

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Richland County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Circuit Court Case No. 2014-CP-40-0313

Opinion No. 5562 (S.C. Ct. App. filed May 23, 2018)
Court of Appeals Case No. 2016-000192

Supreme Court Case No. 2018-002047

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,

Intervenor-
Petitioner,

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.,

Intervenor-
Respondents.

Of whom CompTrustAGC of South Carolina a/k/a CompTrust
AGC of South Carolina, Inc., is

Petitioner,

And CAGC Insurance Company, in Liquidation; Raymond G.
Farmer, in his capacity as Ancillary Receiver of CAGC Insurance
Company, in Liquidation; and South Carolina Property and
Casualty Insurance Guaranty Association are

Respondents.

APPENDIX
(VOLUME 2 OF 2)

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Company, in Liquidation*

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-CP-40-0313

Appellate Case No. 2016-000192

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.

**RECORD ON APPEAL
VOLUME III**

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Raymond G. Farmer, as Director of the) Civil Action No. 2014-CP-40-0313
South Carolina Department of)
Insurance,)

Petitioner,)

vs.)

CAGC Insurance Company, In)
Liquidation,)

Respondent.)

INTERVENOR-PETITIONER'S
FIRST SET OF
INTERROGATORIES TO
INTERVENOR-RESPONDENT
COMPTRUSTAGC OF SOUTH
CAROLINA

South Carolina Property and Casualty)
Insurance Guaranty Association,)

Intervenor-Petitioner.)

vs.)

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.,)

Intervenor-Respondents.)

TO: MICHAEL A. MOLONY, ESQUIRE, AND T. DOUGLAS CONCANNON,
ESQUIRE, ATTORNEYS FOR INTERVENOR-RESPONDENT
COMPTRUSTAGC OF SOUTH CAROLINA A/K/A COMPTRUSTAGC OF
SOUTH CAROLINA, INC.:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Intervenor-
Petitioner South Carolina Property and Casualty Insurance Guaranty Association

("Association"), requests that you answer the following Interrogatories no later than thirty (30) days from the date of service hereof. The Interrogatories are continuing in nature and must be supplemented if you obtain additional responsive information.

DEFINITIONS

- A. "You," "your," and "Intervenor-Respondent" and any variants thereof, refers to CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc., and shall also include employees, agents, attorneys, and any other persons or entities acting (or who acted) or purporting to act (or who purported to act) on its behalf.
- B. "Person" means any natural person, sole proprietorship, corporation, company, association, joint venture, firm, partnership or other legal or business entity in whatever form.
- C. "Representative" means any person acting or purporting to act on behalf of any other person.
- D. The words "document" or "documents" include any written, printed, records or graphic matter, photographic matter or sound reproductions, however produced or reproduced, referring or relating to the subjects mentioned, now or formerly in the possession, control or custody of Intervenor-Respondent, including documents at any time in the possession, control, custody of Intervenor-Respondent's agents or other persons.
- E. The words "communication" or "communications" include any verbal conversations or any other statement from one person to another, including but not limited to, any interview, conference, conversation, discussion, meeting or telephone conversation.
- F. The words "identify," "identity," or "identification," of an individual person means to state his or her full name and present location, his or her present or last known address, employment, and position. "Identify" or "identification" of a document means to state the type document (e.g., letter, memorandum, telegram, chart, etc.), or some other means of identifying and its present

location or custodian. If any identified document was but is no longer in your possession or under your control, state its disposition.

- G. As used herein, the term "referring" or "relating" means reflecting, containing, pertaining, indicating, showing, concerning, constituting, evidencing, describing, discussing or mentioning.
- H. The singular form of a word shall refer to the plural, and words used in the masculine gender shall also include the feminine, and vice-versa.
- I. If any privileges are claimed with respect to any document, identify the document and for each such document please state:
 - (a) The nature of the document (*e.g.*, letter, memorandum, report, tape recording, etc.);
 - (b) The date the document bears, or if undated, the date it was written or created;
 - (c) The document's author;
 - (d) The identity of each of the document's recipients;
 - (e) The general subject matter of the document;
 - (f) The document's present or last known location or custodian; and
 - (g) The privilege claimed and the basis therefor.
- J. If any privileges are claimed with respect to any oral communication, identify the communication and for each such communication, please state:
 - (a) The date of the communication;
 - (b) The participants in the communication;
 - (c) All persons present during the communication;
 - (d) The nature of the communication (*e.g.*, face-to-face, by telephone);
 - (e) The general subject matter of the communication; and
 - (f) The privilege claimed and the basis therefor.
- K. If the answer to any interrogatory is that you lack knowledge of the requested information, describe all efforts made by you to obtain the information.

INTERROGATORIES

1. Give the names and addresses of persons known to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses, and indicate who has possession of such statements.
2. Set forth a list of photographs, plats, sketches, or other prepared documents that relate to the claim in the case.
3. List the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of the case.
4. For each person known to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.
5. If you denied any Paragraphs of the Association's Complaint in your Answer, state with specificity the basis upon which you denied each Paragraph.
6. Set forth a list of your member employers at the time of your dissolution on March 31, 2011, and for the five years preceding dissolution.
7. Set forth a list of all your trustees and the time periods when they served as trustees.
8. Set forth the present location of all documents relating to CompTrustAGC of South Carolina.
9. State your records retention policy at the time of dissolution and identify any written policy regarding records retention in place at dissolution and for the five years preceding dissolution.

10. Set forth a list of all documents responsive to Requests for Production in this matter being withheld on the grounds of privilege, including the date of the document, the author of the document, any recipients of the document, the type of document (email, memorandum, etc.) and the basis for your claim of privilege.

11. Identify the individuals and entities involved with the decision to enter the Loss Portfolio Transfer and state the reasons this decision was made.

12. Identify the individuals and entities involved with the decision for you to dissolve and state the reasons the decision was made.

13. Identify any communications in any form, whether written or oral, between you, your members or your agents and the South Carolina Worker's Compensation Commission, NC Department of Insurance, SC Department of Insurance or any other state or federal governmental agency or department regarding the "Loss Portfolio Transfer." For purposes of this Interrogatory, Loss Portfolio Transfer shall be given the same meaning as that in your Answer.

14. Identify any communications in any form, whether written or oral, between you, your members or your agents with any member of the South Carolina Legislature, their agents or staff members regarding the Loss Portfolio Transfer or claims made to you or CAGC.

15. Set forth a list of all claimants existing at the time of the Loss Portfolio Transfer and identify the attorney or representative of each.

16. Set forth a list of all claimants existing at the time of the dissolution of CompTrustAGC of South Carolina and identify the attorney or representative of each.

17. Identify any contact you or your representatives had with the Association regarding the Loss Portfolio Transfer, the dissolution, and the Association's acceptance of pre-transfer claims.

18. Identify the attorney and/or law firm representing you at the time of the Loss Portfolio Transfer.

19. Identify the attorney and/or law firm representing you at the time of the dissolution.

20. Identify the attorney and/or law firm who represented CAGC at the time of the Loss Portfolio Transfer.

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May 20, 2015.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT

Raymond G. Farmer, as Director of the) Civil Action No. 2014-CP-40-0313
South Carolina Department of)
Insurance,)

Petitioner,)

vs.)

CAGC Insurance Company, In)
Liquidation,)

Respondent.)

South Carolina Property and Casualty)
Insurance Guaranty Association,)

Intervenor-Petitioner.)

vs.)

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.,)

Intervenor-Respondents.)

INTERVENOR-PETITIONER'S
FIRST SET OF REQUESTS FOR
PRODUCTION TO INTERVENOR-
RESPONDENT COMPTRUSTAGC
OF SOUTH CAROLINA

TO: MICHAEL A. MOLONY, ESQUIRE, AND T. DOUGLAS CONCANNON,
ESQUIRE, ATTORNEYS FOR INTERVENOR-RESPONDENT
COMPTRUSTAGC OF SOUTH CAROLINA A/K/A COMPTRUSTAGC OF
SOUTH CAROLINA, INC.:

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, Intervenor-
Petitioner South Carolina Property and Casualty Insurance Guaranty Association

("Association"), requests that Intervenor-Respondent CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc. ("CompTrust"), produce and make available for inspection and duplication, in response to each numbered paragraph, all documents specified herein which are in its possession, custody or control or in the possession, custody or control of its agents, accountants or attorneys. CompTrust is requested to make such production within thirty (30) days after service of this request at the offices of the undersigned at the address indicated below, as required pursuant to the South Carolina Rules of Civil Procedure. If you contend any item need not be produced, identify such item and set forth the basis for your failure to produce same.

DEFINITIONS AND INSTRUCTIONS

As used herein, the following terms shall have the meanings set forth below:

1. The terms "you" and "your" mean the party or parties to which these requests for production are addressed, including their agents, attorneys, and all other persons acting or purporting to act on their behalf. If that party is a corporation or partnership, the terms "you" and "your" also include the party's divisions, departments, subsidiaries, affiliates, predecessors, present or former officers, directors, owners, agents, attorneys, and accountants as well as each partnership in which it is a partner, and includes any other person, acting or purporting to act on its behalf.

2. The term "person" or "persons" means any natural person, individual, proprietorship, partnership, corporation, association, organization, joint venture, firm, other business enterprise, governmental body, group of natural persons or other entity and includes any other person acting on behalf of a person.

3. The terms "document" or "documents" mean and include any written or graphic matter or other means of preserving thought or expression and all tangible things from which information can be processed or transcribed, including the originals and native forms of electronic documents, and any draft and all non-identical copies regardless of origin or location, whether different from the original by reason of any notation made on such copy or otherwise, including, but not limited to, correspondence, memoranda, handwritten notes, instructions, messages (including, but not limited to, reports of telephone conversations or conferences), letters, telegrams, teletype, telefax, bulletins, papers, meetings or other communications, interoffice and intraoffice telephone calls, diaries, chronological data, indices, minutes, books, reports, records, studies, summaries, analyses, pamphlets, booklets, circulars, bulletins, printed matter, charts, tables, graphs, ledgers, working papers, invoices, worksheets, receipts, returns, computer printouts, prospectuses, financial statements, schedules, affidavits, contracts, cancelled checks, statements, transcripts, statistics, surveys, magazine or newspaper articles, periodicals, releases (and any and all drafts, alterations and modifications, changes and amendments of any of the foregoing), graphic or aural records or representations of any kind (including without limitation photographs, microfiche, microfilm, videotape, tape recording, wire recording, transcript of recordings, records and motion pictures) and electronic, mechanical or electric records or representations of any kind (including without limitation tapes, cassettes, discs, records, data sheets and data processing cards) and any other compilations from which information can be obtained and translated if necessary, or any written, recorded, transcribed, punched, taped, filed or graphic matter, however produced or reproduced, to which you have or had access.

4. The term "all documents" means every document or group of documents as above defined that are known to you or that can be located or discovered by reasonably diligent efforts.

5. The term "communication" means any oral or written statement, dialogue, colloquy, discussion, conversation, agreement, or expression of any kind.

6. When producing the documents, please keep all documents segregated by the file in which the documents are contained and indicate the name of the file in which the documents are contained and the name of the documents being produced.

7. In the event such file(s) or document(s) has (have) been removed for the purposes of this action or for some other purpose, please state the name and address of the person who removed the file, the title of the file and each subfile, if any, maintained within the file, and the present location of the file.

8. If you choose to withhold any documents from production for inspection and copying (on the basis of privilege or otherwise), please identify each document withheld and provide its date, number of pages, author, recipient(s), a brief description of its subject matter, and your basis for withholding the document from production.

9. If any of the documents requested herein have been lost or destroyed since their creation, identify each of the missing documents, state when, where, how and by whom the documents were lost or destroyed and identify, by name and address, the person who last had custody of the missing documents.

10. As used herein, the singular shall include the plural, the plural shall include the singular, and the masculine, feminine, and neuter shall include each of the other genders.

11. The words "and" as well as "or" shall be construed disjunctively as well as conjunctively. The word "all" means "any and all." The word "each" means "each and every," and the word "every" means "each and every."

DOCUMENTS REQUESTED

1. Any and all documents related to the claims set forth in the Association's Complaint or the allegations, denials, and/or defenses set forth in your Answer, including but not limited to any and all documents or materials identified in response to Interrogatories.

2. Any and all governing documents for CompTrust.

3. Any and all documents related to the dissolution of CompTrust.

4. Any and all documents related to the Loss Portfolio Transfer by CompTrust.

5. Any and all documents you provided to or received from the North Carolina Department of Insurance ("NC DOI"), including but not limited to all documents evidencing its "prior review and approval" of the Loss Portfolio Transfer as set forth in your Answer.

6. Any and all documents you provided to or received from the South Carolina Department of Insurance.

7. Any and all documents you provided to or received from the South Carolina Workers' Compensation Commission ("SC WCC"), including but not limited to all documents evidencing its "prior review and approval" of Loss Portfolio Transfer as set forth in your Answer.

8. Any and all documents you provided to or received from CAGC Insurance Company ("CAGC") or its Liquidator.

9. Any and all documents you provided to or received from your members related to the workers' compensation coverage you provided to them.

10. Any and all documents you provided to or received from your members related to the Loss Portfolio Transfer.

11. Any and all documents evidencing the intention and understanding of CAGC, CompTrust, NC DOI, and the SC WCC that the Loss Portfolio Transfer would effect a contractual novation as set forth in your Answer.

12. Any and all documents evidencing the agreement of the member employers of CompTrust that the Loss Portfolio Transfer would effect a contractual novation of their "essential agreements" with CompTrust as set forth in your Answer.

13. All documents related to any claims which you assert are now the responsibility of the Association as a result of the Loss Portfolio Transfer.

14. All documents received as a result of any subpoena issued in this case.

15. All documents that were sent to members regarding dissolution and member responsibility.

16. Any documents sent to individual claimants relative to the "novation" and any acceptance or approval received back.

17. Any merger related documents for both South Carolina and North Carolina.

18. All of your financial records from two years prior to the Loss Portfolio Transfer to the present.

19. Any other documents or materials which you intend to introduce in the trial of this case.

< signature block next page >

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Attorneys for South Carolina Property and Casualty Insurance
Guaranty Association

Columbia, South Carolina

May 20, 2015.

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for SC Property and Casualty Insurance Guaranty Association, do hereby certify that I have served all counsel in this action with a copy of the document(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Document(s):

1. Intervenor-Petitioner's First Set of Interrogatories to Intervenor-Respondent ComptrustAGC of South Carolina; and
2. Intervenor-Petitioner's First Set of Requests for Production to Intervenor-Respondent ComptrustAGC of South Carolina.

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Maria Keeve
Administrative Assistant

May 20, 2015

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1	STATE OF SOUTH CAROLINA	)	
2	<u>COUNTY OF RICHLAND</u>	)	COURT OF COMMON PLEAS 2014-CP-40-0313
3	Raymond G. Farmer, as	)	
4	Director of the South Carolina	)	
	Department of Insurance,	)	
5	Petitioner,	)	
6	vs.	)	
7	CAGC Insurance Company, In	)	
	Liquidation,	)	
8	<u>Respondent.</u>	)	TRANSCRIPT OF RECORD
9	South Carolina Property and	)	
10	Casualty Insurance Guaranty	)	
	Association,	)	
11	Intervenor-Petitioner,	)	
12	vs.	)	
13	CAGC Insurance Company, in	)	
14	Liquidation; Raymond G. Farmer	)	
15	in his capacity as Ancillary	)	
16	Receiver of CAGC Insurance	)	
	Company, in Liquidation; and	)	
	CompTrustAGC of SC a/k/a	)	
	CompTrustAGC of SC, Inc.,	)	
17	<u>Intervenor-Respondents.</u>	)	
18			June 9, 2014 Columbia, South Carolina
19	B E F O R E:		
20	THE HONORABLE DEANDREA G. BENJAMIN, JUDGE.		
21	A P P E A R A N C E S:		
22	GEOFFREY ROSS BONHAM, ESQ.		
	Attorney for the Petitioner		
23	ERIK T. NORTON, ESQ.		
24	Attorney for the Respondent		
25			DEBORAH M. McCURDY, RPR Official Court Reporter

I N D E X O F W I T N E S S E S

(WHEREUPON, no witnesses were called
during these proceedings.)

E X H I B I T S

(WHEREUPON, no exhibits were introduced
during these proceedings.)

JUNE 9, 2014

THE COURT: Raymond Farmer v. CAGC Insurance Company.

MR. BONHAM: Yes, ma'am. That is an insurance receivership. I'm Geoffrey Bonham. I'm with the Department of Insurance. Erik Norton is here. He also has a motions hearing at 11:00 before Judge Cooper, and he said he'll be down -- I think he was the second one up there -- he will be down as soon as --

THE COURT: Who is that?

MR. BONHAM: Erik Norton, also of Nexsen Pruet -- or, excuse me, he is co-counsel with Ms. Sullivan.

THE COURT: All right.

(WHEREUPON, a break was taken.)

THE COURT: Raymond v. CAGC Insurance Company.

MR. NORTON: Good morning, Your Honor.

THE COURT: Mr. Norton?

MR. NORTON: Yes, ma'am.

THE COURT: All right.

MR. NORTON: I'm Erik Norton. And I am actually here for the South Carolina Property and Casualty Insurance Guaranty Association. We are moving to intervene and for a joinder of

1 intervenor-respondents to deal with a legal issue
2 regarding who is responsible for dealing with
3 certain covered claims under the Guaranty Act.
4 Mr. Ross is here on behalf of the director and is
5 in agreement with our intervening. Because of the
6 procedural nature of these things, we have to do it
7 as an intervention rather than a separate
8 declaratory judgment action lawsuit, we have to do
9 all this under the ancillary receivership created
10 because CAGC Insurance Company is insolvent. And I
11 can tell you more if you would like to know.

12 THE COURT: But y'all have an agreement? Is
13 that correct, Mr. Ross?

14 MR. BONHAM: Mr. Bonham. Geoffrey Bonham.

15 THE COURT: Bonham. I said Ross.

16 MR. NORTON: Excuse me. I apologize.

17 MR. BONHAM: That's all right. Your Honor, I
18 represent of course the receiver, Mr. Farmer, who
19 is our director, and also as receiver. So
20 certainly as far as the receiver is concerned, we
21 reviewed the order -- the motion and the order, of
22 course -- and we have no objection. Nobody
23 evidently is here as far as the proposed intervenor
24 today.

25 MR. NORTON: That's correct, Your Honor. I

1 think all we have to do is to serve the two parties
2 under Rule 5 that were initially in the action,
3 which we have done, Mr. Farmer, through Mr. Bonham;
4 and then we served CAGC Insurance Company at its
5 registered agent's address, which is the North
6 Carolina Department of Insurance, because they are
7 in liquidation there. They have not responded at
8 all. We did send courtesy copies to CompTrustAGC
9 under the information we have to it. Received no
10 response from them. Obviously we will have to
11 serve them with a summons and complaint to get them
12 into the action.

13 But, with your permission, I will hand up a
14 proposed order.

15 THE COURT: Okay.

16 MR. NORTON: For you to consider.

17 (Complies.)

18 THE COURT: All right, thank you.

19 MR. NORTON: Thank you.

20 (Pause.)

21 THE COURT: There you go. Thank you.

22 MR. NORTON: Thank you, Your Honor, very much.

23 (WHEREUPON, the proceedings were concluded.)

24

25 (END OF TRANSCRIPT)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

I, Deborah M. McCurdy, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 9th day of June, 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

May 25, 2016

s/Deborah M. McCurdy, RPR

Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

State of South Carolina) In The Court of Common Pleas
County of Richland) Fifth Judicial Circuit
2014-CP-40-0313

Raymond G. Farmer as Director,)
et al.,)

Plaintiff,)

vs.)

CAGC Insurance Company,)
in liquidation,)

Defendant.)
_____)

Transcript of Record

September 18, 2015
Columbia, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Jr., Judge

A P P E A R A N C E S:

Geoffrey Ross Bonham, Esquire
Attorney for Ancillary Receiver of CAGC Insurance Company

Erik T. Norton, Esquire
Tara C. Sullivan, Esquire
Howard A. Van Dine, III, Esquire
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Insurance Guaranty Association

T. Douglas Concannon, Esquire
Michael A. Molony, Esquire
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Elizabeth B. Harris, CVR-M
Circuit Court Reporter

I N D E X

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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>Ev.</u>
No exhibits introduced.		

1 THE COURT: All right, in the *Farmer vs. CAGC*, I've
2 got a motion to quash from Mr. Molony, motion to dismiss,
3 motion for partial summary judgment. Somebody just sort of
4 start the ball rolling here and let me know what we're ---

5 MR. MOLONY: Judge, my name ---

6 THE COURT: --- considering today.

7 MR. MOLONY: Excuse me. My name is Michael Molony,
8 and I'm with the firm Young, Clement, Rivers, and we
9 represent CompTrust AGC of South Carolina, and it's a.k.a.
10 CompTrust AGC of South Carolina, Inc. We were not named as
11 parties in the indiv -- in the initial action, but we were
12 joined by the Guaranty Association as a party in this case.

13 We filed a motion to quash discovery in the case
14 because our position, frankly, is that there -- CompTrust
15 AGC no longer exists. It has been properly dissolved as a
16 self-insured workers' comp trust. And then we subsequently
17 filed a motion to dismiss because there was an action in
18 North Carolina that we believe was dispositive of the case
19 here in South Carolina.

20 Doug Concannon, who's with my office and is former
21 counsel of the South Carolina Department of Insurance and
22 handled these rehab cases, he's going to argue the case for
23 us, but we don't think it's a -- I mean, actually the
24 motion to quash and the motion to dismiss are part of --
25 are the same thing. We're asking to be removed from the

1 case because, 'frankly, we just, we no longer exist.

2 The -- and just, just very quickly, in 2010 CompTrust
3 AGC did what's called a loss portfolio transfer -- you may
4 know what that is -- where we took everything we had in the
5 trust, and it was transferred to the insurance company and
6 it's in rehabilitation in North -- in liquidation, excuse
7 me, in North Carolina, CAGC Insurance Company. The three
8 trustees at the time -- we have affidavits from two of them
9 -- Harry Brunson and Jim Thorpe and Senator Leatherman,
10 they, they were the three trustees at the time that the
11 loss portfolio transfer was effected to the North Carolina
12 insurer, and we'll, we'll go into a little bit more detail
13 on that.

14 I'm going to let Doug make the argument in the case,
15 but this is kind of to give you a little background.
16 That's where we are with our motion, and I know it might be
17 confusing. Why a motion to quash? Well, at the time we,
18 we thought that was appropriate. Now we think the motion
19 to dismiss is appropriate, and the decision has been
20 rendered by the North Carolina Supreme Court.

