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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

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SC Court of Appeals

Appellate Case No. 2016-000192
Trial Court Case No. 2014-CP-40-00313

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.

PETITION FOR REHEARING

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NOW COMES Respondent CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc. ("CompTrust"), by and through its undersigned counsel, pursuant to Rule 221, SCACR, and, on the grounds set forth below, hereby petitions this Honorable Court for rehearing of this matter and requests that the Court reconsider its decision herein, namely, *S.C. Prop. & Cas. Ins. Guar. Assoc. v. CAGC Ins. Co.*, Op. No. 5562 (S.C. Ct. App. filed May 23, 2018) (Shearhouse Adv. Sh. No. 21 at 104) (the "Subject Decision").[1] [2]

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[1] Because the Subject Decision was filed on May 23, 2018, the *original* deadline for CompTrust to petition for rehearing was June 7, 2018. *See* Rule 221(a) (prescribing a 15-day deadline for petitions for rehearing); *see also* Rule 263(a), SCACR (regarding computation of time); *but see* Rule 263(b) (regarding the appellate court's ability to extend the time prescribed by the South Carolina Appellate Court Rules). Out of an abundance of caution, CompTrust notes that, per the Court's order filed June 25, 2018, the *operative* deadline for CompTrust to petition for rehearing is July 9, 2018.

[2] For ease of reference, a copy of the Subject Decision is attached to this petition as Exhibit A. Specifically, Exhibit A is a copy of the Subject Decision, obtained from the South Carolina Judicial Department website (sccourts.org), as it appears on pages 104–112 of the Advance Sheets published May 23, 2018. Accordingly, the first page of Exhibit A (i.e., the first page of the opinion's eight total pages) is numbered "104," and the rest are numbered sequentially through "112." In this petition, citations to particular pages of the Subject Decision correspond to that pagination.

MATERIAL POINTS OVERLOOKED OR MISAPPREHENDED

Most respectfully, the Subject Decision is erroneous, and the Court has overlooked or misapprehended the following material points:

1. **In South Carolina, an appellate court cannot reverse a circuit court decision for just any reason. Rather, an appealed order comes to the appellate court with a presumption of validity, and for that presumption to be upset, the appellant must affirmatively demonstrate reversible error. The appellate court cannot simply find reversible error on its own. Insofar as reversing (as opposed to affirming) an order on appeal is concerned, the appellate court's role is limited to recognizing any reversible error that the appellant properly brings to its attention, and for the appellant to properly bring reversible error to its attention, the appellant must first properly preserve the error for appellate review and then properly present it to the court for decision on appeal.**

While the appellate court "may *affirm* any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal[,]"[3] it "may not, of course, *reverse* for any reason appearing in the record." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) (emphasis in original); *see also State v. Roach*, 377 S.C. 2, 3, 659 S.E.2d 107, 107 (2008) (noting that issues not preserved for review should not be addressed); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("South Carolina appellate courts do not recognize the 'plain error rule,' under which a court in certain circumstances is allowed to consider and rectify an error not raised below

[3] Rule 220(c), SCACR (emphasis added).

by the party."); *id.* at 25, 602 S.E.2d at 780 (instructing that South Carolina's error preservation requirements are "mandatory"); *Hendrix v. E. Distrib., Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995) (issue not preserved for review before the Court of Appeals should not have been addressed and thus portion of opinion was vacated by Supreme Court). Indeed, an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error, and the appellate court is obliged to reverse when error is called to its attention, but it is not in the business of figuring out on its own whether error exists. *McCall v. IKON*, 380 S.C. 649, 659–60, 670 S.E.2d 695, 701 (Ct. App. 2008); *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). It is thus error for the appellate court to reverse a circuit court decision unless the appellant carries the affirmative burden of both preserving below[4] and properly presenting on appeal—in the appellant's principal appellate

[4] This, of course, requires issues/arguments to be raised to and ruled on by the lower court. *Elam*, 361 S.C. at 23, 602 S.E.2d at 779–80 ("A great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are

brief[5]—argument that demonstrates reversible error on the part of the circuit court.[6]

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preserved for appellate review only when they are raised to and ruled on by the lower court.").

[5] *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); *First Savings Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (same); *Glasscock, Inc. v. U.S. Fidelity & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief."); *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 a reply brief); *Jackson v. Bi–Lo Stores, Inc.*, 313 S.C. 272, 277, 437 S.E.2d 168, 171 (Ct. App. 1993) ("The partners make several new arguments relating to estoppel and ratification in their reply brief. However, these arguments are not properly before this Court because an appellant cannot make new arguments for reversal in a reply brief.") (citation omitted); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."); *In the Interest of Bruce O.*, 311 S.C. 514, 515, 429 S.E.2d 858, 858 n.1 (Ct. App. 1993) ("This court will not grant relief on an alleged error asserted for the first time on appeal. Further, an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief.").

[6] CompTrust has set forth the foregoing propositions of law and supporting authority at the outset of this petition because, as will be explained, they are relevant in regard to various points below, and rather than repeat these citations throughout this petition, CompTrust hereby simply incorporates them by reference into its discussion of the relevant points below as if stated therein.

