IN THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No.: 2016-CP-26-06091
Appellate Case No.: 2018-000381

ACCC Insurance Company ..... Respondent

v.

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

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

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

FINAL BRIEF OF RESPONDENT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

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5. Did Appellants' Notice of Appeal and Amended Notice of Appeal which failed to name State Farm as a party to the appeal in violation of Rule 203, SCACR, result in the orders being appealed becoming the law of the case as to State Farm?

STATEMENT OF THE CASE

The Respondent, ACCC Insurance Company ("ACCC"), filed this action on September 14, 2016. The Complaint sought a declaratory judgment that, under an automobile liability insurance policy it issued (the "Policy"), it provided no liability coverage to and had no duty to defend and/or indemnify Patrick Benjamin Myers ("Myers") and Brittany Stanley a/k/a Brittany Standley ("Stanley") for a personal injury claim asserted by Patricia Williams as a result of a vehicular collision that occurred in Horry County, South Carolina, on March 18, 2016. (R. pp. 21-22; Complaint, ¶¶ 21, 24).

Appellants filed an Answer on September 19, 2016. (R. pp. 23-24) that admitted virtually all operative factual allegations and admitted ACCC was entitled to the requested declaratory relief. (R. pp. 23-24). Myers and Stanley did not respond to the Complaint. The Respondent,

State Farm Mutual Automobile Insurance Company ("State Farm"), timely filed an Answer on December 6, 2016 denying that ACCC was entitled to the requested relief. (R. pp. 25-26). On August 4, 2017, Appellants filed a motion to require ACCC and State Farm to comply with the mandatory alternative dispute resolution process. (R. pp. 35-36). On August 4, 2017, ACCC and State Farm filed a Joint Consent Motion to Dismiss ("Motion to Dismiss") – to which neither Myers, Stanley, nor Appellants consented – requesting that the Circuit Court dismiss this action with prejudice pursuant to Rule 41, SCRCP. (R. pp. 37-38). Appellants thereafter filed a Motion for Status Conference and Scheduling Order on August 7, 2017 (R. pp. 33-34), a Motion to Compel ADR on August 4, 2017 (R. pp. 35-36), a Motion to Amend Answer to Assert Counterclaim on September 6, 2017 (R. pp. 67-107), and a Motion to Compel Deposition of ACCC pursuant to Rule 30(b)(6), SCRCP, on October 26, 2017. (R. pp. 108-109).

The pending motions came before Judge Hyman for a hearing on November 1, 2017. (R. pp. 170-187). He orally granted the Motion to Dismiss with Prejudice pursuant to Rule 41, SCRCP and found the Appellants' motions were moot (R. pp. 187 ll 2-6) and issued a Form 4 Order to that effect. (R. pp. 5-7).

Appellants filed three Motions for Reconsideration on November 10, 2017. (R. pp. 127-134). Before hearing these motions, Judge Hyman issued a formal Order on November 15, 2017 granting the Motion to Dismiss with prejudice and ruling that Appellants' Motions were moot. (R. pp. 8-10).

On November 21, 2017, Appellants filed a Motion for Reconsideration of the November 15, 2017 Order pursuant to Rule 59(e), SCRCP. (R. pp.135-137). Judge Hyman denied Appellants' Motions for Reconsideration by Order dated February 1, 2018. (R. pp. 14-16).

On March 1, 2018, Appellants timely filed a Notice of Appeal as to Judge Hyman's Orders granting the Motion to Dismiss and denying the Motions for Reconsideration. On March 2, 2018, Appellants filed an Amended Notice of Appeal. Neither Notice of Appeal named State Farm as a respondent.

STATEMENT OF FACTS

ACCC issued a policy of automobile liability insurance to Patrick Myers and Brittany Standley providing bodily injury and property damage liability insurance coverage with regard to a 2004 Chevrolet Monte Carlo. (R. p. 19, Complaint, ¶ 10, Exhibit 3). The policy's declaration page lists Myers as a policyholder and states his date of birth as May 12, 1961 and his South Carolina driver's license number as 100375876. (R. p. 19, Complaint, ¶ 11, Exhibit 2). The policy declaration page also lists Brittany Standley as a policyholder. (R. p. 19, Complaint, ¶ 12, Exhibit 2).