21 THE COURT: All right, Mr. Concannon.

22 MR. CONCANNON: Thank you, Your Honor. May it please
23 the court?

24 THE COURT: Yes.

25 MR. CONCANNON: My name is Doug Concannon. I'm with

1 Young, Clement, Rivers.

2 THE COURT: Do you have all the appearances?

3 COURT REPORTER: I do, yes, sir.

4 THE COURT: All right. Go ahead.

5 MR. CONCANNON: I'm with Young, Clement, Rivers, and
6 it falls to me to argue the motion to quash and motion to
7 dismiss. As Mr. Molony indicated, this is styled as a
8 discovery motion, but it is, in fact, effectively a motion
9 to dismiss, and the reason we brought it is because it
10 became very clear to us as we looked the pleadings and
11 things, when the Guaranty Association's motion to intervene
12 was heard, nothing was essentially brought up about the
13 CompTrust, and it was kind of added as a secondary thought,
14 I guess, to bring it into the party -- bring it into the
15 suit.

16 THE COURT: When were you brought in?

17 MR. CONCANNON: Last, last year. Last year.

18 THE COURT: All right.

19 MR. CONCANNON: So, you know, it was brought in as, as
20 I said, as kind of a secondary measure, it seems to us,
21 because if you step back and look, it really does not make
22 sense legally or in any other way to add an insolvent,
23 assetless entity to an ongoing litigation.

24 THE COURT: So, they were insolvent at the time you
25 were named?

1 MR. CONCANNON: At the time we were named, it had been
2 dissolved; it had no assets, had no records. It had no --
3 it had nothing. It has been that way for over three years.
4 So, we have no idea why it was brought in because it really
5 doesn't make sense.

6 So, we figured initially, as Mike Molony said, because
7 the motion -- the litigation in North Carolina was still
8 proceeding. The better answer for us, instead of tying
9 things up -- and eventually this would have gone to, you
10 know, a motion to compel since we don't have anything -- to
11 go ahead and file this motion to quash. To raise this
12 issue with the court and give it a chance to revisit its
13 decision to have -- to CompTrust be a party at all in this
14 matter.

15 For some brief history, CompTrust was formed all the
16 way back in 1982 as an unincorporated business trust in
17 Charlotte, North Carolina. An unincorporated business
18 trust is a very peculiar entity. I think it's unique in my
19 experience as a lawyer, and the fact that it's so unique
20 makes it interesting to work with. It existed, as I
21 indicated, before the corporate code was adopted in South
22 Carolina or North Carolina. The corporate codes in both
23 states acknowledge and essentially grandfathered them into
24 existence with their own little short chapter in the
25 corporate code.

1 But the South Carolina law on unincorporated business
2 trusts is very sparse. There's only five sections there,
3 and two of those deal with how you have to work with the
4 transfer of property. So there's, there's very little to
5 go on. I have in front of me also the statutes from North
6 Carolina. They are, if anything, less. They only have
7 four sections.

8 So while it existed, the CompTrust, it's sole purpose
9 in life was to be the mechanism by which its member
10 employers could qualify for group self-insurance under
11 South Carolina workers' compensation laws. And it did
12 business that way for several years until in 2010 it wound
13 up. It entered into a loss portfolio transfer agreement
14 with CAGC, and under the terms of that agreement it
15 transferred lock, stock, and barrel to AGAC. That
16 transaction was reviewed and approved by the South Carolina
17 Workers' Comp Commission since it was a regulated,
18 self-insured entity there. It was also regulated by the
19 North Carolina Department of Insurance. The transfer was
20 negotiated and worked out. There was over \$6 million
21 transferred as part of the transaction, and that was
22 actuarially determined at the time to be appropriate for
23 the, for the deal, for the risk that was being transferred.
24 So having done that, three months later the company
25 promptly dissolved in 2011 and has done nothing, heard

1 nothing absolutely since then.

2 So, it is not a corporation. It's not a partnership.
3 It existed before the corporate law was enacted. There are
4 essentially no standards for its incorporation, no
5 standards for its operation, and no standards for its
6 dissolution. So, we have to kind of default to other
7 statutory standards, including the statute of limitations
8 and other aspects to, to bring it in to bear.

9 There are some cases in other states where they
10 attempt to deal with this as a trust since it's set up
11 under a trust agreement, that -- the underlying question on
12 the -- it's the basis for the motion that remains, and that
13 is why do you bring suit against a dead, assetless entity?
14 If this is, in fact, a purely legal question, as the
15 Guaranty Association is trying to pitch this, then why do
16 you need the CompTrust for the Guaranty Association to
17 absolve itself from that liability? I mean, why ask the
18 CompTrust for books and records and other things if all
19 that was transferred to CAGC? And by virtue of being the
20 Guaranty Association, it already has those books and
21 records transferred to it once the AGC became insolvent.

22 So, the -- we found the discovery, frankly, impossible
23 to fulfill, and rather, rather than go through the motion
24 to quash -- or rather than going through the motion to
25 compel process, we filed this. I mean, you may as well ask

1 me for who's -- the passenger records for Eastern Airlines.
2 It, it just doesn't exist. It's, it's not something I can
3 produce, and that was the basis for the motion there.

4 Since then, litigation in North Carolina has
5 transpired where the Guaranty Association in North Carolina
6 was battling with -- if I can summarize this very quickly
7 -- was battling with the Guaranty Association for the
8 Workers' Comp Self-insured Association over who would be
9 responsible for the claims there, and until that litigation
10 got resolved, we were all kind of waiting in the wings to
11 see how we would resolve our claims in South Carolina, if
12 you will. That was recently dissolved -- resolved, rather,
13 in favor of the Guaranty Association -- or in favor of the
14 Guaranty Association being liable.

15 So, again now it becomes a question of why is the
16 CompTrust in? I think the only reason the CompTrust can be
17 brought in other than to -- the, the purpose of making it
18 -- making the Guaranty Association not liable, I guess, is
19 to, to make it liable. I mean, if not the Guaranty
20 Association, who? If they're saying we don't need to pay
21 these claims, then the bottom line is who does?

22 There are thousands of injured South Carolina
23 employees and their families who are receiving benefits
24 under CAGC right now; they're receiving benefits by virtue
25 of the Guaranty Association safety net that's in place.

1 The Guaranty Association has agreed to pay these claims at
2 the direction of the Director of Insurance but has done so
3 under a reservation of rights because it doesn't believe
4 it's responsible for those.

5 So, the question becomes who does it believe is
6 responsible? That's, that's kind of the other shoe that
7 hasn't dropped. When they say in their briefing that we,
8 we don't want to make you responsible, we don't mention
9 anything in the brief that says you should be responsible,
10 our response is yet. And, you know, in the process of
11 negotiating service of process on this, we asked them. If
12 that's really your object, then tell us that. Write it
13 down and file it or, you know, make it part of the record.

14 So, I think the reason we're involved in this lawsuit,
15 because they're seeking to make it be an entity that they
16 can make liable. And if that's the case, then this is
17 where the mootness springs up. It is a dead, assetless
18 entity. There's no point in making it liable for anything.
19 It can't help anybody; it can't resolve anything.

20 The second reason that I can think is having paid
21 these claims under reservation of rights, the question
22 becomes who is supposed to be now responsible for them
23 because now I have a right of subrogation, or I could
24 pursue that, who do I pursue that against? And again from
25 the CAG -- from the CompTrust standpoint, it's, it's a moot

1 point. There's no assets there; there's nothing to pursue.
2 So, we, we feel like this is something that we just never
3 should have been brought into, and it's something we should
4 be dismissed from.

5 The North Carolina case, as I said, has been resolved
6 so that the Guaranty Association is responsible there. The
7 South Carolina Department of Insurance filed a memorandum
8 in support of the motions, the idea the Guaranty
9 Association be responsible here. And what it shows is that
10 this is not uncommon. This has happened all around the
11 United States, and this is the other reason why we think we
12 should be dismissed from this is that this case has already
13 been asked and answered, if you will, by several ---

14 THE COURT: Are you registered in other states?

15 MR. CONCANNON: No. This, this issue, this issue of
16 what happens when an LPT -- when an LPT from a self-insurer
17 gets transferred from a Guaranty Association, that question
18 has been answered in several states -- in Virginia,
19 Louisiana, in Georgia -- and it's the same basic fact. We
20 have a self-insured entity -- typically a workers' comp
21 entity -- that does a loss portfolio transfer to an
22 acknowledged insurance company. The insurance company then
23 winds up going insolvent for whatever reason. The Guaranty
24 Association decides that it should now be required to pay
25 these claims. We go through the motions of arguing this

1 issue, and the court decides that the general assembly
2 really intends for people to get paid, and on that point
3 they -- that's how the North Carolina court recently
4 resolved it, too. So, this issue has been argued not just
5 in other states but particularly in North Carolina where
6 CAGC is home based.

7 THE COURT: All right, who represents ---

8 MR. CONCANNON: We recognize it is not controlling
9 authority. We recognize that it's, you know, that it is
10 extremely, extremely persuasive because it is the same fact
11 pattern. It's the same law firm representing the Guaranty
12 Association in both states. It is the same argument
13 legally, and so we respectfully request that the discovery
14 against us be quashed and we be dismissed from this case as
15 a party.

16 THE COURT: Who represents the Guaranty Association?

17 MR. NORTON: I do, Your Honor, Erik Norton from Nelson
18 Mullins.

19 THE COURT: All right, you may proceed.

20 MR. NORTON: Thank you, Your Honor. With due respect,
21 the underlying legal question hasn't been answered because
22 the South Carolina statute is different than the model act
23 in those other states, and the arguments here are
24 different, but we'll get to that on the summary judgment.
25 Certainly I think it would be premature at a motion to

1 dismiss stage without those arguments before you dismiss on
2 that ground.

3 With regard to the discovery motion, we accept the
4 answer that they have nothing if that's what they're
5 representing to the court. We've never disputed that. The
6 real issue has always been their argument that CompTrust's
7 dissolution prevents them from ever being sued, makes them
8 immune from suit. And while business trust is somewhat
9 different, it's in our corporate code and it is, by
10 analogy, compared to a corporation in those few provisions
11 that were just referenced. For example, the 50 -- 33-53-50
12 says that business trusts are served by corporations.
13 33-53-40 says that a business trust can be sued without
14 naming its members and by analogy, all of the entities
15 referenced in the corporate code can be sued after
16 dissolution as part of its windup process, all companies.
17 Just because you do a voluntary dissolution doesn't mean
18 you're absolved from your liabilities. I think Your Honor
19 knows what the logical result of that would be is anybody
20 facing a large liability just dissolve whatever corporate
21 entity they have and to claim they couldn't be sued and
22 they're gone. Just -- you can't read the corporate code
23 that way and end up with a logical result.

24 In this particular case, the question was asked is,
25 you know, why is CompTrust in the case. And the answer is

1 is because that even though they are saying they're wound
2 up, they're not wound up, and members have responsibilities
3 in the wind up of any corporation or trust or anything
4 else.

5 CompTrust obviously has resources; it's got two
6 lawyers here representing it today. It has filed a memo to
7 oppose on the merits the summary judgment arguments. It
8 obviously knows that it has an interest in this particular
9 action.

10 The Association at this point doesn't have a defined
11 position on exactly how the claims might be adjudicated by
12 CompTrust in this scenario because there are, frankly,
13 questions about whether a novation occurred that would be
14 sufficient as to certain claims, and I'm sure its
15 plaintiffs lawyers will have arguments on that and that
16 kind of thing, but it's just like any other corporation,
17 Your Honor. You know, they have members that are large
18 companies in the state that are capable of, of defending
19 themselves here in this action that are -- have
20 participated and have actually asked this court for
21 affirmative relief in their, in their pleadings.

22 THE COURT: Who are or were the members?

23 MR. NORTON: The members are a group of general
24 contractors, frankly, Your Honor. Typically what they are,
25 specialty contractors. A couple of them were mentioned.

1 Mashburn Construction who signed for -- was, was served,
2 Henry Mashburn of that, that, company. CAGC is an
3 insurance company that was created out of a trade
4 association for contractors in the Carolinas, Carolinas
5 AGC. The board member -- one board member for Carolinas
6 AGC is an officer at Mashburn Construction. They're the
7 same people, Your Honor. This wasn't an arms-length
8 transaction in which the CompTrust reached out to -- on the
9 market to some third-party insurer to try to work -- to try
10 to assign these claims. This was orchestrated as a means
11 to exit the self-insurance business by CompTrust.

12 We here today have named CompTrust because it is plain
13 that at least some people might believe that they -- that
14 the CompTrust continues to have liability and that its
15 members have an obligation to fund that liability. So,
16 they have an interest in this litigation, as is shown by
17 their fifty some-odd page filing on the summary judgment
18 motion in itself. They're obviously a proper party to the
19 case because this is a declaratory judgment action, and
20 their presence is needed for a just adjudication and
21 complete relief to be afforded, and so we believe that the
22 motion to dismiss should be denied.

23 I think the motion to quash is irrelevant. If the
24 answer is they don't have it, they just need to provide us
25 a response that says we don't have any documents anymore.

1 That -- that's not the issue. The real issue is whether
2 they are -- whether CompTrust is a proper party to the
3 action. We believe that they are because they have
4 potential -- CompTrust has potential liability going
5 forward, and it would be obligated as part of the windup
6 process to deal with those liabilities.

7 THE COURT: And you have how many policies or
8 claimants?

9 MR. VAN DINE: I believe -- Your Honor, if I can give
10 a little background here?

11 THE COURT: Yes, sir, and who are you?

12 MR. VAN DINE: I'm Howard Van Dine with Nelson Mullins
13 as well.

14 The -- at the time that CAGC went insolvent, there
15 were two separate types of claims that were submitted over
16 at the Guaranty Association. One was the fully insured
17 claims of which CAGC actually wrote policies after they
18 came into existence. Those claims are being paid. Those
19 claims are not in, in this matter at all, and so we're not
20 even arguing about whether or not we have responsibility
21 for that. We do because they were under an insurance
22 policy.

23 Prior to that during the loss portfolio transfer, the
24 claims that were transferred are some seventy claims, round
25 number. Is that -- I don't, I don't have the exact number

1 in front of me, but approximately seventy claims. The
2 representation today that there are thousands of claims is
3 purely fantasy. There are seventy claims that exist under
4 this. There are seventy claims that have been in existence
5 since as early as, as 1989. CompTrust was paying those
6 claims up until the time that it worked this deal with
7 itself to actually transfer the losses so they could try
8 and get out from under, put them into an insurance company
9 which was represented to have been a transfer of \$6
10 million. And if you look at the loss portfolio document,
11 it's closer to \$3 million that was actually transferred.

12 They knew at that point in time the liabilities
13 exceeded the money they had and the money coming in. So,
14 they put it into this particular insurance company under
15 the sole purpose of following a procedure that was done
16 in North Carolina to dump those claims onto the Guaranty
17 Association without the Association ever having known
18 about them, without the Association ever having the ability
19 to assess anybody on those claims, or in any way prepare
20 itself for the potential of taking those on. So, we
21 have seventy claims that we're talking about, and in round
22 numbers it's approximately a 4 to \$5 million total
23 expected ---

24 THE COURT: Those are claims that have been filed?
25 Those are claims that have been filed?

1 MR. VAN DINE: Absolutely, but the claims that would
2 have been filed after the 2010 or 2009 -- I can't remember
3 when they started writing insurance -- are our
4 responsibility. We have it. So, if, if they were not
5 filed by 2009 and they were filed subsequent to that, we
6 pick those up as being insured policies, which our act
7 requires us to take when GAC went insolvent.

8 So, we are here basically, when we get to the summary
9 judgment aspect to it, we are all discussing the
10 pre-transfer claims only, and there, there will be no
11 additional claimants that arise because that is now
12 approximately five or six years ago when that took place
13 and when the transfer took place, and they've been
14 insolvent now for the better part of three years. North
15 Carolina held them in, in an attempt to, quote,
16 rehabilitate them with the full knowledge that they were
17 going to liquidate. So, they tried to use the funds to pay
18 off claims, and then when it got to the point where they
19 realized they didn't have enough funds to do that, that's
20 when they went into liquidation.

21 What happened at that point in time was the director
22 of Farmer, and it's right under the statute, filed an
23 ancillary proceeding here because there's approximately
24 \$175,000 held by the Department of Insurance as security
25 for CAGC to do its work. He had to find some way to make

1 sure that money was going the right way, so that was the
2 ancillary proceeding that took place.

3 The bottom line is we're arguing about the actual
4 claims that existed prior to the loss portfolio transfer
5 which were known claims that CompTrust and CAGC both knew
6 when they took on to attempt this transfer.

7 And so as far as your question -- I know a long-winded
8 answer, but attempting to put some background, some meat on
9 the bones -- it's approximately seventy claims that we have
10 that we have been paying. We've paid under an agreement
11 with the Department. They asked us to please pay them. We
12 are paying them. We did pay, are paying under a
13 reservation of rights, but there's been no decision to date
14 as to whether or not we're ever going to seek that money
15 back or we have the right to seek that money back, so.

16 THE COURT: All right, who's arguing the motion for
17 summary judgment?

18 MR. NORTON: I will, Your Honor.

19 THE COURT: You may proceed.

20 MR. NORTON: You want to proceed with the motion for
21 summary judgment?

22 THE COURT: Yes, I do.

23 MR. NORTON: Thank you, sir. All right. Well, I'll,
24 I'll try to shorten because you've gotten some of the
25 background from Mr. Van Dine. The, the -- here are the

1 undisputed facts of the matter, and I'll try to ---

2 THE COURT: The, the ---

3 MR. NORTON: Yes, sir.

4 THE COURT: The summary judgment as to whom, summary
5 judgement?

6 MR. NORTON: The summary judgement seeks a declara --
7 it's a -- we're seeking a declaratory judgment that the
8 Association is not responsible for the pre-LPT claim, the
9 transferred claims. We're seeking a declaratory judgment
10 that the Association does not have to pay claims that were
11 actually filed with CompTrust before the LPT agreement
12 happened in December 2010, just those claims.

13 THE COURT: December 2010?

14 MR. NORTON: Yes, Your Honor. There are about seventy
15 of them, I think, as Mr. Van Dine pointed out.

16 THE COURT: All right. Who, who opposes that?

17 MR. NORTON: Well, Your Honor, both -- CompTrust has
18 filed a memorandum in opposition, and the Department of
19 Insurance has also filed a memorandum of law. I, I, I
20 don't -- I guess it's fair to say that they oppose the
21 motion. I think they've argued it's perhaps premature.
22 I'm not -- I don't want to speak for them, but...

23 THE COURT: They're sitting at the same table.

24 MR. NORTON: Yes, sir. They're, they're, they're --
25 he's kind of in the middle.

1 MR. BONHAM: Your Honor, there's no room over at that
2 table.

3 THE COURT: Well, let me just -- what's your role in
4 this, Mr. Bonham?

5 MR. BONHAM: Your Honor, I'm here on behalf of the
6 ancillary receiver and the -- I am here representing the
7 receiver in his capacity as ancillary receiver. He bought
8 -- brought this proceeding for two reasons, both of which
9 are in the statute.

10 One, it was clear, based on some of the issues that
11 have been alluded to here, and I don't want to get ahead of
12 myself. It's clear that there were two matters in South
13 Carolina. One, there was a small amount of assets, a
14 deposit that was deposited by CAGC under 38-9-80 and 90.
15 It was in the amount of \$175. And also there were the
16 interest -- it was the best interest of policyholders.
17 Since this is a liability, a type of casualty policy,
18 workers' compensation, the interest of policyholders were
19 at stake, and so the director under the statute brought an
20 ancillary receivership.

21 And again, I don't want to get too far ahead of us,
22 but in order to perhaps frame this a little better and in
23 answering the question why am I here, the -- CAGC is a
24 North Carolina domiciled workers' compensation company, or
25 was, and it did business in both North Carolina and South

1 Carolina. CAGC is now in liquidation; it was liquidated in
2 accordance with the state insurance regulation scheme by
3 the domiciliary state. So, there is a ---

4 THE COURT: Liquidated in North Carolina?

5 MR. BONHAM: That is correct, Your Honor. There is a
6 liquidator appointed in North Carolina.

7 The CAGC, as indicated, was writing policies and
8 those policies have been, without dispute, been paid, have
9 been paid and are being paid by the North Carolina Guaranty
10 Association as to the North Carolina claims and by the
11 South Carolina Guaranty Association as to South Carolina
12 claims. In both states, a dispute arose with regard to
13 what can probably be called -- they're called here -- the
14 assumed claims.

15 Now, the transaction that took place in North Carolina
16 with an entity called CompTrust, CompTrust North Carolina,
17 was a merger. And during the course of this receivership,
18 there was a dispute by the North Carolina Guaranty
19 Association as to whether or not it was responsible for the
20 claims that had been passed on or assumed as a result of
21 this merger between CompTrust North Carolina and CAGC.

22 The lower court found that the Guaranty Association,
23 the lower South Carolina -- or, excuse me, North Carolina
24 court found that Guaranty Association was not responsible,
25 and all of this is taking place at about the same time this

1 ancillary receivership began.

2 Subsequently on appeal, the North Carolina Court of
3 Appeals said no, this merger constituted a novation, and
4 CAGC is substituted as the party under these claims, and
5 the Guaranty Association in North Carolina stands in the
6 shoes of the now defunct CAGC, and the Guaranty Association
7 in North Carolina is responsible for all the North Carolina
8 claims. That was back in -- I believe that became final in
9 June.

10 Meanwhile, the South Carolina Guaranty Association
11 brought a similar claim challenging a similar transaction
12 in South Carolina. Here there was not a merger between
13 CAGC and CompTrust South Carolina. There was a loss
14 portfolio transfer that was apparently -- what is the word
15 I'm looking for -- midwived, perhaps, by the Workers' Comp
16 Commission, and of course this is detailed more in the
17 documents that have been submitted to the court.

18 But out of that agreement, 3 million and several
19 hundred thousand dollars were transferred. There was a
20 loss portfolio transfer document; that is in the Exhibit B
21 to the petition to intervene. It -- that agreement was
22 approved by both the North Carolina Department of Insurance
23 and the South Carolina Workers' Comp Commission. The
24 transfer took place. Apparently this is when the events
25 that counsel has talked about in regard CAG -- not CAG,

1 CompTrust South Carolina took place as far as dissolution
2 or -- I don't want to put words in his mouth.

3 In any event, the basic argument is, I guess, at this,
4 at this point in, in South Carolina is are these claims
5 assumed under the loss portfolio transfer. The South
6 Carolina claims that originated under CompTrust, are these
7 the claims of CAGC and thus the responsibility of the South
8 Carolina Guaranty Association? The Guaranty Association
9 says that they're not.

10 THE COURT: Okay.

11 MR. BONHAM: And I don't know if the court has had a
12 chance -- I know the court has had a busy week. We filed
13 only a twenty-two page brief with exhibits and also a
14 complete tomb of out-of-state authorities. So, I don't
15 know if the court's been able to do that, but some of these
16 things are talked about in more detail. But, Your Honor, I
17 hope I didn't ---

18 THE COURT: No. You gave me a framework.

19 MR. BONHAM: But that is essentially the framework in
20 which we're dealing, Your Honor.

21 THE COURT: All right.

22 MR. BONHAM: And that's why I'm here.

23 THE COURT: All right, Mr. Norton.

24 MR. NORTON: Yes, Your Honor, and I, I appreciate
25 that, so I won't belabor the framework because I think he

1 did an adequate job of laying it out.

