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.

FINAL REPLY BRIEF OF APPELLANT

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Attorneys for Appellant

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I. Respondent fails to rebut Appellant's argument that the timing requirements of S.C. Code § 38-39-90 were followed.

While acknowledging that ProCentury personally did not receive the cancellation notice until July 28, 2011, Respondent contends that S.C. Code § 38-39-90(c), which requires notice of cancellation be delivered to the insurer not less than 5 days after the expiration date, was not satisfied because Independent Dealers Insurance Management ("IDIM") was sent a notice of cancellation on May 26, 2011 – the purported cancellation date. Respondent, however, relies, for the first time, on the erroneous assumption that IDIM is an agent of ProCentury such that "delivery of cancellation notice to [IDIM] constitutes delivery of the cancellation to the insurer less than five days after the expiration of the notice of intent to cancel." (Resp. Brief. p. 5). This argument is unsupported by the law and the evidence in the record.

As an initial matter, there is no evidence in the record which establishes an agency relationship between IDIM and ProCentury. Respondent has not presented evidence of any contractual agreements between IDIM and ProCentury or evidence of the course of dealings between those two entities which presumably could imply an agency relationship. Rather, Respondent argues that IDIM is ProCentury's agent because IDIM is listed on the premium finance security agreement ("agreement") as "Insurance Company and Managing General Agent" and on subsequent correspondence generated by FINCO pursuant to that agreement. For the reasons that follow, these documents do not determine whether IDIM is an agent of ProCentury, Autos Nex or any other entity.

Whether an agency relationship exists and the scope of the alleged agent's authority are questions of fact. American Fed. Bank v. Number One Joint Venture, 321 S.C. 169, 173-174, 467 S.E.2d 439, 442 (1996). The declarations of an agent alone as to his agency are insufficient to prove agency. City of Greenville v. Washington Am. Baseball Club, 205 S.C. 495, 504-505, 32 S.E.2d 777, 178-81 (1945). The agreement from which all of Respondent's purported agency arguments flows is not an agreement between ProCentury and FINCO such that IDIM could be in a position to presumably be acting on ProCentury's behalf. Rather, the agreement is between FINCO and Autos Nex, the insured. (R. p. 30). ProCentury is not a party to that agreement. As such, any representations made on the agreement, upon which FINCO ultimately relied, are not binding on either IDIM or ProCentury and do not establish an agency relationship.

There is no evidence in the record regarding the reasons why FINCO or Autos Nex designated IDIM as "Insurance Company and Managing General, Agent" on the agreement. Nonetheless, what is evident is that the designation was not done by ProCentury or IDIM and certainly does not establish an agency between them.

Having established no agency relationship between IDIM and ProCentury, it is evident that the requirements of S.C. Code § 38-39-90 have been met. In compliance with S.C. Code § 38-39-90(b), 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. Thereafter, Johnson and Johnson notified Century of the cancellation, effective May 31, 2011, on July 28, 2011, 59 days after the cancellation date. 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 as required by S.C. Code § 38-39-90(c).

II. Respondent has not provided any statutory or common law authority establishing that unearned premiums must be returned prior to an accident to effect the policy cancellation.

As stated more fully in ProCentury's initial brief, neither Section 38-39-90 not Bowman v. State Roofing Co., 365 S.C. 112, 616 S.E.2d 699 (2005), contain any specific requirements as to when an insurer or premium finance company must return unearned premiums. Respondent now argues that S.C. Code Regs. 69-10(21) requires the return unearned premiums to the premium finance company not more than 30 days from the date of cancellation and, thus, the cancellation was ineffective. This argument too is unavailing because ProCentury complied with S.C. Code Regs. 69-10(21).

S.C. Code Regs. 69-10(21) provides:

> Every insurer, *upon receipt of such request for cancellation*, shall, subject to Section 22 hereof, cancel such contract as of the date requested and shall within a reasonable time, not more than 30 days, cause the gross return premium, if any, to be computed and paid or credited to, or for, the account of the licensee. A copy of the statement relating to such return premiums shall be furnished by the insurer to the insured.

S.C. Code Regs. 69-10(21) (emphasis added). As such, pursuant to the regulation, an insurer shall (1) cancel the contract as of the date requested and (2) return the unearned premiums within 30 days upon receipt of the request for cancellation. ProCentury received the request for cancellation on July 29, 2011 and returned the premium to FINCO by August 17, 2011. As such, ProCentury returned the premium within 30 days from receipt of the request for cancellation pursuant to the regulation. While Respondent argues that the return was not timely because the return was made 78 days after IDIM's receipt of the cancellation notice, IDIM, as discussed above, is not an agent of

ProCentury. ProCentury, as the insurer, acted in compliance with all statutes and regulations regarding the cancellation of the policy in this matter. As such, the policy was properly cancelled and, thus, the Circuit Court erred in granting summary judgment to Respondent.

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,

February 28, 2017

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RULE 211, SCACR CERTIFICATION
FINAL REPLY BRIEF OF APPELLANT

I, Nicholas A. Farr, Esquire, hereby certify that the *Final Reply Brief of Appellant* complies with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.

Nicholas A. Farr, Esquire

Greenville, South Carolina

February 28, 2017

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

PROOF OF SERVICE

I certify that I served copies of Appellant's Final Reply Brief and Appellant's Final Brief by United States Mail, postage prepaid, addressed to:

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February 28, 2017

The Honorable Jenny Abbott Kitchings
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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 in the above-referenced matter, please find the following:

1) Original unbound, 14 bound copies and three unbound copies of the Final Reply Brief of Appellant, including the Certificate of Compliance;

2) Original unbound, 14 bound copies and three unbound copies of the Final Brief of Appellant, including the Certificate of Compliance; and

3) Original and three copies of a Proof of Service.

We would appreciate your filing these documents with the Court of Appeals and returning the three extra unbound stamped copies of the Final Reply Brief, Final Brief of Appellant, Certificates of Compliance and Proof of Service to us in the enclosed envelope. By copy of this letter, we are serving counsel of record with copies of these documents.

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.

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cc: Mr. Steven M. Krause
Mr. Timothy A. Nowacki