2. It is error to reverse the circuit court on the basis of this Court's finding that the circuit court did not have the "discretion to answer [a] question of first impression[7] with no factual record while ruling upon a Rule 21[, SCRCP] motion."[8]

(a) This is an improper basis for reversal of the circuit court because it does not correspond to any issue/argument that was properly before the Court for decision in this appeal.

The Association did not properly preserve below or present to this Court on appeal any argument for reversal of the circuit court on this basis;[9] accordingly, it is error for the Court to reverse the circuit court on this basis. (*See* Authorities in Point 1, *supra*.)

(b) The Court's finding is incorrect.

The only legal authority that the Court cites in support of this finding is *Evans v. State*, 344 S.C. 60, 543 S.E.2d 547 (2001). And it is true that *Evans* does support the "general rule" that "important questions of novel impression should not be decided on a . . . motion to dismiss . . . [and] [i]nstead, a novel issue is best decided in light of the testimony to be adduced at trial." *Id.* at 68, 543 S.E.2d at 551. But more importantly, the *Evans* Court followed this statement of the general rule by expressly stating, "However, where the dispute is not as to the underlying

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[7] The question to which the Court refers is the question of "whether an unincorporated business trust can be sued after it has voluntarily dissolved . . . ." (Exhibit A at p. 109.)

[8] (*Id.*)

[9] (*See generally* R. pp. 9–23, 400–05; Final Brief of Appellant.)

facts but as to interpretation of the law, and development of the record will not aid in the resolution of the issues, *it is proper to decide even novel issues on a motion to dismiss for failure to state a claim.*" *Id.* (emphasis added).

Here, the circuit court certainly had discretion to determine that the matter before it for decision presented a question of law, not of disputed fact, and that development of the record would not be helpful. And this Court did not merely find that the circuit court "abused" discretion that it had; rather, the Court found that circuit court did not even have certain discretion to begin with. In other words, Court has not merely curbed some supposed "abuse" of the circuit court's discretion but confined the scope of the circuit court's discretion so as to effectively abridge its subject matter jurisdiction. *See Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 192 Conn. 447, 472 A.2d 21, 22 (1984)) ("Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'"). Certainly, the circuit court had the power to hear and determine the legal issues presented to it and, along with that power, the discretion to determine whether it was appropriate to rule as a matter of law or if development of the record was needed. The Court's determination that the circuit court did not even have discretion to make the threshold determination as to whether it could appropriately rule as a matter of law is erroneous—and if it

stands, would effectively announce a new rule that the circuit court can never rule on a novel issue as a matter of law without development of the record because the court will be left without discretion to do otherwise.

3. It is error to reverse the circuit court on the basis of this Court's finding that the Association's addition of CompTrust as a party to its complaint for declaratory relief "meets the 'right to relief' necessary for proper joinder under Rule 20, SCRCP . . . [and that] [d]ismissing CompTrust at this early stage of the lawsuit jeopardizes the judicial economy Rule 21 and the Declaratory Judge Act strive to foster."[10]

(a) This is an improper basis for reversal of the circuit court because it does not correspond to any issue/argument that was properly before the Court for decision in this appeal.

In making this finding, the Court first examines certain federal authority in search of guidance in interpreting Rule 21 and concludes that misjoinder under Rule 21 is analogous to a failure to satisfy the preconditions for permissive joinder under Rule 20(a), SCRCP. (*See* Exhibit A at p. 109.) The Court then cites certain provisions of the Declaratory Judgment Act, most notably, S.C. Code Ann. § 15-53-80, which requires that, "[w]hen declaratory relief is sought[,] all persons . . . be made parties who have or claim any interest which would be affected by the declaration . . . ." (*Id.*)

The Association did not properly preserve below or present to the Court any

[10] (Exhibit A at p. 110.)

argument for reversal of the circuit court on this basis;[11] accordingly, it is error for the Court to reverse the circuit court on this basis. (*See* Authorities in Point 1, *supra*.)

(b) The Court's finding is incorrect.

While the Court finds that the Association's addition of CompTrust to its complaint for declaratory relief "meets the 'right to relief' necessary for proper joinder under Rule 20 . . . ," the Court's finding does not account for the entirety of the language in Rule 20(a) that the Court itself cited on the preceding page of the Subject Decision, specifically, this language: "As to joining parties as defendants, Rule 20(a), SCRCP, states: 'All persons may be joined in one action as defendants if there is asserted *against them* . . . any right to relief in respect of or arising out of the same transaction . . . .'" (Exhibit A at p. 109 (emphasis added).) It is indisputable that the Association's complaint alleges no claim whatsoever *against CompTrust*. (*See generally* R. pp. 95–101.) All the Association's complaint asks for is a declaration that the Association itself is not obligated for the "covered claims"—and, at that, it bases is alleged right to this determination solely on an argument of statutory construction that requires no factual inquiry; the Association's complaint does not ask for a declaration that CompTrust, or any other party, is obligated for the "covered claims," and it makes no challenge to the

[11] (*See generally* R. pp. 9–23, 400–05; Final Brief of Appellant.)

validity of the LPT Agreement. (*Id.*)

This point also proves the Court's reliance on § 15-53-80 to be misplaced. This statute directs only that those persons "who have or claim any interest which *would be* affected by the declaration" are to be made parties to an action for declaratory judgment. (emphasis added). Again, it is indisputable that the Association's complaint does not actually seek any relief that "would . . . affect" any interest of CompTrust. (*See generally* R. pp. 95–101.)

