

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

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SC Court of Appeals

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2009-CP-24-180

Adam Hill, Jr.,.....Appellant,

v.

Henrietta Norman and Primerica Life Insurance Company Defendants,

Of Whom Henrietta Norman is..... Respondent.

FINAL BRIEF OF APPELLANT

October 16, 2012.

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TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF CASES AND AUTHORITIES2 - 3

ISSUES ON APPEAL4

OVERVIEW OF THE CASE5

PROCEDURAL HISTORY AND FACTS OF THE CASE6 - 10

ARGUMENT10 - 18

I. The Circuit Court erred in granting summary judgment based upon
the claim file submitted by Priamerica Life Insurance Company
and an Affidavit that was submitted as a pretext9 - 10

 A. The Priamerica claim file displays numerous instances indicating
 the company was negligent in its record keeping10 - 13

 B. It is evident from the documentation in the Priamercia claim
 file the company engages in questionable business practices.....13 - 15

II. The Circuit Court erred in its failure to consider the sworn affidavit
submitted by the decedent's Pastor.....16

CONCLUSION.....18

CERTIFICATE OF COUNSEL IN FINAL BRIEF19

TABLE OF CASES AND AUTHORITES

Cases

Anderson v. Liberty Lobby, Inc.,
242, 248, 106 S. Ct. 2505, 2510 (1986).....16

Balloon Plantation, Inc. v. Head Ballons, Inc.,
303 S.C. 152, 299 S.E.2d 439 (Ct App. 1990).....13

Balloon Plantation,
303 S.C. at 155, 399 S.E.2d at 44113

Bayle v. South Carolina Dep’t of Transp.,
344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001).....11

Brown v. Budz,
398 F.3d 904, 908-909 (7th Cir. 2005).....10

Fields v. Regional Med. Ctr. Orangeburg,
354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003).....13

Glasscock, Inc. v. United States Fld. & Guar. Co.,
348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).....11

In re Robert M.,
294 S.C. 69, 362 S.E.2d 639 (1987)13

Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers,
355 S.C. 104, 584 S.E.2d 375 (2003)11

Loney v. Primercia Life Insurance Company,
231 Ga App. 815, 499 S.E.2d 385 (1998).....14

Middleborough Horizontal Prop Regime Council V. Montedison,
320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).....11

Moriarity v. Garden Sanctuary Church of God,
341 S.C. 320, 534 S.E.2d 672 (2000)11

Mosteller v. County of Lexington,
336 S.C. 360, 520 S.E.2d 620 (1999)11

Pittman v. Atlantic Realty Co.,
754 A.2d 1030, 1042 (Md 2000)15

Cases continued

Redwend Ltd. P’ships,
354 S.C. at 468, 581 S.E.2d at 50111

Samples v. Mitchell,
329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997).....13

State v. Mansfield,
343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000).....13

State v. Smith,
276 S.C. 494, 280 S.E.2d 200 (1981)13

Stewart v. State Farm Mut. Auto. Ins. Co.,
341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000).....11

Vermeer Carolina’s Inc. v. Wood/Chuck Chipper Corp.,
336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).....11

Rules

Federal Rule 12(b)(6).....10

Rule 30(h)(1), SCRCPP8

Rule 38(a)(b) SCRCPP6

Rule 59, SCRCPP.....5

Rule 406, SCRE14

Books

Blacks Legal Dictionary16

ISSUES ON APPEAL

- I. Whether the Circuit Court committed an error of law by granting summary judgment to Defendant Norman based upon flawed evidence submitted by Priamerica
- II. Whether the Circuit Court acted prematurely in granting summary judgment to Defendant Norman.
- III. Whether the Circuit Court committed an error of law in its failure to address the sworn affidavit submitted by the decedent's Pastor, Clara O. Barnes
- IV. Whether a jury trial as a right of law should be granted to Appellant Hill.

