THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Larry B. Hyman, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2018-000381

ACCC Insurance Company, ... Respondent,

vs.

Patricia Williams, Ronald Williams, Patrick Benjamin Myers, Brittany Stanley a/k/a Brittany Standley, and State Farm Mutual Automobile Insurance Company, Defendants,

Of Whom
Patricia Williams and Ronald Williams are ..... Appellants,

And
State Farm Mutual Automobile Insurance Company is ..... Respondent.

INITIAL REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Appellants submit this brief in reply to the briefs of both ACCC and State Farm.[1] Their reply arguments are presented in the same sequence as in their primary brief, followed by a response to Respondents' additional sustaining ground. To the extent necessary to single out specific contentions made by either Respondent, Appellants have referred to Respondents' briefs individually as "ACCC's Brief" and "State Farm's Brief."

ARGUMENTS

1. The Circuit Judge erred by failing to apply the proper standards in ruling upon the Rule 41, SCRCP, Motion to Dismiss.

Respondents do not appear to disagree with Appellants regarding the proper standards to be applied by a trial court in resolving a contested Rule 41 motion to dismiss. In fact, both acknowledge the Circuit Judge should have considered whether any party would be prejudiced by a dismissal. (ACCC's Brief, p. 13; State Farm's Brief, p. 6). State Farm agrees a summary judgment standard applied to the Motion to Dismiss. (State Farm's Brief, p. 8).

Instead, Respondents' disagreement with Appellants on this topic relates to whether the Circuit Judge applied these standards properly given issues of prejudice, justiciable controversy, and standing. Appellants respond to Respondents' arguments on these issues under heading 2.

2. The Circuit Judge erred in granting the Motion to Dismiss with prejudice given the evidence in the record.

At both the motion hearing and in their briefs, Respondents have repeatedly asserted that the Motion to Dismiss was prompted by and supported by new evidence that ACCC allegedly learned in discovery. (*See, e.g.,* R. p. ___; Tr. 9, line 24, to 10, line 6; ACCC's Brief, pp. 4, 7,

[1] For the sake of consistency, capitalized terms herein have the same definitions as set forth in Appellants' Brief.

14; State Farm's Brief, pp. 4, 5, 7, 8). State Farm has even represented to this Court that "[a]ll of the evidence was reviewed by Judge Hyman...." (State Farm's Brief, p. 8).

In fact, Respondents failed to file any evidence with their Motion to Dismiss and did not otherwise offer evidence in support of the motion. (R. p. ___; Affidavit of Gerald Finkel, Esq., ¶ 28). Rather, the only evidence submitted was by Appellants in opposition to the motion. (R. p. ___; Affidavit of Gerald Finkel, Esq.; Memorandum in Opposition to Joint Motion to Dismiss).

In short, the moving parties submitted no evidence in support of their position and the Circuit Judge had no evidence upon which to base his findings. Therefore, he abused his discretion and reversal is proper.

Respondents further assert Appellants failed to show legal prejudice if this action were dismissed with prejudice. (ACCC's Brief, p. 13 (referring to Appellants' arguments in Circuit Court as "baseless"); State Farm's Brief, pp. 6 ("Appellants have never put forth any evidence of legal prejudice"), 7-8). On the contrary, Appellants argued to the Circuit Judge that his disposition of the liability insurance coverage question may have a direct negative effect on Appellants' ability to recover from State Farm given its different limits for uninsured and underinsured motorist coverage. (R. p. ___; Tr. 4, line 10, to 5, line 4). The Circuit Judge even acknowledged: "Mr. Stanley, I appreciate your predicament." (R. p. ___; Tr. 18, line 2).

ACCC asserts Appellants lack standing to litigate the liability insurance coverage issue, so that dismissal of this action was appropriate despite Appellants' objection. (ACCC's Brief, p. 15). However, ACCC created Appellants' standing when it commenced this action.

Per S.C. CODE ANN. § 15-53-80 (1976, as amended), Appellants are deemed necessary parties to this declaratory judgment action. The Uniform Declaratory Judgments Act authorizes the Court to issue a declaration that is "either affirmative or negative in effect." S.C. CODE ANN.

§ 15-53-20 (1976, as amended). In other words, once ACCC filed this action, the Court had the jurisdiction to issue a declaratory judgment affirming coverage (as Respondents sought via the Motion to Dismiss) or negating coverage (as ACCC sought in its Complaint and Respondents sought in their Answer). In light of this, as necessary parties under the Act, Respondents have standing to litigate the coverage issues presented by this action.[2]

Moreover, a justiciable controversy exists among the parties despite ACCC's eleventh-hour reversal of its position on coverage. The controversy is demonstrated by the conflicting evidence and the inferences and legal conclusions that can be drawn therefrom. (*See, e.g.,* R. p. ___; Affidavit of Gerald Finkel, Esq.).

