

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Case No. 2014-CP-40-0313

Appellate 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
CompTrustAGC of South Carolina, Inc. is the,

Petitioner,

v.

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
the,

Respondents.

RETURN TO PETITION FOR CERTIORARI

Introduction

This Court should deny the petition for writ of certiorari filed by petitioner CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc. (“CompTrust”). This case is at the pleading stage. It presents no novel issue, and the Court must accept the allegations as true. The Court of Appeals did so and correctly found a well-pleaded complaint that should not be dismissed. CompTrust’s petition includes little discussion of any substantive issues. Instead, CompTrust asks this Court to grant certiorari primarily to review arguments based on preservation and procedure. CompTrust fails to raise any issue worthy of this Court’s consideration, and the high burden for certiorari cannot be met. *See* Rule 242(b), SCACR. Accordingly, respondent South Carolina Property and Casualty Insurance Guaranty Association (the “Association”) respectfully requests that this Court deny the petition for certiorari.

Counter-Statement of the Questions Presented for Review

1. Did the Court of Appeals correctly find that the circuit court erred in dismissing CompTrust from this action?
2. Did the Court of Appeals properly reject the remaining procedural arguments raised by CompTrust?

Counter-Statement of the Case

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); *S.C. Prop. and Cas. Ins. Guar. Ass’n v. Carolinas Roofing & 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 Guaranty Act.

S.C. Code Ann. §§ 38-31-30 & -60; *see also Brock*, 410 S.C. at 365–66, 764 S.E.2d at 922; *Builders Transp.*, 307 S.C. at 406, 415 S.E.2d at 424.

The purpose of the Association is “to provide *some* protection” to insureds whose insurance companies become insolvent. *Brock*, 410 S.C. at 367–68, 764 S.E.2d at 923 (emphasis added); *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 124, 754 S.E.2d 486, 492 (2014); *Carolinas Roofing*, 315 S.C. at 557, 446 S.E.2d at 424. The Association is a “last resort” for payment when an insurance 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 it is not the intent of the Guaranty Act to place the Association in the shoes of the insurer because the Association’s rights and obligations are limited). All insurers who write insurance to which the Act applies are members of the Association as a condition of their authority to transact insurance business in South Carolina. S.C. Code Ann. §§ 38-31-20(11) & -40. The Association is funded by assessments paid by each member, S.C. Code Ann. § 38-31-60(c), which are ultimately passed on to the consumer in the form of increased insurance rates, *see* S.C. Code Ann. § 38-73-920. Self-insured organizations, in contrast, 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 in the Association as a 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).

CompTrust was a South Carolina business trust and operated as an unincorporated workers’ compensation self-insurance trust. (Appx. 100). CompTrust was never a licensed insurer in South Carolina and was never a member of the Association. (Appx. 101). From July 1, 1982, through December 28, 2010, CompTrust—as a self-insured organization—provided workers’

compensation coverage to its self-insured members (the “self-insurance coverage”). (Appx. 14).

CAGC Insurance Company (“CAGC”) is a North Carolina insurance company established on December 31, 2007. (Appx. 107). On October 27, 2008, CAGC became a licensed insurer in South Carolina and began issuing South Carolina workers’ compensation liability insurance policies. (Appx. 44). 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. On December 28, 2010, CompTrust and CAGC executed a Self-Insurance Loss Portfolio Transfer Assumption Agreement (the “LPT Agreement”). (Appx. 135–42). 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 (the “Transferred Claims”) arising out of the self-insurance coverage. (*Id.*). CompTrust then dissolved. (Appx. 14).

In January 2012, approximately one year after the execution of the LPT Agreement, CAGC disclosed that it was financially unsound. (Appx. 70). Pursuant to its authority under section 38-5-120(B) of the South Carolina Code, the Department of Insurance suspended CAGC’s authority to transact insurance business in South Carolina. (Appx. 73). Around the same time, CAGC was placed into receivership in its state of domicile, North Carolina. (Appx. 45). A North Carolina court declared CAGC insolvent on January 6, 2014. (Appx. 6).