2 But there's one, one area of disagreement there, and
3 that is that we don't believe that the North Carolina
4 action has any bearing on this particular action, and the
5 reason for that is because South Carolina, the, the
6 arguments we're making here on these limited number of
7 seventy claims implicate a section of the South Carolina
8 act that doesn't appear in most of those states that they
9 mentioned, and it wasn't an issue at all in the North
10 Carolina action because it involved a broader section of
11 claims.

12 Specifically, I'm referring to section 38-31-30 and
13 I'll -- if Your Honor doesn't mind, I'll hand up a copy of
14 it so you'll have it in front of you. Specifically, Your
15 Honor, when we're looking 38-31-30, we're looking at
16 section 6, which refers -- essentially what this section
17 does is it says that the chapter applies to all kinds of
18 direct insurance but does not apply to the following.

19 So, the Guaranty Association is a creature of statute.
20 It only has the obligation to pay claims that fall under
21 the act, that are covered claims under the act. Normally,
22 and it's undisputed, self-insurance claims do not fall
23 under the act in ordinary course. They're not covered
24 claims.

25 The only way they can become covered claims in this

1 particular context is that at the time of the LPT
2 agreement, transferring the self-insurance claims from a
3 self-insurer to a licensed insurer somehow would convert
4 the claims into covered claims. That, that's the only way
5 it can happen in this particular context.

6 The model act doesn't necessarily address that
7 situation, and a lot of the cases that they refer to fall
8 under the model act. South Carolina's legislature saw fit
9 to prevent that scenario from occurring to prevent these
10 kinds of claims that can't be assessed or can't be
11 accounted for or are unknown to a Guaranty Association to
12 be transferred over and become the responsibility of the
13 Association, and they did it through this section 6 which
14 does not appear in the model act.

15 Section 6 says that claims that are -- it's says that:

16 Direct insurance that is insurance written on a
17 retroactive basis to cover known losses which
18 have resulted from an event with respect to which
19 a claim has already been made and the claim is
20 known to the insurer at the time the insurance is
21 bound.

22 What we're saying; Your Honor, is that section
23 prevents you from taking claims that had already been filed
24 with CompTrust at the time they tried to assign them over
25 to CAGC. Cannot be the responsibility of the Association.

1 For purposes of this motion, unlike the North Carolina
2 action, we're not contesting whether that is or is not a
3 novation. We're not contesting whether their -- whether
4 the self-insurer can transfer those claims over to a
5 licensed insurer. For purposes of -- that's fine. That's
6 accepted as a matter of, of, of record for these motions.
7 What we're saying is that none of that matters because that
8 particular section says that the Association is not
9 responsible for claims that are known at the time the
10 insurance is bound.

11 And what we're saying is that when the LPT agreement
12 was entered into, obviously, as they mentioned, there was a
13 payment made based on an actuarial basis. They knew what
14 the existing claims were that had already been filed with
15 CompTrust. And because they already knew about these
16 claims, they can't now make the Association responsible for
17 them after CAGC becomes insolvent.

18 That is not addressed in the North Carolina court;
19 it's not addressed in any of these. We've searched as best
20 we could for cases across the country that dealt with that
21 specific section and this specific scenario. We couldn't
22 find anything. To our knowledge, this is a novel issue of
23 law, and part of the reason it's novel is that it doesn't
24 appear in most of the guaranty acts across the country.

25 So, in our view what this does, based on the limited

1 relief the Association is asking for here, we are simply
2 saying that claimants who file a self-insurance claim with
3 a self-insurer should be in the exact same shoes as all
4 other claimants who file with self-insurance in this state.
5 Our legislature did not see fit like other legislatures to
6 create a guaranty association for self-insurers; we don't
7 have that here in South Carolina. What our legislature did
8 see fit to do was to make it clear that the Guaranty
9 Association is not responsible for claims that are known by
10 a self-insurer at the time they try to assign over to
11 another licensed insurer.

12 And the reason for that makes sense, Your Honor. This
13 isn't a matter of this -- this isn't just a matter of, of
14 the Association not wanting to deal with it. It has
15 serious policy implications going forward. There are many,
16 many of these self-insurance trusts around the state right
17 now. If those self-insurers are allowed to simply
18 voluntarily dissolve and assign claims over to what is
19 tantamount to a captive insurer to transfer the loss, then
20 these are losses that the Association cannot account for,
21 can't assess for.

22 Just to be clear, the way this works is the
23 Association pays these claims by assessing licensed
24 insurers. Licensed insurers are entitled by statute to
25 pass that cost on to the insureds in the form of increased

1 premiums. So, this affects insurers in the state of South
2 Carolina.

3 The request here is to take claims made to a
4 self-insurer and make insureds of licensed insurers
5 responsible for them. Our stat -- our legislature
6 expressly prohibited it, and the act prohibited the
7 Association being responsible for it in the act for a very
8 good policy reason, and we ask Your Honor simply to apply
9 the express terms of the act to find that the Association
10 is not responsible for these limited number of claims that
11 were filed with CompTrust before the LPT agreement. We're
12 not asking for anything after that; the Association is
13 responsible for that. We're only asking for a declaration
14 that we're not responsible for those seventy claims filed
15 with CompTrust prior to the LPT agreement.

16 THE COURT: And that was what date?

17 MR. NORTON: December 28, 2010.

18 THE COURT: December?

19 MR. NORTON: December, yes, Your Honor.

20 MR. VAN DINE: Your Honor, I believe, just to be
21 clear, the LPT sort of goes this back to the prior time,
22 and the LPT, I believe, is July -- June 30th or something
23 like of 2009.

24 MR. NORTON: June 30, 2009. It was retroactive.

25 MR. VAN DINE: It was retroactive to that point in

1 time. We are not contesting anything after that June
2 timeframe as being our responsibility. It's anything prior
3 to that June timeframe.

4 THE COURT: Seventy claims you talked about?

5 MR. VAN DINE: Approximately seventy claims, yes.

6 THE COURT: All right. Anybody oppose that?

7 MR. BONHAM: Your Honor, if the relief that is sought
8 by the Guaranty Association is granted, then the obvious
9 question for the ---

10 THE COURT: Who's going to handle those claims?

11 MR. BONHAM: Exactly. What's going to happen to those
12 claims? The claims have been paid. They are being paid
13 thanks in large part to the Guaranty Association honoring
14 the request of the director of the Department of Insurance.
15 But if a pronouncement is made that the Guaranty
16 Association has no legal obligation for these claims, then
17 presumably the payments would stop.

18 THE COURT: These are the ones that are being paid
19 under the reservation of rights?

20 MR. BONHAM: Yes, Your Honor.

21 MR. NORTON: And, Your Honor, I mean, I think the
22 answer that, that is apparent in this, at least
23 hypothetically without getting into the details, is those
24 claimants look back to CompTrust, which has an obligation
25 to fund those claims as part of its wind-down process. I

1 mean, they took the risk. CompTrust took the risk of doing
2 business with CAGC. It's, it's -- it, it created CA -- the
3 insurer through its trade association. It took the risk
4 that that insurer would become insolvent when it
5 transferred the claims. That, that was their business
6 decision at the time.

7 This is -- as part of the wind down, as you know, Your
8 Honor, a corporation, an entity can be required to fund
9 certain liabilities. And without going into the details of
10 whether there's a novation or not because I think some
11 claimant's counsels would, you know, have to assert some
12 legal arguments and probably have to deal with some stuff
13 on that about how that's allocated among the members and
14 exactly how that goes. I don't think that's before Your
15 Honor at this time.

16 I think the idea that there's no money there, though,
17 to pay for these claims, that is not practically true. How
18 you get there legally might be subject to some future
19 litigation and some fighting on the other side.

20 THE COURT: What do you mean some litigation?

21 MR. NORTON: There would be litigation, Your Honor.

22 THE COURT: You're damn right.

23 MR. NORTON: No question about it, and so the issue
24 really becomes, you know, who has the burden of sorting all
25 this situation out. I would submit to Your Honor that the

1 claimants we're talking about worked for companies that
2 provided self-insurance, and the claimants knew that at the
3 time, and that there are hundreds and hundreds of
4 self-insured claimants all around the state all the time
5 that have to deal with this very issue because ---

6 THE COURT: But not in -- they're not in this
7 situation.

8 MR. NORTON: They have to deal with the situation
9 where there's a self-insurer that claims to be unable to
10 pay claims. That, that is not an unheard of situation.

11 THE COURT: I understand that.

12 MR. NORTON: And these claimants are simply put back
13 in the same situation that all those other self-insured
14 claimants are in this situation. You know, our
15 legislature's had opportunities over the years to create
16 guaranty associations for self-insurers and they've elected
17 not to do that, and unfortunately self-insured folks
18 sometimes find themselves caught in that situation, and I'm
19 afraid that's probably what's happened here. But there is
20 a mechanism to deal with that, and that mechanism is
21 through the wind-down process of self-insurers.

22 And I'm -- they say they're wound down. What I'm
23 saying to you is I don't think they are. Just like any
24 other corporation who may think that their liabilities have
25 been exhausted and taken care of and finds out that's not

1 so much true, that's exactly what's happened here. That,
2 you know, this company who thought that they had assigned
3 their claims thought that another company was taking care
4 of it, a company that they had control over through various
5 means, but they -- a company they thought was taking care
6 of this didn't. And, you know, sometimes you find out
7 later that the liabilities you thought were taken care of
8 aren't, and I submit to Your Honor that's what happened
9 here.

10 THE COURT: You just want to get shed of these claims.

11 MR. NORTON: We want the statute to be applied. I
12 mean, to be frank with Your Honor, the, the bigger concern
13 is the implications for what happens going forward in the
14 future. I mean, this is a road map for any self-insurer
15 who finds themselves unable to make a claim to get shed of
16 its ongoing liabilities. It is an invitation to
17 self-insurers to underfund themselves because if they ever,
18 if they ever get to a point where they can't pay, they have
19 a ready-made mechanism to shift that liability on to other
20 people without paying any assessments, without giving
21 anybody notice, without allowing anybody to actually
22 adjudicate those claims. It's an invitation to those
23 people to take advantage of that.

24 Your Honor, I guess what we're saying is there is a
25 funding mechanism for the Guaranty Association that

1 provides protection to -- some protection to insurers in
2 this state, and this practice that has been engaged in here
3 would destroy that funding mechanism. It, it would -- it,
4 it doesn't allow the Association or its members to properly
5 account for, underwrite, actuarially assess the likely
6 liabilities going into the future. It puts the Association
7 in an untenable position of having to assess licensed
8 insurers for self-insured claims it may or may not know
9 about, and it is a -- but runs the risk of becoming an
10 untenable situation overall for the Association and for
11 those writing workers' compensation insurance in the state.
12 I mean, it's \$5 million at issue here or so. It's not like
13 that's a small amount of money, but that's a drop in the
14 bucket to the potential liability and potential claims
15 going forward into the future.

16 THE COURT: So, you think it's bad faith on the part
17 of CompTrust to have done what they did?

18 MR. NORTON: I'm sorry, Your Honor?

19 THE COURT: You were distracted.

20 MR. NORTON: I was. I apologize.

21 THE COURT: I said you assume, then, or imply that it
22 was, it was an act of bad faith.

23 MR. NORTON: I, I don't know.

24 THE COURT: Or perhaps ---

25 MR. NORTON: I, I ---

1 THE COURT: --- even fraudulent.

2 MR. NORTON: I, I don't know that, Your Honor. I
3 can't say that. They say that it was actuarially assessed.
4 What I'm saying to you is they took a known risk by
5 assigning these claims for an amount of money to an
6 insurance company that they, through their trade
7 association, at minimum had say about how it got run. And
8 I'm saying that ultimately that trade association, that
9 insurer, did not handle claims appropriately, didn't handle
10 its business appropriately.

11 THE COURT: What's going on in North Carolina?

12 MR. NORTON: In North Carolina the -- there was a
13 different argument that was made. It was a merger instead
14 of an LPT agreement, and at this point the Supreme ---

15 THE COURT: Who's paying those claims?

16 MR. NORTON: The Guaranty Association.

17 THE COURT: In North Carolina?

18 MR. NORTON: Yes, sir, and so -- and it's a little bit
19 of a different animal in North Carolina. They have -- it
20 was a fight between two associations because they have a
21 self-insured association. It wasn't limited to just those
22 claims that were filed before because it was a merger
23 agreement instead of an LPT agreement. So, there were --
24 there, there was a different legal analysis and for that
25 reason, the Association there was not -- North Carolina has

1 a similar provision in its act to what, to what I refer to
2 here in ours, but it wasn't an issue in that case because
3 the facts and circumstances were different. It was not
4 addressed by the court at all. And as I pointed out, we've
5 not found any, any statutory authority or, or any case
6 authority from anywhere in the country on that particular
7 provision.

8 What we know is that our legislature contemplated this
9 situation or similar situations where people would try to
10 transfer claims to licensed insurers to leave the
11 Association responsible and specifically prohibited it.
12 And because they specifically prohibited it, we think that
13 we're in the right here and that the -- we're simply asking
14 to effect the will of the legislature, which is to not make
15 licensed insurers pay for these self-insurance claims, and
16 to let the self-insurer deal with that issue as part of its
17 wind-down process.

18 THE COURT: All right. Anything further?

19 MR. BONHAM: Your Honor, Your Honor, if I may?

20 THE COURT: Mr. Bonham.

21 MR. BONHAM: Your Honor, I need to, for my own
22 understanding and I apologize if I'm interrupting anyone,
23 but I need to understand the argument that's been presented
24 here on summary judgment. It may be of use to the court.

25 Is the Guaranty Association saying that the provision

1 in the South Carolina code 31 -- 38-31-36, insurance
2 written on a retroactive basis is not covered under the
3 act? Are they saying that there is no provision in the
4 North Carolina Guaranty Association Act that parallels
5 that?

6 THE COURT: I don't know.

7 MR. NORTON: No, and the answer, Your Honor, if I
8 might is no, we're not saying that. What we're saying is
9 that the North Carolina litigation they're referring to,
10 the North Carolina order did not address that issue. They
11 -- the North Carolina order does not go through and make
12 any kind of analysis on their parallel provision.

13 MR. BONHAM: Well, but, Your Honor, the only
14 difference from what I understand, and I welcome a counter
15 argument to this, but the only difference I can see in
16 terms of the North Carolina transaction and this one is
17 that there was a merger there, and that appeared to have
18 been the issue in North Carolina saying, well, this wasn't
19 a, this wasn't an agreement between the parties. This was
20 a merger. That's different, but their -- and the reason
21 they were saying that in North Carolina is because it was a
22 much older case, the *Bowles* case where you had a
23 transaction similar to this.

24 And, of course, as our, as our memorandum of law says
25 -- again these things are -- I didn't know this until we

1 started actually digging into this, but these types of
2 transactions, these loss portfolio transfers or assumption
3 reinsurance, they're called different things. Between
4 workers' comp carriers and self-insurers, these are --
5 these have been done in the past. *Reliance*, *Reliance* comes
6 to mind. *Reciprocal of America*. There was a case down in
7 Mississippi. These are all discussed at length in our, in
8 our memorandum of law.

9 But going back to the *Bowles* case in North Carolina,
10 that dealt with a situation where you had a self-insurer
11 and, and again I'm welcome to be corrected if I'm
12 misstating it, but there was no merger there. They tried
13 to make a, a distinction in the CAGC North Carolina
14 proceedings. Well, that wasn't an agreement. That was a
15 merger, and the case, the North Carolina court said very
16 clearly it doesn't matter whether it's a merger or whether
17 through -- it's an agreement, a re, re -- and insurance --
18 excuse me, reinsurance assumption agreement. A novation
19 took place and, therefore, the North Carolina Guaranty
20 Association is responsible, and *Bowles* governs this case as
21 well. So, I don't really don't see what the distinction is
22 here. We have a statute. We have parallel statutes, and
23 we have parallel situations with an earlier case, *Bowles*,
24 and again we have claimants.

25 And there's been, I hope, no suggestion that

1 claimants, workers' comp claimants have somehow pulled the
2 wool over the Workers' Comp Commission's eyes or the
3 Department of Insurance's eyes or have somehow done some
4 dirty dealing to the Guaranty Association or to policy
5 holder -- or, excuse me, to insurers that are assessed and
6 then passed those assessments onto policy holders pursuant
7 to statute and, therefore, those, those costs are passed on
8 to the public.

9 I mean, it's -- I, I agree. I understand why the
10 guaranty associations are mad; I would be, too. You do
11 have self-insurers out on the market who at some point
12 decide for whatever reason they no longer want to be in the
13 workers' comp business. They pass this onto a carrier, and
14 sometimes these carriers, for whatever reason, fail and the
15 guaranty associations foot the bill.

16 But who are you going to be mad at? Who are you going
17 to punish? The claimants, workers' comp claimants whose
18 benefits are all of a sudden going to stop? And that's why
19 I asked the question: what's going to happen to those
20 claimants?

21 And here's the thing is if there's a beef, W.C.
22 Smith's handwriting is all over that. He's the director of
23 the self-insurers program at the Workers' Comp Commission.
24 He wrote an email to the claims manager, and this is, this
25 is in your record. Submitted it to the court. It was

1 produced during discovery, initiated by the Guaranty
2 Association. He said this loss portfolio transfer
3 constitutes the transfer of all claims past, present, and
4 future. His exact quote is in there, but I know he says
5 a-1-1, all caps underlined, all claims.

6 Now, should the Workers' Compensation Commission be
7 doing that without consultation with the Guaranty
8 Association? Probably the Guaranty Association will tell
9 you no, they shouldn't. The problem is they did and
10 guaranty -- and workers' comp commissions and departments
11 of insurance where they have jurisdiction over that in
12 their state, they've done this. They've done it in
13 Mississippi. They've done it in North Carolina. They've
14 done it in Virginia. We know this because these are
15 important cases; these are cases that are discussed at
16 length in our memorandum of the law. And in each case they
17 found a novation, and in each case they said Guaranty
18 Association, we know you don't like eating these things,
19 but you're going to have to. There was a novation, and you
20 are responsible under the statute for these claims.

21 THE COURT: All right, I understand. Thank you.

22 MR. NORTON: Your Honor, could I address a couple of
23 those things briefly?

24 THE COURT: Wait a minute. Let me hear from ---

25 MR. NORTON: Yes, sir. I'm sorry.

1 THE COURT: --- the whipping boy.

2 MR. CONCANNON: Well, first off I want to thank
3 counsel for the Guaranty Association for correcting me. I
4 misspoke. I was saying thousands of claimants and I meant
5 to say hundreds, but it's nice to know that there's only
6 seventy.

7 THE COURT: Change your position?

8 MR. CONCANNON: No, Your Honor. I think that if
9 anything, it makes the one aspect of the argument even
10 stronger, I guess, because there are a couple of things
11 going on. They're trying to represent this as if it's a
12 small private poker game in a garage, and the stakes
13 suddenly got raised to \$1,000 a card when what we're really
14 talking about is obviously more like a church bingo parlor.

15 It's the IG is -- the, the idea that IG assessments
16 are going to just skyrocket and premiums are going to
17 skyrocket is, I think, is as fancy as the idea of a
18 thousand claimants. I mean, and we can say this because
19 IGA assessments are premium tax deductions, and you know
20 the Department of Insurance is not going to allow that
21 sudden run on premium income, premium tax income.

22 I mean, it's -- it -- it's not, I think, as dire a
23 situation. The situation is not as dire as they represent.
24 It's also not as dire as they represent as Mr. -- counsel
25 for the Department has indicated because this is not a, not

1 a subversive transaction. This has been reviewed by the
2 state-authorized entities that review these things: the
3 Workers' Comp Commission in South Carolina, the North
4 Carolina Department of Insurance ---

5 THE COURT: You mean the loss trust transfer has been

6 ---

7 MR. CONCANNON: The loss portfolio transfer was fully
8 vetted. In fact, there is evidence that blacklined it and
9 said no, we need to do this, and it is as though the
10 Workers' Comp -- it was, it was not the intention of the
11 LPT, it was not the intention of the Workers' Comp
12 Commission, it was not the intention of the North Carolina
13 Department of Insurance that these claims would not be
14 covered by a guaranty association. It was clearly an
15 intention that a novation would occur and that everything
16 would come together and the claims proceed as you see.

17 We believe that the motion for summary judgment should
18 be denied for two reasons. First off is the reason that
19 most motions for summary judgement get denied is that it's,
20 quite, frankly, premature. We think that there are
21 underlying facts that have not been established,
22 specifically what happened to the contractual situation and
23 why. Was there a novation or not? That assumption that
24 we're all making here for -- one way or another is very
25 critical to our conclusion.

1 Another series of facts that Your Honor has kind of
2 caught on here is there is an allusion to some type of bad
3 faith or collusion. I don't know where that would go, but
4 that hasn't been vetted at all. Is this a legitimate
5 transaction? I think it has from, from what we've seen.
6 But I think that the motion is premature.

7 I also think the motion is improper, and that is
8 because there is a -- there, there is a reason why the
9 statute is reading what it is, and that is not to prevent
10 loss portfolio transfers. Loss portfolio transfers are not
11 just happening between workers' comp entities and new
12 insurance companies. They're happening insurance industry
13 wide. It is a quite common transaction and it's sometimes
14 called an assumption agreement, a co-insurance agreement,
15 loss portfolio agreement. There, there's all sorts of
16 transactions that happen in the market between insurance
17 companies where they trade books of business, where they
18 modify books of business. It's very common for them to do
19 that.

20 It's also very common for them in the process of the
21 trade to say specifically we will not cover claims that
22 occurred prior to 2009. That is not in the LPT agreement.
23 The LPT agreement is very clear, direct, and
24 straightforward. So, if the Guaranty Association's
25 argument prevails, what they're saying is no LPTs, no

1 transfers like that would be allowed.

2 And they don't even follow their rule now. There have
3 been several guaranty association-run insolvencies, if you
4 will, that have required the handling of transferred loss
5 portfolios, transferred books of business from different
6 companies, whether it's in the *Reliance* case or the
7 *American Standard* case. I mean, these companies trade
8 their books of business and decide we don't want to do
9 coastal property on the, on the -- in South Carolina
10 anymore, so we're going to trade all that business to
11 another company. When that other company goes insolvent,
12 the Guaranty Association does not squint from that. It's,
13 it's part of the risk that they assume by being the safety
14 net. It is what the legislature intended, not the -- that
15 provision was not intended to deny benefits to legitimate
16 workers' comp employees. It was designed to prevent
17 fraudulent transfers and actions, and that's, I think, what
18 they're kind of alluding to here.