OVERVIEW OF THE CASE

This appeal is the second appeal in this case before the Court. In the first appeal, the Court remanded the matter back to the trial court based upon a consent motion between Respondent Norman's attorney of record (Edward S. McCallum, III) and Appellant Hill's attorney of record (Joel M. Bondurant). See Consent Motion. The consent motion requested the Court to vacate the trial court's summary judgment order at issue in the appeal and remand the case for further proceedings. In the first appeal the Appellant's Initial Brief argued that summary judgment was inappropriately granted insofar as the affidavit submitted in support of summary judgment was flawed in a few regards (i.e., was not based on personal knowledge, did not contain admissible information, did not satisfy the best evidence rule, etc.). The Court in its Order dated April 12, 2011 deemed it more appropriate to remand the matter back to the trial court for a hearing on the motion to vacate. The Court in its Order also stipulated the Appellant should provide a status report within thirty days and every thirty days thereafter until the matter was resolved. On March 22, 2012 Appellant Hill's attorney of record (Joel M. Bondurant) petitioned the Court to be relieved as counsel and that petition was granted by the Court's order dated May 12, 2012.

On remand, the Circuit court conducted a bench trial on January 9, 2012 and permitted Priamerica Insurance Company to submit a corrected affidavit in support of Defendant's Norman's Motion for Summary Judgment. The Circuit court granted Defendant Norman's 2nd Motion for Summary Judgment and denied Appellant Hill's SCRCP Rule 59 Motion for Reconsideration.

PROCEDURAL HISTORY AND FACTS OF THE CASE

On September 9, 2008, Helen Rebecca Smith passed away at her residence. At the time of her passing, Ms. Smith was covered by a life insurance policy issued by Primerica Insurance Company in the amount of twenty thousand dollars (\$20,000.00). Approximately nine thousand dollars (\$9,000.00) of the proceeds were used to pay for the decedent's funeral, and Primerica paid the balance of the proceeds to the decedent's cousin Henrietta Norman, who is the Respondent in this action. The decedent's brother, Adam Hill, Jr. is the appellant in this action. On February 4, 2009 the Appellant initiated a lawsuit by filing a complaint with the Court of Common Pleas in Greenwood, South Carolina. **(See R. pp. 141 thru 146)**. In accordance with SCRCP Rule 38(a)(b) the complaint requested a jury trial to determine whether the Respondent, Henrietta Norman, may have fraudulently acquired the proceeds from the insurance policy and to determine the true beneficiary under the Primerica Life Insurance Policy. Appellant Hill filed this complaint as a pro se litigant because he was unable to retain the services of counsel in order to meet the guidelines established by the statute of limitations for the case. The insurance policy of the decedent was never located and the respondent, Henrietta Norman, alleges to not have known she was the beneficiary of the policy. **(See R. p. 120, lines 1 thru 9 & R. p. 128, lines 18 thru 21)**.

Plaintiff's Complaint alleged that Defendant Norman engaged in fraudulent and deceptive acts to alter the decedent's life insurance policy so that Defendant

Norman was the named beneficiary. Defendant Norman answered the Complaint, denying the material allegations and pleading a counterclaim against Plaintiff. (See R. pp. 149 thru 154).

On June 27, 2009 Appellant Hill retained Attorney Heather Hite Stone to represent him and act on his behalf before the Circuit Court. On November 16, 2009 the attorney client relationship with attorney Stone began to deteriorate after she began to arrange for a video conference deposition for Priamerica Life Insurance Company. On March 12, 2010 Priamerica Life Insurance Company submitted a copy of their motion for Summary Judgment to Attorney Stone. Appellant Hill discussed the motion with Attorney Stone and agreed to dismiss them from the civil suit without prejudice. On March 23, 2010 Attorney Stone informed Appellant Hill that the Video Conference for Priamerica was scheduled to take place on April 7, 2010 and that he was to go to Birmingham, Alabama and she and Attorney McCallum would go to Greenville, South Carolina for the video conference deposition. Appellant Hill asked Attorney Stone why he should be required to be deposed when he had agreed to dismiss Priamerica from the civil suit. Appellant Hill pointed out to Attorney Stone that Attorney McCallum had not submitted the request to conduct the video conference deposition and he was not representing Priamerica. Appellant Hill informed Attorney Stone that Attorney McCallum had not requested or provided him with written notice of a deposition on behalf of his client, Henrietta Norman. The Hood Law Firm requested the video conference deposition on behalf of their client, Primercia. Appellant Hill also informed Attorney Stone he disagreed that a video conference deposition was necessary because this matter was centered upon an issue

involving a \$20,000.00 (twenty thousand dollars) life insurance policy. Appellant Hill pointed out to Attorney Stone the amount of this controversy was less than \$100,000.00 (one hundred thousand dollars) and therefore it did not comply with the provisions of SCRCP Rule 30(h)(1).