On January 17, 2014, Raymond G. Farmer, Director of the South Carolina Department of Insurance, filed a petition to commence an ancillary receivership for CAGC in South Carolina. (Appx. 69). The circuit court appointed Farmer as the Ancillary Receiver of CAGC (the “Receiver”). (Appx. 1).

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 by the self-insurance coverage previously provided by non-member CompTrust. (Appx. 102). The Association does not dispute its obligation to pay the South Carolina claims submitted based on policies actually issued by CAGC, and it has been paying these claims pursuant to the Guaranty Act. (*Id.*). However, the Association disputes that the Guaranty Act requires it to pay the Transferred Claims, which arose under the self-insurance coverage provided by CompTrust but purportedly became CAGC's responsibility based on the LPT Agreement. If the Association is responsible for the 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.

The Association moved to intervene in the underlying receivership of CAGC so it could join CAGC, the Receiver, and CompTrust in the action and seek a declaration that the Association is not liable for the Transferred Claims based on its obligations under the Guaranty Act. (Appx. 223–30). On June 9, 2014, the circuit court allowed the Association to intervene in the ancillary receivership. (Appx. 10–11). The circuit court joined CAGC, the Receiver, and CompTrust as parties and authorized the Association to serve each party with its summons and complaint for declaratory judgment. (*Id.*).

The Association filed its declaratory judgment complaint on June 17, 2014. (Appx. 99–105). In response, CompTrust filed a Limited Answer and Affirmative Defenses in which it asserted that it is not a proper party to this lawsuit because it is dissolved and has no interest in the litigation. (Appx. 147–57). 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. *See* (Appx. 152–53). CompTrust asserted this 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. (Appx. 419–31). In response, CompTrust moved to quash the discovery requests. (Appx. 271–72). CompTrust then moved to dismiss pursuant to Rule 12(b)(1) and Rule 21 of the South Carolina Rules of Civil Procedure, arguing under both rules that the Association’s claim as to CompTrust is “moot” because CompTrust has been dissolved. (Appx. 368–74).

After a hearing, the circuit court granted CompTrust’s motions. (Appx. 13–23, 439–93). The circuit court found that the prior order—issued by a different circuit judge—granting the Association’s motion to join CompTrust as a party was improper and dismissed CompTrust from the case. (Appx. 13–23). The circuit court found that provisions in the South Carolina Business Corporation Act regarding dissolution and windup do not apply to unincorporated business trusts like CompTrust, and it further held that the general three-year statute of limitations applied and began to run, at the latest, when the LPT Agreement was executed in 2010. (Appx. 19). Therefore, the circuit court held the statute of limitations expired before the Association filed its declaratory judgment action. (*Id.*). Finally, the circuit court found that CompTrust’s dissolution made relief against CompTrust “impossible,” and any action against it “would do no good, serve no purpose, or have any practical legal effect.” (*Id.*).

The Association moved to reconsider pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure, but the circuit court denied the motion. (Appx. 408–13); *see also* (Appx. 63–64). The Association appealed both orders within thirty days after the circuit court issued its order denying the Association’s motion to reconsider. (Appx. 64–64, 495–96).

In its brief to the Court of Appeals, the Association raised a single issue: whether the circuit

court erred by dismissing CompTrust from the Association's declaratory judgment action. (Appx. 526). The Association argued, among other things, that the circuit court erred in dismissing CompTrust because the three-year statute of limitations did not support the dismissal, dissolution does not insulate CompTrust from suit, and 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. (Appx. 534–41). In response, CompTrust argued that the Court of Appeals should decline to review the merits of any of the issues raised by the Association and that the circuit court properly dismissed it from the action because the Association asserted no claim against CompTrust, CompTrust transferred its liabilities to CAGC, and CompTrust is not subject to liability because it has been dissolved. (Appx. 563–70).