4. The Court's statute of limitations analysis is erroneous.

(a) The circuit court did not mischaracterize the Association's declaratory judgment action.

To the contrary, this Court's characterization of the Association's declaratory judgment action is mistaken. According to the Court, the Association "brought a declaratory judgment action to determine who is responsible for paying claims presented to it pursuant to the Guaranty Act." (Exhibit A at p. 110.) Again, as explained above (and, of course, in CompTrust's previously filed appellate brief), it is simply not correct that the Association's declaratory judgment action seeks a determination of "who" is responsible for the claims—the Association's complaint asks only whether "it" (the Association) is responsible, no more. (*See generally* R. pp. 95–101.)

(b) Even if it were the case that the relief sought in the Association's complaint calls for investigation into the LPT Agreement (which, again, it does not), the Court does not account for the "exclusive jurisdiction" of South Carolina Worker's Compensation Commission (the "Commission") and the fact of the Commission's approval of the LPT Agreement.

As explained CompTrust's previously filed appellate brief, S.C. Code Ann. § 42-5-20 grants the Commission "exclusive jurisdiction" over group self-insurers, and the Commission—as well as, for that matter, the regulatory authority in CAGC Insurance Company's home state, the North Carolina Department of Insurance—reviewed and approved the LPT Agreement at the time it was entered. (R. pp. 322–57.) Thus, the regulatory authority expressly identified by the State of South Carolina as having exclusive jurisdiction with respect to CompTrust's affairs knew about and approved of the LPT Agreement by December 2010, yet the Subject Decision is to the effect that another state agency (i.e., an agency other than the Commission, and one without the Commission's regulatory authority), the Association, can come in more than three years later and effectively disapprove of the LPT Agreement. This is error.

5. The Court erred in relying on the Association's statutory authority under S.C. Code Ann. § 38-31-60(d) and (l) to reverse the circuit court.

(a) This is an improper basis for reversal of the circuit court because it does not correspond to any issue/argument that was properly before the Court for decision in this appeal.

The Association did not properly preserve below any argument for reversal of the circuit court on this basis;[12] accordingly, it is error for the Court to reverse the circuit court on this basis. (*See* Authorities in Point 1, *supra*.)

(b) Just because, generally speaking, the Association is directed and authorized as stated in these statutory provisions, these provisions are nonetheless irrelevant here, where the case actually pleaded by the Association simply does not implicate them.

According to the Court, these provisions direct the Association to "'investigate claims brought against [it]'" and to "'perform any other acts necessary or proper to effectuate purpose of [the Guaranty Act],'" and thus "allow[] [the Association] to scrutinize the LPT Agreement, an endeavor that would be impaired by CompTrust's absence." (Exhibit A at p. 110.) Even assuming, *arguendo*, these provisions direct and empower the Association as the Court states, it does not change the fact that, again (as explained above and in CompTrust's previously filed appellate brief), the Association's complaint in this particular case does not actually call for any scrutiny of the LPT Agreement. (*See*

[12] (*See generally* R. pp. 9–23, 400–05.)

generally R. pp. 95–101.)

6. It is error for the Court to reverse the circuit court by viewing the Association's complaint more broadly than the Association itself asked the circuit court to view it.

In finding that the circuit court erred to the extent it dismissed CompTrust under Rule 12(b)(6), SCRCP, "for failure to state a claim," the Court cited the Rule 12(b)(6) standard—indicating that the question asked of it on appeal was "whether the complaint would entitle the plaintiff to relief under any theory"—and it found "the Association's complaint states a valid claim." (Exhibit A at p. 111.) While this may be an accurate statement of the standard to be applied by the circuit court in the first instance when presented with a motion under Rule 12(b)(6), it is of no moment on appeal unless the appellant has properly preserved some issue/argument relating to the circuit court's application of the standard. The Association has preserved no such argument here,[13] and it is error for the Court to reverse the circuit court by viewing the Association's complaint more broadly than even the Association itself asked the circuit court to view it—for instance, by somehow construing the claim for relief that was actually set forth in the Association's complaint to encompass a claim in challenge to the validity of the LPT Agreement or otherwise *against* CompTrust (which, again, the Association's complaint does not, but any notion to the contrary is not preserved in any event).

[13] (*See generally* R. pp. 9–23, 400–05.)