Appellant Patricia Williams was involved in a motor vehicle accident on March 18, 2016 when her vehicle was struck by a 2004 Chevrolet Monte Carlo driven by Patrick Myers. (R. p. 18, Complaint, ¶ 8). The South Carolina Department of Motor Vehicles Uniform Traffic Collision Report lists Myers' date of birth as June 28, 1987, states that he is the owner of the 2004 Chevrolet Monte Carlo, and lists Myers' driver's license number as 100375877, one digit off the number reflected on the insurance policy. (R. p. 18, Complaint ¶ 9, Exhibit 1). The accident report reflects that the 2004 Chevrolet Monte Carlo was uninsured at the time of the accident. (R. p. 18, Complaint ¶ 9, Exhibit 1). Patricia Williams and Ronald Williams are insured by State Farm. Their automobile liability insurance policies contain uninsured motorist coverage as well as underinsured motorist coverage.

On April 14, 2016 ACCC tendered its $25,000.00 in bodily injury liability insurance coverage and $25,000.00 in property damage liability insurance coverage to the Appellants. State Farm tendered $100,000.00 to the Appellants on each of three policies for a total of $300,000.00 in underinsured motorist coverage. Appellants accepted the tender of underinsured motorist coverage from State Farm but ultimately did not accept the policy limits tendered by ACCC. The Appellants argued that due to the discrepancies of the dates of birth and the driver's license numbers, Myers was not who he said he was and did not own the 2004 Chevrolet Monte Carlo. As a result on September 14, 2016, ACCC filed a declaratory judgment action asking the Court for a determination of whether its policy was void ad initio based on material misrepresentations by Myers and Standley. (R. pp. 17-22). The declaratory judgment action alleged that Myers and Standley made material misrepresentations about their identities when applying for the coverage with ACCC and that neither of them had an ownership interest in the 2004 Chevrolet Monte Carlo involved in the March 18, 2016 motor vehicle accident. (R. p. 21, Complaint ¶ 16 and 17).

During discovery ACCC determined that Myers was in fact who he claimed to be and that he was the owner of the 2004 Chevrolet Monte Carlo involved in the motor vehicle accident. Further, ACCC determined that S.C. Code Ann. §56-9-20(5)(b) which states in pertinent part that no statement made by an insured or on his behalf and no violation of the policy shall defeat or void the policy. The statute further states that the liability of an insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by the motor vehicle liability policy occurs.

Thereafter, on August 4, 2017 ACCC and State Farm filed a joint Motion to Dismiss the Action with Prejudice and ACCC once again tendered all of its liability coverage. (R. pp. 37-38). A month after the Joint Motion to Dismiss was filed, the Appellants filed a Motion to Amend their

Answer to Assert a Counterclaim. (R. pp. 67-107). This Motion to Amend the Answer to add a Counterclaim was filed almost one year after the declaratory judgment action was filed. (R. pp. 67-107). The proposed counterclaim raised the same issues found in the Complaint in the declaratory judgment action and alleged that misrepresentations by Myers and Standley voided their insurance policy with ACCC ad initio. (R. pp. 103-107). Judge Larry B. Hyman, Jr. conducted a hearing on the Joint Motion to Dismiss on November 1, 2017. (R. pp. 170-188). At the hearing ACCC's attorney announced to the Court that as a result of discovery it had determined that coverage existed under its policy and it was prepared to tender the policy limits of liability coverage. (R. p. 178 l 20-p. 179 l 13). Thus, there was no justiciable issue and the action should be dismissed. (R. p. 187). ACCC further took the position that S.C. Code Ann. §56-9-20(5)(b) was controlling. (R. p. 180 ll 2-19). Judge Hyman specifically found that code section "dictates that there is liability coverage under the ACCC policy and ACCC is willing to pay its liability limits to the Appellants. The Court finds that there is liability coverage under the ACCC policy." (R. p. 9). That order also found that the Appellants' Motions to Amend the Answer, to require mediation, to require the deposition of the 30(b)(6) witness of ACCC, and for a status conference and scheduling order were all rendered moot by the dismissal of the action. (R. p. 10).