The Court of Appeals reversed the dismissal of CompTrust. It rejected CompTrust's attempt to create a procedural bar to this appeal and held (1) CompTrust's dissolution is not a ground for dismissal based on misjoinder under Rule 21, (2) the Association asserted a right to relief against CompTrust sufficient to establish proper joinder under Rule 20, (3) the Association filed its declaratory judgment action within the statute of limitations, and (4) the Association's statutory powers allow it to scrutinize the LPT Agreement, which requires CompTrust's presence in the case. (Appx. 620–28). The Court of Appeals further held it was premature to dismiss CompTrust on grounds of futility given the Association's argument that CompTrust may have residual liability for the Transferred Claims under the South Carolina Workers' Compensation Law. (Appx. 590–97).

Argument

CompTrust incorrectly claims it is not a proper party to this action. Rather than offer substantive arguments in support of its position, CompTrust seeks to avoid appellate review by

asserting the Court of Appeals decided issues that were not properly before the court. CompTrust’s assertions are incorrect. It is a proper party to the Association’s declaratory judgment action, the Association preserved each of the issues it raised to the Court of Appeals, and the Court of Appeals’ ruling in favor of the Association is both legally and procedurally proper. CompTrust has not offered any argument that would warrant a writ of certiorari, and this Court should deny CompTrust’s petition.

I. The Court of Appeals correctly determined that the circuit court erred in dismissing CompTrust.

A. The Association asserted a right to declaratory relief against CompTrust, and CompTrust is therefore a proper party to this action.

The Association’s declaratory judgment complaint expressly implicates CompTrust and seeks relief that requires CompTrust to be a party to this action. Therefore, CompTrust is a proper party, and the Court of Appeals properly reversed the circuit court’s decision.¹

The Declaratory Judgments Act—which must be liberally construed and administered²—allows any person whose rights, status, or legal relations are affected by a statute or contract to file a declaratory judgment action asking a court to declare the rights, status, or legal relations of persons under the contract or statute. S.C. Code Ann. § 15-53-30; *see also* S.C. Code Ann. § 15-53-20 (“The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.”). It also requires a party seeking a declaratory judgment to join in the action all persons “who have or claim any interest

¹ Moreover, contrary to CompTrust’s argument, the Court of Appeals’ ruling based on Rules 20 and 21 is squarely within the issue raised by the Association—whether CompTrust is a proper party to the Association’s declaratory judgment action.

² S.C. Code Ann. § 15-53-130.

which would be affected by the declaration” and prohibits a declaration from binding any person not made a party to the action. S.C. Code Ann. § 15-53-80.

The Association seeks a declaration that it is not obligated to pay the self-insurance claims purportedly transferred from CompTrust to CAGC pursuant to the LPT Agreement. (Appx. 99–105). As the Court of Appeals properly recognized, this declaratory judgment action is broader than CompTrust seeks to make it. There are four interested parties if a court grants the relief sought by the Association—the Association, CompTrust, CAGC, and the Receiver—and the Association repeatedly argued the circuit court must determine the rights of all parties involved in the transaction and the resulting events. *See, e.g.*, (Appx. 223–24, 453–54). CompTrust’s participation in the declaratory judgment action is necessary to grant effectual relief because the primary issue in the case—as CompTrust recognized in its limited answer³—is whether the LPT Agreement transformed the self-insurance claims into “covered claims” that must be paid by the Association under the Guaranty Act. (Appx. 101, 104–05, 451–54). The Association’s complaint asks the circuit court to answer this question. (Appx. 102–05). To do so, the circuit court must analyze whether the claims arise out of an insurance policy issued by an insolvent insurer that was licensed to transact insurance business at the time it issued the policy. S.C. Code Ann. § 38-31-20(8) & (9). The circuit court also must determine whether the claims constitute retroactive