On May 11, 2010 Defendant Norman filed the first motion for summary judgment and a hearing was conducted on July 12, 2010 before the Circuit Court (Judge Eugene Griffith presiding). At that hearing Defendant Norman's counsel submitted a large file to the court which was purported to be the Priamerica claim file. During the hearing Plaintiff Hill's trial counsel (Heather Hite Stone) objected to the admission of the document because it did not comply with the South Carolina Rules of Evidence because none of it had not been properly sworn by affidavit (**See R. p 59, lines 18 thru 25 & R. p. 60 , lines 1 thru 8**). Presiding Judge Griffith did not render a decision at the July 12th hearing. Instead he indicated he would allow plaintiff Hill's counsel to review the claim file and submit additional information. (**See R. p. 67, lines 20 thru 25 & R. p 68, lines 1 thru 7**).

On July 14, 2010 Plaintiff Hill submitted a Supplemental Response to Defendant Norman's Request for Summary Judgment. (**See R. pp. 37 thru 40**). In this Response Plaintiff Hill pointed out to the Court that the contents of the claim file were inconsistent with statements in Defendant Norman's sworn deposition. On July 20, 2010, Defendant Norman filed an Affidavit submitted by Priamerica Life Insurance Company. On September 17, 2010 the Circuit Court issued an Order granting Defendant Norman's motion for summary judgment. (**See R. pp. 4 thru 10**). On September 19, 2010 Plaintiff Hill filed a motion to strike the affidavit

submitted by Priamerica in support of Defendant Norman's Motion for Summary Judgment. **(See R. pp. 41 thru 42)**. On September 30, 2010 Attorney Stone filed a Motion to Reconsider. On October 7, 2012 the Court issued an Order denying the Motion to Reconsider. **(See R. pp. 11 thru 13)**.

In September 2010 Appellant Hill retained the services of Attorney Joel M. Bondurant to represent him on the appeal of the case. On November 9, 2010 Attorney Bondurant filled the Notice of Appeal on this matter. On November 23, 2010 Attorney Stone petitioned the appellate court to be relieved as counsel in the appeal and informed the Court that Joel M. Bondurant was handling the appeal.

On April 5, 2011 Attorney Bondurant submitted a Consent Motion to Vacate Appealed Order and Remand Case for Further Proceedings. Attorney Bondurant and opposing counsel for Defendant, Henrietta Norman (Attorney McCallum) entered into the consent agreement without the knowledge and consent of Appellant Hill (his client). Attorney Bondurant failed to provide Appellant Hill (his client) with a copy of the Order remanding the case back to the trial court. On October 6, 2011 Attorney Stone petition the Circuit (trial) court to be relieved as counsel for Plaintiff Hill. On October 24, 2011 the Circuit court issued an Order granting Attorney Stone's Petition and scheduled a hearing for January 9, 2012 for Defendant Norman's second motion for summary judgment.

On January 12, 2012 the Circuit Court issued an Order granting Defendant Norman's second motion for summary judgment based upon the submission of a corrected affidavit from Primercia. **(See R. pp. 16 thru 21)**. On January 24, 2012

Plaintiff Hill filed a motion for the Court to reconsider the order of January 12. (See R. pp. 45 thru 51). On March 22, 2012 Attorney Bondurant filed a Petition with the Appellate court requesting to be relieved as counsel. On May 11, 2012 the Appellate Court issued an Order granting Attorney Bondurant's petition. On May 17, 2012 Appellant Hill submitted a motion to the Circuit (trial) court to add his spouse, Wynetta Hill, as an additional plaintiff on the case. (See R. p. 52). On June 5, 2012 a hearing was conducted in the Greenwood County Court of Common pleas to consider Appellant Hill's Motion for Reconsideration and the Motion to add an additional Plaintiff. On June 5, 2012 the Circuit Court issued an Order denying Appellant Hill's motions. On June 15, 2012 Appellant Hill filed a Notice of Appeal of the Circuit Court Order dated June 5.