In addition, even though ACCC has offered to pay what it considers its liability limits under the ACCC Policy, Appellants are not required to accept that tender. If it is ultimately determined that ACCC had liability coverage all along and should not have filed the present action in an effort to avoid paying that coverage,[3] ACCC may be subject to a bad faith action by its insureds once Appellants obtain a verdict exceeding that coverage. Therefore, a Court determination of the justiciable coverage question would be important in this scenario, particularly since the Circuit Judge had previously entered an Order against Myers and Standley finding that the ACCC Policy provided no coverage to them.

Respondents, like the Circuit Judge, seek refuge under the Financial Responsibility Act to contend that ACCC is legally precluded from denying coverage under the ACCC Policy. Their conclusion is incorrect for two reasons.

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[2] Notably, even if lack of standing were a proper basis to support dismissal of this action, the dismissal should have been without prejudice to Appellants' right to litigate the coverage issue in a subsequent action. *See, e.g., Park v. Safeco Ins. Co. of America,* 251 S.C. 410, 415, 162 S.E.2d 709, 711 (1968).

[3] This is not Appellants' position but they point out this possibility to demonstrate a justiciable controversy exists notwithstanding ACCC's changed position on coverage.

Initially, there is a difference between misrepresentations that induce the issuance of an insurance policy and those which occur after the issuance of a valid policy. S.C. CODE ANN. § 56-9-20(5)(b) (1976, as amended), upon which Respondents rely, addresses the latter. But the misrepresentations at issue in the present action are in the nature of the former (*i.e.,* statements made by Myers and/or Standley to induce issuance of the ACCC Policy). Under the Automobile Insurance Code, an insurer can cancel a policy for misrepresentations made in procurement of a policy. *See* S.C. CODE ANN. §§ 38-77-120, -121, & -390(B)(2)(a) (1976, as amended) ("the insurer or agent shall not be required to furnish specific items of privileged information if it has a reasonable suspicion ... that the applicant, policyholder, or individual proposed for coverage has engaged in criminal activity, fraud, material misrepresentation, or material nondisclosure").

In addition, an insurer like ACCC has the right to cancel an automobile policy within 90 days of its issuance for any reason (other than for improper discriminatory reasons). S.C. CODE ANN. § 38-77-121(D) (1976, as amended). The ACCC Policy was issued 36 days before the subject collision. (R. p. ___; Affidavit of Gerald Finkel, Esq., ¶¶ 11, 19). Therefore, ACCC had the right to cancel and to deny coverage under the ACCC Policy as of that date.

The Circuit Judge abused his discretion in dismissing this action with prejudice.

3. The Circuit Court erred in granting ACCC relief that was not sought in its pleadings and which was directly contrary to the declaratory relief it previously obtained in this action.

ACCC's Brief does not address this argument from Appellant's Brief. State Farm's Brief only responds to it in passing, predicting: "If the court adopts the approach set forth by the appellants, then anytime a plaintiff in an action through discovery determines that its position is incorrect, it cannot admit that it was wrong and dismiss the action." (State Farm's Brief, p. 9).

State Farm's forecast is unduly dire and unpersuasive in the present context. The instant action is different than "any action" (in which defendants will normally consent to a dismissal

when a plaintiff determines its position is untenable) because it is a declaratory judgment action where defendants' (here, the Appellants') rights may be negatively affected by plaintiff's change in position. Also, this appeal is not about ACCC's right to change its position – Appellants do not challenge a plaintiff's right to "admit it was wrong" and to seek to amend its Complaint, a right ACCC chose not to exercise in this case – it is about ACCC's request for an unfettered dismissal with prejudice to Appellants' right to litigate an issue on its merits, a situation that is restricted by Rule 41, SCRCP, and the standards imposed by the case law construing that rule.

4. The Circuit Judge erred in ruling on the Motion to Dismiss without first addressing Appellants' pending motions.

Respondents' arguments appear based on the premise that – although Appellants' motions were pending at the time of the hearing with Judge Hyman – they could not be heard until he ruled on the Motion to Dismiss because they were filed after that motion.

No rule supports the contention that motions must be heard in the order in which they are filed. However, Rule 40(h), SCRCP, does require that discovery motions and motions for scheduling order be given priority over other motions. Because two of Appellants' motions dealt with these topics, they should have been heard first.

