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 Number 2016-000867

Daryhl Taylor as Personal Rrepresentative
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.

FINAL BRIEF OF THE RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **THE CIRCUIT COURT CORRECTLY HELD NOTICE OF CANCELLATION WAS PREMATURELY DELIVERED TO THE INSURER IN VIOLATION OF S.C. CODE 38-39-90.**

II. **THE CIRCUIT COURT CORRECTLY HELD THAT THE FAILURE OF THE INSURER AND THE PREMIUM SERVICE COMPANY TO RETURN THE UNEARNED PREMIUM TO THE INSURED UNTIL TWO MONTHS AFTER THE WRECK THAT KILLED RESPONDENT'S DECEDENT AND SEVENTY-EIGHT DAYS AFTER THE ALLEGED DATE OF CANCELLATION RENDERED CANCELLATION INEFFECTIVE UNDER S.C. CODE § 38-39-90.**

STATEMENT OF THE CASE

Respondent agrees with the statement of the case provided in Appellant's Initial Brief, and the same is incorporated herein by reference.

STATEMENT OF THE FACTS

On June 17, 2011, Ruth T. Simpson was killed in an accident in Anderson County, South Carolina involving a vehicle owned by Autos Nex Store, LLC and driven by Mazen A. Zein. Respondent filed a civil action against Autos Nex and Mazen Zein in the Anderson Court of Common Pleas. Following a trial, an order and judgment was entered on September 17, 2013 in *Darhyl Taylor, as Personal Representative for the Estate of Ruth T. Simpson, v. Mazen A. Zein and Autos Nex Store, LLC* (C/A No. 2011-CP-04-02407) against Autos Nex Store, LLC in the amount of $500,000 and in favor of Respondent Taylor for his wrongful death and survival action claims arising from the Accident. (R. pp. 28-33).

Autos Nex obtained a motor vehicle liability policy (the "Policy") from Appellant Pro Century, with an effective dates of August 10, 2010, through August 10, 2011. The policy was obtained through a premium finance security agreement with FINCO, a premium service company. (R. pp. 127-28). That agreement contains a power of attorney permitting Defendant FINCO to cancel the insurance contract. The agreement also specifies that Independent Dealers Insurance Management is the managing general agent and insurance company as listed on the premium finance security agreement. (R. pp. 127-28).

Prior to the wreck involving Ms. Simpson, Autos Nex fell behind in its premium payments to FINCO. The following dates are not in dispute:

1.) The notice of intent to cancel contains a mailing date of May 16, 2011. (R. p. 129).

2.) The cancellation notice contains a mailing date of May 26, 2011, and purports to state that the effective date of cancellation is May 31, 2011. (R. p. 130, 134-35).

3.) The check refunding the unearned premium in the amount of $166.89 to the insured Autos Nex was not issued until August 17, 2011. (R. p. 137).

All told, seventy-eight days elapsed between the date Appellant claims it effectuated cancellation and the return of the unearned premium. Sixty-one days lapsed between the date of the accident and return of the premium to Autos Nex. Additional facts will be provided as necessary in the arguments below.

LEGAL ANALYSIS AND ARGUMENT

Standard of Review

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ellis v. Davidson*, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Id.* 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).

I. The Circuit Court correctly held that the notice of cancellation was prematurely delivered to the insurer in violation of S.C. Code 38-39-90.

The Circuit Court provided two alternative grounds for finding the cancellation invalid. The first of which, and the principal ground, was the failure of the Appellant and defendants to promptly return the unearned premium to the insured. The second of which was the timing of the notices. Appellant addresses the Circuit Court's grounds for granting summary judgment in favor of Respondent in reverse order, and Respondent is bound to reply in the same order. This Court however may affirm on either or both grounds.

S.C. Code § 38-39-90 is the exclusive means for cancellation of an insurance contract by a premium service company. *Bowman v. State Roofing Co.*, 365 S.C. 112, 121, 616 S.E.2d 699, 704 (2005). An insurance contract "may not be canceled by the premium service company unless the cancellation is effectuated in accordance with this section." § 38-90-90(a). Any violation of this section therefore invalidates cancellation. *Bowman*, 365 S.C. at 121, 616 S.E.2d at 704. *citing South Carolina Ins. Co. v. Brown*, 280 S.C. 574, 313 S.E.2d 348 (Ct. App. 1984).

S.C Code 38-39-90 mandates the following timeline for the mailing of notices:

(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 canceled 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). The statute requires a "five day waiting period" after the expiration of the notice of intent to cancel before the premium service company may deliver to the insurance company the cancellation notice. *Brown*, 280 S.C. at 575-76, 313 S.E.2d at 348-49. All told, FINCO, as the premium service company, must have waited fifteen (15) days before delivering the notice of cancellation. The date of delivery is the date of mailing under § 38–39–90(c). *Bowman*, 365 S.C. at 119, 616 S.E.2d at 703 n.3.

Appellant argues that the cancellation notice was not delivered to ProCentury until July 28, 2011. However, based upon all records before the Circuit Court, a cancellation notice with a date of mailing of May 26, 2011 was sent to Independent Dealers Insurance

Management. (R. p. 134).[1] The notice history printout indicates that on May 26, 2011 at 11:25:02 a.m. the cancellation notice was generated and at 4:06:54 p.m. the cancellation was sent via email to "Ins. Co: Independent Dealers Insurance Management". (R. pp. 135-36). Independent Dealers Insurance Management is the managing general agent and insurance company as listed on the premium finance security agreement. (R. pp. 127-28) It is also listed as the "Company" on the cancellation notice with a mailing date of May 26, 2011. (R. p. 134). As agent for the insurer, delivery of the cancellation notice to Independent Dealers Insurance Management constitutes delivery of the cancellation notice to the insurer less than five days after the expiration of the notice of intent to cancel. Therefore, the Circuit Court correctly held that the premature delivery of the cancellation notice invalidates cancellation under S.C Code 38-39-90(c).