(*See* Authorities in Point 1, *supra.*)

7. To reverse the circuit court, it is not enough that "the Association has alleged a real and substantial controversy concerning whether the Guaranty Act obligates it to pay the Transferred Claims."[14]

The circuit court did not dismiss the Association's *complaint* altogether, it only dismissed *CompTrust* as a *party*. It is not enough to reverse the circuit court's dismissal of CompTrust to find that the Association has alleged a claim that can be adjudicated under the Declaratory Judgment Act; the question is whether the Association's complaint alleges a claim *for relief against CompTrust.* And, again, as has been explained herein and in CompTrust's previously filed appellate brief, the Association's complaint simply does not allege any such claim—as the circuit court correctly found. (*See* R. p. 15 ("The [Association's] Complaint makes no allegations against the CompTrust; it merely sets forth the facts outlined herein. The Complaint asserts no cause of action against the CompTrust and does not reference the CompTrust in its prayer for relief.").)

8. The Association did not present to this Court any proper argument "concerning an employer's residual liability under [S.C. Code Ann.] § 42-1-150 . . . ."[15]

The Court "also f[ound] it was premature to toll out CompTrust on grounds of futility given the Association's argument concerning an employer's residual

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[14] (Exhibit A at p. 111.)

[15] (Exhibit A at p. 111.)

liability under § 42-1-150 . . . ." (*Id.*) But the Association made no such argument in its principal brief;[16] accordingly, this is not a proper basis for reversal of the circuit court. (*See* Authorities in Point 1, *supra.*)

9. The Court overlooked or misapprehended the effect of the law of the case doctrine on the circuit court's unappealed ruling.

As CompTrust explained in its appellate brief, the circuit court denied the Association's motion for reconsideration for *two* reasons:

> [(1)] After careful consideration of the record in this case and the submissions of the parties, the Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts no appropriately considered. [(2)] *In addition, the Court was not served with a copy of the Association's [motion to reconsider] as is required under Rule 59(g) of the South Carolina Rules of Civil Procedure.*
>
> *Accordingly*, this Court hereby **DENIES** [the motion] . . . .

(R. p. 60 (bold, capitalized print in original) (italics added for emphasis).)

As CompTrust further explained, the Association itself raised in its principal brief the rule that "an unappealed ruling, 'right or wrong,' is the law of the case." (Final Brief of Appellant p. 8, n.3 (attempting to assert this rule against CompTrust, arguing that CompTrust's "[f]ailure to seek relief of the Order of Judge Benjamin [granting the Association's motion to join CompTrust] ma[d]e the

[16] (*See generally* Final Brief of Appellant.)

ruling the 'law of the case.' *See Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160–61, 177 S.E.2d 544, 544 (1970) (holding that an unappealed ruling, 'right or wrong,' is the law of the case).").)

Thus, as CompTrust explained, the question is not whether the circuit court was "right or wrong" in ruling that Rule 59(g) required the Association to "serve" its motion for reconsideration on the court, but rather the question is this: What is the impact of this ruling where it is conclusively established as the law of the case? Consequently, the Court's citation in the Subject Decision to *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) is misplaced. (Exhibit A at p. 108.) In other words, *Gallagher* is of no moment because what is the law of the case *in the instant case*—that Rule 59(g) required the Association to "serve" its motion for reconsideration on the circuit court and the Association failed to do so—was not the law of the case in *Gallagher*.

Proper analysis of this argument requires that the conclusively established law of the case—i.e., the law of *this* case—be followed. And it is the law of this case that a Rule 59(e), SCRCP, motion for reconsideration is not properly made unless it is served on the presiding judge. And, as explained in CompTrust's previously filed appellate brief, timely service of a notice of appeal is a jurisdictional requirement, and it is only proper service of a motion under Rule 59(e) that stays time for serving a notice of 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); *Elam*, 361 S.C. at 14-15, 602 S.E.2d at 775; *id.* at 20, 602 S.E.2d at 778. Because it is the law of this case that the Association did not properly serve its motion for reconsideration, the time for the Association to appeal was not stayed by its motion for reconsideration, and appellate jurisdiction is lacking because the Association did not timely appeal.

10. The Court's citation to *Jones v. State*, 382 S.C. 589, 677 S.E.2d 20 (2009) *abrogated on other grounds by Smalls v. State*, Op. No. 27764 (S.C. filed Feb. 7, 2018) (Shearouse Adv. Sh. No. 6 at 43), does not dispose of CompTrust's two-issue-rule argument.

While it is true, as the Court noted, that the *Jones* Court evaluated the merits of the State's appeal, despite the PCR judge's dismissal of the State's motion for reconsideration for failure to comply with Rule 59(g), the *Jones* Court did so without ever actually addressing the two-issue-rule argument CompTrust raised to this Court. Accordingly, *Jones* does not stand for the rejection of CompTrust's argument; it is simply silent on the point, and this Court should address CompTrust's argument distinctly as it is necessary to the decision of this appeal and fairly arises upon the record. *See* Rule 220(b), SCACR.

11. The Court erred in finding that the Association could not have appealed the circuit court's ruling that the Transferred Claims were "covered claims" the Association was responsible for paying.

