**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

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|---|---|
| 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. |

# REPLY TO RETURN TO PETITION FOR CERTIORARI

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While believing, most respectfully, that the merit of its petition for a writ of certiorari is already adequately demonstrated therein, in further support of the said petition, CompTrust[1] makes the following brief points in reply to the Association's return:

## POINTS IN REPLY

### 1. The Association did not assert a right to declaratory relief against CompTrust.

Arguing that it did assert a right to declaratory relief against CompTrust, the Association makes this assertion:

> If the [Transferred C]laims are retroactive insurance or are not covered claims, the circuit court must determine whether CompTrust remains liable for the [Transferred C]laims 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.

(Ret. p. 10.) Simply put, this notion is wholly absent from the Association's complaint for declaratory judgment, the entirety of the prayer for relief therein reading as follows:

> WHEREFORE, the Association respectfully prays that the Court declare that it has no statutory obligation for any claims arising out of the Self-Insured Coverage because such claims are not "covered claims" as defined

[1] This reply uses the same shorthand references as the petition (such as the reference "CompTrust," which, of course, refers to Petitioner CompTrustAGC of South Carolina a/k/a CompTrust AGC of South Carolina, Inc.).

> by the Act; CACG 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. 101.)

Indeed, at the hearing on CompTrust's motion to dismiss and the Association's motion for summary judgment, the Association, by and through its counsel, expressly clarified that its claim did not raise a challenge to the transfer of liability from CompTrust to CAGC via the LPT Agreement (i.e., "the original transaction," "whether it was a novation," and "whether it was done in bad faith"), rather, it merely raised a question of statutory construction about whether *it*—the Association itself, no other party—was liable for the Transferred Claims:

> [COUNSEL FOR THE ASSOCIATION]: Just very briefly, Your Honor, *just to make sure we're really clear about this*. We are *not* reading the statute to prevent loss portfolio transfers or assumption agreements or anything like that. We're *not* here today contesting the original transaction. We're *not* contesting today whether it was a novation. We're *not* contesting whether it was done in bad faith. We're certainly not arguing that the claimants did anything wrong. *None of those factual issues matter to our argument.*
>
> The *only*, the *only* argument we put forward here is exactly what was just brought up, which is that the *statute* prohibits this kind of liability *for the Association.*

(R. p. 471 (emphasis added).)

**2. Point 1 (above) also underscores the problem with the Court of Appeals' reversal of CompTrust's dismissal on account of the Association's supposed statutory direction and authorization to investigate the LPT Agreement.**

As illustrated in Point 1 (above), the declaratory judgment claim that the Association actually pleaded—and from which CompTrust was actually dismissed—sought only the answer to a question of statutory construction about whether the Association itself was liable for the Transferred Claims, no more. It did not include any challenge to the validity of the transfer of liability from CompTrust to CAGC via the LPT Agreement.

And while the Association's counsel did suggest, at the hearing before the circuit court, that the LTP Agreement was not an arms-length transaction, this was not, as the Association's return would have the Court believe, an argument against CompTrust's motion to dismiss. (Ret. P. 11 ("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.").) It must be remembered that, as noted above, and although the Association's return refers to it as merely "the hearing on CompTrust's motion to dismiss," it was not only that: *it was also the hearing on the Association's own motion for summary judgment*, i.e., it was also the hearing at which the Association itself appeared before the circuit court and affirmatively took the position that no further discovery was necessary and the entirety of the matter that was actually

raised by its complaint was then ripe for determination as a matter of law. Its counsel's statement about the LPT Agreement not being an arms-length transaction was made in the context of argument not against CompTrust's dismissal but for summary judgment in favor of the Association, and even then, the Association's counsel made clear that this point was not material to the Association's claim for declaratory judgment.

> THE COURT: You say it was not an arms length?
>
> [COUNSEL FOR THE ASSOCIATION]: It was not. That -- it is clearly not an arms-length transaction. The insurer was set up by the trade association of self-insurers. It's, it's -- I'm not saying it's bad faith. I'm not saying it's fraudulent because we don't have the information in the record before the court to make that statement, and I am saying it's not an arms-length transaction.
>
> I am saying that in this scenario that the -- that CompTrust and its members continue to be able to exert pressure and control over the insurance company through its trade association and, and other means. So -- and from an equity standpoint, *to the extent that matters*, it's certainly appropriate to have CompTrust responsible for this and have to deal with the claims.
>
> *In the end, though, Your Honor, you really don't have to get into all that because the legislature already did this for us. The legislature's already decided that there wasn't going to be a self-insurer association set up. The legislature's already decided that people can do these LPT agreements, but the Guaranty Association is not responsible for the claims. The legislature's already done it for us, so we don't have to go into all of that. They've told us we don't have to do all this discovery on*

> *whether it was fraudulent or not fraudulent or whether it's a novation or not. It said simply if the claims exist at the time of the transfer, the Association is not responsible. It's no more complicated than that.*

(R. pp. 474:1–475:3 (emphasis added).)