³ *See* (Appx. 153) (“A novation is an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation. In this case, the CompTrust’s agreements with its employee members constituted a prior valid obligation to pay workers compensation claims; all of the parties affected by the LPT Agreement agreed to the new contract; the new contract shows the intention by the parties to discharge the prior obligation; and the LPT Agreement itself has all of the elements of a valid contract. By effecting a contractual novation, *the LPT Agreement converted the CompTrust member employer workers compensation self-insurance programs into ‘insurance policies’ issued by a ‘licensed insurer’ and ‘covered claims for which [the Association] should be statutorily responsible.’*” (emphasis added)).

insurance for which the Association is not liable. S.C. Code Ann. § 38-31-30(6). If the claims are retroactive insurance or are not covered claims, the circuit court must determine whether CompTrust remains liable for the claims pursuant to the Worker's Compensation Law, which requires every employer to "secure the payment of compensation to his employees in the manner provided in this chapter." S.C. Code Ann. § 42-5-10.

The Association's position in this case therefore affects CompTrust's interest and, contrary to CompTrust's argument, the Association is seeking relief *against* CompTrust. (Appx. 453–54). Accordingly, CompTrust is a proper party to this action under the plain language of the Declaratory Judgments Act. S.C. Code Ann. § 15-53-80. Moreover, if CompTrust is not a party and the circuit court ultimately finds that the Association is not liable for the claims, CompTrust may assert as a defense in a future action that it was not a party to this action and its rights could not be determined by the circuit court in this case. *Id.* The Court should deny certiorari as to Questions 2, 5, and 6 in CompTrust's petition.

B. The Association is required to investigate whether the Transferred Claims are "covered claims" that trigger the Association's payment obligations under the Guaranty Act.

The Association argued that its powers and duties under sections 38-31-60(d) and (l) of the South Carolina Code require it to investigate whether the LPT Agreement caused a valid transfer of claims that renders the Association liable to pay those claims. (App. Br. 15–16, Appx. 540–41; Reply Br. 7–9, Appx. 582–84). The Court of Appeals agreed.

CompTrust raises two arguments related to sections 38-31-60(d) and (l): first, the issue was not properly before the Court of Appeals, and second, the Association's declaratory judgment action does not implicate those provisions. CompTrust's argument is erroneous. Section 38-31-60(d) provides 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 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) (emphases added). Section 38-31-60(l) allows the Association to “perform any other acts necessary or proper to effectuate the purpose of this chapter.” S.C. Code Ann. § 38-31-60(l). The Association’s declaratory judgment complaint expressly stated that the Association denies responsibility for any liabilities *purportedly transferred* from CompTrust to CAGC, (Appx. 102); that the Transferred Claims are not insurance policies subject to the Act, (Appx. 103); that the LPT Agreement did not convert the Transferred Claims into “covered claims” pursuant to section 38-31-60, (Appx. 104); that CAGC’s assumption of CompTrust’s liabilities did not amount to issuing a policy within the meaning of the Act, (*Id.*); and that, at the time of the LPT Agreement, the losses incurred under the self-insurance coverage were known by CompTrust and CAGC and therefore constitute retroactive insurance not covered by the Act, (Appx. 104–05). The Association further argued at the hearing on CompTrust’s motion to dismiss that the LPT Agreement was not an arms-length transaction and that CompTrust and its members continued to assert control over CAGC. (Appx. 485–96); *see also* (Appx. 470–71).

These arguments fall squarely within the Association’s powers and responsibilities under sections 38-31-60(d) and (l), and the declaratory judgment complaint seeks a judicial resolution of those issues pursuant to the Association’s powers. As the Association argued to the Court of Appeals, “[t]he 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.” (Reply Br. 9, Appx. 584). Thus, contrary to CompTrust’s arguments, sections 31-38-60(d) and (l) were encompassed within the Association’s complaint and raised to both the circuit

court and the Court of Appeals. The Court of Appeals did not err in finding the circuit court improperly dismissed CompTrust on this basis. CompTrust does not ask this Court to decide the merits of this issue. Instead, it asks the Court to grant certiorari solely to find that the Court of Appeals should have declined to rule on this issue. The Court of Appeals properly considered this issue, and this Court should deny certiorari as to Question 4 in CompTrust’s petition.