Addressing the circuit court's denial of the Association's motion for summary judgment, the Subject Decision states as follows:

> In denying the Association's motion for summary judgment, the circuit court found the Transferred Claims were "covered claims," therefore the Association was responsible for their payment. The Association did not—and could not—appeal this interlocutory ruling. *Ballenger v. Bowen*, 313 S.C. 476, 477–78, 443 S.E.2d 379, 380 (1994) ("A denial of a motion for summary judgment decides nothing about the merits of the case [and] does not establish the law of the case . . . [t]herefore, an order denying a motion for summary judgment is not appealable.").

(Exhibit A at pp. 107–08.)

While the Court is certainly correct that the Association "did not" appeal the circuit court's ruling that the Transferred Claims were "covered claims" the Association was responsible for paying, most respectfully, the Court erred in finding that the Association "could not" have done so.

To be sure, when it comes to the mere denial of a motion for summary judgment, not only is such a ruling not immediately appealable, it is simply non-appealable at all. *See Ballenger*, 313 S.C. at 477–78, 443 S.E.2d at 380. But South Carolina precedent instructs that such rulings are only granted the unique status of being completely invulnerable to appeal because, when all that it has done is merely deny a motion for summary judgment, the lower court has not really done anything so significant as to warrant appellate review, the court having decided nothing about the merits of the case, having not established the law of the case, and having, as a practical matter, done no more than determine that the case

ought to proceed to trial, without any prejudice to any party in regard to the claims/defenses to be tried. *See, e.g., Id.* Here, however, in view of the plain language of the circuit court's order, the foregoing rationale (for the non-appealability of the mere denial of summary judgment) cannot be reconciled with the substance and effect of the circuit court's ruling.

It is substance and effect, not labeling, that controls the classification of order as appealable or not. *Dorn v. Cohen*, 418 S.C. 126, 138, 791 S.E.2d 313319 (2016) ("'[T]he question of whether an order is immediately appealable is determined on a case-by-case basis.' To determine whether an order is immediately appealable, we look to the . . . order's effect on the proceedings.") (internal citation omitted); *see also Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) ("[A]n appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c)."). Here the substance and effect of the Association's motion was to place squarely before the circuit court a question not of disputed fact, which the court could not have properly decided, but of *law*, which indeed it did properly decide, and not just any legal question, either, but the one which this Court itself recognized to be "the core of this case." (Exhibit A at p. 105 ("As we will see, *what constitutes a 'covered claim' as defined by [S.C. Code Ann.] § 38-31-20(8)* is the core of this case.") (emphasis added).)

And so it was, with this question properly put to it, that the circuit court ruled against the Association on the basis of its *finding* that the Transferred Claims were "covered claims" the Association was responsible for paying. (Exhibit A at p. 107 ("In denying the Association's motion for summary judgment, the circuit court *found the Transferred Claims were "covered claims," therefore the Association was responsible for their payment.*") (emphasis added).) Clearly, unlike a mere denial of summary judgment, the substance and effect of the circuit court's ruling here *did* indeed decide something about the merits of this case—indeed, it decided the case on the merits outright, establishing not just the law of the case, but that as a matter of law the Association had lost the case, and it is error for this Court to deem the circuit court's ruling to be something less than dispositive. To be clear, it is *not* as if the circuit court denied the Association's motion for summary judgment because of the existence of triable issues that precluded judgment as a matter of law; quite the contrary, it denied the Association summary judgment because of its affirmative finding against the Association as a matter of law on the legal proposition at "the core of the case" precluded the entry of any judgment (summary or otherwise) in the Association's favor.

INCORPORATION AND REITERATION OF ARGUMENT/ANALYSIS IN APPELLATE BRIEF

CompTrust does not intend to abandon (for any potential future consideration) any argument/analysis presented in its appellate brief (i.e., the

FINAL BRIEF OF RESPONDENT COMPTRUSTAGC OF SOUTH CAROLINA A/K/A COMPTRUSTAGC OF SOUTH CAROLINA, INC., which is, of course, already on file with the Court) that supports affirmance of the result below (i.e., CompTrust's dismissal from this case). Therefore, out of an abundance of caution, besides making the above points, CompTrust incorporates its appellate brief by reference herein and reiterates the argument/analysis therein in support of the instant petition.

CONCLUSION

For the foregoing reasons, CompTrust asks the Court to grant this petition for rehearing; to reconsider this matter; and indeed to decide this appeal again, with the Subject Decision withdrawn and replaced by a decision that favors CompTrust and affirms its dismissal from this case.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: 7/5/18

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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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.