On June 15, 2012 Appellant Hill contacted the court reporter and requested a copy of the transcript of the hearing held on June 5. On August 9, 2012 Appellant Hill received a copy of the transcript (hereinafter referred to as "Transcript2"). Transcript2 was seriously flawed with errors and omissions. (See R. pp. 170 thru 171).

ARGUMENT

"The Court should not grant a motion to dismiss unless it appears beyond doubt that the plaintiff cannot prove his claim under any set of facts consistent with the complaint. Brown v. Budz, 398 F.3d 904, 908-909 (7th Cir. 2005). '[I]f it is possible to hypothesize a set of facts, consistent with the complaint, that would entitle the plaintiff to relief, dismissal under Rule 12(b)(6) is inappropriate.'

Summary Judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Moriarity v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Mosteller v. County of Lexington, 336 S.C. 360, 520 S.E.2d 620 (1999); Redwend Ltd. P'ship, 354 S.C. at 468, 581 S.E.2d at 501; Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001); Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999); Middleborough Horizontal Prop. Regime Council v. Montedison, 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995).

Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Redwend Ltd. P'ship, 354 S.C. at 468, 581 S.E.2d at 501; Glasscock, Inc. v. United States Fld. & Guar. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001); Stewart v. State Farm Mut. Auto. Ins. Co., 341 S.C. 143, 533 S.E.2d 597 (Ct. App. 2000); see also Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to the conclusions to be drawn therefrom).

On June 5, 2012 during the hearing of Respondent Norman's second Motion for Summary Judgment Appellant Hill's wife, Wynetta G. Hill, was permitted to testify. She pointed out to the Court facts documented within the claim file submitted by Primercia in support of Defendant Norman's motion for summary judgment clearly indicates their records are in such disarray that even if the decedent had submitted a change of beneficiary, the Company, more likely than not, misplaced it or

tossed it aside. (See R. pp. 161 thru 169). It was pointed out to the Court that Priamerica's claim file contained an application indicating the deceased had designated Henrietta Norman as her beneficiary. The application only contained the name printed name of Henrietta Norman as the primary beneficiary. The application did not contain any other information to confirm the identity of Henrietta Norman (i.e., her social security number, phone number, date of birth or mailing address). (See R. p. 160). With specificity in her testimony on June 5 Appellant Hill's wife informed the court of the following facts:

- According to the contents of the claim file it took Primerica approximately 4 days to determine and notify the funeral home who was the named beneficiary of the policy. The decedent, Helen R. Smith, was a licensed agent who worked for Priamerica and knew how to properly document the identity of a beneficiary. The decedent knew the importance of providing correct and accurate information to identify a beneficiary
- According to Respondent Norman's sworn deposition she telephoned Priamerica Insurance Company on September 12, 2008. The phone call is not annotated in the claim file. A call Respondent Norman indicates she made after receiving notification from the funeral home that she had been identified as the beneficiary of Ms. Smith's insurance policy. It is questionable whether or not Respondent Norman made the phone call as indicated; because according to the documented facts in the claim file Respondent Norman called Priamerica on September 24, 2008 and provided her address. A reasonable person would wonder what prompted Respondent Norman to place this call on September 24 when her address and some form of identification should have been provided to Primerica on September 12 when she supposedly made the call at the funeral home
- According to the documented facts in the claim file Priamerica mailed two letters on September 19, 2008. There is a letter addressed to the beneficiary, Mrs. Henrietta Norman and a letter to Mr. James Arthur Richardson. Both of these letters have the address of the deceased policy holder, Ms. Helen R. Smith. There a three instances when the correct address of the beneficiary should have been verified and recorded in the company's records – the first instance was when the policy holder or insured, Helen R. Smith, designated her as beneficiary, the second instance was when Mrs. Norman made the alleged phone call on September 12th and the third instance would have been when the funeral

home employee faxed the assignment of claims back to Priamerica. This assignment of claims had Respondent Normans correct address.

- According to the documented facts in the claim file Priamerica received two inquires or phone calls from the deceased, Helen R. Smith, after the pronouncement of her death. According to the official death certificate which was issued on September 23, 2008, the insured, Helen R. Smith, died at 09:45 am on September 9, 2008. There is phone call documented as have been received on September 9, 2008 at 03:32 pm and a phone call documented as having been received on September 24, 2009 at 04:19 pm. Both of these phone calls according to the claim file were from the insured, Helen R. Smith, and they both had the insured's home phone number.