C. The Court of Appeals properly ruled the statute of limitations had not expired prior to the Association filing its declaratory judgment complaint.

CompTrust argues the Court of Appeals erred in finding the statute of limitations does not bar the Association’s declaratory judgment claim. (Pet. 15–16). However, it offers no substantive argument related to the statute of limitations, instead repeating its position that the declaratory judgment complaint asserted no right to relief against CompTrust and arguing the Workers’ Compensation Commission had exclusive jurisdiction to determine the validity of the LPT Agreement. (Pet. 15–16). Neither argument addresses the Court of Appeals’ statute of limitations analysis.

Under the “discovery rule,” a cause of action accrues—and the statute of limitations begins to run—on the date the aggrieved party knew or could have discovered its claim through the exercise of reasonable diligence. *See Maher v. Tietex Corp.*, 331 S.C. 371, 376–77, 500 S.E.2d 204, 207 (Ct. App. 1998). The circuit court found the statute of limitations began to run either in 2009, when CompTrust issued its last self-insurance policy, or in 2010, when CompTrust transferred its liabilities to CAGC. (Appx. 19). The Court of Appeals properly reversed the circuit court’s ruling. As the Court of Appeals held, the three-year statute of limitations⁴ applicable to

⁴ S.C. Code Ann. § 15-3-20 (“Civil actions may only be commenced within the periods prescribed in this title *after the cause of action has accrued*” (emphasis added)); S.C. Code Ann. § 15-3-530.

the Association 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.” (Appx. 595–96).

The Association is not required to pay claims that arise under self-insurance coverage such as that issued by CompTrust. *See* S.C. Code Ann. §§ 38-31-30 & -40. Thus, CompTrust’s issuance of self-insurance coverage in 2009 did not trigger any right, obligation, or claim for the Association. The Association could not have “discovered” that it had a cause of action at that time, because no cause of action existed. Moreover, the Guaranty Act requires the Association to pay “covered claims,” which are defined as unpaid claims that arise out of an insurance policy issued by an *insolvent insurer*. *See* S.C. Code Ann. §§ 38-31-20(8) & -60. As long as an insurer remains solvent, the Association has no obligation to pay its covered claims, and no case or controversy exists that would allow the Association to file a declaratory judgment action. *See* S.C. Code Ann. § 15-53-70; *Notios Corp. v. Hanvey*, 256 S.C. 275, 280, 182 S.E.2d 55, 57 (1971) (providing a declaratory judgment action must be based on an actual case or controversy). Although CompTrust appears to argue that the LPT Agreement itself triggered the statute of limitations, the Association still had no cause of action at that time because CAGC remained solvent. Additionally, the Association was not a party to the LPT Agreement, did not receive a copy of the LPT Agreement, and had no knowledge that the LPT Agreement existed. *See* (Appx. 338–44). Accordingly, neither CompTrust’s issuance of self-insurance coverage nor the December 2010 transfer of its liabilities to CAGC triggered any obligation for the Association or caused any claim to accrue.