Appellate Case No. 2016-000192

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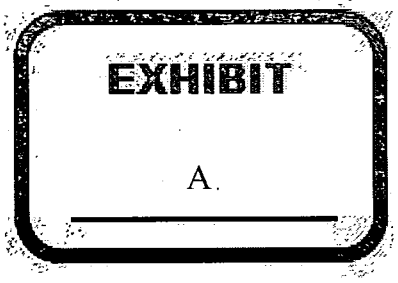
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5562
Heard November 8, 2017 – Filed May 23, 2018

REVERSED AND REMANDED



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Michael A. Molony, Thantus Douglas Concannon, Russell Grainger Hines, all of Young Clement Rivers, of Charleston, for Respondent CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc., and Geoffrey Ross Bonham, of Columbia, for Respondent Raymond G. Farmer.

HILL, J.: In this declaratory judgment action, the South Carolina Property and Casualty Insurance Guaranty Association ("Association") appeals the circuit court's grant of CompTrustAGC of South Carolina, Inc.'s ("CompTrust") motions to quash discovery and be dismissed as a party. We reverse, finding CompTrust's dismissal improper.

I.

The Association is a nonprofit entity created by the South Carolina Property and Casualty Insurance Guaranty Association Act ("Guaranty Act"), §§ 38-31-10 to -170 of the South Carolina Code (2015), which controls the Association's duties, liabilities, and obligations. The Association, in statutorily prescribed circumstances, protects insureds of insolvent insurance carriers. S.C. Code Ann. § 38-31-60 (2015); *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing and Sheet Metal Contractors Self-Ins. Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994). The Association must "pay covered claims to the extent of the [A]ssociation's obligation and deny all other claims . . . ." S.C. Code Ann. § 38-31-60(d) (2015). As we will see, what constitutes a "covered claim" as defined by § 38-31-20(8) is the core of this case.

All insurers who write insurance to which the Act applies must become members of the Association. S.C. Code Ann. §§ 38-31-20(11), 40 (2015). The Association is funded by member assessments, which are passed on to consumers in the form of increased premiums. S.C. Code Ann. § 38-31-60(c) (2015).

CompTrust was created in 1982 as a South Carolina unincorporated business trust and operated as a self-insurance trust, providing workers' compensation coverage to its self-insured members ("Self-Insured Coverage"). Self-insured organizations such as CompTrust are not subject to the Guaranty Act, are not members of the Association, and pay no assessments to it.

CAGC Insurance Company ("CAGC") is a North Carolina insurance company established in 2007 by some of CompTrust's principals. In 2008, CAGC became a licensed insurer in South Carolina and began issuing South Carolina workers' compensation liability insurance policies to prior participants in CompTrust. CAGC was a member of the Association and paid assessments to the Association based on the policies it issued.

On December 28, 2010, CompTrust and CAGC executed a Self-Insurance Loss Portfolio Transfer Assumption Agreement (the "LPT Agreement"), wherein, *inter alia*, CompTrust paid $3,586,527.01 for CAGC to assume all of CompTrust's liabilities on approximately seventy active workers' compensation claims arising out of the Self-Insured Coverage ("Transferred Claims"). The LPT Agreement was approved by the South Carolina Workers Compensation Commission and the North Carolina Department of Insurance. CompTrust voluntarily dissolved on April 1, 2011.

On November 30, 2011, less than a year after execution of the LPT Agreement, the South Carolina Department of Insurance ("Department") determined CAGC was financially unsound. On January 18, 2012, the Department suspended CAGC's authority to transact insurance business in South Carolina. Also in January 2012, CAGC was placed into receivership in North Carolina. On January 6, 2014, a North Carolina court declared CAGC insolvent.

On January 17, 2014, Raymond G. Farmer, Director of Department, petitioned the Richland County Circuit Court to commence this ancillary receivership for CAGC in South Carolina. That court appointed Farmer the Ancillary Receiver of CAGC.

As a result of CAGC's insolvency, claims made by South Carolina workers' compensation claimants against CAGC were brought to the Association. The Association agrees the Guaranty Act requires it to pay claims submitted under

policies issued by CAGC, but disputes its obligation to continue paying the Transferred Claims, i.e. those arising under the Self-Insured Coverage provided by CompTrust prior to the LPT Agreement.

To resolve responsibility for the disputed Transferred Claims, the Association moved to intervene in the ancillary receivership, and join CAGC, the Ancillary Receiver, and CompTrust as parties to seek a declaratory judgment as to the Association's responsibility under the Guaranty Act. On June 9, 2014, the Association's motion for joinder and intervention was granted, and service of the declaratory judgment action on CAGC, the Ancillary Receiver, and CompTrust was authorized.

While discovery was proceeding, CompTrust filed a motion to quash pursuant to Rule 26(c), SCRCP, and a motion to dismiss based on Rules 12(b) and 21. Meanwhile, the Association moved for summary judgment, claiming the Transferred Claims could not be considered covered claims under § 38-31-20(8) as they were: (1) initially claims against a self-insured entity and not a direct insurer obligated to pay into the Association's fund; and (2) they constituted "insurance written on a retroactive basis" to cover claims "known to the insurer at the time the insurance is bound" pursuant to § 38-31-30(6).