19 It was designed to -- as a former counsel of the
20 Department, I can apprise the court from an allegorical
21 standpoint or an anecdotal standpoint, it's not at all
22 uncommon for insurance companies that are being improperly
23 run at the last minute to start delaying, deferring,
24 denying, and hiding assets and transferring things. And it
25 is entirely right and proper for the Guaranty Association

1 to stand up and say these transactions were all fraudulent,
2 and we do not have to pay them. That's what that provision
3 is designed to allow them to do. It was not designed to
4 allow them to balk at their traditional, legitimate,
5 approved loss portfolio transfer agreement. So, the motion
6 is premature, the motion is improper, and it should be
7 denied.

8 THE COURT: All right, anything further?

9 MR. NORTON: Just very briefly, Your Honor, just to
10 make sure we're really clear about this. We are not
11 reading the statute to prevent loss portfolio transfers or
12 assumption agreements or anything like that. We're not
13 here today contesting the original transaction. We're not
14 contesting today whether it was a novation. We're not
15 contesting whether it was done in bad faith. We're
16 certainly not arguing that the claimants did anything
17 wrong. None of those factual issues matter to our
18 argument.

19 The only, the only argument we put forward here is
20 exactly what was just brought up, which is that the statute
21 prohibits this kind of liability for the Association. And
22 the analogy I use, Your Honor, is the fraudulent
23 conveyance, the Statute of Elizabeth type argument where
24 the statute prevents certain conveyances and doesn't allow
25 it to occur, but you don't have to prove actual fraud.

1 It's not really fraud.

2 And what's happened here is the legislature has said
3 we are not going to make the Association responsible for
4 what occurs when a self-insurer decides to transfer its
5 liabilities to an insured. We don't have to prove fraud;
6 we don't have to prove bad faith. We don't have to go
7 through that kind of factual analysis. The legislature has
8 already said we are not going to prevent people from making
9 that kind of decision or making these kinds of agreements.
10 That's okay. What we are saying is that if you are a
11 self-insurer and you make that decision to transfer your
12 liabilities to a licensed insurer, you can't look to the
13 Association to cover the claims that already existed at
14 that time.

15 That's the distinction between this case and the North
16 Carolina case. In the North Carolina case, all the claims
17 were at issue. There was a challenge as to whether it was
18 a novation. There were arguments about bad faith. But
19 what the North Carolina opinion which is before the court
20 -- and you've got copies of it from everybody, I think.
21 What the North Carolina opinion doesn't do is address North
22 Carolina's parallel provision in its statute that limits
23 the liability of the Association to just those claims that
24 have already been filed at the time.

25 And our Supreme Court has already acknowledged in

1 recent case law, Your Honor, that sometimes claimants don't
2 get full protection under the guaranty act. You might be
3 familiar with the *Brock* case that just came down not --
4 recently. That had to do with the cap in the guaranty act
5 in which the ability of certain claimants under the act to
6 recover from the Association is capped at \$300,000 and the
7 way that's done. And the court's been very clear that the
8 guaranty act is not meant to be an insurer of last resort.
9 It's not meant to make every claimant in the state whole.
10 It has very narrow statutory duties that it is to fulfill,
11 and in this particular case, what the legislature has said
12 is you can do an LPT agreement. You can do an assumption
13 of risk. That's fine, and for all those claims that arise
14 after that agreement, Guaranty Association, you're
15 responsible. You can't run away from it just because it's
16 part of a, of a transfer agreement. But for those limited
17 claims that exist at the time of the transfer that are
18 known by the parties to the transfer, the Guaranty
19 Association is not responsible if the insurer ultimately
20 goes insolvent.

21 And in this particular case, I think it's particularly
22 equitable -- I think the Department has raised that -- to
23 have CompTrust responsible for dealing with these claims at
24 this time because this wasn't an arms-length transaction.
25 This wasn't some situation where they had no control.

1 THE COURT: You say it was not an arms length?

2 MR. NORTON: It was not. That -- it is clearly not an
3 arms-length transaction. The insurer was set up by the
4 trade association of self-insurers. It's, it's -- I'm not
5 saying it's bad faith. I'm not saying it's fraudulent
6 because we don't have the information in the record before
7 the court to make that statement, and I am saying it's not
8 an arms-length transaction.

9 I am saying that in this scenario that the -- that
10 CompTrust and its members continue to be able to exert
11 pressure and control over the insurance company through its
12 trade association and, and other means. So -- and from an
13 equity standpoint, to the extent that matters, it's
14 certainly appropriate to have CompTrust responsible for
15 this and have to deal with the claims.

16 In the end, though, Your Honor, you really don't have
17 to get into all that because the legislature already did
18 this for us. The legislature's already decided that there
19 wasn't going to be a self-insurer association set up. The
20 legislature's already decided that people can do these LPT
21 agreements, but the Guaranty Association is not responsible
22 for the claims. The legislature's already done it for us,
23 so we don't have to go into all of that. They've told us
24 we don't have to do all this discovery on whether it was
25 fraudulent or not fraudulent or whether it's a novation or

1 not. It said simply if the claims exist at the time of the
2 transfer, the Association is not responsible. It's no more
3 complicated than that.

4 THE COURT: All right. All right, thank you, counsel.
5 Motion to quash, motion to dismiss, and the motion for
6 summary judgment, and the ancillary receiver's memorandum,
7 is there anything else?

8 MR. MOLONY: Your Honor, could I say one more thing
9 because I want to make it's really crystal clear on the
10 record, okay? The comment that just came from opposing
11 counsel really bothered me a little bit. There's some
12 insinuation that it was not an arms-length transaction
13 between ---

14 THE COURT: No. He didn't say it was an insinuation.
15 He said it was not.

16 MR. MOLONY: It was not an arms-length transaction,
17 that -- well, that's right. I mean, I'm saying this in the
18 reverse. This was a regulated transaction, heavily
19 negotiated. That \$3 million fee wasn't pulled out of the
20 air. The actuaries analyzed all the ---

21 THE COURT: I thought it was 6 million.

22 MR. MOLONY: Excuse me?

23 THE COURT: I thought it was 6 million.

24 MR. MOLONY: No. Well, in the loss portfolio
25 transfer, the actual transfer of, of funds back over to the

1 insurance company.

2 But I -- my concern, my concern, let me make it
3 crystal clear for the record. The trustees of CompTrust
4 negotiated this, this loss portfolio transfer, with an
5 insurance company licensed in another state. It was fully
6 vetted out. That insurance company was ultimately approved
7 to operate in South Carolina. These trustees did exactly
8 what they're supposed to do. These are some of the most
9 prominent people in the state of South Carolina, and any
10 insinuation they did anything wrong I want to make clear on
11 the record is absolutely false, absolutely false.

12 THE COURT: So, you think that the Guaranty
13 Association should be responsible for these claims?

14 MR. MOLONY: Absolutely.

15 THE COURT: Thank you.

16 MR. MOLONY: And, And just because it's seventy claims
17 -- one of these claims is a very severe workers' comp
18 claim. The Brock case, that's a lot -- that a wreck case,
19 a one-off case. We're talking about seventy claimants out
20 there and, and I don't remember all the specifics, but one
21 is a very severe case of a young man who's a quadriplegic
22 who is relying on that check every single month, and the
23 Guaranty Association has been paying that under a
24 reservation of rights. I understand that, but trust me.
25 The public policy of this state is not to deny an injured

1 party what, what ---

2 THE COURT: Well, they're not. They're not denying.
3 They just want you to pay it.

4 MR. MOLONY: Right. Well, if we don't exist anymore,
5 we're gone.

6 THE COURT: All right.

7 MR. NORTON: Your Honor, I think the family of Mr.
8 Brock would not be pleased by that statement. He was very
9 seriously hurt, and I don't think that it's appropriate ---

10 THE COURT: All right, we're not ---

11 MR. NORTON: --- for that to be on the record.

12 THE COURT: We're not going to try all seventy cases.

13 MR. BONHAM: Your Honor, just as a, just as a
14 practical matter, we haven't really gotten into ---

15 THE COURT: Well, let me get to one thing before you
16 do.

17 Mr. Norton, what about the premature argument? I have
18 not been involved in the litigation. At what stage have
19 you chosen to make your motion for summary judgment? How
20 much discovery has been done? How much legal work?

21 MR. NORTON: We've done -- we've completed written
22 discovery from our perspective, Your Honor. I don't think
23 the Department intends on doing any. CompTrust has said
24 they don't have any interest in it. So, we're sent our
25 written discovery. We've gotten their response back from

1 them that they quashed and don't have any documents. We've
2 got all of the other records.

3 THE COURT: Well, what about the premature agreement?

4 MR. NORTON: We don't believe that, for the purposes
5 of statutory construction, it's necessary because the only
6 issues of fact that were raised were whether or not it's a
7 novation, which we're not contesting for purposes of the
8 motion. We don't think it matters. Whether it was in bad
9 faith, we don't think it matters. There, there is really
10 no other issue of fact that matters with regard to the
11 statute.

12 It's only -- there only is one question of fact, and
13 it's undisputed. That is which claimants existed at the
14 time of the transfer. But, Your Honor, we're not
15 litigating the claims here. We're asking for a declaration
16 of rights under the statute.

17 THE COURT: I understand. Thank you.

18 MR. NORTON: Okay.

19 MR. BONHAM: Your Honor, if I may? First of all, I, I
20 don't see how somebody can argue retroactive statutes or a
21 statute or a section regarding retroactivity is of no
22 relevance to a case -- talking about a novation -- since if
23 you have a novation, which simply replaces one existing
24 party with another party, then you're not talking about
25 something that's retroactive. You're talking about

1 something that's ongoing and has been existent. There's
2 simply been a substation.

3 But be it as it may, again the North Carolina statute
4 was there. Presumably the Court of Appeals of North
5 Carolina knows what its legislature has passed and it held
6 under similar situations that the Guaranty Association was
7 responsible for these under the theory of a novation. And
8 it made no difference whether it was a merger or a
9 reinsurance assumption agreement.

10 Finally, Your Honor, I found out today clearly that
11 what the Guaranty Association -- and again correct me if
12 I'm wrong -- but they intend to tell workers' comp
13 claimants who have been having their claims paid for years
14 that their benefits are being terminated as far as
15 administration and payment by the Guaranty Association, and
16 that they -- if they are to seek further benefits, further
17 payment of those benefits, they are to CC AGC. If that is,
18 in fact, what they seek today, and if by chance the court
19 grants summary judgment in this case, what I would request
20 on behalf of the Department is a warning because people are
21 going to call.

22 THE COURT: I understand.

23 MR. BONHAM: We know that. I mean, I'm not trying to
24 threaten anybody. People are going to call, and my boss is
25 going to want to know what did I do, and I don't have any

1 interest in getting myself kicked all the way down the
2 hall. So, I would just request that -- we would submit
3 that, that the summary judgment is not proper. But if the
4 court decides that it is, we need a warning.

5 MR. VAN DINE: Your Honor, if I may very quickly? The
6 -- it was just raised that somehow there's some Draconian
7 thing that is going to happen immediately after today.
8 This legal proceeding will take its route. Ultimately when
9 a decision has been put down, the Guaranty Association will
10 not be stopping payments under its reservation until such
11 time as this litigation is completely resolved and
12 finished.

13 THE COURT: All right. Thank you very much. Thank
14 you very much, counsel. Appreciate your arguments.

15 I need proposed orders from those of you who are
16 affected, and, Mr. Bonham, I don't know where you fall on
17 that spectrum, but I have your memorandum. I'll take it in
18 the form of an *amicus*.

19 MR. BONHAM: Well, Your Honor, we have a very real
20 interest in -- we have a responsibility to protect
21 policyholders and the claimants against those policies.

22 THE COURT: All right.

23 MR. BONHAM: So it's far more than *amicus*, and this is
24 our receivership.

25 THE COURT: All right.

1 MR. BONHAM: And, of course, as the, as the ancillary
2 receiver under the *New South* decision, we are an arm of the
3 court and we advise the court.

4 THE COURT: All right, if you feel it's appropriate
5 for your receiver to submit a proposed order, I'll be glad
6 review it.

7 MR. BONHAM: Certainly, Your Honor.

8 THE COURT: Everybody understand ten days to my law
9 clerk by email, Word format. Thank you very much.

10 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 18TH DAY OF SEPTEMBER, 2015.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

ELIZABETH B. HARRIS, CVR-M

COLUMBIA, SOUTH CAROLINA

JANUARY 4TH, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-CP-40-0313

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, ... Intervenor-
Petitioner/
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 Intervenor-
Respondents/
CompTrustAGC of South Carolina, Inc., ... Respondents.

NOTICE OF APPEAL

The South Carolina Property and Casualty Insurance Guaranty Association
("Association") hereby appeals from the following orders and/or judgments of the circuit
court in the above matter: (1) the Order Granting Motion to Quash Discovery and Motion
to Dismiss and Denying Motion for Summary Judgment filed September 30, 2015
("Original Order") (attached as Exhibit A); and (2) the Order denying the Association's
Motion Pursuant to S.C. R. Civ. P. 52(b) and 59(e) Regarding Orders filed September 30,

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SC Court of Appeals

2015, which sought reconsideration of the Original Order and was filed January 26, 2016 ("Reconsideration Order") (attached as Exhibit B).

The Association received written notice of entry of the Original Order on October 7, 2015, and timely served its Motion for Reconsideration on October 13, 2015. The Association received written notice of entry of the Reconsideration Order on February 1, 2016, and, therefore, this Notice of Appeal is timely.

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February 2, 2016.

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Carolina, Inc.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4000313

Raymond G Farmer

South Carolina Dept of Insurance

CAGC Insurance Company

South Carolina Property and Casualty Insurance
Guaranty Asso

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (or Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 30 September 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Geoffrey Ross Bonham

Tara C Sullivan
Michael A. Molony

Jeffrey A. Jacobs

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

SCRCP Form 4C (10/2011)

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EXHIBIT

ROA_000486

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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

Petitioner,

vs.

CAGC Insurance Company, in liquidation,

Respondent.

South Carolina Property and Casualty,
Insurance Guaranty Association,

Intervenor-Petitioner,

vs.

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.

Intervenor-Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-03

FILED
SEP 30 PM 2:55
JENNIFER W. McBRIDE
CLERK, C.P. & S.

RICHLAND COUNTY
FILED

**ORDER GRANTING
MOTION TO QUASH DISCOVERY
AND MOTION TO DISMISS
AND DENYING MOTION
FOR SUMMARY JUDGMENT**

This matter comes before me on the Motion to Quash and the Motion to Dismiss of Intervenor-Respondent, CompTrustAGC of South Carolina, a/k/a CompTrustAGC of South Carolina, Inc., ("CompTrust") as well as on the Motion for Summary Judgment of Intervenor-Petitioner Intervenor-Petitioner South Carolina Property and Casualty Insurance Guaranty Association (the "SC IGA"). After hearing the arguments of the parties, it appears from the pleadings, supporting documentation, and affidavits on file in this case that CompTrust was

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improperly added as a party on June 9, 2015, and I grant CompTrust's motions pursuant to Rules 12(b)(6), 21, and 26 SCRCF. It further appears that workers compensation insurance claims filed against Respondent CAGC Insurance Company ("CAGC") pursuant to CompTrust policies lawfully transferred to CAGC should be considered "covered claims" under § 38-31-20 (8), so I deny the SC IGA's Motion for Summary Judgment.

Factual Background

CompTrust was formed on May 14, 1982 in Charlotte, North Carolina as an unincorporated business trust. It transacted business solely in South Carolina before it voluntarily dissolved on March 31, 2011. While it existed, the sole purpose of CompTrust was to provide workers compensation coverage for its South Carolina employer members as a group self-insurance provider regulated by the South Carolina Workers Compensation Commission ("SC WCC") under the authority granted to that agency in §§ 42-5-20, *et seq.* of the South Carolina Code.

Respondent CAGC Insurance Company ("CAGC") was a North Carolina-domiciled workers compensation insurance company. The South Carolina Department of Insurance ("SC DOI") authorized CAGC to transact business in this state on September 3, 2008. In 2010, CompTrust negotiated the transfer of its entire portfolio of workers compensation policies from July 1, 1982 through June 30, 2009 (the "Transferred Policies") to CAGC through a loss portfolio transfer ("LPT"). Under the specific direction, guidance, supervision, and prior approval of both the SC WCC and the North Carolina Department of Insurance ("NC DOI"), CAGC's domestic regulator, CompTrust and CAGC entered into a Self-Insurance Loss Portfolio Transfer Assumption Agreement (the "LPT Agreement") effective December 30, 2010. Under the LPT Agreement, CompTrust transferred to CAGC not only all of its past, present, and future

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workers compensation liabilities, but also over \$3.5 million in loss reserves, essentially all CompTrust's assets, along with its books, and records. Having done this, on March 31, 2011, CompTrust underwent voluntarily dissolution and has transacted no business since.

CAGC was declared insolvent and placed into liquidation under the supervision of the NC DOI on January 6, 2014. Thereafter, the SC IGA assumed responsibility for payment of CAGC's South Carolina "covered claims" under the South Carolina Property and Casualty Insurance Guaranty Association Act, S.C. Code Ann. §§ 38-31-10, *et seq.* (the "SC Act"). The SC IGA asserted at the time that it should not be statutorily liable for payment of claims filed against CAGC based on approximately 70 Transferred Policies (the "Contested Claims"), but agreed to pay the Contested Claims under reservation of rights at the insistence of the South Carolina Director of Insurance (the "Director"). On March 5, 2014 this Court named the Director as South Carolina Ancillary Receiver of CAGC under S.C. Code Ann. § 38-27-940 so that he could facilitate the payment of CAGC's claims in South Carolina and preserve and administer CAGC's assets in this state for the benefit of CAGC's South Carolina policyholders. A copy of the Complaint was served upon the North Carolina Attorney General, as legal representative of CAGC, which chose to allow CAGC to go into default.

CAGC's principal insurance obligations in South Carolina are the Contested Claims arising from the Transferred Policies. On June 9, 2014, the Court granted the SC IGA permission to intervene in the Director's Ancillary Receivership as envisioned by § 38-27-430 of the South Carolina Code to contest its liability for payment of the Contested Claims, and the Court also added CompTrust as a party. As legal representative of CAGC, the North Carolina Attorney General had been notified of the SC IGA's request, but chose not to participate in the hearing. On June 17, 2014 the SC IGA filed a Complaint requesting a Declaratory Judgment

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from the Court confirming that the Contested Claims are not "covered claims" as defined by § 38-31-20 (8) of the South Carolina Code because they are excluded from the SC Act under §38-31-30(6) so that the SC IGA had no statutory responsibility to pay the Contested Claims. A copy of the Complaint was served upon the North Carolina Attorney General, as legal representative of CAGC, which again went into default. A copy was also served upon one of CompTrust's former trustees. This was the first notice the CompTrust received that it had been formally added as a party to the Director's Ancillary Receivership. The CompTrust filed a Limited Answer on March 12, 2015, asserting among other things that the LPT Agreement accomplished a contractual novation under which the Transferred Policies should be considered CAGC policies *ab initio*, and that CompTrust itself is a dissolved, assetless entity immune from liability for the Contested Claims made under the Transferred Policies by virtue of South Carolina's statute of limitations.

The SC IGA served standard interrogatories on the CompTrust on May 22, 2015, and in response the CompTrust filed a Motion to Quash Discovery based on, and essentially reiterating, the allegations in its Limited Answer. On July 1, 2013, the SC IGA filed a Motion for Summary Judgment essentially reiterating the allegations and legal arguments in the Complaint. In light of the final results of CAGC's concurrent insolvency proceedings in its home state of North Carolina, the CompTrust filed a Motion to Dismiss on September 9, 2015. The Court ordered the parties to prepare legal memoranda supporting each of these motions and heard oral argument on all of them on September 18, 2015.

CAGC's liquidation also had been the subject of extensive litigation in North Carolina. There the North Carolina Property and Casualty Insurance Guaranty Association ("NC IGA") contested its claims liability for insurance policies assumed by CAGC as a result of

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a corporate merger with a workers compensation group self-insurer (the "NC Trust"). The merger had occurred with the full review and approval of NC DOI. On December 18, 2012 the NC IGA had been allowed to intervene in the CAGC insolvency proceedings and to seek to establish that it was not statutorily responsible under the North Carolina Insurance Guaranty Association Act, *N.C. Gen. Stat. §§ 58-48-1, et seq.* (the "NC Act") for payment of claims which had arisen under policies underwritten by the NC Trust prior to its merger with CAGC. On January 20, 2015 the North Carolina Court of Appeals decided the NC IGA should be "estopped from denying that it is obligated under the [NC Act] for any of the pre-merger workers' compensation claims made or incurred against [the NC Trust]" because a contractual novation of the policies had occurred, and it was not relevant whether that novation "was achieved through the execution of an assumption reinsurance agreement, or through the execution of a merger agreement. The responsibility for paying the relevant workers compensation claims was removed from [NC Trust] and assumed by CAGC." On June 10, 2015, the North Carolina Supreme Court denied the NC IGA's request for an appeal and dismissed the remaining claims in the case as moot. Finally, on July 27, 2015 the North Carolina court with primary jurisdiction over the CAGC insolvency proceedings issued the judgment against NC IGA directed by the North Carolina Court of Appeals.

Conclusions of Law

Section 38-27-60 of the South Carolina Code gives exclusive jurisdiction over South Carolina proceedings regarding the insolvency of insurance companies to the Richland County Court of Common Pleas. As stated above, § 38-27-430 grants the SC IGA the ability to intervene in these proceedings to present claim liability issues. Sections 33-53-40 and 33-53-50 confirm that unincorporated business trusts may sue and be sued in South Carolina and that

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service of process may be made on unincorporated business trusts in the same manner that domestic or foreign corporations are served. I therefore have full and proper jurisdiction over each of the parties and the subject matter in this case.

Motions to Quash and to Dismiss

These motions are best taken together, because the underlying legal arguments are very similar. In fact, at oral argument counsel for CompTrust asserted the Motion to Quash, though styled as a discovery motion, was best interpreted as a Motion to Dismiss.

South Carolina's statutory law on unincorporated business trusts is sparse, only five sections: S.C. Code Ann. §§ 33-53-10 through 33-53-50. There appears to be no South Carolina case law involving one, so the nature and structure of the CompTrust presents some novel issues to the Court. An unincorporated business trust is created by the voluntary act of the parties. 12A C.J.S. Business Trusts § 12. A written declaration of trust is often necessary; however there is no special form or language that is required to form a business trust other than the parties' intention to create a trust or by showing the intention to beneficially own another party's property. *Id.* South Carolina's Business Corporation Act of 1988 (the "Corporation Act," S.C. Code Ann. §§ 33-1-101, *et seq.*), passed after the CompTrust was created, acknowledges the existence and operation of unincorporated business trusts in the state, but does not set any requirements for an unincorporated business trust's foundational trust agreement. Similarly, while the Corporation Act provides for suits and service of process on unincorporated business trusts, it is silent regarding the dissolution notice, liability timeline, or any other aspects of the dissolution of unincorporated business trusts. One important thing the Corporation Act does specify is that the declaration of trust may limit the individual liability of shareholders and trustees. S.C. Code Ann § 33-51-40. Article VI § 8 of the CompTrust's Declaration of Trust

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contains such a provision, and the CompTrust's Articles of Dissolution reiterate those limitations of shareholder and trustee liability.