The Court of Appeals properly held no case or controversy regarding 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 that the Association should pay the claims purportedly transferred from CompTrust to CAGC. (Appx. 15, 595–96); *see also* S.C. Code Ann. § 15-53-70; *Webb v. Reames*, 326 S.C. 444, 447, 485 S.E.2d 384, 386 (1997) (holding a declaratory judgment cause of action did not accrue until a party was notified of a competing property interest). Thus, the statute of limitations began to run—at the earliest—when CAGC became insolvent on January 6, 2014. The Association filed its declaratory judgment action less than six months later, on June 17, 2014. (Appx. 99). The Court of Appeals properly reversed the circuit court’s dismissal based on the statute of limitations, and this Court should deny certiorari as to Question 3 in CompTrust’s petition.⁵

D. Dissolution does not absolve CompTrust of liability as a matter of law.

A primary basis for the circuit court’s dismissal of CompTrust was its conclusion that CompTrust could not be subject to liability, as a matter of law, because it had dissolved. (Appx. 18–19). The Court of Appeals reversed the circuit court, holding the issue was one of first impression and the circuit court abused its discretion by answering the question with no factual record while ruling upon a Rule 21 motion. (Appx. 595). Regardless of whether the dissolution issue is a novel one, CompTrust does not ask this Court to consider the merits of the issue. CompTrust argues only that (1) this issue was not before the Court of Appeals because it did not correspond to a specific issue on appeal raised by the Association, and (2) the Court of Appeals’ decision improperly restricts the circuit court’s discretion. (Pet. 9–13). Neither of CompTrust’s arguments warrants a writ of certiorari.

⁵ Contrary to CompTrust’s assertion, *see* (Pet. 16), the Association is *not* a state agency. *See* S.C. Code Ann. § 38-31-40 (providing the Association is a “nonprofit unincorporated legal entity”).

First, the Association raised a single broad issue on appeal—whether the circuit court erred in dismissing CompTrust from the declaratory judgment action. (App. Br. 1). An appellant is not required to state every argument as a separate issue on appeal. The Association’s argument that the circuit court erred in dismissing CompTrust based on its dissolution falls squarely within the issue on appeal raised by the Association, and the Court of Appeals properly decided the issue. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (“When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is reasonably clear from an appellant’s arguments.”).

Second, the Court of Appeals did not err in holding the circuit court abused its discretion by deciding this issue with no factual record when ruling on a Rule 21 motion. (Appx. 595). Rule 21 allows a circuit court to dismiss a party that has been “misjoined,” rather than dismissing the entire action. Rule 21, SCRPC. As the Court of Appeals properly explained, a party is misjoined if it fails to satisfy any of the preconditions for permissive joinder under Rule 20(a). *See DirecTV, Inc. v. Leto*, 467 F.3d 842, 844 (3d Cir. 2006) (“Misjoinder . . . occurs when there is no common question of law or fact or when, as here, the events that give rise to the plaintiff’s claims against defendants do not stem from the same transaction.”). It cannot be disputed that the Association’s claim against CompTrust arises from the same transaction as its claim against CAGC or that common questions of law or fact exist between those claims. Accordingly, Rule 21 provides no basis for dismissing a defendant based on dissolution.

Further, the Association argued that unincorporated business trusts can be liable after dissolution as a matter of law *and* raised factual grounds that would support a finding of post-dissolution liability. Specifically, the Association argued CompTrust’s own Articles of Dissolution contemplate post-dissolution liability:

[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*

(Appx. 286–87) (emphases 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.

Similarly, the Association argued that, as a matter of law, a dissolved unincorporated business trust can still be sued. (App. Br. 10–13, Appx. 535–38; Reply Br. 4–6, Appx. 579–81; Appx. 470–71); *see also* S.C. Code Ann. § 33-53-40 (providing a business trust may sue or be sued); S.C. Code Ann. § 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. § 33-14-107(d) (providing a claim may be enforced against a dissolved corporation to the extent of its undistributed assets); *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, No. CIV.A. 2:09-3171-MBS, 2011 WL 3665335, at *4 (D.S.C. Aug. 19, 2011) (“South Carolina law permits a dissolved corporation to be sued.”); *Broom v. Marshall*, 284 S.C. 530, 536, 328 S.E.2d 639, 643 (Ct. App. 1984) (“The right of third persons to enforce obligations and contracts binding on a firm at the time of its dissolution usually continues after the termination of the partnership.”). Although the Association maintains that these principles require a finding that CompTrust can still be liable as a matter of law, the Court of Appeals did not err in holding it was premature for the circuit court to reject these grounds and dismiss CompTrust.