After hearing arguments, the circuit court issued an order granting CompTrust's motions to quash discovery and be dismissed from the action, and denying the Association's motion for summary judgment. The circuit court found: (1) the motions raised novel issues, including whether an unincorporated business trust can be sued after it has voluntarily dissolved, (2) any claims against CompTrust relating to the LPT Agreement were barred by the statute of limitations, (3) CompTrust's dissolution rendered any grant of effectual relief against CompTrust or its shareholders impossible, and (4) the Association's complaint asserted no cause of action or prayer for relief against CompTrust. It further ruled that, because CompTrust did not retain any records regarding the transferred claims, "neither the argument nor the resolution of the legal question presented in the Complaint would be prejudiced if [CompTrust] were dismissed as a party."

In denying the Association's motion for summary judgment, the circuit court found the Transferred Claims were "covered claims," therefore the Association was responsible for their payment. The Association did not—and could not—appeal this interlocutory ruling. *Ballenger v. Bowen*, 313 S.C. 476, 477–78, 443 S.E.2d 379,

380 (1994) ("A denial of a motion for summary judgment decides nothing about the merits of the case [and] does not establish the law of the case . . . [t]herefore, an order denying a motion for summary judgment is not appealable.").

The Association now appeals the grant of CompTrust's motions to quash discovery and be dismissed as a party.

II.

Initially, CompTrust contends the Association's appeal is untimely because the Association did not serve the presiding judge with a copy of its Rule 59(e), SCRCP, motion. In the alternative, CompTrust argues the Association's arguments on appeal are barred by the two issue rule because it did not appeal the circuit court's finding that the service failure independently warranted dismissal of the Rule 59(e), SCRCP, motion. CompTrust's timeliness argument was answered by *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) ("There is no indication that the failure to transmit a copy of the [Rule 59(e), SCRCP, motion] to the circuit court affects the tolling provision of Rule 203(b)(1), SCACR. Therefore, the time for filing the notice of appeal did not begin to run until after the circuit court denied the motion . . . ."). We likewise find CompTrust's reliance on the two issue rule meritless. *See, e.g.*, *Jones v. State*, 382 S.C. 589, 594, 677 S.E.2d 20, 22 (2009) *abrogated on other grounds by Smalls v. State*, Op. No. 27764 (S.C. filed Feb. 7, 2018) (Shearouse Adv. Sh. No. 6 at 43) (evaluating the merits of the State's appeal, despite the PCR judge's dismissal of the State's motion for reconsideration for failure to comply with Rule 59(g), SCRCP).

III.

We next consider the propriety of using Rule 21, SCRCP, to dismiss CompTrust. A motion to dismiss a party under Rule 21, SCRCP, is addressed to the court's discretion. *Demian v. S.C. Health & Human Servs. Fin. Comm'n*, 297 S.C. 1, 5, 374 S.E.2d 510, 512 (Ct. App. 1988). Rule 21, SCRCP, provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Because few South Carolina decisions have interpreted our Rule 21, and none to any degree pertinent here, we look to federal cases construing their almost identical Rule 21. Like many of the Federal Rules of Civil Procedure, Rule 21 was designed to remove the traps of common law pleading, where a slight procedural misstep like misjoinder could doom the entire action. 7 Wright & Miller, *Federal Practice and Procedure* § 1681 (3d ed.). Rule 21 should be viewed by the company it keeps; its neighbors, Rules 17, 19, and 20, are provisions that also tell us who are proper parties. Taken together, these rules "'evidence the general purpose . . . to eliminate the old restrictive and inflexible rules of joinder designed for a day when formalism was the vogue and to allow joinder of interested parties liberally to the end that an unnecessary multiplicity of actions thus might be avoided.'" *Id.* (quoting *Soc'y of European Stage Authors & Composers v. WCAU Broad. Co.*, 1 F.R.D. 264, 266 (E.D. Pa. 1940)). Although Rule 21 does not define misjoinder, "[t]he cases make it clear that parties are misjoined when they fail to satisfy either of the preconditions for permissive joinder of parties set forth in Rule 20(a)." 7 Wright & Miller, *Federal Practice and Procedure* §1683 (3d ed.). As to joining parties as defendants, Rule 20(a), SCRCP, states: "All persons may be joined in one action as defendants if there is asserted against them . . . any right to relief in respect of or arising out of the same transaction, occurrence . . . and if any question of law or fact common to all defendants will arise in the action." Misjoinder therefore "occurs when there is no common question of law or fact or when . . . the events that give rise to the plaintiff's claims against defendants do not stem from the same transaction." *DirectTV, Inc. v. Leto,* 467 F.3d 842, 844 (3d Cir. 2006); *see also Demian*, 297 S.C. at 6, 374 S.E.2d at 512 (finding no abuse of discretion when the circuit court denied a defendant's motion to be dismissed for misjoinder when a common question of law applied to all defendants).

It appears the circuit court was persuaded CompTrust was misjoined not because CompTrust had no connection to the factual or legal issues in the action, but because it had been dissolved. As the circuit court pointed out, whether an unincorporated business trust can be sued after it has voluntarily dissolved is a novel question in South Carolina. We do not believe it was within the court's discretion to answer this question of first impression with no factual record while ruling upon a Rule 21 motion. Motions to dismiss are no place for novelty. *See generally Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001).