II. The Circuit Court correctly held that the failure of premium service company to return the unearned premium to the insured until two months after the wreck that killed Respondent's decedent and seventy-eight days after the alleged date of cancellation rendered cancellation ineffective under S.C. Code § 38-39-90.

In *Bowman vs. State Roofing Co.*, our Supreme Court held that the return of the unearned premium is required by S.C. Code § 38-39-90, and therefore the return is "a condition precedent to an effective cancellation." *Bowman*, 365 S.C. at 122, 616 S.E.2d at 704 (2005). Requirement (f) of S.C. Code § 38-39-90 provides that a premium service company must "promptly refund" any surplus over five dollars.[2] The *Bowman* court gave meaning to the "promptly refund" language when it held that the requirement is a condition precedent. The Court further held that "this provision works to the benefit of

[1] The July 28, 2011, date represents the date printed.
[2] The court noted in Bowman vs. State Roofing Co. that legislature increased the surplus refund threshold amount from three dollars to five dollars before the case was decided.

the insured and is an added protection ensuring notice to the insured." *Bowman*, 365 S.C. 112, 122, 616 S.E.2d 699, 704 (2005).

This is a fact specific case reflecting significant delay on the part of one or more the Defendants to ensure the return of the premium to the insured as required by statute. It is undisputed that the premium was not refunded until August 17, 2011, which is seventy-eight (78) days after the May 31, 2011, date that Appellant claims the policy was cancelled. The wreck that killed Ms. Simpson occurred on June 17th, 2011, which is during the time period between the alleged cancellation date and the refund of the premium. The burden of complying with the statute and promptly refunding the policy is on the Appellant as carrier and the premium service company. Since the premium service company acted to cancel the policy, "it had the right to demand repayment of the unearned premium." *Id.* It failed to return the premium to the insured until seventy-eight days after the alleged date of cancellation, and therefore cancellation is invalid under subsection (a) of S.C. Code Ann. § 38-39-90.

The Appellant seeks to differentiate this case from *Bowman* because it has returned the premium while the insurer in *Bowman* never returned the premium. Appellant argues that Bowman does not discuss any specific time constraints for the prompt return of the premium, and therefore, merely by its return they claim they are absolved of liability. The Circuit Court correctly noted:

> "As a practical matter, accepting the Defendants' argument would allow an insurer and premium service company to wrongfully withhold the return of an unearned premium and avoid paying under a policy. An insurer and premium service company could simply

refund the premium after a claim is received and backdate the cancellation to the date of the cancellation notice, even after significant delay. "

(R. p. 6). The statute mandates strict compliance and invalidation of cancellation is the repercussion for failing to promptly refund the premium other than its return. S.C. Code Ann. § 38-39-90.

Moreover, although not discussed in the Circuit Court's decision, the *Bowman* court observed in Footnote 4 that S.C. Code Ann. Regs. 69-10(21) requires the return of unearned premiums within thirty days of cancellation to the premium service company and that a copy of the statement regarding the return to be sent to the insured. *Bowman*, 365 S.C. at 121, 616 S.E.2d at 704 n.6 (2005). S.C. Code Ann. Regs. 69-10(23) requires that "any excess of return premium over the amount to which the [premium service company] is properly entitled under the premium service agreement ... shall be promptly paid, and in no event more than 30 days after its receipt, to the insured." The most generous reading of these regulations would at most provide that the unearned premium be returned not more than sixty (60) days from date of cancellation.[3] The seventy-eight (78) day delay in this case violates the regulations. Therefore, this Court should uphold the Circuit Court's decision that the cancellation is invalid under S.C. Code 38-39-90.

[3] The Cancellation Notice Correspondence from FINCO to Independent Dealers Insurance Management provides: "Note to Insurer: Please be advised that the gross cancellation return must be returned within 60 days of the cancellation date."

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Court of Appeals affirm the judgment of the trial court and find that the Policy was not cancelled in accordance with S.C. Code 38-39-90. Therefore, the Policy provides coverage for the wreck that occurred on June 17, 2011 and is the subject of the judgment *Darhyl Taylor, as Personal Representative for the Estate of Ruth T. Simpson, v. Mazen A. Zein and Autos Nex Store, LLC* (C/A No. 2011-CP-04-02407).

Respectfully submitted,

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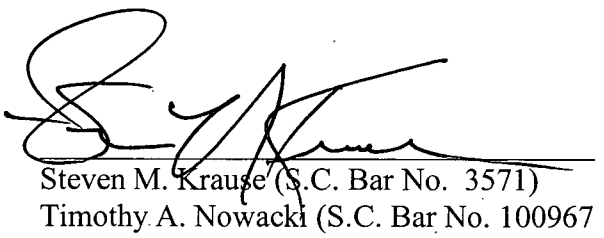

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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February 28, 2017

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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 – Case No.: 2016-000867

Dear Ms. Kitchings:

Enclosed please find the original unbound Final Brief along with 14 bound copies and my Proof of Service for same in the above-referenced matter.

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

With kind regards,

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