CompTrust does not address these arguments and does not ask this Court to decide whether it can be sued after dissolution. Instead, it argues solely that the circuit court had such broad discretion to decide the issue that no appellate court may review its decision. (Pet. 11–13). Such a procedural argument is unsupported by South Carolina law and is not a basis for this Court’s consideration. This Court should deny certiorari as to Question 1 in CompTrust’s petition.

II. The Court of Appeals properly rejected the remaining procedural arguments raised by CompTrust.

CompTrust asks this Court to grant certiorari to review this case on several additional procedural grounds. (Pet. 19–24) (discussing Questions 7 through 10 of CompTrust’s questions presented). These grounds do not satisfy the certiorari considerations provided by Rule 242(b) of the South Carolina Appellate Court Rules, and none of the grounds constitute error by the Court of Appeals.

First, CompTrust argues “[t]he Association did not present any proper argument to the Court of Appeals ‘concerning an employer’s residual liability under § 42-1-150’” (Pet. 19). CompTrust is incorrect. The Association argued both to the circuit court and the Court of Appeals that dismissal of CompTrust is premature because CompTrust may still be liable for the Transferred Claims. *See, e.g.*, (Appx. 450–51, 468–69). Specifically, in its primary brief at the Court of Appeals, the Association cited section 42-5-10 and explained, “CompTrust and its members may become liable” (App. Br. 14, Appx. 539). The Court of Appeals considered this argument and ruled in the Association’s favor. The Court of Appeals did not err in ruling on an issue that was properly presented by the Association, and this Court should deny certiorari as to Question 7 in CompTrust’s petition.⁶

⁶ The Court of Appeals’ citation to section 42-1-150 as part of this ruling appears to be a scrivener’s error. Section 42-1-150 does not apply to this case. *See* S.C. Code Ann. § 42-1-150 (defining

Second, CompTrust argues the law of the case renders the Association’s appeal untimely. CompTrust incorrectly applies the law of the case doctrine. The issue CompTrust seeks to raise is whether the circuit court’s finding that the Association failed to transmit a timely copy of its Rule 59(e) motion to the judge bars the Association from perfecting a timely appeal. (Pet. 20–22). South Carolina law is clear—the failure to comply with that requirement does not affect the time for filing a notice of appeal. *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) (“The notes to Rule 59, SCRCF, indicate that subsection (g) was added ‘to help insure the judge is promptly notified that the motion has been filed.’ There is no indication that the failure to transmit a copy of the motion to the circuit court affects the tolling provision of Rule 203(b)(1), SCACR.”). CompTrust’s attempt to distinguish *Gallagher* and use the law of the case doctrine to avoid a ruling on the merits of this appeal is mistaken. In *Gallagher*, the circuit court stated that it never received the Rule 59(e) motion and could have denied the motion on that ground alone, but it heard the motion and considered the merits anyway—just as the circuit court did in this case. *Id.* (“Although the circuit court acknowledged that it never received a copy of the motion until December 12, 2000, and ‘on this ground alone’ it could deny the motion, the circuit court went forward and considered the matters presented in Gallagher’s memorandum in support of the motion.”); (Appx. 64) (denying the Association’s motion on the merits but noting, “In addition, the Court was not served with a copy of the Association’s Motion . . . , as is required under Rule 59(g)”). Thus, *Gallagher* is not distinguishable.