After presenting the above facts to the trial Court Appellant Hill's wife asked the Court to consider the plausibility of the Company misplacing a change of beneficiary. (See R. p. 80, lines 11 thru 22).

I. The Circuit Court committed an error of law by granting summary judgment to Defendant Norman based upon flawed evidence submitted by Priamerica.

A circuit court's failure to exercise discretion is itself an abuse of discretion. In re Robert M., 294 S.C. 69, 362 S.E. 2d 639 (1987); State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981); Fields v. Regional Med. Ctr. Orangeburg, 354 S.C. 445, 581 S.E. 2d 489 (Ct. App. 2003); State v. Mansfield, 343 S. C. 66, 538 S.E.2d 257 (Ct. App. 2000); Balloon Plantation, Inc. V. Head Balloons, Inc., 303 S. C. 152, 299 S.E.2d 439 (Ct. App. 1990). See Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App 1997) ("When the trial judge is vested with discretion, but his ruling reveals no discretion, was in fact, exercised, an error of law has occurred."); Balloon Plantation, 303 S.C. at 155, 399 S.E.2d at 441 ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.").

The documented facts in the Priamerica claim file would lead a reasonable person to conclude that the Company may have misplaced any change of beneficiary submitted by the decedent. A reasonable person would question why Priamerica submitted an affidavit after it was pointed out to the Court the company's record keeping was poor and the documented facts in the records were inconsistent with statements in Defendant Norman's sworn deposition.

In Appellant Hill's Motion for Reconsideration dated January 24, 2012, he pointed out to the Court that Priamerica has a reputation of deceptive and fraudulent activity as evidenced by numerous lawsuits that have been filed against this company. The most notable of which is Loney v. Priamerica Life Insurance Company, 231 Ga App, 815, 499 S.E.2d 385 (1998). Referencing SCRE Rule 406 Appellant Hill's wife in her testimony of June 5, 2012 requested the court to consider the habit of Priamerica in regards to its credibility.

II. The Circuit Court acted prematurely in granting summary judgment to Defendant Norman

The Circuit Court relied mostly upon the sworn affidavit and claim file submitted by Priamerica to grant Defendant Norman's motion for summary judgment. The Court indicated a sworn affidavit from a corporate representative is uncontradicted. Even though it was pointed out to the Court the affidavit submitted by the corporate representative may have been a sham affidavit; the Court insisted Priamerica had no reason to not pay the proceeds to the beneficiary. **(See R. p. 79, lines 18 thru 22)**. In Appellant Hill's motion for reconsideration dated January 24, 2012 he discloses to the Court the flawed affidavit was submitted to the Court on July

20, 2010 and the corrected affidavit was submitted on July 27, 2010. The corrected affidavit was submitted after the errors were revealed to the affiant and the mistakes were eradicated.

In distinguishing between a sham affidavit and a correcting or clarifying affidavit, the following considerations provide guidance: (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance of the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment the second affidavit is submitted. See Pittman v. Atlantic Realty Co., 754 A.2d 1030, 1042 (Md 2000).

In the affidavit submitted by the Primerica's corporate representative she states: "I am employed by Primerica Life Insurance Company ("Primerica Line") as Vice President and Assistant General Counsel." Employing the guidelines listed to distinguish a sham affidavit from a correcting or clarifying affidavit the Court did not consider the following factors: (1) as assistant general counsel for the company the affiant had prior knowledge of the standards required to submit an affidavit in support of a summary judgment; (2) the court did not question the degree of variation between the initial affidavit and the corrected affidavit; (3) the court did not entertain when, in relation to Defendant Norman's motion for summary judgment the affidavit was submitted.

The issue was not the payment of the proceeds to the beneficiary; but, whether the company may have mistakenly paid the proceeds to the wrong beneficiary. A beneficiary who had perhaps somehow deceived the insurer to change her designation of beneficiary. Further fact finding may have revealed that Primercia did misplace the change of beneficiary.

