THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge
(Common Pleas Case No. 2017-CP-40-01758)

Appellate Case No. 2019-000906

TERRI L. JOHNSON,

Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in granting summary judgment on Appellant's claim for breach of contract (Count I), where genuine issues of material fact existed and/or Respondent-Defendant State Farm Mutual Automobile Insurance Company ("State Farm") was not entitled to judgment as a matter of law?

2. Did the circuit court err in granting summary judgment on Appellant's claims for bad-faith claims handling (Counts II-III) where genuine issues of material fact existed and/or Respondent-Defendant State Farm was not entitled to judgment as a matter of law?

STATEMENT OF THE CASE

On March 23, 2017, Appellant Terri L. Johnson filed a summons and complaint against State Farm Mutual Automobile Insurance Company ("State Farm"), which she twice amended to ultimately include four counts with a jury demand. [Second Amended Compl.]. Count I alleged that State Farm had breached its insurance contract by failing to pay all benefits due to her pursuant to her automobile insurance policy. [*Id.*]. Count II alleged that State Farm's breach was done in common-law bad faith. [*Id.*]. Count III alleged statutory bad faith. [*Id.*]. Count IV alleged negligent misrepresentation. [*Id.*].

State Farm's answer denied liability and damages and included as affirmative defenses that the automobile insurance policy at issue had been cancelled at the time of the accident or, alternatively, was void for lack of insurance interest. [Ans. to Second Amended Compl.].

On May 7, 2019, the Court of Common Pleas entered a formal order granting State Farm summary judgment on all claims. [5/7/19 MSJ Order]. At the time of the hearing on the motion for summary judgment, Ms. Johnson was proceeding *pro se*. [*Id.*].

Ms. Johnson filed and served a notice of appeal on May 28, 2019. [Notice of Appeal & Proof of Service].

STATEMENT OF ADDITIONAL FACTS

I. The Parties' Stipulations of Fact

Below, the parties stipulated to the following facts:

1. As of January 5, 2014, Plaintiff and her husband, Stephen Johnson, insured three vehicles with State Farm under three different automobile insurance policies: a 2004 Buick Rainier (the "Buick") under Policy Number 087 5772-F18-40G (the "Buick Policy"); a 2002 Toyota Tundra (the "Tundra") under Policy Number 0875-773-40E (the "Tundra Policy"); and a 2005 Toyota Scion (the "Scion") under Policy Number 454 3308-A03-40 (the "Scion Policy"), attached hereto as **Exhibit 1**.

2. As of January 5, 2014, Stephen Johnson was the sole owner of the Scion, and the Scion was financed by Stephen Johnson through Wells Fargo Dealer Services ("Wells Fargo") and, as a result, Wells Fargo held a lien on the Scion.

3. As of January 5, 2014, Plaintiff and Stephen Johnson were enrolled in the State Farm Payment Plan. As shown in the billing and payment history and breakdowns, attached hereto as **Exhibit 2**, as of January 2014, a single monthly payment for the premiums for the Buick Policy, Tundra Policy, and Scion Policy, as well as the premiums for Plaintiff's and Stephen Johnson's other insurance policies with State Farm, was regularly scheduled to automatically draft from a banking account designated by the Plaintiff and Stephen Johnson on the 10th of each month or the first business day thereafter, with that regularly scheduled payment being billed by State Farm Payment Plan on the 20th of the preceding month or the first business day thereafter. See Exhibit 2.

4. On January 6, 2014, Stephen Johnson was involved in an automobile accident (the "January 6 accident") while driving the Scion.

5. The Scion was towed from the scene of the January 6 accident to Ballentine Collision Repair and was never driven by Stephen Johnson or Plaintiff again.

6. As shown on the billing and payment history and breakdowns, on January 10, 2014 the regularly scheduled payment of premiums was automatically drafted from Plaintiff and Stephen Johnson's bank account as billed by State Farm Payment Plan on December 20, 2013. *See* Exhibit 2. The total payment drafted on January 10, 2014 was $284.51, and included the $57.26 premium for the Scion Policy. *See id.*

7. On January 16, 2014 Stephen Johnson authorized Ballentine Collision Repair to release possession of the Scion to State Farm.

8. State Farm, through its salvage vendor, took physical possession of the Scion on January 17, 2014 and then declared the vehicle a total loss.