**3. The Association's declaratory judgment claim does not actually include any question of CompTrust's liability—and CompTrust does not argue that the circuit court's discretion is beyond appellate review.**

The Association's return states, (1) "CompTrust does not address [its arguments regarding CompTrust's post-dissolution liability] and does not ask this Court to decide whether it can be sued after dissolution," and (2) "[i]nstead, . . . argues solely that the circuit court had such broad discretion to decide the issue that no appellate court may review its decision." (Ret. P. 17.) The first statement is a red herring: as discussed above and in CompTrust's petition, the Association's claim does not actually include any question of CompTrust's liability. The second statement is a mischaracterization of CompTrust's argument.

Regarding this second statement, it appears the Association is referring to Argument 1(b) in CompTrust's petition. The premise of this argument is not, as the Association asserts, that the circuit court's discretion is unreviewable, but rather, that the Subject Decision—in finding that the circuit court did not have "discretion to answer [a] question of first impression with no factual record while

ruling on a Rule 21 motion"[2]—had erroneously stripped the circuit court of any discretion to determine in the first place whether a novel issue of law is proper for decision without development of the record. The authority the Court of Appeals cited in support of this finding, *Evans v. State*, 344 S.C. 60, 543 S.E.2d 547 (2001), expressly recognizes that, where issues of legal interpretation, not of fact, are involved, and development of the record will not aid in the resolution of those issues, "it is proper to decide even novel issues on a motion to dismiss for failure to state a claim." *Id.* at 68, 543 S.E.2d at 551. According to the Subject Decision, however, this can never happen, because the circuit court does not even have the discretion to make the threshold determination that no development of the record is needed. CompTrust is not saying that the circuit court's exercise of this discretion can never be reviewed on appeal, but it is saying that the Court of Appeals erred in taking this discretion away from the circuit court altogether.

**4. The Association misapprehends CompTrust's argument about the effect of the law of the case doctrine on the circuit court's unappealed ruling regarding denial of the Association's motion for reconsideration.**

As explained in CompTrust's petition, the law of the case doctrine operates without regard to whether the law that has been established for a given case is right or wrong. Accordingly, like the Court of Appeals' citation to it in the Subject Decision, the Association's citation in its return to *Gallagher v. Evert*, 353 S.C. 59,

[2] (App. p. 595.)

63, 577 S.E.2d 217, 219 (Ct. App. 2002), is misplaced.

As an "addition[al]" basis for denying the Association's motion for reconsideration, the circuit court found that the Association had failed to "serve" its motion on the court as required by Rule 59(g), SCRCP. (R. p. 60.) Having not appealed this ruling, it is the law of this particular case—even if not a correct statement of South Carolina law—that Rule 59(g) required "service" of the motion on the circuit court, and the Association did not meet this requirement. As explained in CompTrust's petition, the failure to "serve" a motion for reconsideration as required by Rule 59 has rendered such motions ineffective to stay the time for serving a notice of appeal under Rule 203, SCACR. Applying that logic to this case, against the backdrop of what must be conclusively deemed the law of the case, the timeliness of the Association's notice of appeal is called into question because the notice was not timely if its improperly "served" motion for reconsideration did not stay the time for that notice to be served. And, of course, if the Association's notice of appeal was not timely served, the Court of Appeals lacked appellate jurisdiction and the Subject Decision is void.

**5. Regarding CompTrust's argument about the Association's failure to appeal the circuit court's ruling that the Transferred Claims were "covered claims" the Association was responsible for paying, the Association does not refute CompTrust's points about established South Carolina law providing that it is the substance and effect, not labeling, that controls the classification of an order as appealable or not.**

In response to this argument, the Association simply asserts that CompTrust

asks this Court to create a new exception to the rule about the denial of a motion for summary judgment not being appealable. (*See* Ret. p. 20.) Of course, CompTrust itself acknowledged this rule and then proceeded to argue why its application is not called for in this case on account of other well established South Carolina law, namely, that providing that it is substance and effect, not labeling, that controls the classification of order as appealable or not. Nowhere in the Association's return is this argument refuted.

## CONCLUSION

For the foregoing reasons (together with those already advanced in its petition), CompTrust asks this Honorable Court to review the Subject Decision via issuance of a writ of certiorari to the Court of Appeals, to reverse the Subject Decision, and to affirm the circuit court's dismissal of CompTrust.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Dated: 2/11/19

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Petitioner, CompTrustAGC of South Carolina a/k/a CompTrustAGC of South Carolina, Inc., hereby certify that the foregoing **REPLY TO RETURN TO PETITION FOR CERTIORARI** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on February 11, 2019, properly posted for delivery to the following addressees:

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