The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. Mitchell v. City of Greenville, 411 S.C. 632, 770 S.E.2d 391 (2015). Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. Spectre, LLC v. South Carolina Dept. of Health and Environmental Control, 386 S.C. 357, 688 S.E.2d 844 (2010). Similarly, in the absence of a statute specifically applying South Carolina's corporate filing, dissolution or statute of limitation requirements to an unincorporated business trust, the Court should avoid the application of statutes by analogy and default instead to a specific statute that can be applied to achieve the intent of the General Assembly. Title 15, Chapter 3, of the South Carolina Code outlines and lists the time limits by which civil actions must be commenced in this state. Section 15-3-530 specifically requires "an action upon a contract, obligation, or liability, express or implied," like the LPT Agreement, to be brought within 3 years. The CompTrust is therefore correct in asserting that it could not lawfully be made liable for the Contested Claims, since the latest of the Transferred Policies was underwritten in 2009, and they were lawfully transferred to CAGC in 2010.

The 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. Several affidavits attest that all of CompTrust's relevant books and records were transferred to CAGC. When CAGC became the subject of insolvency proceedings, those books and records were transferred to the NC DOI, which

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presumably transferred copies to the SC IGA when CAGC was declared insolvent so the SC IGA could begin paying claims under the SC Act.

In short, there does not appear to have been any legal or practical reason to add the CompTrust as a party to the Director's Ancillary Receivership. More specifically, neither the argument nor the resolution of the legal question presented in the Complaint would be prejudiced if the CompTrust were dismissed as a party. Misjoinder of parties is not ground for dismissal of an action. Rule 21, SCRCF. However, the windup and dissolution of CompTrust in 2010-2011 renders any grant of effectual relief impossible from either the CompTrust or its former trustees or shareholders in this case. Mere service does not create a proper cause of action. Even if the allegations in the Complaint are presumed true, any action by the Court against CompTrust would do no good, serve no purpose, or have any practical legal effect because CompTrust has not existed in over three years, has no assets, and was properly dissolved under the Corporation Act.

Motion for Summary Judgment

At oral argument, Counsel for the SC IGA essentially waived factual questions, such as whether the LPT Agreement constituted a contractual novation, which counsel the CompTrust raised in the attempt to show the Motion for Summary Judgment was premature. Instead, the SC IGA's argument relies solely on a strict statutory construction of provisions of the SC Act and supporting South Carolina case law establishing rules of statutory construction. Section § 38-31-30 of the SC Act limits its application, and consequently liability of the SC IGA, to a specific set of direct insurance situations. Subsection (6) specifically prohibits "insurance written on a retroactive basis to cover known losses which have resulted from an event with

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respect to which a claim has already been made, and the claim is known to the insurer at the time the insurance is bound." The language in this exception broadly describes the LPT.

When it existed, CompTrust was a qualified, registered group self-insurer under the South Carolina's Workers Compensation Act, effectively issued "insurance" policies, as defined by § 38-1-20 (25) of the South Carolina Code, and lawfully transferred those policies to CAGC via a contractual novation under the LPT Agreement. Accordingly, under South Carolina contract law the SC IGA should be required to consider the CompTrust's former group self-insurance policies as CAGC policies ab initio and evaluate claims made under those policies as "covered claims." S.C. Code Ann. § 38-31-20 (8) (Supp. 2015).

The South Carolina Supreme Court has distinguished workers compensation self-insurance programs like CompTrust's based on the effective transfer of risk and determined that such a self-insurer may be considered an "insurer" that issues a "policy" under S.C. Code Ann. § 38-1-33 based on factual findings regarding the program's operation and structure. South Carolina Prop. and Cas. Ins. Guar. Ass'n. v. Carolinas Roofing and Sheet Metal Contractors Self-Ins. Fund, 315 S.C. 555, 446 S.E.2d 442 (1994).

The cardinal rule of statutory construction is to discern and give effect to the intent of the legislature. Hodges v. Rainey, 341 S.C. 79 at 85, 533 S.E.2d 578 at 581. "In the absence of ambiguity and absurdity, a statute must be applied according to the clear meaning of its language." Insurance Services Office v. South Carolina Ins. Commission, 267 S.C. 54 at 62, 26 S.E.2d 33 at 36 (1976) quoting Boyd v. State Farm Mutual Automobile Insurance Company, 260 S.C. 316, 195 S.E.2d 706 (1973). If a statute is susceptible to two reasonable interpretations, though, it is ambiguous. South Carolina Dept. of Social Services v. Lisa C., 380 S.C. 406, 669 S.E.2d 647 (Ct. App. 2008).

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At oral argument it became clear that S.C. Code Ann. § 38-31-30 (6) can have multiple interpretations. The strict construction proposed by SC IGA would allow the court to declare the LPT to not be covered by the SC Act. A valid alternative interpretation, though, is to proscribe SC IGA coverage for underwriting fraud and other such matters that unfortunately become common as an insurance company veers into insolvency. Moreover, counsel for both the Director and CompTrust pointed out that the SC IGA's clear-cut interpretation would improperly reach the absurd result of preventing the SC IGA from covering claims for any policies lawfully transferred between insurance companies when that practice is so prevalent in the insurance industry. It also would lead to the tragic result of the loss of workers compensation benefits by at least 70 South Carolina policyholders despite the regulatory prior review and approval of the SC WCC and NC DOI and the express intentions of the parties and regulators in the LPT Agreement. Whatever the General Assembly may have intended in drafting § 38-31-30 (6) of the SC Act, it certainly was not to deprive innocent South Carolina policyholders of workers compensation benefits. The clear and unambiguous purpose of the SC Act is to ensure continuation of that coverage, particularly since insurance policies can only be transferred to a different insurer after prior regulatory review and approval by multiple state regulators.

The ultimate question to be decided in this case is whether the scope of the SC Act requires the SC IGA to evaluate as "covered claims" those claims arising under insurance policies which an insolvent insurance company had contractually acquired with the prior review and approval of its domestic regulator from a workers compensation group self-insurance entity. That question has not been addressed by a court in South Carolina. Accordingly, the most persuasive authority to look to in this case is Bowles v. BCJ Trucking Servs. Inc., 172 N.C. App. 149, 615 S.E.2d 724 (Ct. App. 2005).

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In *Bowles*, the North Carolina Court of Appeals addressed whether a plaintiff's claim for insurance coverage rested within the statutory obligations of the NC IGA under the NC Act. The plaintiff was injured in the course of his employment and subsequently was awarded disability benefits from his employer's workers' compensation insurance company, North Carolina Selective. *Id.* at 151. Selective was comprised of various employers who pooled their workers' compensation liabilities to create a licensed self-insured group. Selective began experiencing financial trouble and entered into a NC DOI-approved assumption reinsurance agreement with another company, Reliance. *Id.* Selective transferred and Reliance assumed all of Selective's workers' compensation liability claims and obligations. Reliance was a member of the NC IGA by virtue of its licensure by NC DOI. Reliance became insolvent and, following liquidation, the NC IGA assumed payments of plaintiff's benefits. *Id.* at 152. The NC IGA commenced an action with the NC DOI requesting a determination of its responsibility for paying plaintiff's claim. The NC DOI held the NC IGA was responsible, and NC IGA appealed.

On appeal, the North Carolina Court of Appeals rejected the NC IGA's argument that the plaintiff's claim did not meet the definition of a "covered claim" per N.C. Gen. Stat. §58-48-20. *Id.* at 153. The court affirmed the NC DOI's conclusion that the NC IGA's liability for plaintiff's claim arose when Reliance assumed Selective's obligations, relying on the law of novation.¹ The North Carolina Court of Appeals found Reliance, through novation, became the employer's insurance company. When Reliance became insolvent, the NC IGA became liable for all covered claims issued as an insolvent direct insurer. Accordingly, the NC Court of

¹ *Id.*, noting:

It is well established that "[t]he essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract'.... 'Ordinarily ... in order to constitute a novation the transaction must have been so intended by the parties.'"

GT

Appeals found the NC DOI correctly concluded plaintiff's claim met the definition of a "covered claim" under N.C. Gen. Stat. § 58-48-20 and held IGA was liable for plaintiff's claim. *Id.* at 155. The issue of whether the *Bowles* workers compensation policy transfer itself should have been excluded from the statutory scope of the NC Act appears to never have been even questioned.

Factually, this case closely resembles *Bowles*. A workers compensation self-insurer (CompTrust) entered into the LPT Agreement with an insurance company that became insolvent (CAGC). In *Bowles*, a workers compensation self-insurer entered into an assumption agreement with an insurance company that became insolvent. As in *Bowles*, the CompTrust transferred, and the CAGC assumed, all of its group workers' compensation self-insurance liability policies and obligations.

Perhaps most significantly, though, the statutory scope, definitions, and other provisions of the NC Act that the *Bowles* court relied upon in analyzing whether the plaintiff's claim was a "covered claim" are substantially similar to those under the SC Act. This is because the NC Act and the SC Act are based on the same model law developed by the National Association of Insurance Commissioners. For example, like the SC Act, the scope of the NC Act prohibits its application to:

Insurance written on a retroactive basis to cover known or unknown losses which have resulted from an event with respect to which a claim has already been made, and the claim is known to the insurer at the time the insurance is bound."

N.C. Gen. Stat. § 58-48-10 (10).

S.C. Code Ann. § 38-31-10 defines "covered claim" as:

[A]n unpaid claim, including one of unearned premiums, which arises out of and is within the coverage and is subject to the applicable limits of an insurance policy to which this chapter applies issued by an insurer, if the insurer is an insolvent

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insurer and (a) the claimant or insured is a resident of this State at the time of the insured event, if for entities other than an individual, the residence of a claimant or insured is the state in which its principal place of business is located at the time of the insured event or (b) the claim is for first-party benefits for damage to property permanently located in this State.

The definition of "covered claim" under North Carolina insurance law is in N.C. Gen. Stat. § 58-48-20(4):

[A]n unpaid claim, including one of unearned premiums, which is in excess of fifty dollars (\$50.00) and arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies as issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article and (i) the claimant or insured is a resident of this State at the time of the insured event; or (ii) the property from which the claim arises is permanently located in this State.

Similarly, S.C. Code Ann. § 38-31-10 (9) defines of an "insolvent insurer" as:

[A]n insurer (a) licensed to transact insurance in this State either at the time the policy was issued or when the insured event occurred and (b) determined to be insolvent by a court of competent jurisdiction in the insurer's state of domicile or of this State and which the director or his designee has found fails to meet its obligation to policyholders in this State.

And the definition of "insolvent insurer" in North Carolina in N.C. Gen. Stat. § 58-48-20(5) is:

"Insolvent insurer" means (i) an insurer licensed and authorized to transact insurance in this State either at the time the policy was issued or when the insured event occurred and (ii) against whom an order of liquidation with a finding of insolvency has been entered after the effective date of this Article by a court of competent jurisdiction in the insurer's state of domicile or of this State under the provisions of Article 30 of this Chapter, and which order of liquidation has not been stayed or been the subject of a writ of supersedeas or other comparable order.

Therefore, *Bowles* establishes a strong, very persuasive precedent in the liquidation of CAGC in South Carolina. CAGC, through novation, became the insurance company for the Transferred Policies *ab initio*. When CAGC was declared insolvent, the SC IGA became liable for all of CAGC's South Carolina claims, including Contested Claims made under the Transferred Policies.

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In addition to *Bowles*, there exists strong precedent in the recent North Carolina judicial decisions regarding CAGC. In reading South Carolina statutes regarding ancillary proceedings on insolvent, foreign insurance companies, S.C. Code Ann. §§ 38-27-910, *et seq.*, it is clear that this Court should give great deference and weight to the company's domestic regulator and judicial proceedings and to the Director as court-appointed Ancillary Receiver. The underlying facts and parties to the CAGC litigation in North Carolina are virtually identical to the one at hand. The NC IGA and SC IGA are represented by the same law firm, which presented essentially the same arguments against liability for pre-transfer CAGC policy claims at trial and on appeal. Like the NC IGA, the SC IGA is denying that it is statutorily obligated for any CAGC claims in South Carolina based on the CompTrust's worker compensation liabilities prior to their transfer to CAGC. The jurisdiction has changed, but little else. In short, the principal issues underlying the Complaint have been reviewed and decided by the court of final authority over the liquidation of CAGC in its state of domicile and principal regulation.

Order

The SC IGA's allegations in its Complaint have been effectively resolved by recent decisions of both the North Carolina Court of Appeals and the North Carolina Supreme Court. There is also very persuasive factual and legal precedent in *Bowles* to determine that Transferred Policies are properly CAGC policies by virtue of contractual novation and that the Contested Claims are properly "covered claims" under the SC Act. Therefore, SC IGA's Motion for Summary Judgment is hereby **DENIED**.

While SC IGA's Petition to Intervene may have been properly granted, its concurrent motion to add an extra, non-existent entity as a party to this case was not. It appearing that SCP&CIGA's claims against CompTrust are effectively moot, and the rights and obligations of

G. e. d.

the parties would not be prejudiced if the CompTrust were dismissed, the Comp Trust is hereby
DISMISSED as a party from this action under Rules 12(b)(6) and 21, SCRCP.

And it is so ordered.


G. Thomas Cooper, Jr.
Circuit Judge

Columbia, South Carolina

Dated: September 30, 2015

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FORM 4

JUDGMENT IN A CIVIL CASE

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2014CP4000313

Raymond G Farmer
South Carolina Dept of Insurance

CAGC Insurance Company
South Carolina Property and Casualty Insurance Guaranty
Asso

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____ Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. 3 consult); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Geoffrey Ross Bonham

Tara C Sullivan
Michael A. Molony

Jeffrey A. Jacobs

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court *Janette W. McBride*

SCRCP Form 4C (10/2011)

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EXHIBIT

B
FOA 000562

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

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

Case No. 2014-CP-40-0313

Petitioner,

vs.

CAGC Insurance Company, In Liquidation,

Respondent.

**ORDER DENYING INTERVENOR-
PETITIONER SOUTH CAROLINA
PROPERTY AND CASUALTY
INSURANCE GUARANTY
ASSOCIATIONS' MOTION TO
RECONSIDER**

South Carolina Property and Casualty
Insurance Guaranty Association,

Intervenor-Petitioner,

vs.

CAGC Insurance Company, in Liquidation;
Raymond G. Farmer, in his capacity as
Ancillary Receiver of CAGC Insurance
Company, in Liquidation; and CompTrust
AGC of South Carolina a/k/a
CompTrustAGC of South Carolina, Inc.,

Intervenor-Respondents.

RICHLAND COUNTY
FILED
2016 JAN 26 PM 2:35
JEANETTE W. MCBRIDE
C.C.P. & G.S.

This matter comes before the Court by way of Intervenor-Petitioner South Carolina Property and Casualty Insurance Guaranty Association's ("Association") Motion to Alter or Amend the Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Specifically, the Association asks this Court to reconsider its Orders Denying the Association's Motion for Summary Judgment, Denying the Association's Motion for Summary Judgment, and Granting Intervenor-Respondent CompTrustAGC of South Carolina a/k/a CompTrust AGC of South Carolina, Inc.'s Motion to Quash Discovery and Motion to Dismiss filed on September 30, 2015.

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After careful consideration of the record in this case and the submissions of the parties, this 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 not appropriately considered. In addition, the Court was not served with a copy of the Association's Motion to Alter or Amend the Judgment filed October 13, 2015, as is required under Rule 59(g) of the South Carolina Rules of Civil Procedure.

Accordingly, this Court hereby **DENIES** Defendants' Motion under Rule 59(e) of the South Carolina Rules of Civil Procedure, to reconsider this Court's Orders Denying the Association's Motion for Summary Judgment, Denying the Association's Motion for Summary Judgment, and Granting Intervenor-Respondent CompTrustAGC of South Carolina a/k/a CompTrust AGC of South Carolina, Inc.'s Motion to Quash Discovery and Motion to Dismiss filed on September 30, 2015. Furthermore, pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
January 26, 2016


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

SCANNED

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

Case No. 2014-CP-40-0313

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FEB 02 2016

SC Court of Appeals

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, ...

Intervenor-
Petitioner/
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., ...

Intervenor-
Respondents/
Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson
Mullins Riley & Scarborough LLP, attorneys for South Carolina Property and Casualty
Insurance Guaranty Association, do hereby certify that I have served all counsel in this
action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same
by United States Mail, postage prepaid, to the following address(es):

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Administrative Assistant

February 2, 2016

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AUG 25 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-CP-40-0313

Appellate Case No. 2016-000192

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

<signature block next page>

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Columbia, South Carolina

August 25, 2016.

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AUG 25 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-CP-40-0313

Appellate Case No. 2016-000192

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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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err by dismissing CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc. from the Association's declaratory judgment action because the Association is not statutorily liable for the purported "transferred" claims?

STATEMENT OF THE CASE

The sole issue before this Court is whether CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc. (“CompTrust”) is a proper party to the declaratory judgment action brought by South Carolina Property and Casualty Insurance Guaranty Association (“Association”) because CompTrust is liable for the transferred claims. The underlying facts are not in dispute.

The Association is a nonprofit unincorporated legal entity created by the South Carolina legislature pursuant to S.C. Code Ann. § 38-31-10, *et seq.* (the “Act” or “Guaranty Act”). *See S.C. Prop. and Cas. Ins. Guar. Ass’n v. Brock*, 410 S.C. 361, 365-66, 764 S.E.2d 920, 922 (2014); *Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 754 S.E.2d 486 (2014); *S.C. Prop. and Cas. Ins. Guar. Ass’n v. Carolinas Roofing and Sheet Metal Contractors Self-Insurance Fund*, 315 S.C. 555, 557, 446 S.E.2d 422, 424 (1994); *Builders Transp. v. S.C. Prop. and Cas. Ins. Guar. Ass’n*, 307 S.C. 398, 406, 415 S.E.2d 419, 424 (Ct. App. 1992). Because the Association was created by statute, its duties, liabilities, and obligations are controlled by the terms and conditions set forth in the Act. S.C. Code Ann. §§ 38-31-30 and -60; *see also Brock*, 410 S.C. 361, 365-66, 764 S.E.2d 920, 922; *Builders Transp.*, 307 S.C. at 406, 415 S.E.2d at 424.¹ Pursuant to the statutory scheme, the Association must “pay covered claims to the extent of the association’s obligation and deny all other claims.” S.C. Code Ann. § 38-31-60(d).

As stated in *Brock*, *Hudson*, and *Carolinas Roofing*, the purpose of the Association is “to provide **some** protection” to insureds whose insurance companies become insolvent. 410 S.C. at 367-68, 764 S.E.2d at 923; 407 S.C. at 124, 754 S.E.2d at 492; 315 S.C. at 557, 446 S.E.2d at 424 (emphasis added). The Association is a “last resort” for payment when an insurance

¹ *See also* 44 C.J.S. Insurance § 213 (“The association is a statutory entity that depends on statutory law for its existence and for the definition of its powers, duties, and protections.”).

company is declared insolvent. *Hudson*, 407 S.C. at 124, 754 S.E.2d at 492; *see also S.C. Prop. and Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 215, 403 S.E.2d 625, 628 (1991) (finding that it is not the intent of the Act to place the Association in the shoes of the insurer because the Association's rights and obligations are limited); 44 C.J.S. Insurance § 213 (“[T]he duties of an Insurance Guarantee Association are not co-extensive with the duties owed by the insolvent insurer under its policy. An Insurance Guarantee Association is a guarantor of last resort. . . . [A]n Insurers Insolvency Fund is not an insurer; rather, it is a statutorily mandated nonprofit association created to provide limited protection to insureds and claimants in the event of insolvency of an insurer. It is not itself an insurer and does not ‘stand in the shoes’ of the insolvent insurer for all purposes.”).

All insurers who write any kind of insurance to which the Act applies are members of the Association as a condition of their authority to transact insurance in South Carolina. S.C. Code Ann. § 38-31-40 and § 38-31-20(11). The Association is funded by assessments paid by each member. S.C. Code Ann. § 38-31-60(c). These assessments are ultimately passed on to the consumer in the form of increased insurance rates. *See* S.C. Code Ann. § 38-73-920.

CompTrust was a South Carolina business trust and operated as an unincorporated workers' compensation self-insurance trust. CompTrust was never a licensed insurer in South Carolina and was never a member of the Association. From July 1, 1982, through December 28, 2010, CompTrust, as a self-insured organization, provided workers' compensation coverage to its self-insured members (“Self-Insurance Coverage”).

In South Carolina, self-insured organizations are not subject to the Guaranty Act, are not members of the Association, and pay no assessments to the Association. *See* S.C. Code Ann. § 38-31-40 (requiring membership of Association as condition of transacting insurance business in

South Carolina); S.C. Code Ann. § 38-31-30 (omitting reference to self-insurance as types of insurance to which the Act applies). As a result, if the Association were to be responsible for any liabilities of CompTrust purportedly transferred to CAGC, licensed insurers and South Carolina insureds would be paying for the liabilities of a company that never paid into the Association for the protection it now seeks.

CAGC Insurance Company (“CAGC”) is a North Carolina insurance company established on December 31, 2007. On or about October 27, 2008, CAGC became a licensed insurer in South Carolina. Thereafter, CAGC 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 after its licensing in South Carolina. Claims made subject to these licensed policies are not in dispute here.

On December 28, 2010, CompTrust and CAGC executed an agreement titled Self-Insurance Loss Portfolio Transfer Assumption Agreement (the “LPT Agreement”). Under the terms of the LPT Agreement, CompTrust paid \$3,586,527.01 for CAGC to assume all of CompTrust’s liabilities on workers’ compensation claims arising out of the Self-Insured Coverage (“Transferred Claims”). CompTrust subsequently dissolved on April 1, 2011.

On November 30, 2011, less than a year after the execution of the LPT Agreement, a review by the South Carolina Department of Insurance (the “Department”) determined that CAGC was financially unsound. On January 18, 2012, pursuant to its authority under S.C. Code § 38-5-120(B), the Department suspended CAGC’s authority to transact insurance business in South Carolina. Also in January 2012, CAGC was placed into receivership in its state of domicile, North Carolina. CAGC was declared insolvent by a court on January 6, 2014.

On January 17, 2014, Raymond G. Farmer, Director of the South Carolina Department of Insurance, filed a petition to commence this ancillary receivership for CAGC in South Carolina. Farmer was appointed as the Ancillary Receiver of CAGC ("Receiver") by Order of this Court filed March 10, 2014.

As a result of CAGC's insolvency, claims made by South Carolina workers' compensation claimants against CAGC have now been asserted against the Association, including claimants covered pursuant to the Self-Insured Coverage previously provided by non-member CompTrust. The Association does not dispute its obligation to pay the South Carolina claims submitted as a result of policies actually issued by CAGC and has been paying these claims pursuant to the Guaranty Act. The Association disputes that it is obligated, under the plain language of the Guaranty Act, to pay the Transferred Claims,² which arose under the Self-Insured Coverage provided by CompTrust but purport to have become CAGC's responsibility based on the LPT Agreement.