Also, because Appellants' Motion to Amend Answer to Assert Counterclaim did not become necessary until after ACCC completely reversed its coverage position in this case (without a corresponding amendment of its Complaint), there was no reason for Appellants to file that motion until they received the Motion to Dismiss. Under these circumstances, the Circuit Judge should have heard the Motion to Amend before addressing the Motion to Dismiss (and, if he granted the amendment, potentially realigned the parties per Rule 21, SCRCP, *see Branham v. Ford Motor Co.,* 390 S.C. 203, 242-43, 701 S.E.2d 5, 26 (2010)).

Respondents incorrectly argue that Appellants were not prejudiced by the Circuit Judge's refusal to hear Appellants' motions (ACCC's Brief, p. 20) and that "[n]o amount of discovery was going to change" the outcome in this case[4] (State Farm's Brief, pp. 9-10; *see also* ACCC's Brief, p. 20 ("None of Appellants' pending motions had any substantive bearing whatsoever on any dispositive issue presented to the trial court.")).

In fact, as Appellants argued before the Circuit Judge, the disposition of the liability insurance coverage question has a direct effect on their ability to recover from State Farm given its different limits for uninsured and underinsured motorist coverage. (R. p. ___; Tr. 4, line 10, to 5, line 4). Therefore, the resolution of the liability coverage issue has the potential to prejudice Appellants. And, when the issue is resolved without a full hearing on the merits, that prejudice is unfairly imposed.

Discovery may have revealed additional facts about the underlying liability insurance coverage issues, a point that is particularly significant given the fact that Respondents offered *no evidence* in support of their Motion to Dismiss. Neither Appellants nor the Circuit Court should be required to accept Respondents' *ipse dixit* that there were no issues as to ACCC's liability coverage. Instead, Appellants should have been permitted to conduct requested discovery on this topic in order to oppose Respondents' motion.

5. State Farm is a proper party to this appeal.

In their Notice of Appeal and Amended Notice of Appeal, Appellants listed State Farm as a party to this action and noted State Farm's attorney as an attorney of record. Moreover, Appellants served State Farm's attorney with both the Notice of Appeal and Amended Notice of Appeal and listed her on the corresponding Certificates of Service. Appellants' counsel copied

[4] This argument is truly ironic since Respondents allege (without proof) that discovery is what changed ACCC's position on coverage.

State Farm's attorney on all correspondence with the Court. (R. p. ___; Utsey letters dated March 1, 2018, March 2, 2018, and March 20, 2018; Ct. App. letters dated March 8, 2018 and April 3, 2018).

State Farm was obviously not misled into believing it was not a party to the appeal. On the contrary, its attorney quickly pointed out that State Farm was involved in the appealed issues and "the appropriate caption should reflect that State Farm is also a Respondent in the appeal." (R. p. ___; Gangi letter dated March 20, 2018).[5]

State Farm thereafter filed a Motion to Extend the Time for Filing Its Initial Brief; in that motion, State Farm listed itself in the caption as a Respondent and characterized itself as a Respondent in the substance of the motion. Additionally, both State Farm's Brief and its Designation of Matter to be Included in the Record on Appeal list State Farm as a Respondent.

Rule 203, SCACR, governs the Notice of Appeal in this case. It requires an appellant to serve the notice on all respondents, Rule 203(b)(1), to file the notice with the appellate court and the lower court, Rule 203(d)(1)(A), SCACR, to file a proof of service on all respondents, Rule 203(d)(1)(B)(i), SCACR, and to list on the notice the parties and their attorneys of record, Rule 203(e)(1)(E), SCACR. In the present appeal, Appellants did all these things.

Appellants' initial failure to put the word "Respondent" next to State Farm's name on the notices was, as acknowledged by Appellants' counsel, an "omission". (R. p. ___; Utsey letter dated April 9, 2018). It was in the nature of a clerical error that does not affect appellate jurisdiction. *See Moody v. Dickinson,* 54 S.C. 526, 32 S.E. 563 (1899). This is particularly true given the fact that State Farm was not "misled or in any way prejudiced" by the mistake. *Id.* at 534, 32 S.E. at 566 ("There can be no doubt that [respondents] did have notice of [appellants']

[5] Appellants' counsel promptly agreed with State Farm's attorney's observation. (R. p. ___; Utsey letter dated April 9, 2018).

intention to appeal, within due time, and the effort to take advantage of a mere clerical error in the title of the notice, by which they were in no way prejudiced or misled, seems clearly technical.").

Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002), upon which Respondents rely, is easily distinguishable. There, Rowe and Langley, the parties who were not initially named as respondents, "were misled into believing they were not part of [the] appeal by [an] almost five-month delay." Conversely, here, State Farm immediately recognized the clerical error, acknowledged it was a party to the appeal, and has participated as a Respondent without prejudice to any party. In *Conner*, Rowe and Langley objected to being named as parties to the appeal; but, in this case, State Farm did not object until after ACCC raised the issue in ACCC's Brief.

Most importantly, the Court in *Conner* based its holding on the appellant's failure to *serve* Rowe and Langley with a Notice of Appeal within the period required by Rule 203(b)(1), SCACR, thereby creating the jurisdictional issue.[6] Specifically, the *Conner* court reasoned:

> Petitioners Rowe and Langley argue that the appeal against them should be dismissed because Conner *failed to timely serve them* a Notice of Appeal. We agree.
>
> . . .
>
> Service of the notice of intent to appeal is a jurisdictional requirement, and the Court has no authority to extend or expand the time in which the notice of intent to appeal must be served. *Mears v. Mears,* 287 S.C. 168, 337 S.E.2d 206 (1985).[7]
>
> Clearly, *Rowe and Langley were not served* with a Notice of Appeal naming them as respondents within the 30-day time period prescribed by Rule 203(b)(1), SCACR.

Id. at 460-61, 560 S.E.2d at 609 (emphasis added).

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[6] As discussed above, Rule 203, SCACR, does not impose a requirement to denominate a party as a respondent in a notice of appeal but does require an appellant to serve the notice on all respondents and file proof of that service.

[7] In *Mears*, the Supreme Court made it clear that *service* is the requirement for appellate jurisdiction. *Mears*, 287 S.C. at 169, 337 S.E.2d at 207 ("Service of the notice of intent to appeal is a jurisdictional requirement.").

On the other hand, in the instant appeal, Appellants served State Farm with the Notice of Appeal and Amended Notice of Appeal as required by the applicable appellate rule and properly filed proof of that service.

For the foregoing reasons, the Court should find that State Farm is a proper party to this appeal and reject Respondents' additional sustaining ground.

CONCLUSION

For the reasons set forth above, this Court should conclude State Farm is a proper party to this appeal. For the reasons set forth above and in Appellants' Brief, this Court should reverse the judgment of the Circuit Court granting the Motion to Dismiss and remand this case for resolution on its merits or, at a minimum, with instructions for it to resolve Appellants' pending motions before ruling on the Motion to Dismiss. Alternatively, in the event this Court concludes dismissal was appropriate, it should nevertheless reverse the Circuit Court's decision to dismiss this action with prejudice and instead rule that the dismissal is without prejudice.

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July 2, 2018
Charleston, South Carolina

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Of Whom Patricia Williams and Ronald Williams are the ..... Appellants.

And
State Farm Mutual Automobile Insurance Company is ..... Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the Initial Reply Brief of Appellants upon the Respondents ACCC Insurance Company and State Farm Mutual Automobile Insurance Company, by depositing a copy of it in the United States Mail, postage prepaid, on July 2, 2018, addressed to counsel of record

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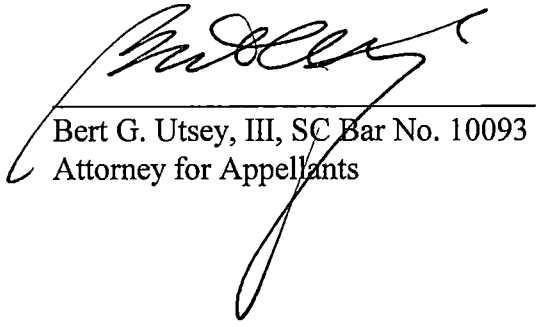

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July 2, 2018

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: ACCC Insurance Company vs. Patricia Williams
Appellate Case No. 2018-000381

Dear Ms. Kitchings:

Enclosed, for filing with the Court, please find original and one copy each of the Initial Reply Brief of Appellants and Supplemental Designation of Matter to be Included in the Record on Appeal, together with a Certificate of Service.

Please file the originals, clock the copies and return same to me in the provided self-addressed stamped envelope for my file.

Thank you in advance for your kind assistance with this request.

Sincerely,

Bert G. Utsey, III

BGU/hd
Enclosures

cc: J. Timothy Wooten, Esquire
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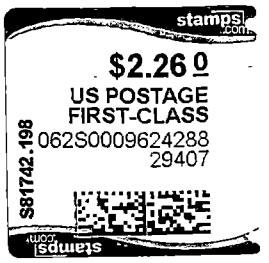

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