The circuit court also noted the Association asserted no claim of relief against CompTrust. The Association added CompTrust as a party to its complaint for declaratory relief. We find this meets the "right to relief" necessary for proper joinder under Rule 20, SCRCP; after all, the Declaratory Judgment Act commands that "[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration . . . ," and empowers courts to "declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. §§15-53-20, 80 (2005). Dismissing CompTrust at this early stage of the lawsuit jeopardizes the judicial economy Rule 21 and the Declaratory Judgment Act strive to foster.

The circuit court further found the three year statute of limitations for breach of contract actions barred any recovery against CompTrust. It reasoned the clock began running at the latest in 2009, when the last policy relating to the Transferred Claims was issued. Although joinder of a party does not remove a statute of limitations defense, *see Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1408 (11th Cir. 1998), a motion to dismiss on such grounds is properly brought pursuant to Rule 12(b)(6) rather than Rule 21, SCRCP. Nevertheless, we find the circuit court mischaracterized the Association's declaratory judgment action. The Association is not suing CompTrust for breach of an insurance policy; it brought a declaratory judgment action to determine who is responsible for paying claims presented to it pursuant to the Guaranty Act. The Guaranty Act is triggered—and the statute of limitations begins to run—when a claim arising under a policy issued by an insurer who has become insolvent is attempted to be transferred to the Association, not when the insurer issued the policy. Otherwise an insurer could unilaterally burden the Association and its members with all of its claims, covered and non-covered, simply by becoming insolvent more than three years after the last policy was issued.

The Guaranty Act directs that the Association "shall investigate claims brought against the association and adjust, compromise, settle, and pay covered claims to the extent of the association's obligation and deny all other claims . . . ." S.C. Code Ann. § 38-31-60(d)(2015). The Association contends this directive, together with section 38-31-60(l), which authorizes it to "perform any other acts necessary or proper to effectuate the purpose of [the Guaranty Act]," allows it to scrutinize the LPT Agreement, an endeavor that would be impaired by CompTrust's absence. We agree, and find the circuit court erred in dropping CompTrust from the Association's declaratory judgment action under Rule 21, SCRCP.

IV.

To the extent the Association's action against CompTrust was dismissed pursuant to Rule 12(b)(6) for failure to state a claim, we find this was also error. In deciding a Rule 12(b)(6) motion, the court looks only at the complaint and, taking the facts alleged as true and construing all reasonable inferences and doubts in plaintiff's favor, asks whether the complaint would entitle the plaintiff to relief under any theory. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (2007).

We find the Association's complaint states a valid claim. A cause of action under the Declaratory Judgment Act is established by showing the existence of a justiciable controversy, defined as "a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Power v. McNair,* 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970). The Association has alleged a real and substantial controversy concerning whether the Guaranty Act obligates it to pay the Transferred Claims. Resolution of this dispute turns on whether the claims meet § 38-31-20(8)'s definition of "covered claims." The Association's complaint is therefore the precise type of concrete controversy the Declaratory Judgment Act contemplates, as it invites a party affected by a statute to ask a court to define how the statute impacts the party's rights. S.C. Code Ann. § 15-53-30 (2005).

It appears the dismissal order was based on a belief that CompTrust's voluntary dissolution shielded it from being sued at all or, alternatively, any suit would be futile. As we have noted, a voluntarily dissolved business trust's amenability to suit may be a novel issue, which should not be decided on a motion to dismiss when further facts might add form and structure. *Evans*, 344 S.C. at 68, 543 S.E.2d at 551. As T.S. Eliot said: it is easy to carve a goose when there are no bones.

We also find it was premature to toss out CompTrust on grounds of futility given the Associations' argument concerning an employer's residual liability under § 42-1-150 of the South Carolina Code (2015). Finally, as to the circuit court's finding that further pursuit of CompTrust would be fruitless because CompTrust retained no records, we discern no basis for this finding from the face of the complaint.

V.

We hold CompTrust was improperly dismissed from the Association's declaratory judgment action, and reverse the grant of CompTrust's motions to quash discovery and be dismissed under Rules 12(b) and 21, SCRCP.

REVERSED AND REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

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
Trial Court Case No. 2014-CP-40-00313

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.

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc., hereby certify that the foregoing **PETITION FOR REHEARING** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on July 9, 2018, properly posted for delivery to the following addressees:

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Respectfully submitted,

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Charleston, South Carolina

Dated: 7/5/18

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July 9, 2018

VIA HAND DELIVERY
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Appellate Case No. 2016-000192
Case No.: 14-CP-40-0313
YCR File: 15140-20130673

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of a Petition for Rehearing, the original and one (1) copy of the Proof of Service of same and our firm's check in the amount of $25.00 representing the filing fee. Please file the originals and return a court-stamped copy of each document to the bearer of this letter.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Kathleen B. Barnes
Secretary

Enclosures
(all via US Mail and email)
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