The Association petitioned to intervene in the underlying receivership of CAGC and to join CAGC, the Receiver, and CompTrust for the purpose of asserting a declaratory judgment action against them, seeking a declaration that the Association is not liable for the Transferred Claims based on the Guaranty Act and its defining of the Association's obligations, not an agreement between CompTrust and CAGC. (Motion to Intervene, for Joinder of Intervenor-Respondents, and for Declaratory Judgment; R. 213.) On June 9, 2014, the circuit court allowed the Association to intervene in the ancillary receivership, joined CAGC, the Receiver, and CompTrust as parties, and authorized the Association to serve each of them with its summons and complaint for declaratory judgment. (Order Granting Motion to Intervene and for Joinder of

² The "Contested Claims" referred to in the Order and the "Transferred Claims" as referred to in the Association's papers are synonymous.

Intervenor-Respondents; R. 5.)

The Association filed its Summons and Complaint for Declaratory Judgment on June 17, 2014. (Summons and Complaint for Declaratory Judgment; R. 90.) On March 12, 2015, CompTrust filed its Limited Answer and Affirmative Defenses, in which it asserted, among other things, that it is not a proper party to this lawsuit because it is dissolved and has no interest in the litigation. (Limited Answer and Affirmative Defenses of Intervenor-Respondent CompTrustAGC of SC; R. 143.) Nonetheless, CompTrust asserted multiple legal arguments contrary to the positions of the Association and specifically alleged that the Association is obligated for the Transferred Claims. (*Id.*) CompTrust asserted such position because it was responsible for providing the claimants with workers' compensation coverage and former members of CompTrust can become liable for the obligations of CompTrust if CompTrust refuses or is not able to pay the obligations. See S.C. Code Ann. § 42-5-10.

On May 20, 2015, the Association served CompTrust with discovery requests. (First Set of Interrogatories to CompTrust; R. 407; First Set of Requests for Production to CompTrust; R. 413.) In response, CompTrust filed a Motion to Quash these discovery requests on June 22, 2015. (Motion to Quash; R. 261.) On September 11, 2015, the Association filed its Memorandum in Opposition to the Motion to Quash. (Memorandum in Opposition to Motion to Quash; R. 286.)

On September 17, 2015, CompTrust filed a Motion to Dismiss pursuant to S.C. R. Civ. P. 12(b)(1) and S.C. R. Civ. P. 21, arguing under both rules that the Association's claim as to CompTrust is "moot." (Motion to Dismiss; R. 358.) CompTrust's Motion to Dismiss was largely duplicative of its Motion to Quash, and the two motions were essentially treated as one motion to dismiss by the parties and circuit court.

A hearing was held on the Motion to Quash and Motion to Dismiss on September 18, 2015, before Judge G. Thomas Cooper, Jr. (Transcript of Hearing; R. 427.) By Order filed September 30, 2015, the circuit court granted CompTrust's Motion to Quash and Motion to Dismiss ("Order"). (9/30/15 Order; R. 8.) The circuit court found that the prior circuit court order granting the Association's motion to join CompTrust as a party was improper and dismissed CompTrust from the case. (*Id.*) The circuit court reasoned that South Carolina's Business Corporation Act's ("Corporation Act") provisions regarding dissolution and windup do not apply to unincorporated business trusts such as CompTrust and, therefore, the general three-year statute of limitations would apply to any actions against CompTrust. (*Id.*) The circuit court further held that the three-year statute of limitations began to run, at the latest, at the time of the LPT Agreement in 2010 and, therefore, expired before the declaratory judgment action was brought. (*Id.*) Finally, the circuit court found that CompTrust's dissolution made relief against CompTrust "impossible" and, therefore, any action against it "would do no good, serve no purpose, or have any practical legal effect." (*Id.*)

The Association timely filed a Motion Pursuant to S.C. R. Civ. P. 52(b) and 59(e) Regarding Orders Filed September 30, 2015. (Motion Pursuant to S.C. R. Civ. P. 52(b) and 59(e) Regarding Orders Filed September 30, 2015; R. 398.) By Order filed January 26, 2016, the circuit court denied the Association's motion for reconsideration. (1/26/16 Order Denying Intervenor-Petitioner South Carolina Property and Casualty Insurance Guaranty Association's Motion to Reconsider; R. 58.)

The Association timely appealed from the circuit court's orders.

ARGUMENT

The circuit court committed reversible error when it dismissed CompTrust as a party to

this case. (9/30/15 Order; R. 8.) As set forth below, the circuit court's ruling improperly reverses a previous circuit court order and incorrectly relies on the three-year statute of limitations and CompTrust's dissolution to justify CompTrust's dismissal. This Court should reverse the circuit court's order and reinstate CompTrust as a party to the Association's declaratory judgment action to permit that action to proceed.

I. The Order improperly reverses a prior circuit court order.

The circuit court's Order improperly reversed a previous circuit court order issued by another judge in this case. Specifically, by Order filed June 9, 2014, Judge DeAndrea Benjamin joined CompTrust as a party to this action. CompTrust did not seek any reconsideration or appeal of this Order from Judge Benjamin.³ Instead, CompTrust filed a Motion to Dismiss to be heard by a different circuit court judge. In ruling on CompTrust's Motion to Dismiss and Motion to Quash Discovery, the circuit court reversed Judge Benjamin's order, found that CompTrust was improperly added as a party, and dismissed CompTrust. (9/30/15 Order; R. 8.) However, a circuit court judge does not have the power to set aside another circuit court judge's order. *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979) (citing *Steele v. Charlotte, C&A R Co.*, 14 S.C. 324 (1879); *Cudd v. Williams*, 39 S.C. 452, 18 S.E.3 (1893); *State v. Harrelson*, 211 S.C. 11, 43 S.E.2d 593 (1947); *Dukes & Dukes v. Hygrade Food Products Corp.*, 236 S.C. 69, 113 S.E.2d 254 (1960); *Ex Parte State*, 263 S.C. 363, 210 S.E.2d 600 (1974)). As set forth in Judge Benjamin's order, CompTrust was properly added as an Intervenor-Respondent in the declaratory judgment action.

The second circuit court judge improperly set aside the order of another circuit court

³ Failure to seek relief of the Order of Judge Benjamin makes the 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).

judge on the same issue. This was in error. Accordingly, the Order should be reversed and CompTrust should be reinstated as a party.

II. The three-year statute of limitations does not support dismissal of CompTrust.

The circuit court erroneously relied on the three-year statute of limitations found in S.C. Code Ann. § 15-3-530 to find that CompTrust “could not lawfully be made liable for the Contested Claims, because the latest of the Transferred Policies was underwritten in 2009, and they were lawfully transferred to CAGC in 2010.” (9/30/15 Order at p. 7; R. 15.) However, Section 15-3-20 provides that “[c]ivil actions may only be commenced within the periods prescribed in this title *after the cause of action has accrued . . .*” (emphasis added). Moreover, South Carolina applies the “discovery rule” to contract actions, under which the action accrues on the date the aggrieved party knew or could have discovered the breach through the exercise of reasonable diligence. *Maier v. Tietex Corp.*, 331 S.C. 371, 376–77, 500 S.E.2d 204, 207 (Ct.App. 1998). The circuit court did not analyze the time when the Transferred Claims accrued or applicability of the discovery rule from the Association’s perspective, nor did it consider the case or controversy requirement of South Carolina’s Uniform Declaratory Judgment Act. *See* S.C. Code Ann. § 15-53-70; *Notios Corp. v. Hanvey*, 256 S.C. 275, 280, 182 S.E.2d 55, 57 (1971) (finding that the requirement of a “real and substantial controversy between the parties as to their respective rights and duties” is met where “there is nothing contingent, hypothetical, or abstract about the dispute”).

In this case, the Association’s Declaratory Judgment action was properly filed within six months of the case or controversy arising—the first instance any claimant could assert the Association was liable for the obligations of CompTrust, a non-member of the Association. A declaratory judgment action may only be filed when a case or controversy exists. *See* S.C. Code

Ann. § 15-53-70; *see also Webb v. Reames*, 326 SC 444, 447, 485 S.E.2d 384, 386 (1997) (holding declaratory judgment cause of action did not accrue until party notified of competing property interest). The Guaranty Act provides that the Association is only responsible for “covered claims,” which are, with limitations, unpaid claims of an insolvent insurer. *See* S.C. Code Ann. §§ 38-31-20(8) (defining covered claim) and -60 (limiting duty of Association to payment of covered claims). As such, no case or controversy with regard to the Association’s obligation to pay the Transferred Claims could have existed, and no cause of action could have accrued, until CAGC became insolvent on January 6, 2014, and it was first asserted the Association should pay the claims CompTrust was obligated to pay. (9/30/15 Order at p. 3; R. 11.) Moreover, it is undisputed that the Association did not know, and could not have known, of the Transferred Claims until after January 6, 2014, when the claims were presented to the Association for payment. (*Id.*).

The claims at issue in this case therefore did not accrue and were not known by the Association until, at the earliest, January 6, 2014, when CAGC became insolvent. No case or controversy existed prior to this time. The Association timely filed this action on June 17, 2014, approximately six months after the claims accrued and became known to the Association.

Accordingly, the Order dismissing CompTrust based on the statute of limitations should be reversed and CompTrust reinstated as a party.

III. Dissolution does not insulate CompTrust from suit.

The circuit court also improperly cited CompTrust’s dissolution as the basis for its finding that CompTrust should be dismissed. The circuit court’s Order is internally inconsistent in that it finds that CompTrust properly dissolved pursuant to the Corporation Act but refuses to apply the Corporation Act’s provision regarding liability following dissolution. (9/30/15 Order

at pp. 6-8; R. 14-16.) The circuit court did not identify any limitations on a business trust's liability following its dissolution and specifically recognized that the Corporation Act provides for suits on unincorporated business trusts. (*Id.*) Accordingly, CompTrust's dissolution is not a proper ground for its dismissal from this action as it still has liability as provided by the Corporation Act in S.C. Code Ann. §§ 33-14-105 and 33-14-107, and as recognized in CompTrust's Articles of Dissolution.

Specifically, the Corporation Act provides that a business entity may still be sued after its dissolution. *See* S.C. Code § 33-14-105(c)(5) ("Dissolution of a corporation does not . . . prevent commencement of a proceeding by or against the corporation in its corporate name."); *see also* S.C. Code Ann. § 33-14-105, Official Comments (stating that the statute "expressly reserves all . . . common law attributes of dissolution and makes clear that the rights, powers, and duties of shareholders, the directors, and the registered agent are not affected by dissolution and that suits by or against the corporation are not affected in any way"); S.C. Code § 15-5-90 ("Causes of action for and in respect to any and all injuries . . . shall survive both to and against . . . the legal representative of . . . a defunct or insolvent corporation.").

Cases also demonstrate that the circuit court should not have dismissed CompTrust based on its dissolution because dissolved entities are routinely sued in South Carolina courts. *See, PCS Nitrogen, Inc. v. Ross Dev. Corp.*, No. CIV.A. 2:09-3171-MBS, 2011 WL 3665335, at *3 (D.S.C. Aug. 19, 2011) (recognizing the ability to sue a dissolved entity under South Carolina law). In *PCS Nitrogen*, the District Court of South Carolina, applying South Carolina law, expressly stated that "South Carolina law permits a dissolved corporation to be sued." *Id.* at *4; *see also Broom v. Marshall*, 284 S.C. 530, 535, 328 S.E.2d 639, 643 (Ct. App. 1984) (recognizing the ability to enforce obligations binding a partnership even after the partnership

has dissolved); *Morris v. Tidewater Land & Timber, Inc*, 388 S.C. 317, 325, 696 S.E.2d 599, 603 (Ct. App. 2010) (evaluating former shareholders' potential recovery available from a dissolved entity). The *PCS Nitrogen* court went on to conclude that because a dissolved corporation remains subject to suit, dissolved corporations may continue to assert the attorney-client privilege under certain circumstances. 2011 WL 3665335, at *4. The circuit court failed to recognize the well-established principle in South Carolina law that entities remain subject to suit even after their dissolution.

Moreover, CompTrust's own Articles of Dissolution recognized that CompTrust remains subject to suit after its dissolution:

[T]he Trustees now desire to terminate and dissolve CompTrustAGC-SC by entering into these Articles of Dissolution (hereinafter "Articles") and to hold the Trustees harmless **for any claims, liabilities, or obligations of CompTrustAGC-SC that may arise following the termination and dissolution of CompTrustAGC-SC.**

...

The Trustees are hereby indemnified against and held harmless **for any alleged debts, liabilities or obligations asserted against CompTrustAGC-SC after the effective date of these Articles.** . .

(Motion to Quash at Ex. B pp. 1-2; R. 278-279.) (emphasis added). Because CompTrust's obligation to indemnify its trustees continues following CompTrust's dissolution for any of CompTrust's liability arising thereafter, it necessarily follows that CompTrust continues to exist for certain purposes after its dissolution. Despite CompTrust's dissolution, it may have liabilities or obligations arising thereafter for which it may be responsible and to which it must respond in court.

Also, contrary to its own assertion that it cannot sue or be sued, CompTrust sought affirmative relief from the circuit court by requesting its own declaratory ruling in its Limited

Answer and by filing the Motion to Quash. (Limited Answer, Prayer for Relief at p. 10; R. 152.) Pursuant to South Carolina law, and as recognized by CompTrust itself at dissolution and during the underlying litigation, claims may still be asserted against CompTrust in South Carolina courts even after its dissolution. CompTrust's dissolution does not insulate it from the Association's declaratory judgment action—to hold otherwise would invite any corporation to simply dissolve any time it faced a substantial liability. This Court should, therefore, reverse the Order and reinstate CompTrust as a party to the declaratory judgment action.

IV. The Association's claims against CompTrust are not moot.

CompTrust moved for dismissal under S.C. R. Civ. P 12(b)(1) and Rule 21, arguing that the Association's claims are moot because CompTrust has dissolved. (CompTrust Mot. Dis. p. 1-2; R. 326-327.) The circuit court erred by reaching the conclusion that the Association's claims against CompTrust "are effectively moot." (9/30/15 Order p. 14; R. 22.) "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy." *Byrd v. Irmo H.S.*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). In this case, judgment by the circuit court could have significant consequences for CompTrust and its members, leaving the case against CompTrust ripe for adjudication because of the above-cited provisions of the Corporation Act that provide for liability after dissolution and the Workers' Compensation Act provisions placing the obligation to provide workers' compensation coverage on employers.

Here, CompTrust's participation in the case is necessary to grant effectual relief because questions remain regarding whether the Transferred Claims were ever properly transferred from CompTrust to CAGC at all. (Compl. ¶¶ 10-11 and 30-35, R. 97, 100-101; Hearing Trans. 13:24 – 15:22; R. 439-441.) If the claims were not properly transferred from CompTrust to CAGC,

CompTrust and its members may become liable for the costs of these claims pursuant to the Worker's Compensation Act, which requires all employers to "secure the payment of compensation to his employees in the manner provided in this chapter." S.C. Code Ann. § 42-5-10. Further, the Association would not be liable for these claims if they were not transferred from CompTrust to CAGC. The validity of the transfer from CompTrust to CAGC has not been resolved and, therefore, the Association's claims are not moot. The Order therefore should be reversed and CompTrust reinstated as a party to this matter.

V. **CompTrust is a proper party because the Association has a statutory duty to investigate claims asserted against the Association and the statutory authority to bring suits to prevent collusion and fraud.**

The Association exists to provide some measure of protection to insureds of insolvent member insurers. *Carolinas Roofing*, 315 S.C. at 557, 446 S.E.2d at 424. To pay these sums, the Association is funded by assessments paid by its members who write property and casualty coverage in South Carolina, which in turn are used to pay "covered claims" in accordance with the Act. S.C. Code Ann. § 38-31-10 *et seq.* The assessments paid by insurers are ultimately passed on to the consumer in the form of increased insurance rates. S.C. Code Ann. § 38-31-140; *see also* S.C. Code Ann. § 38-73-920 ("Rate changes proposed where the sole factor for the change is the impact of a revised assessment does not constitute a rate increase for purposes of this section.").

The Association does not protect non-member insolvent workers' compensation self-insurers like CompTrust; the statutory regime for workers' compensation provides that protection. *See* S.C. Code Ann. § 42-5-10. The Association does not provide any protection to insureds of non-members nor does it provide any protection for claims transferred by a non-member to a member insurer. S.C. Code Ann. § 38-31-60 (defining Association's obligation on

“covered claims”); S.C. Code Ann. § 38-31-20(8) (defining “covered claim” as being limited to coverage provided by member insurers); and S.C. Code § 38-31-30(6) (excluding transferred claims from Association’s obligation). CompTrust improperly attempted to shift its liabilities to CAGC and, by extension, the Association.

The Association has a duty to prevent self-insured claims from being shifted to its members and South Carolina insureds. Indeed, the Association has a statutory duty to “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 and may review settlements, releases, and judgments to which the insolvent insurer or its insureds were parties to determine the extent to which these settlements, releases, and judgments may be properly contested.” S.C. Code Ann. § 38-31-60(d). Likewise, the Association is authorized to bring suit or take any other action necessary to carry out its purpose. S.C. Code Ann. §§ 38-31-60(j) and (l). In attempting to comply with its statutory obligation to investigate claims brought against it, the Association filed the underlying declaratory judgment action to determine its liability for the Transferred Claims. The circuit court has ignored the Association’s statutory duty to sue and its role as an investigatory body in dismissing CompTrust from this suit, when a viable and plausible claim has been stated, thereby defeating the purpose of Sections 38-31-60(j) and (l) by erroneously ending this action as to CompTrust before depositions and discovery into the purported “transfer.” The Association should be allowed to continue with that action with CompTrust reinstated as a party so that the Association may fulfill its statutory obligation to fully investigate the claims CompTrust attempted to transfer to CAGC and then to the Association.

In this case, CompTrust transferred millions of dollars of claims to an affiliated insurer without any notice to the Association and without ever having paid a dime of assessments to the Association for those claims. (Hearing Trans. 14:23–15:22; R. 440-441.) Self-insured employers cannot be permitted to make such end-runs around their individual liability for workers' compensation claims by dissolving and transferring them to failing insurance companies so that South Carolina insurers and insureds have to pay for the claims through the Association. CompTrust hopes to accomplish this without even being subject to judicial review. This is precisely what the trial court order allows and, therefore, it cannot be allowed to stand. CompTrust is a proper party to this action. The Order should be reversed so that the Association can conduct the discovery necessary to determine whether the transfer, which appears collusive on its face, was proper. Accordingly, the circuit court's dismissal of CompTrust should be reversed.

CONCLUSION

For the foregoing reasons, the Association respectfully requests this Court reverse the circuit court's dismissal of CompTrust and allow this declaratory judgment action to proceed with CompTrust as a party.

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Columbia, South Carolina
August 25, 2016.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

AUG 25 2016

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

SC Court of Appeals

Case No. 2014-CP-40-0313

Appellate Case No. 2016-000192

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.

**BRIEF OF RESPONDENT RAYMOND G. FARMER,
IN HIS CAPACITY AS ANCILLARY RECEIVER OF CAGC
INSURANCE COMPANY, IN LIQUIDATION**

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STATEMENT OF ISSUE ON APPEAL

- I. Did the supervising court err by dismissing CompTrustAGC of South Carolina a/k/a/ CompTrust AGC of South Carolina, Inc. from the Association's declaratory judgment action instead of allowing the Association to conduct discovery related to its assertion that it is not responsible for the Transferred Claims?

ARGUMENT

This appeal arises out of an action for declaratory judgment by the intervenor within an ancillary insurance company receivership. The Respondent Raymond G. Farmer is the Director of the South Carolina Department of Insurance in his capacity as the Ancillary Receiver of CAGC, an insurer in liquidation proceedings in North Carolina.

S.C. Code Ann. § 38-27-940 (2015) provides that if a domiciliary liquidator has been appointed for an insurer not domiciled in this State, the Director of the South Carolina Department of insurance or his designee may file a petition with the Court of Common Pleas (in Richland County) requesting appointment as ancillary receiver in this State, provided he finds that there are sufficient assets of the insurer located in this State to justify the appointment of an ancillary receiver or if the protection of creditors or policyholders in this State so requires. After the liquidation of CAGC in North Carolina, and in light of the Association's contention that it was not statutorily responsible for "Transferred Claims" this Respondent filed a petition for the ancillary receivership.

Pursuant to S.C. Code Ann. § 38-27-940, the Ancillary Receiver has the same powers and is subject to the same duties with respect to the administration of assets as if he were appointed the Liquidator of an insurer domiciled in this State. *Ins. Comm'n v. New South Life Ins. Co.*, 270 S.C. 612, 627-628, 244 S.E.2d 289, 297 (1978). The Insurance Law provides for the appointment of the Director as receiver in insurance insolvency matters because of expertise regarding the insurance industry as specified in S.C. Code Ann. § 38-3-10 (2015). *See New South Life*, 270 S.C. at 627-628, 244 S.E.2d at 297. He serves as an arm of the supervising court and, as such, is answerable to the court, as is a receiver in other ordinary insolvency matters. *Id.* The supervising court acts in a general

supervisory role, approving or disapproving the recommendations and actions of the receiver and resolving any disputes arising from conflicting interests of the various parties. *Id.* It is in this official capacity that the Ancillary Receiver submits this brief.

This Respondent is substantially in agreement with Appellant's statement that the "sole issue before this Court is whether CompTrust AGC of South Carolina a/k/a CompTrust AGC of South Carolina, Inc. ('CompTrust') is a proper party to the declaratory judgment action brought by South Carolina Property and Casualty Insurance Guaranty Association ('Association')" in this ancillary receivership. Not at issue is whether, as a matter of law, the Association is or is not responsible under Chapter 29 of Title 38 for paying what Appellant calls the "Transferred Claims." The Appellant essentially acknowledges this in arguing it "should be allowed to continue with [its] action with CompTrust reinstated as a party so that the Association may fulfill its statutory obligation to fully investigate the claims CompTrust attempted to transfer to CAGC" and that it should be allowed "to conduct the discovery necessary to determine whether the [claims] transfer . . . was proper."

