies of Appellant's Initial Brief and the Designation of Matter to be Included in the Record on Appeal by United States Mail, postage prepaid, addressed to:

Mr. Steven M. Krause
Mr. Timothy A. Nowacki
Krause, Moorhead & Drasien, P.A.
207 E. Calhoun Street
Anderson, South Carolina 29621

Mr. Stephen L. Brown
Young Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402-9993

Mr. Thomas L. Stephenson
Stephenson & Murphy, LLC
207 Whitsett Street
Greenville, South Carolina 29601

Mr. William E. Booth, III
Booth Law Firm, LLC
3231 Sunset Boulevard, Suite A
West Columbia, South 29169

Phillip E. Reeves (S.C. Bar No. 4672)
Nicholas A. Farr (S.C. Bar No. 78769)
GALLIVAN, WHITE & BOYD, P.A.
P. O. Box 10589
Greenville, SC 29603
(864) 271-9580

Greenville, SC
October 20, 2016

Attorneys for Appellant,
ProCentury Insurance Company

Nick Farr
A member of the South Carolina Bar
Direct 864.271.5347
NFarr@GWBlawfirm.com

Gallivan, White & Boyd, P.A.
ATTORNEYS AT LAW

55 Beattie Place, Suite 1200
Post Office Box 10589 (29603)
Greenville, South Carolina 29601
Telephone 864.271.9580
Facsimile 864.271.7502
www.GWBlawfirm.com

October 20, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Darhyl Taylor, as personal representative of the Estate of Ruth T. Simpson v. Johnson & Johnson Preferred Financing, ProCentury Insurance Company, FINCO Premium Finance Co., Inc. and Carolina Independent Automobile Dealers Association, Dealers Risk and Insurance Services, Independent Dealers Insurance Management
Appellate Case No.: 2016-000867

Dear Ms. Kitchings:

Enclosed for filing please find the originals and three copies each of Appellant ProCentury Insurance Company's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and a Proof of Service in the above-referenced matter. We would be very appreciative if you would file the originals and return the clocked copies to us in the enclosed stamped envelope.

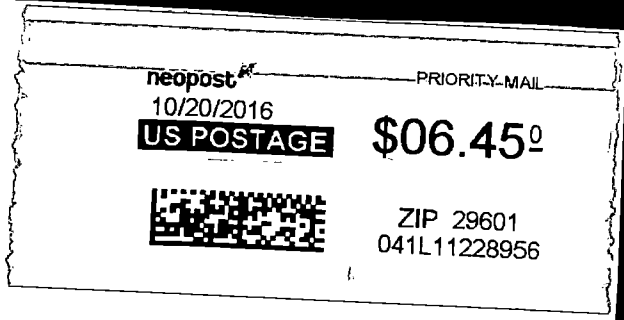
Thank you for your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely yours,

GALLIVAN, WHITE & BOYD, P.A.

Nicholas A. Farr

cc: Mr. Steven M. Krause
Mr. Timothy A. Nowacki
Mr. Stephen L. Brown
Mr. Thomas L. Stephenson
Mr. William E. Booth, III
Ms. Vivian Cross



Gallivan, White & Boyd, P.A.
ATTORNEYS AT LAW
55 Beattie Place, Suite 1200
Post Office Box 10589 (29603)
Greenville, South Carolina 29601

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211