ARGUMENTS

I. THE CIRCUIT COURT JUDGE PROPERLY EXERCISED HIS DISCRETION IN GRANTING THE MOTION TO DISMISS WITH PREJUDICE PURSUANT TO RULE 41, SCRCP.

Rule 41(a)(2) states:

> Except [by the plaintiff before the appearance by a defendant or by the consent of all parties], an action shall not be dismissed at the plaintiff's insistence save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for

independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

In exercising discretion in determining whether to grant a motion under Rule 41(a)(2), the hearing judge must do so with regard to the interest of the parties and public. *Prime Medical Corp v. First Medical Corp.*, 291 SC 296, 299, 353 SE2d 294, 296 (Ct. App. 1987).

The Appellants assert that the Circuit Court Judge failed to inquire into whether or not any of the parties are legally prejudiced by dismissal of this action with prejudice and in particular, whether the Appellants are legally prejudiced. The Appellants are not legally prejudiced by the dismissal of this action with prejudice. The Appellants have never put forth any evidence of legal prejudice and failed to do so at the hearing or in their brief. ACCC readily admits that it provides insurance coverage to Patrick Benjamin Myers and Brittany Standley. That is the whole issue raised in the declaratory judgment action (R. pp. 17-22) and it is the issue raised in the Appellants' proposed counterclaim. (R. pp. 103-107). The declaratory judgment action and the proposed counterclaim do not pose a justiciable issue since ACCC acknowledges that it has coverage, ACCC is willing to pay all of its liability insurance coverage, and, in fact, has tendered that coverage on two occasions. Furthermore, S.C. Code Ann. § 56-9-20(5)(6) is dispositive of the issue of coverage as discussed below.

The Appellants have suffered no legal prejudice by the dismissal of this action with prejudice. Furthermore, the Circuit Court Judge properly exercised his discretion in dismissing this action with prejudice.

II. THE CIRCUIT COURT JUDGE PROPERLY EXERCISED HIS DISCRETION IN GRANTING THE MOTION TO DISMISS WITH PREJUDICE.

The Circuit Court found that once ACCC determined through discovery that it had liability insurance coverage available under its policy issued to Myers and Standley and it was willing to pay all of its liability coverage to the Appellants, there is no justiciable issue. Further, the Court found the Appellants have no standing to assert that there is no coverage under the ACCC policy. Therefore, the case should be dismissed with prejudice.

Through discovery ACCC determined that Patrick Benjamin Myers was who he said he was and that he owned the 2004 Chevrolet Monte Carlo that was insured by ACCC. (R. pp. 178-179). Further, ACCC made a determination that its declaratory judgment action was prohibited by S.C. Code Ann. §56-9-20(5)(b) which states:

> (b) Provisions deemed incorporated in such policy. Every motor vehicle liability policy is subject to the following provisions, which need not be contained therein:
> (1) The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute whenever injury or damage covered by the motor vehicle liability policy occurs;
> (2) The policy may not be canceled or annulled as to the liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage;
> (3) No statement made by the insured or on his behalf and no violation of the policy shall defeat or void the policy.

This statute is clearly dispositive of this entire action. The Appellants proposed counterclaim seeks a declaratory judgment action requesting that this Court find that there is no liability insurance coverage available under the ACCC policy on the basis of fraud and misrepresentation by ACCC insureds, Patrick Benjamin Myers and Brittany Standley. (R. pp. 103-107). This statute specifically prohibits ACCC or anyone else from taking that position.

The proposed counterclaim essentially re-alleges the allegations of ACCC's complaint. (R. pp. 103-107). There is no legal prejudice in dismissing this action with prejudice. No new issues

are raised by the proposed counterclaim. In ex parte: United Services Auto Association, 365 SC 50, 614 SE2d 652 (Ct. App. 2005), this Court held that when a Rule 41(b) motion to dismiss has the same effect as summary judgment, the Court should view all evidence in the light most favorable to the non-moving party. Id. at 53, 614 SE2d at 653. All of the evidence was reviewed by Judge Hyman in the light most favorable to the Appellants and it revealed that no viable cause of action existed. There is liability insurance coverage under the ACCC policy. ACCC acknowledged that there was coverage under its policy and in fact tendered its coverage on two separate occasions. The Circuit Court properly exercised its discretion and dismissed this action with prejudice.