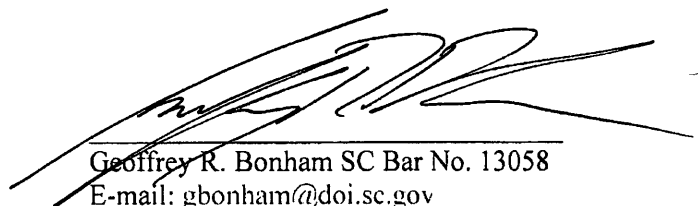
The Ancillary Receiver takes no issue with Appellant's general description and explanation of the provisions and operation of the South Carolina Life and Accident and Health Insurance Guaranty Law, S.C. Code Ann. §§ 38-29-10 *et seq.* He takes no position on whether (1) the lower court Order dismissing CompTrust improperly reversed a prior circuit court order, (2) the three-year statute of limitations does not support the dismissal of CompTrust, (3) dissolution does not insulate CompTrust from suit, or (4) the Association's claims are moot. This Respondent also agrees generally that the Association has a statutory duty to investigate claims asserted against the Association and the statutory

authority to bring suits to prevent collusion and fraud pursuant to, *inter alia*, S.C. Code Ann. § 38-31-60(d) (2015). To the extent Appellant might be understood to argue that it is entitled to judgment that, as a matter of law, it is not responsible for the Transferred Claims, this Respondent submits that this is not an issue properly presented by the instant appeal. The Ancillary Receiver did not maintain in the court below that any party was entitled to judgment as a matter of law regarding any provision of the Insurance Law, and he does not make such an assertion before this Court.

The sole issue presented involves the interpretation of Titles 15 and 33 of the Code of Laws of South Carolina 1976, as amended, matters that do not implicate the Ancillary Receiver's "expertise regarding the insurance industry." In the court below, the Ancillary Receiver was not asked for and did not offer any opinion whatsoever on the application of Title 15 or the Corporation Code. Accordingly, this Respondent takes no position as to the arguments presented by Appellant as to whether the lower court, in granting CompTrust's motion to dismiss, properly applied the cited provisions of Titles 15 and 33.

CONCLUSION

Respondent takes no position as to the specific issue presented on appeal.



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Columbia, South Carolina
August 25, 2016

**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
Circuit Court Case No. 2014-CP-40-0313

RECEIVED

AUG 26 2016

SC Court of Appeals

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.

**FINAL BRIEF OF RESPONDENT
COMPTRUSTAGC OF SOUTH CAROLINA
A/K/A COMPTRUSTAGC OF SOUTH CAROLINA, INC.**

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INTRODUCTION

This appeal arises in the context of ancillary receivership proceedings commenced on petition of Raymond G. Farmer, as Director of the South Carolina Department of Insurance (the “Director” and the “SCDOI,” respectively), in respect of CAGC Insurance Company, in Liquidation (“CAGC”), a North Carolina-domiciled property and casualty insurer that was declared insolvent and ordered to liquidation in early 2014 via proceedings in its home state, prompting the Director’s petition here. Specifically, it arises in the context of an action for declaratory judgment brought within these proceedings at the urging of Appellant South Carolina Property and Casualty Insurance Guaranty Association (the “Association”) that it be allowed to intervene and to join CAGC; the Director, as ancillary receiver of CAGC; and CompTrustAGC of South Carolina a/k/a CompTrust AGC of South Carolina, Inc. (“CompTrust”) as respondents to its claim for relief.

The Association’s appellate challenge concerns the lower court’s dismissal of CompTrust as a *party* to its action—not dismissal of its action—and, according to the Association, the issue now before the Court is this: “Did the trial court err by dismissing [CompTrust] from the Association’s declaratory judgment action *because the Association is not statutorily liable for the purported ‘transferred’ claims?*” (App’s Br. at p. 1 (emphasis added) (original bold print omitted).) This

non sequitur (set off in italics above) illustrates the problem with the *merits*—although, as explained elsewhere, other problems arise before they are reached—of the Association’s appeal: No logical relationship is offered between the alleged error and its stated cause.

Before going further, some backstory would seem helpful at this point, at the least, to explain the Association’s reference to “transferred” claims. South Carolina law¹ requires employers to either insure, or provide the state workers’ compensation commission (the “Commission”) with “satisfactory proof of . . . ability to pay directly,” i.e., self-insure, their liabilities arising under the Law. S.C. Code Ann. § 42-5-20. With Commission approval, an employer may qualify as a self-insurer via membership in a group self-insurance fund. *Id.*; see generally S.C. Code Ann. Regs. 67-1501 to -1516. Section 42-5-20 grants the Commission “exclusive jurisdiction” over these group self-insurers and prohibits them from being deemed “insurance companies” or being regulated by the SCDOI.

Though now dissolved (as it was effective April 1, 2011), CompTrust, an unincorporated business trust, was established in 1982 for the specific purpose of fulfilling its member employers’ obligations and liabilities under the Law. It operated as a Commission-approved group self-insurer for over 25 years until it closed June 30, 2009. At that time, CAGC was authorized to do business in South

¹ See generally The South Carolina Workers’ Compensation Law (the “Law”), codified at S.C. Code Ann. §§ 42-1-10 to -19-50.

Carolina and able to write workers' compensation insurance policies to employers formerly self-insuring via CompTrust. (R. pp. 179-83, 190-200, 211-12.)

Effective December 30, 2010—following review and approval by the Commission and the North Carolina Department of Insurance (the “NCDOI”)²—all of CompTrust’s assets and liabilities were transferred to/assumed by CAGC under the terms of a Self-Insurance Loss Portfolio Transfer Assumption Agreement (the “LPT Agreement”);³ whereupon, CAGC became solely responsible for administration and disposition of all claims—past, present, and future—on account CompTrust’s now-former liabilities. Claims arising out of these liabilities are the “transferred” claims to which the Association refers.

Notably, the Association also refers to these claims as *purportedly* transferred, perhaps suggesting the validity of their transfer is in question in this matter. Not so. While CompTrust certainly maintains the transaction is above reproach,⁴ in point of fact, the Association’s complaint for declaratory judgment

² (R. pp. 322-57.)

³ (R. pp. 202-09.)

⁴ As a duly qualified, registered group self-insurer under the Law, CompTrust was, while it lasted, effectively an “insurer” issuing “insurance” policies as defined by S.C. Code Ann. § 38-1-20 (25). See S.C. Prop. & Cas. Ins. Guar. Ass’n. v. Carolinas Roofing & Sheet Metal Contractors Self-Ins. Fund, 315 S.C. 555, 446 S.E.2d 442 (1994). It was the shared intention of the parties to the LPT Agreement to transfer all CompTrust policies to CAGC via novation—with the Commission and the NCDOI understanding and approving the transaction as such—as found to have occurred in Bowles v. BCJ Trucking Servs., Inc., 172 N.C. App. 149, 615 S.E.2d 724 (N.C. Ct. App. 2005), as well as in CAGC’s domiciliary

simply does not challenge it. Indeed, the Association framed its case in terms that necessarily assume valid transfer of liability to CAGC, asking that—and only that—the Court declare it not liable for the claims, i.e., notwithstanding the fact of their transfer to CAGC, doing so solely on the basis of statutory-construction arguments with no bearing on the validity of the LPT Agreement or its effect insofar as CompTrust is concerned.

CompTrust is dissolved, has no assets, and serves no legal purpose—and the Association has not actually sought any relief against it in this case. Assuming, *arguendo*, this Court has appellate jurisdiction, and also that affirmance of CompTrust’s dismissal is not mandated by rules of error preservation alone, there is no reversible error here, and the circuit court should be affirmed.

COUNTER-STATEMENT OF THE ISSUE ON APPEAL

Assuming, *arguendo*, this appeal should not be dismissed for lack of appellate jurisdiction, has the Association preserved for review and affirmatively identified to the Court reversible error in the circuit court's dismissal of CompTrust from the Association's declaratory judgment action?⁵

COUNTER-STATEMENT OF THE CASE

On January 17, 2014—the effective date on which CAGC was ordered into liquidation in domiciliary proceedings—the Director petitioned the Court of Common Pleas for Richland County to be appointed ancillary receiver of CAGC in South Carolina. (R. pp. 61-89.) On March 10, 2014, the circuit court (the Honorable L. Casey Manning presiding) found commencement of ancillary proceedings to be appropriate and appointed the Director ancillary receiver of CAGC. (R. pp. 1-4.)

⁵ See 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); 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); McCall v. IKON, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error); First Union Nat’l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding an “unchallenged ruling, right or wrong, is the law of the case and requires affirmance”); 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 reply brief).

On May 7, 2014, the Association moved to intervene in the ancillary proceedings and to assert therein a claim for declaratory relief, with CAGC; the Director, as receiver of CAGC; and CompTrust joined as respondents thereto. (R. pp. 213-60.) Specifically, the Association wanted to pursue a judicial declaration that

it has no statutory obligation for any claims arising out of the Self-Insured Coverage [i.e., liabilities transferred to/assumed by CAGC under the LPT Agreement] because such claims are not “covered claims” as defined by the [South Carolina Property and Casualty Insurance Guaranty] Act; CAGC did not issue any policy of insurance by assuming the Self-Insured Coverage under the LPT Agreement; and/or the LPT Agreement would be “insurance written on a retroactive basis to cover known losses” for which the Association is not responsible.

(R. p. 221.) The circuit court (the Honorable Deandra G. Benjamin presiding) heard the motion on June 9, 2014,⁶ and granted it that same day, allowing the Association to intervene and to assert its claim for the above-referenced declaratory relief, with CAGC; the Director, as receiver of CAGC; and CompTrust joined as respondents thereto. (R. pp. 5-7.)

Thus the Association’s declaratory judgment action was brought within the ancillary receivership proceedings, its complaint, directed at the newly added respondents, seeking the same declaratory relief as stated in its motion to

⁶ (R. pp. 421-26.)

intervene. (R. pp. 90-138.) Following its responsive pleading, CompTrust made a motion to quash the Association's discovery requests and then later moved for dismissal. (R. pp. 143-212, 261-79, 358-97.)

The circuit court (the Honorable G. Thomas Cooper, Jr., presiding) heard CompTrust's motions on September 18, 2015, and granted them by order filed September 30, 2015, dismissing CompTrust from the Association's action. (R. pp. 8-23, 427-82.) The circuit court thereafter denied the Association's motion to reconsider by order filed January 26, 2016. (R. pp. 58-60, 398-406.)

This appeal followed by notice served February 2, 2016.

ARGUMENT

- I. This appeal is required to be dismissed for lack of appellate jurisdiction, but assuming, *arguendo*, such is not the case,⁷ the Association’s argument that the order dismissing CompTrust improperly reversed a prior circuit court order is not preserved for review, but even assuming, *arguendo*, that, too, is not the case, the order dismissing CompTrust did not in fact improperly reverse a prior circuit court order.**

First off, the notion, advanced by the Association, that Judge Benjamin’s “ruling [is] ‘the law of the case[]’”⁸ is misguided. The Association points to the lack of a motion to reconsider or an appeal by CompTrust, but overlooks or disregards the fact—which it expressly acknowledged at the hearing before Judge Benjamin—that CompTrust was not at that time a party to the case. (R. p. 424, line 25 - p. 425, line 12.) CompTrust had no obligation—indeed no ability—to seek reconsideration or take an appeal. Insofar as the law-of-the-case doctrine is concerned, there can be no *unappealed* ruling where there is no *appealable* ruling to begin with, and the Association’s invocation of the doctrine is plainly misplaced.

But, on the other hand, the doctrine may well be applicable—even dispositive—against the Association. As the Association observes, “right or wrong” an unappealed ruling is the law of the case. (App’s Br. at p. 8 n. 3); *see*

⁷ In light of the nature of this argument, this assumption is carried over and incorporated throughout this brief as needed for the sake of addressing arguments that would implicate the Court’s exercise of appellate jurisdiction.

⁸ (App. Br. at p. 8 n. 3.)

also Soden, 333 S.C. at 566, 511 S.E.2d at 378. CompTrust believes the argument that its dismissal would improperly reverse a prior order was raised for the first time in the Association's motion asking Judge Cooper for reconsideration.⁹ Regardless, Judge Cooper denied that motion on two separate grounds: (1) he was unpersuaded on the merits; (2) "[i]n addition, [he] was not served with a copy of the [motion] as . . . required under Rule 59(g) of the South Carolina Rules of Civil Procedure." (R. p. 60.)

The Association has not presented any appellate challenge to the second ground for Judge Cooper's decision—that the Association's motion to reconsider was invalid because he was not served with a copy as required; consequently, any such challenge has been abandoned,¹⁰ and it is the law of the case. And because it constitutes an independent ground for the judge's decision, it requires affirmance of the decision under the two-issue rule. Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on

⁹ This alone would render the argument unpreserved for this Court's review. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (argument must be "sufficiently specific to inform the trial court of the point being urged . . ."); Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider.").

¹⁰ See Jinks, 355 S.C. at 344, 585 S.E.2d at 283 n. 3 (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); Shives, 328 S.C. at 474, 492 S.E.2d at 811 n. 2 (an issue not raised in the appellant's principal brief may not be raised via reply brief).

more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.”); *see also* Anderson v. S.C. Dep’t of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255, n. 1 (1996).

Moreover, in consequence of Judge Cooper’s order denying reconsideration having to be affirmed—as mandated by a doctrine requiring this result without regard, as the Association itself pointed out, to whether it is “right or wrong”—application of the relevant principles of error preservation would, under the circumstances, require affirmance of Judge Cooper’s prior order of dismissal as well, or else effectively violate the commandment against reversing the reconsideration order—and especially so since the reconsideration order itself expressly reiterates the correctness of CompTrust’s dismissal on the merits. *Cf.* Elam, 361 S.C. at 25, 602 S.E.2d at 780 (instructing that South Carolina’s preservation requirements are “mandatory”); Rule 103, SCRE (expressly rejecting the plain-error rule as “inconsistent with the law in South Carolina”); Hendrix v. E. Distribution, Inc., 320 S.C. 218, 464 S.E.2d 112 (1995) (granting a writ of certiorari to review the Court of Appeals’ decision, affirming the decision in result only, and vacating the decision to the extent it addressed an issue that was not preserved, explaining, “Since the issue . . . was not preserved for review, it should not have been addressed.”).

Then there is this: Timely service of a notice of appeal is a jurisdictional requirement, and the effectiveness of a motion, like the Association's motion for reconsideration, in staying the time for appeal depends on the propriety of the motion.¹¹ Because such a motion must be timely served to stay the time for appeal, and here it is the law of the case that the Association's motion was invalid, beset by a fatal procedural defect for not serving the judge with a copy at all, as required, the force of logic compels the conclusion that the Associations' motion did not stay the time for appeal and, in turn, that the Association did not timely serve its notice of appeal, leaving this Court without jurisdiction and requiring dismissal of the 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).

¹¹ See Elam, 361 S.C. at 14-15, 602 S.E.2d at 775 ("The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment. The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice. A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.") (internal citations omitted); id. at 20, 602 S.E.2d at 778 ("An appeal may be barred due to untimely service of the notice of appeal when a party-instead of serving a notice of appeal-files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment. An appeal also may be barred due to untimely service of the notice of appeal when a party-instead of serving a notice of appeal-recaptions a written JNOV/new trial motion, which has been ruled on, and resubmits it as a virtually identical, written Rule 59(e) motion.") (internal citations omitted).

Still, assuming, *arguendo*, the foregoing analysis is of no moment and the Association's argument is properly addressed on the merits, it is nonetheless unavailing. Again, CompTrust was not a party to the case when the Association's motion to intervene was made and decided, as the Association then acknowledged; the position CompTrust advanced in support of dismissal was not at all addressed in the order allowing intervention; and, of course, it is not the case that a procedural ruling allowing joinder of an absent party prohibits the party from thereafter seeking dismissal upon appearing in the case. Judge Cooper's holding—that CompTrust should be dismissed—did not have the effect of reversing an earlier substantive order; therefore, it did not improperly reverse the earlier order. See Enoree Baptist Church v. Fletcher, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986).

II. Judge Cooper did not otherwise commit reversible error in dismissing CompTrust from the Association's declaratory judgment action—i.e., in any way besides the claim refuted above.

The transferred CompTrust policies all predate July 2009. The applicable statute of limitations expired no later than July 2012. See S.C. Code Ann. § 15-3-530. And the notion that the discovery rule is of aid to the Association in this regard is false, for, as explained in the introduction (which is incorporated by reference herein), the Association has not actually alleged a *claim* for relief against CompTrust that it supposedly discovered, which, in turn, shows that CompTrust

was correctly dismissed in any event because of its needless inclusion in the case. (R. pp. 95-101.) CompTrust's dismissal from the action will not affect the outcome of the ancillary receivership or the Association's claim for the declaratory relief it seeks—the Association is not seeking to establish any contested fact, impose liability, or recover damages; CompTrust's dismissal cannot constitute reversible error.

Moreover, as explained above, CompTrust lawfully transferred all of its liabilities to CAGC via a contractual novation under the LPT Agreement, which had received the full, objective review and prior approval of both the Commission—the authority expressly designated as having “exclusive jurisdiction” over it—and the NCDOT. Indeed, it was at the insistence of these authorities that the terms of the LPT Agreement substituted CAGC as the liable party *ab initio* for any causes of action that would have arisen under the transferred policies to another insurer licensed to transact business in South Carolina. (R. pp. 322-57.)

Also, CompTrust is not subject to suit under S.C. Code Ann. §§ 33-14-105 and -107. It was formed as an unincorporated business trust in 1982, before the South Carolina Business Corporation Act of 1988, S.C. Code Ann. §§ 33-1-101 to -57-200 (the “BCA”). While the BCA acknowledges the prior existence of such trusts, the few provisions that specifically address them, §§ 33-53-10 to-50,

primarily address real property ownership and records. The BCA does not state that unincorporated business trusts are to be treated as incorporated entities; nor does it impose on them any of the filing, notice, or other requirements imposed on incorporated entities; nor does the BCA impose upon them any post-dissolution liability other than that which would normally exist under common law.

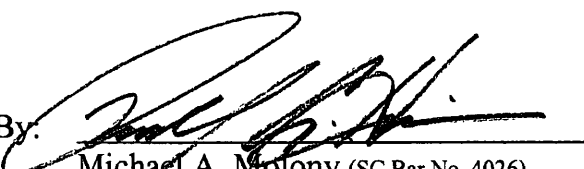
A business trust is created by the voluntary act of the parties. 12A C.J.S. Business Trusts § 12. A written declaration of trust is often necessary; however, there is no special form or language that is required to form a business trust other than the parties' intention to create a trust or by showing the intention to beneficially own another party's property. Id. None of the BCA's provisions set any firm requirements for a business trust's foundational trust agreement. One important thing BCA does specify is that the declaration of trust for a business trust may limit the individual liability of shareholders and trustees, S.C. Code Ann § 33-51-40, and, indeed, Article VI, § 8 of CompTrust's declaration does so. (R. pp. 190-200).

CONCLUSION

For the foregoing reasons, either the appeal should be dismissed or CompTrust's dismissal from the Association's action should be affirmed.

Respectfully submitted,

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Charleston, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2014-CP-40-0313

Appellate Case No. 2016-000192

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.

FINALY REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The circuit court lacked authority to reverse a prior circuit court order.

CompTrust fails to substantively address the Association's argument that the trial court improperly reversed the prior order of another circuit court judge. CompTrust asserts the prior judge's ruling that CompTrust should be a party was not appealable and, therefore, could not be the law of the case, which misses the point of the issue. (Respondent's Brief at p. 8.)¹

A circuit court judge does not have the power to set aside another circuit court judge's order. *Cook v. Taylor*, 272 S.C. 536, 252 S.E.2d 923 (1979) (citing *Steele v. Charlotte, C&A R. Co.*, 14 S.C. 324 (1879); *Cudd v. Williams*, 39 S.C. 452, 18 S.E.3 (1893); *State v. Harrelson*, 211 S.C. 11, 43 S.E.2d 593 (1947); *Dukes & Dukes v. Hygrade Food Products Corp.*, 236 S.C. 69, 113 S.E.2d 254 (1960); *Ex Parte State*, 263 S.C. 363, 210 S.E.2d 600 (1974)). Here, the second circuit court's Order explicitly overrules the prior order of the first judge. The second circuit court held the Association's "Petition to intervene may have properly been granted, [but] its concurrent motion to add an extra, non-existent entity as a party to this case was not." (9/30/15 Order at p. 14; R. 22.) Since the second circuit judge cannot overrule the prior judge's order, the ruling on appeal was in error, and CompTrust should be reinstated as a party. Only the first judge can alter the prior ruling that CompTrust should be a party. See *Murphy v. Murphy*, 269 S.C. 101, 105, 236 S.E.2d 417, 418 (1977) ("It is manifest that [a second circuit court judge] had no authority, in effect, to reverse the previous order of [another circuit court judge] on the same

¹ CompTrust also asserts the Association's argument is not preserved as the Association did not raise this argument until the Motion to Reconsider. Until the Order improperly overruling Judge Benjamin's order was issued, the Association could not raise this argument. Accordingly, the Association preserved this argument by making it at the earliest available opportunity. See e.g., *State v. Sullivan*, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993) (To preserve an issue for appellate review, the issue must be raised to the trial court at the earliest opportunity.). In any event, CompTrust was a proper party and should not be dismissed which preserves and raises this issue.

facts and allegations. The actions taken by [the second circuit court judge] were without authority of law and of no effect.”).

II. CompTrust fails to address the merits of the Association’s arguments in more than a conclusory manner, thereby leaving the arguments unchallenged under Rule 208(b), SCACR.

CompTrust’s brief fails to address the merits of the Association’s arguments substantively. CompTrust’s brief wholly fails to refute, address, or even mention the merits of the Association’s arguments in violation of Rule 208(b), SCACR. CompTrust has, therefore, conceded these issues on appeal. Rule 208(b), SCACR.

Consistent with the Rules, our Supreme Court has established that the failure of a respondent to make any argument on an issue in its brief renders the issue abandoned. *See, Video Gaming Consultants, Inc. v. S C Dept. of Rev.*, 342 S.C. 34, 42 n.7, 535 S.E.2d 642, 647 n. 7 (2000) (holding that the failure of the respondent in the appeal to argue an issue in its brief established the respondent abandoned the issue and, therefore, the court was precluded from considering it on appeal). Likewise, the failure of the respondent to cite authority in support of an argument also constitutes abandonment of an argument. *SunTrust Bank v. Bryant*, 392 S.C. 264 n.1, 268, 708 S.E.2d 821, 823 n.1 (Ct. App. 2011) (“[The Respondent] failed to cite any authority to support this argument. Therefore, [the Respondent] abandoned this issue on appeal, and we decline to consider the argument.”). Even if a respondent cites authority, a reference to supporting authority without any discussion of its applicability is conclusory and constitutes an abandonment of the respondent’s reliance on those authorities. *Civil Action No.: #2001-CP-32-0711 Carolina Water Serv., Inc. v. Lexington Cty. Joint Mun. Water & Sewer Comm’n*, 367 S.C. 141, 149, 625 S.E.2d 227, 231 (Ct. App. 2006), *rev’d on other grounds, Carolina Water Serv., Inc. v. Lexington Cty. Joint Mun. Water & Sewer Comm’n*, 373 S.C. 96, 644 S.E.2d 681 (2007)

(holding references by the respondent to supporting authority without any discussion of its applicability is conclusory and constitutes an abandonment of the respondent's reliance on those authorities).