III. The Circuit Court committed an error of law in its failure to address the sworn affidavit submitted by the decedent's Pastor

The Court erred in overlooking the sworn testimony of the decedent's Pastor, Clara O. Barnes, because it is admissible documentary evidence creating a genuine issue of material fact regarding the issues of this case. According to Black's legal dictionary a **material fact** is a fact that would be to a reasonable person germane to the decision to be made as distinguished from an insignificant, trivial or unimportant detail. To be material, a disputed fact must be one that might "affect the outcome of the suit under governing law." Anderson v. Liberty Lobby, Inc., 242, 248, 106 S. Ct. 2505, 2510 (1986). Repeatedly Defendant Norman denies having asked the decedent for a power of attorney. Whether or not Defendant Norman asked for a power of attorney is a disputable issue.

As supporting evidence to corroborate Pastor Barnes statement, Appellant Hill, motioned the Court to allow the admittance of a portion of the decedent's medical records. That motion was denied. (See R. pp. 26 thru 30 & R. p. 3).

IV. By right of law Appellant Hill should be granted a jury trial

In accordance with SCRCR Rule 38(a)(b) Appellant Hill has the right to a jury trial. There are genuine issues of material fact involved in this case which

should be decided by a jury. It is a genuine issue of material fact there are inconsistencies in the Defendant Norman's sworn deposition. In the deposition she indicates not knowing she was the beneficiary; yet in the same deposition she indicates the decedent told her one of them (the brother or the son) was not going to do right. **(See R. p. 132, lines 12 thru 25 & R. p. 133, lines 11 thru 25).**

Defendant Norman indicates she had no prior knowledge she was the beneficiary of the insurance policy and stunned when notified by the funeral home she was the beneficiary. Yet Defendant Norman petitioned the Probate Court and convinced the Probate Court the decedent left her the proceeds of the life insurance policy as a gift. As a result of having convinced the Probate Court the insurance proceeds were left to her as a gift and she was entitled to a reimbursement of the monies spent for the burial, Appellant Hill was forced to relinquish his duty as executor of his sister's estate and the property placed for sale to sale to satisfy Defendant Norman's claim. The estate of Helen R. Smith was cash poor. **(See R. pp. 172 thru 173 & R. pp. 24 thru 25).**

There are inconsistencies in Priamerica's claim file and Defendant Norman's sworn deposition which create a genuine issue of material fact. Based upon the documents submitted by Priamerica in support of Defendant Norman's Motion for Summary Judgment it is questionable whether Defendant Norman was ever properly identified as the rightful beneficiary of the insurance policy.

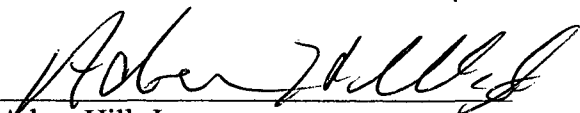
There is a genuine issue of material fact as to whether the funeral home agent, a third party, had the authority to contact Defendant Norman and inform her she was the beneficiary of the decedent's insurance policy.

CONCLUSION

Plaintiff Hill filed this lawsuit to have questions answered about the proper beneficiary of his sister's life insurance policy. In its reliance upon documents submitted by Primercia Life Insurance Company the trial Court failed to consider the possibility Defendant Norman was not the intended beneficiary as bequeathed by his sister. The trial Court refused to consider admissible evidence of the decedent's Pastor. The trial Court was wrong in attempting to rely upon documents submitted by Primercia to answer the question at issue in this matter. That question still remains and for which Plaintiff seeks closure is "Who is the rightful beneficiary of his sister's insurance policy?" Accordingly Plaintiff Hill respectfully requests that this Court reverse the Circuit Court's Order and remand the case for further fact finding. Plaintiff Hill also requests the Court to permit a change of venue of this case if it is remanded for further discovery.

Respectfully submitted,

October 16, 2012


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
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Eugene C. Griffith, Jr., Circuit Court Judge

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Henrietta Norman and Primerica Life Insurance Company Defendants,

Of Whom Henrietta Norman is..... Respondent.

CERTIFICATE OF COUNSEL IN FINAL BRIEF

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 16, 2012.


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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellate on Henrietta Norman by depositing a copy of it in the United States mail, postage prepaid, on October 16, 2012, addressed to her attorney of record Edward S. McCallum, III, 340A Oak & Main Street, P. O. Box 148, Greenwood, SC 29648.

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