III. THE CIRCUIT COURT PROPERLY GRANTED THE DISMISSAL OF THIS DECLARATORY JUDGMENT ACTION WHICH SOUGHT A DETERMINATION AS TO THE EXISTENCE OF LIABILITY COVERAGE UNDER THE ACCC POLICY ONCE ACCC CONCEDED THAT ITS POLICY PROVIDED LIABILITY COVERAGE TO PATRICK BENJAMIN MYERS AND BRITTANY STANDLEY AND TENDERED ITS LIMITS.

ACCC filed a complaint alleging neither Myers nor Standley had an ownership interest in the 2004 Chevrolet Monte Carlo involved in the accident and that Myers and Standley made material misrepresentations while applying for insurance with ACCC. Thus, they are not entitled to indemnity or a defense under the policy. (R. p. 21). ACCC also alleged it is uncertain as to the applicability of the policy. (R. p. 21).

Through discovery ACCC learned that Patrick Myers did own the 2004 Chevrolet Monte Carlo, that Patrick Myers was in fact the person who applied for the insurance, and he did not make material misrepresentations when he applied for the insurance. Once ACCC made those determinations and became aware of S.C. Code Ann. §56-9-20(5)(b), ACCC admitted that it had coverage, tendered its limits, and determined the dismissal of the declaratory judgment action was appropriate.

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. ACCC simply realized that its initial position in the declaratory judgment action is wrong. Once it recognized that its position was wrong, it offered all of its coverage and filed a motion to dismiss the action. The dismissal with prejudice was appropriate as there is no justiciable issue.

IV. ONCE THE CIRCUIT COURT DETERMINED THAT THE MOTION TO DISMISS SHOULD BE GRANTED, THE APPELLANTS' MOTIONS REGARDING DISCOVERY, MEDIATION AND AMENDING ITS ANSWER TO INCLUDE A COUNTERCLAIM WERE RENDERED MOOT.

The above-captioned action was filed on September 14, 2016. (R. p. 17). On August 4, 2017 Appellants filed a Motion to Require ACCC and State Farm to comply with the mandatory alternative dispute resolution process. (R. pp. 35-36). On that same day, ACCC and State Farm filed the Joint Consent Motion to Dismiss. (Motion to Dismiss, R. pp. 37-38). On July 27, 2017 the Appellants filed a Motion for Status Conference and a Scheduling Order. (R. pp. 33-34). On September 6, 2017, almost a year after this matter was filed, the Appellants filed a Motion to Amend the Answer to Assert a Counterclaim. (R. pp. 67-107). That Motion to Amend was filed for no reason other than to attempt to bring the Appellants position within the portion of Rule 41 which prohibits the dismissal of the action if (1) a counterclaim is filed prior to the motion to dismiss and (2) the counterclaim cannot go forward if the case is dismissed. Finally, the Appellants filed a Motion to Compel the 30(b)(6) Deposition of ACCC on October 26, 2017. (R. pp. 108-120). The Motions to Compel Mediation, for a Status Conference and Scheduling Order, to Amend the Answer to Assert a Counterclaim, and to Compel the Deposition of the 30(b)(6) witness of ACCC were all rendered moot by the dismissal of the action. No amount of discovery was going to change the fact that ACCC acknowledged it had coverage, and tendered all of its liability

insurance coverage both bodily and property damage or the fact that S.C. Code Ann. §56-9-20(5)(b) is dispositive of all issues raised in the declaratory judgment action. There was absolutely no reason for the Court to hear the motions filed by the Appellants once it determined this case was properly dismissed with prejudice.

ADDITIONAL SUSTAINING GROUND

V. APPELLANTS' NOTICE OF APPEAL AND AMENDED NOTICE OF APPEAL FAILED TO NAME STATE FARM AS A PARTY TO THE APPEAL IN VIOLATION OF RULE 203, SCACR; THUS, JUDGE HYMAN'S ORDERS CONSTITUTE THE LAW OF THE CASE AS TO STATE FARM.