The argument by CompTrust regarding the Order improperly reversing another trial judge consists of only two sentences and the citation to only one case with no explanation of how the cited case applies. (Respondent's Brief at p. 12.) The remainder of CompTrust's arguments on the merits consists of two and a half pages of text with citations to three different authorities and no case law. (Respondent's Brief at p. 12-14.) CompTrust's arguments on the merits of the Association's arguments *directly* refute only one other argument advanced by the Association: CompTrust argues the statute of limitations bars the Association's action.² (*Id.*) Like all of CompTrust's arguments on the merits of the Association's appeal, CompTrust fails to cite any case law to support this argument. (*Id.*) The decision of CompTrust not to address the merits of the remaining arguments in its Respondent's brief renders those issues abandoned and precludes this Court from considering a contrary position. Additionally, the few arguments CompTrust actually puts forth are conclusory. Thus, by Rule, CompTrust has conceded the Association is correct on the merits, this Court should reverse the Order, and reinstate CompTrust as a party to the declaratory judgment action consistent with the prior circuit court's order making CompTrust a party.

III. The Association is entitled to the declaration sought under the Declaratory Judgment Act.

The Declaratory Judgment Act ("DJA"), in S.C. Code Ann. § 15-53-80, mandates that "all persons shall be made parties who have or claim any interest which would be affected by the declaration." Further addressing the rights of those affected by a declaration, the DJA requires

² The Association maintains this action was brought within the applicable statute of limitations.

that “no declaration shall prejudice the rights of persons not parties to the proceeding.” (*Id.*) The Association seeks a declaration that it is not obligated to pay the self-insured claims brought under and pursuant to any Self-Insured Coverage issued by CompTrust. (Compl. ¶¶ 19-35 and prayer for relief.) This declaration will affect CompTrust. If the Association is not liable for these claims, CompTrust and its members may become liable for the costs of these claims pursuant to the Worker’s Compensation Act, which requires all employers to “secure the payment of compensation to his employees in the manner provided in this chapter.” S.C. Code Ann. § 42-5-10. CompTrust is, therefore, a proper party under the plain language of the DJA.

A. Dissolution does not protect CompTrust from liability.

Despite CompTrust’s conclusory arguments to the contrary, CompTrust’s potential liability is not limited by CompTrust’s dissolution. CompTrust does not cite a single authority that states an unincorporated business trust is no longer subject to suit after dissolution. (Respondent’s Brief at p. 13-14.) Rather, CompTrust asserts the fact that it existed prior to the passage of South Carolina’s Business Corporation Act of 1988 means that CompTrust, as an unincorporated business trust, is not subject to the provisions of that Act. (*Id.*) The Business Corporation Act of 1988, however, applies to then-existing entities. *See* S.C. Code Ann. § 33-1-102; *see also* S.C. Reporter’s Cmt. to S.C. Code Ann. § 33-1-102 (“[T]here would not seem to be any implication that the Legislature no longer has the constitutional right to adopt amended statutes that may modify existing rights, duties, and responsibilities of corporations, shareholders, directors, and officers. . . . Since the corporate code, even before this constitutional amendment, always has mentioned the Legislature’s reserved power to amend, there should be no question that this reserved power is an existing provision of all corporate charters adopted since 1841, as if it were written therein.”); S.C. Code Ann. § 33-20-101 (“This title applies to all

domestic corporations in existence on its effective date that were incorporated under any general statute of this State providing for incorporation of corporations for profit if power to amend or repeal the statute under which the corporation was incorporated was reserved.”); S.C. Reporter’s Cmt. to S.C. Code Ann. § 33-20-101 (“As noted in the Official Comment, this act will apply to all South Carolina for-profit corporations since the corporate statutes of this State, from earliest times, have included the powers to amend or repeal. . . . this act [is] universally applicable to all existing corporations . . . in keeping with the prior major revisions of the South Carolina law, which likewise applied the revisions to existing corporations. . . . the right of the Legislature to adopt new provisions which are binding on existing corporations has been a constitutional provision since the Constitution of 1868 (statutes reciting this right have existed since 1841).”).

South Carolina law does not allow legally-created entities to escape liability simply by ceasing operations. *See* S.C. Code § 33-14-105(c)(5) (“Dissolution of a corporation does not . . . prevent commencement of a proceeding by or against the corporation in its corporate name.”); S.C. Code Ann. § 33-14-105, Official Comments (stating that the statute “expressly reserves all . . . common law attributes of dissolution and makes clear that the rights, powers, and duties of shareholders, the directors, and the registered agent are not affected by dissolution and that suits by or against the corporation are not affected in any way”); S.C. Code § 15-5-90 (“Causes of action for and in respect to any and all injuries . . . shall survive both to and against . . . the legal representative of . . . a defunct or insolvent corporation.”); *Broom v. Marshall*, 284 S.C. 530, 535, 328 S.E.2d 639, 643 (Ct. App. 1984) (recognizing the ability to enforce obligations binding a partnership even after the partnership has dissolved); *Morris v. Tidewater Land & Timber, Inc.*, 388 S.C. 317, 325, 696 S.E.2d 599, 603 (Ct. App. 2010) (evaluating former shareholders’ potential recovery available from a dissolved entity). Otherwise, any legal entity facing

substantial liability would simply end its operations and absolve itself from liability. Legal entities cannot shield themselves from liability in such a manner under South Carolina law.

Indeed, CompTrust recognized it remains subject to suit in its own Articles of Dissolution:

[T]he Trustees now desire to terminate and dissolve CompTrustAGC-SC by entering into these Articles of Dissolution (hereinafter “Articles”) and to hold the Trustees harmless **for any claims, liabilities, or obligations of CompTrustAGC-SC that may arise following the termination and dissolution of CompTrustAGC-SC.**

...
The Trustees are hereby indemnified against and held harmless **for any alleged debts, liabilities or obligations asserted against CompTrustAGC-SC after the effective date of these Articles.** . . .

(Motion to Quash at Ex. B pp. 1-2; R. 278-279.) (emphasis added). Thus, the Articles of Dissolution acknowledge that CompTrust continues to exist for certain purposes after its dissolution, that CompTrust is not immune from suit despite its dissolution, and that CompTrust may have liabilities or obligations arising after dissolution for which it may be responsible and to which it must respond in court. Accordingly, this Court should reverse the Order and reinstate CompTrust as a party to the declaratory judgment action.

B. CompTrust’s declaration of trust does not insulate it from all liability.

CompTrust argues that its declaration of trust limits the individual liability of its shareholders and trustees. (Respondent’s Brief at p. 14.) CompTrust’s declaration of trust does not absolve CompTrust or its members from all liability. It is true that a declaration of trust may provide that no personal liability will attach to the individual shareholders or trustees of the trust. S.C. Code Ann. § 33-53-40. However, CompTrust’s declaration of trust does not purport to absolve its shareholders and trustees from any and all liability. Rather, the declaration only

absolves trustees, not shareholders, from liability “for any action taken pursuant to this Trust Agreement in good faith or for an omission, except gross negligence, or for any act of omission or commission by any other Trustee or by an employee of Trustee.” (Declaration of Trust, Article VI, Section 8; R. 198.) By the terms of the declaration itself, CompTrust’s shareholders are not absolved from liability, and its trustees may be absolved from liability only when specific conditions are met. Nothing in the record indicates these conditions have been satisfied. Additionally, CompTrust itself is not immune from liability. *See* S.C. Code Ann. § 33-53-40 (“A business trust may sue or be sued in the name and style by which it conducts business without naming the individual shareholders therein, and the liability of such business trust shall extend to the whole of the trust estate, or so much thereof as may be necessary to discharge such liability”); *see also supra*, Part IV.A.³ Thus, any argument by CompTrust that it or its shareholders or trustees are somehow immune from the Association’s declaratory judgment action fails.

C. **The declaratory judgment action will determine if CompTrust properly transferred claims to CACG.**

CompTrust argues that the Self-Insurance Loss Portfolio Transfer Assumption Agreement (the “LPT Agreement”) between CompTrust and CAGC Insurance Company (“CAGC”) transferred all liability for the claims in question to CAGC. (Respondent’s Brief at p.

³ Moreover, even when shareholders and other individuals are insulated from liability through the creation of a legal entity, South Carolina allows plaintiffs to hold those individuals liable for the obligations of legal entities when the legal entity is used to protect fraud, justify wrong, or defeat public policy. *See e.g., Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) (“[W]hen the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons.”); *Cumberland Wood Products, Inc. v. Bennett*, 308 S.C. 268, 272, 417 S.E.2d 617, 619 (Ct. App. 1992) (enumerating factors considered when a court will disregard a legal entity to hold individuals liable for the obligation of that legal entity).

13.) Not only does CompTrust fail to cite a single legal authority to support this assertion, but this argument ignores that the purpose of the declaratory judgment action is to determine whether the claims were properly transferred to CAGC so as to make the Association responsible for paying the claims issued by CompTrust pursuant to the South Carolina Property and Casualty Insurance Guaranty Association Act (the “Guaranty Act”), since CompTrust is not a member. (Compl. ¶¶ 30-35, R. 100-101; Hearing Trans. 13:24–15:22; R. 439-441.) CompTrust cites to Workers’ Compensation documents and a letter from the North Carolina Department of Insurance to bolster their argument. (Respondent’s Brief at p. 13.) Neither is binding legal authority, and neither speaks to the issue before this Court. Contrary to CompTrust’s assertions, the NCDOI letter does not state the LPT Agreement operates to make CAGC the party liable *ab initio* for any causes of action arising from the transferred claims so as to transform the transferred claims into covered claims. (NCDOI Letter; R. 357.) Rather, the letter states CAGC, based on a review of the LPT Agreement, “will assume outstanding liability obligations” of CompTrust. (*Id.*) Just like CompTrust’s brief, the letter does not cite any legal authority for this assertion. (*Id.*) Additionally, there is a difference in CAGC assuming liability and the Association assuming liability to pay claims transferred to CAGC. This declaratory judgment action, not a letter from the North Carolina Department of Insurance, will determine whether the LPT Agreement transformed the subject claims into covered claims. In order to make that determination, CompTrust must be a party to this action.

Under the Guaranty Act, the Association is obligated to pay only “covered claims” pursuant to S.C. Code § 38-31-60. To be a covered claim, the claim must fall under an insurance policy issued by a member insurer that has been declared insolvent, among other requirements. *See* S.C. Code § 38-31-20(8). The Guaranty Act also expressly and unambiguously excludes

from the Association's obligation any insurance written to retroactively cover known losses existing at the time insurance is bound. S.C. Code Ann. § 38-31-30(6).

CompTrust, like all group self-insurers, is not a licensed insurer and is not a member insurer. See S.C. Code § 38-31-20(11). Likewise, CompTrust did not issue any coverage pursuant to a policy which falls within the Guaranty Act, and the Guaranty Act's protection is not afforded to any self-insured claims. The Association is not responsible for any claims made pursuant to the Self-Insured Coverage. Non-covered claims cannot attain covered status by virtue of a transfer to an entity without resources to cover the claims. The declaratory judgment action will determine if the transfer of claims from CompTrust to CAGC, pursuant to the LPT Agreement, transformed the claims into covered claims. If the claims are found to not be covered claims, then the Association is not liable. The determination of whether the claims are covered requires CompTrust to be a party to this action. The Order therefore should be reversed and CompTrust reinstated as a party to this matter.⁴

IV. The trial court had a copy of the Rule 59(e) motion and expressly ruled upon it but even if CompTrust were correct that the trial court did not have the motion, the Court is not divested of jurisdiction—CompTrust's contentions are simply wrong.

The Association properly appealed from the trial court's order denying its Rule 59(e) motion and unequivocally stated in its initial brief the motion was timely. Thus, it has properly and timely preserved its challenge to the order denying the Rule 59(e) motion.

Nonetheless, CompTrust tries to convince this Court to ignore the merits of the appeal by

⁴ Respondent Raymond G. Farmer, as the Ancillary Receiver of CAGC ("Farmer"), asserts that he "takes no position" on any of the four arguments the Association put forth in its initial brief. (Farmer's Initial Brief at p. 3.) Farmer further asserts the issue of whether the Association is or is not responsible for paying the transferred claims is not at issue in this appeal. (*Id.* at p. 4.) However, as outlined above, the declaratory judgment will determine that very issue and the consequences of that determination for CompTrust and its members are substantial. Thus, regardless of whether the ultimate issue in this matter is currently before the appellate court, CompTrust is a necessary party to the declaratory judgment action.

relying on an incorrect factual statement in the trial court's Order denying the Association's Rule 59(e) Motion. The trial court incorrectly stated that it was not served a copy of the Rule 59(e) Motion as required by Rule 59(g). (1/22/16 Order Denying Intervenor-Petitioner South Carolina Property and Casualty Insurance Guaranty Association's Motion to Reconsider; R. 58.) In essence, CompTrust attempts to convert the trial court's statement that it was not served with a copy of the Rule 59(e) Motion, as a matter of fact, into an unstated, implied legal ruling that the motion was defective. This tactic has already been tried before in prior cases and disallowed by this Court. Thus, the issues are properly preserved and the Court has jurisdiction as shown below.

A. **The trial judge had the Rule 59(e) motion and stated he ruled on the motion in his order.**

The only record evidence is that the trial court did in fact have a copy of the Rule 59(e) motion. Judge Cooper unequivocally stated he reviewed the parties' submissions and he denied the motion. Had he not had a copy, then he could not have made these statements. The cover letter shows the Rule 59(e) Motion was filed in Richland County. (*Id.*) Judge Cooper is a resident circuit court judge in Richland County. Rules 78 and 79 of the South Carolina Rules of Civil Procedure require the clerk to make the filings part of the record and to maintain public, open records. Thus, the Motion was part of the record and the trial judge was provided a copy. Thus, CompTrust's entire issue preservation contention is wholly without merit.

Further, CompTrust's argument that the trial court's statement that it was not served with a copy of the Rule 59(e) Motion, while wrong, is merely a factual statement and not a basis upon which he denied the motion in any event. It is not incumbent upon the Association to refute every factual statement made by the trial court to preserve legal arguments. A Rule 59(e) Order is a ruling on legal issues; not a making of factual findings. The Court cannot permit such an

improper reading of the Order on the Rule 59(e) Motion. The trial court simply did not conclude that the Rule 59(e) Motion was defective. Such a statement is not in the order or in the record and is not supportable.

The case of *Gallagher v. Evert*, 353 S.C. 59, 577 S.E.2d 217 (Ct. App. 2002), is instructive as there the trial court ruled on the Rule 59(e) motion and this Court held that any lack of service under Rule 59(g) was not fatal to the appeal. In any event, as stated above, the trial court clearly had the motion as it ruled upon it. Just as in *Gallagher*, the trial court addressed the merits of the motion to reconsider. (1/22/16 Order Denying Intervenor-Petitioner South Carolina Property and Casualty Insurance Guaranty Association's Motion to Reconsider; R. 58.) Therefore, even to the extent the trial court's order denying the motion to reconsider is factually accurate with regard to whether a copy was provided to the trial judge, it has absolutely no bearing on the timeliness of this appeal or the Court's jurisdiction. *Gallagher*, 353 S.C. at 63-64, 577 S.E.2d at 219 ("Because the circuit court found it appropriate to hear the matter, we find no error in the circuit court's decision to decide the motion despite Gallagher's failure to comply with Rule 59(g), SCRCP.").

Accordingly, CompTrust's arguments regarding Rule 59(g) do not prevent this Court from entertaining this appeal on the merits. Existing cases, not cited or distinguished at all by CompTrust expressly contradict the issue preservation argument offered by CompTrust. CompTrust has actively attempted to divert the Court from the issues in this case by ignoring existing precedent. The Court should summarily and similarly reject those arguments here too and not permit gamesmanship by a party failing to call to the Court's attention applicable authority on the points it raises.⁵

⁵ No motion to argue against precedent has been filed.

B. Assuming, arguendo, the trial court did not have the motion upon which it ruled, it does not nullify the motion.⁶

Noncompliance with Rule 59(g) is not a procedural or jurisdictional bar to this Court hearing the Association's appeal on the merits. CompTrust fails to cite to a single case for the proposition that a purported failure to comply with Rule 59(g) invalidates a Rule 59(e) motion. This is because no such case exists. Instead, case law directly refutes CompTrust's position.⁷

Like *Gallagher v. Evert*, in *Coon v. Coon*, 356 S.C. 342, 588 S.E.2d 624 (Ct. App. 2003), *aff'd as modified*, 364 S.C. 563, 614 S.E.2d 616 (2005), this Court again found that the failure to comply with Rule 59(g)'s requirement to provide the trial judge a copy of the motion to reconsider had no bearing on the appeal. *See Gallagher*, 353 S.C. at 63-64, 577 S.E.2d at 219; *Coon v. Coon*, 356 S.C. at 346, 588 S.E.2d at 626. Directly contrary to CompTrust's argument,

⁶ As an initial matter, CompTrust waived any argument the Rule 59(e) Motion was not served on the trial court judge by not raising it below. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Accordingly, CompTrust cannot now attempt to argue that the Association's Motion to Reconsider was somehow defective.

⁷ The purpose of Rule 59(g) is not to operate as a procedural bar, rather, it is "to help insure the judge is promptly notified that the motion has been filed." *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) (quoting Notes to Rule 59(g), SCRPC). Thus, even if CompTrust is correct, Rule 59 is a claims processing rule and is not jurisdictional. *Nat'l Ecological Foundation, et. al. v. Clifford Alexander*, 496 F.3d 466, 474 (6th Cir. 2006) (holding that notice of appeal was timely and the appellate court had jurisdiction despite failure to file Rule 59(e) motion with the ten (10) day time limit imposed by Rule 59 because the time limit in Rule is an affirmative defense "which the party opposing the motion is capable of forfeiting"); *Nadine Chandler Wilburn v. Robinson*, 480 F.3d 1140, 1146-1148 (D.C. Cir. 2007) (holding that an objection to the timeliness of post-trial motion can be waived because the time limit imposed is a claim-processing rule subject to forfeiture); *Akinola v. John Doe*, 165 Fed. Appx. 242, 243 n. 1 (3d Cir. 2006) (unpublished) (noting that the filing of a motion to reconsider after the ten (10) time period following lower court's ruling was waived by the other side's failure to raise an objection); *OneCast Media, Inc.*, 439 F.3d 558, 563 (9th Cir. 2006) (holding the time limit for filing post-trial motions pursuant to Rule 59 of the Federal Rules of Civil Procedure is a non-jurisdictional claim-processing rule). Thus, the timing requirements can be waived or ignored by courts. *See Perry v. Green*, 313 S.C. 250, 256-57, 437 S.E.2d 150, 153-54 (Ct. App. 1993) ("We need not address Green's argument concerning the timeliness of the post-trial motions because it is moot in light of the trial court's hearing of and ruling on these motions on their merits.").

this Court further held that noncompliance with Rule 59(g) does not affect the tolling provision of Rule 203(b)(1) of the South Carolina Appellate Court Rules and the time for filing the notice of appeal did not begin to run until after the circuit court denied the Rule 59(e) motion, expressly rejecting the very argument CompTrust now proffers for the first time in this case. *Gallagher*, 353 S.C. at 63-64, 577 S.E.2d at 220; *Coon*, 356 S.C. at 346, 588 S.E.2d at 626.

Accordingly, the Association had thirty days from the date of the ruling on its Rule 59(e) motion to file its Notice of Appeal. Rule 203(b), SCACR. After the circuit court denied the Rule 59(e) motion on January 26, 2015, only seven days passed before the Association filed its notice of appeal on February 2, 2016. (1/22/16 Order Denying Intervenor-Petitioner South Carolina Property and Casualty Insurance Guaranty Association's Motion to Reconsider; Notice of Appeal; R. 58 and 483.) Thus, the Association's appeal is proper and timely.

CONCLUSION

For the foregoing reasons, the Association respectfully requests this Court reverse the circuit court's dismissal of CompTrust and allow this declaratory judgment action to proceed with CompTrust as a party.

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Columbia, South Carolina
August 25, 2016

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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.

Appellate Case No. 2016-000192

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

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

REVERSED AND REMANDED

Howard A. Van Dine, III, Allen Mattison Bogan, Erik
Tison Norton, all of Nelson Mullins Riley &
Scarborough, LLP, of Columbia, for Appellant.

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), SCRCF, 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), SCRCF, 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), SCRPC, 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, SCRPC; 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, SCRPC. 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, SCRPC.

REVERSED AND REMANDED.

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

87242

**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

RECEIVED

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SC Court of Appeals

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}

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 below⁴ 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

brief⁵—argument that demonstrates reversible error on the part of the circuit court.⁶

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

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 its 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

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), SCRCF, 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

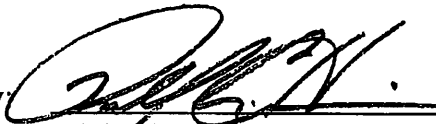
For the foregoing reasons, CompTrust asks the Court to grant this petition
for rehearing; to reconsider this matter; and indeed to decide this appeal again,
with the Subject Decision withdrawn and replaced by a decision that favors
CompTrust and affirms its dismissal from this case.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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By



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Carolina, Inc.*

Charleston, South Carolina

Dated: 7/9/18

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

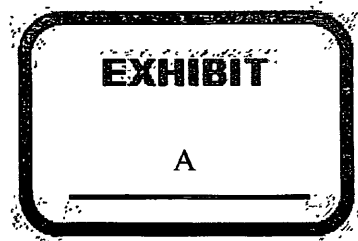
CAGC Insurance Company, In Liquidation; Raymond G.
Farmer, in his capacity as Ancillary receiver of CAGC
Insurance Company, In Liquidation; and
CompTrustAGC of South Carolina a/k/a CompTrustAGC
of South Carolina, Inc., Respondents.

Appellate Case No. 2016-000192

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

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

REVERSED AND REMANDED



Howard A. Van Dine, III, Allen Mattison Bogan, Erik
Tison Norton, all of Nelson Mullins Riley &
Scarborough, LLP, of Columbia, for Appellant.

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), SCRCF, 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, SCRCF; 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, SCRCF. 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, SCRCF.

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 South Carolina Court of Appeals

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,

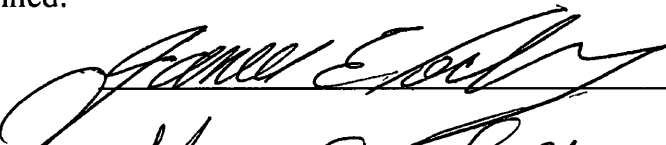
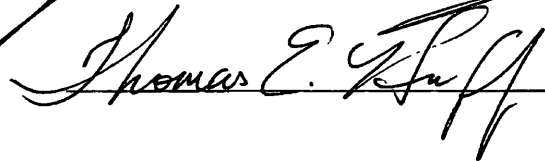
v.

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.

Appellate Case No. 2016-000192

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.

D. Han

J.

Columbia, South Carolina

cc: Allen Mattison Bogan, Esquire
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FILED

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