Moreover, even if the Court accepts CompTrust’s arguments, the law of the case purportedly established by the circuit court’s order is different than the issue CompTrust has

“employment” for workers’ compensation purposes). The Association relied upon a similarly numbered statute, S.C. Code Ann. § 42-5-10, in support of this argument in its brief.

presented in this appeal. The unappealed ruling cited by CompTrust is that, although the Association filed its motion in a timely manner, it did not transmit a copy to the judge. The issue CompTrust raised to the Court of Appeals was whether that failure affected the time to file a notice of appeal. *Gallagher* is clear that this alleged failure does not affect the deadline to file a notice of appeal. 353 S.C. at 63, 577 S.E.2d at 219. Thus, even if CompTrust is correct that the law of the case is that the Association failed to transmit a timely copy of its motion to the judge, that ruling did not implicate any of the issues before the Court of Appeals. The Association was not required to appeal the timeliness ruling to perfect its appeal.

The case law relied upon by CompTrust is distinguishable from this case. In *Elam v. South Carolina Department of Transportation*, the court found an appeal untimely because the Rule 59(e) motion merely repeated the appellant's arguments in its motion for JNOV or a new trial. 361 S.C. 9, 16, 602 S.E.2d 772, 776 (2004). The court explained a party cannot delay its deadline to file a notice of appeal by filing successive post-trial motions raising identical issues. *Id.* at 20, 602 S.E.2d at 778. The Association filed only one Rule 59(e) motion in this case; therefore, *Elam* does not apply.

The issue in *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, was whether an email from the court with the order on appeal as an attachment constituted "written notice" sufficient to begin the running of the thirty-day deadline to file a notice of appeal. 413 S.C. 642, 643, 776 S.E.2d 575, 576 (Ct. App. 2015). There is no dispute in this case that the Association filed its notice of appeal within thirty days after receiving written notice of the denial of its Rule 59(e) motion. Therefore, *Wells Fargo* does not apply to this case. The Association filed a timely notice of appeal, and the Court of Appeals properly rejected CompTrust's attempt to bar this appeal altogether on procedural grounds. CompTrust's argument that the two-issue rule bars

consideration of the Association’s arguments fails for the same reasons—the failure to comply with Rule 59(g) does not bar appellate review as a matter of law, and the Association was not required to appeal that finding. *Gallagher*, 353 S.C. at 63, 577 S.E.2d at 219; *Jones v. State*, 382 S.C. 589, 594, 677 S.E.2d 20, 22 (2009), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018) (considering the merits of an appeal despite the appellant’s failure to comply with Rule 59(g)). Accordingly, this Court should deny certiorari as to Questions 8 and 9 in CompTrust’s petition.

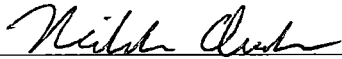
Finally, CompTrust incorrectly asserts that the Association was required to appeal the circuit court’s denial of the Association’s motion for summary judgment. (Pet. 22–24). South Carolina law is unequivocal—the denial of summary judgment is *never* appealable, even after final judgment. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003) (“[T]he denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Therefore, an order denying a motion for summary judgment is not appealable.” (quoting *Ballenger v. Bowen*, 313 S.C. 476, 477–78, 443 S.E.2d 379, 379 (1994))); *Watson v. Underwood*, 407 S.C. 443, 459 n.12, 756 S.E.2d 155, 164 n.12 (Ct. App. 2014). The fact that the Association’s summary judgment motion required the circuit court to consider a question of law does not change that rule, and this Court should not entertain CompTrust’s attempt to create a new exception to this long-standing precedent to avoid appellate consideration of the merits. This Court should deny certiorari as to Question 10 in CompTrust’s petition.

CONCLUSION

None of the procedural arguments raised by CompTrust fall within the categories of cases that this Court normally considers on certiorari, and CompTrust has failed to establish special and

important reasons that would justify this Court's consideration. See Rule 242(b), SCACR. The Court of Appeals correctly held the circuit court erred by dismissing CompTrust, and this Court should deny CompTrust's petition for writ of certiorari.

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Columbia, South Carolina

January 31, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM RICHLAND COUNTY JAN 31 2019
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge S.C. SUPREME COURT

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.

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):

Pleadings:

Return to Petition for Certiorari

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Jan 31, 2019