State Farm was not named by the Appellants as a Respondent in either of its Notices of Appeal. A notice of appeal is a jurisdictional requirement in the South Carolina Appellate Courts. *Conner v. City of Forest Acres*, 348 SC, 454, 560 SE2d 606 (2002). The Court of Appeals has no authority to extend or expand the time in which a notice of intent to appeal must be served. *Conner*, 348 SC at 461. An appellant's failure to properly designate a party as a "respondent" in an appeal is not a mere clerical or scrivener's error. Id. To the contrary, the failure to properly name a respondent in an appeal within the time period set forth in Rule 203, SCACR is grounds for a dismissal of the party not properly named. Id. In *Conner v. City of Forest Acres*, the South Carolina Supreme Court held that adding respondents that were defendants before the lower court, but who were not included as respondents in the appeal after the 30-day period to serve a notice of appeal had expired, was insufficient to bring those defendants before the appellate court. The Court dismissed the purported respondents from the appeal. *Conner*, 348 SC at 462.

In the instant case, Appellants had two opportunities to properly file their Notice of Appeal designating State Farm as Respondent. The Appellants failed in both instances. When the Appellants submitted a letter to the Court on April 9, 2018 advising that State Farm also should be

named as a Respondent, that letter was beyond the required 30-day time period to serve a proper Notice of Appeal pursuant to Rule 203, SCACR. As of the date of this Initial Brief, State Farm is not aware of Appellants ever filing a Notice of Appeal naming State Farm as a respondent. State Farm was never properly named as a respondent.

The Appellants seek a ruling from this Court that the ACCC liability policy is void, Myers is an uninsured motorist, and thus, State Farm must provide Appellants with uninsured motorist (UM) coverage, rather than the underinsured motorist coverage State Farm already paid and which Appellants accepted. The limits of the uninsured motorist coverage under the State Farm policies are higher than the limits of the underinsured motorist coverage. State Farm was a joint movant with ACCC in the Motion to Dismiss and has been a party to this action from the beginning. The Appellants now seek through this appeal to impose obligations against State Farm (payment of the higher uninsured motorist coverage), but never followed Rule 203 SCACR and made State Farm a respondent in the appeal. Accordingly, because State Farm was never properly named as a Respondent and the orders of the Circuit Court are the law of the case as to State Farm, i.e., ACCC provides liability coverage to Myers and Stanley. This Court cannot grant Appellants the relief they seek through this appeal, that State Farm's uninsured motorist coverage applies in this situation, not its underinsured motorist coverage. Therefore, the Court should dismiss this appeal in its entirety.

CONCLUSION

The Circuit Court did not abuse its discretion in dismissing the above-captioned action with prejudice. The entire crux of the declaratory judgment action filed by ACCC was to have the Court make a determination as to whether or not there was liability coverage under the policy it issued to Patrick Benjamin Myers and Brittany Standley, for the injuries and damages sustained by the

Appellants as a result of the March 18, 2016 automobile accident. Once ACCC Insurance determined through discovery that the allegations contained in its Complaint were incorrect, that ACCC in fact provided liability coverage to Myers and Standley, and ACCC tendered all of its liability insurance coverage, both bodily injury and property damage, to the Appellants, there was no justiciable issue and the action should be dismissed with prejudice. In addition, the Appellants have no standing to assert there was no coverage under the policy issued by ACCC to Myers and Standley. The Circuit Court did not abuse its discretion and properly dismissed this action with prejudice. The ruling of the Circuit Court should be affirmed.

Furthermore, since the Notice of Appeal is defective in failing to name State Farm as a respondent, the orders of the Circuit Court are the law of the case with regard to State Farm. Therefore, the relief sought by the Appellants in this court cannot be granted and the appeal should be dismissed.

Respectfully submitted, this the 20th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of State Farm Mutual Automobile Insurance Company complies with Rule 211(b) of the *South Carolina Rules of Appellate Procedure*.

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