9. As shown on the billing and payment history and breakdowns, on January 22, 2014 the recurring monthly payment of premiums scheduled to be automatically drafted from Plaintiff's and Stephen Johnson's bank account on February 10, 2014 was billed by State Farm Payment Plan. See Exhibit 2. The amount billed was $284.51, and included the $57.26 premium for the Scion Policy. *See id.*

10. On January 24, 2014, State Farm and Stephen Johnson agreed upon the value of the Scion and State Farm obtained from Wells Fargo the 10-day payoff of the loan on the Scion, which was $5,828.31, and Stephen Johnson agreed that State Farm, in exchange for ownership of the totaled Scion, would both pay off the loan on the Scion and pay the remainder of the value of the Scion, $1,871.69, to Stephen Johnson.

11. On January 30, 2014, Wells Fargo faxed to State Farm a Letter of Guaranty, attached hereto as **Exhibit 3**, agreeing to release the lien and title to the Scion to State Farm upon receipt of a check in the amount of $5,828.31.

12. On January 31, 2014, State Farm issued and mailed to Wells Fargo a check in the amount of $5,828.31. The payment was accepted by Wells Fargo, which in turn released the lien and title to State Farm.

13. On February 5, 2014, a State Farm associate and Stephen Johnson met in person, at which time Stephen Johnson accepted a check from State Farm made payable to him in the amount of $1,871.69 and, in re-

turn, gave State Farm a Power of Attorney, attached hereto as **Exhibit 4**, executed by him authorizing State Farm to secure the title to the Scion and transfer title to the Scion to State Farm. It was Stephen Johnson's intention to transfer title of the Scion to State Farm in exchange for State Farm's payment of $1,871.69 to him, and State Farm's payment of $5,828.31 to Wells Fargo. (Stephen Johnson Dep. Tr. at 43:12-21.)

14. On Friday, February 7, 2014, Lori Valvano, a representative of State Farm Agent Gary Williamson's Office, submitted a request to State Farm's underwriting department to cancel the Scion Policy and to back-date the cancellation to the date of the January 6 accident. (Lori Valvano Dep. Tr. at 24:7-26:9.)

15. As shown on the billing and payment history and breakdowns, on February 10, 2014 the regularly scheduled payment of premiums was drafted from Plaintiff and Stephen Johnson's bank account as billed on January 22, 2014. *See* Exhibit 2. The payment was $284.51 and included the $57.26 premium for the Scion Policy. See id.

16. Shortly after 3:00 pm on February 19, 2014, Plaintiff was involved in an accident (the "February 19 accident") while driving the Buick. At the time of this accident, all premiums for the Buick Policy, Tundra Policy, and Scion Policy had been paid up to date.

17. On February 19, 2014, Plaintiff called State Farm Agent Gary Williamson's office from the scene of the accident and notified them of the February 19 accident. (Pl. Dep. Tr. at 49:10- 12.)

18. On February 20, 2014 State Farm created an Acknowledgement of Cancellation Request, attached hereto as **Exhibit 5**, confirming the Scion Policy had been canceled effective 12:01 am January 7, 2014 as requested and that any refund of premium would be handled through the State Farm Payment Plan.

19. On February 20, 2014, State Farm Payment Plan billed the recurring monthly payment of premiums to be automatically drafted from the Plaintiff's and Stephen Johnson's bank account on March 10, 2014. *See* Exhibit 2. Because the amount due had changed since the last billing on

> January 20, 2014, on February 20, 2014 State Farm Payment Plan issued to Plaintiff and Stephen Johnson a Notice of Automated Payment, attached hereto as **Exhibit 6**, which no longer included payment for a premium on the Scion Policy, which had been cancelled, and which applied a credit of $105.93, consisting of the sum of the premium paid on the Scion Policy after January 6, 2014.

[Stipulation of Facts].

II. Additional Evidence

On July 13, 2012, the Department of Motor Vehicles issued Mr. Johnson a certificate of title for the Scion. [Ex. A (Scion title) to Ms. Johnson's Reply to State Farm's Motion for Summary Judgment (showing title to Stephen Johnson issued 07-13-2012)]. State Farm did not receive a certificate of title for the Scion until April 4, 2014. [Ex. A (Scion Title) to Ms. Johnson's Reply to State Farm's Motion for Summary Judgment (showing title issued to State Farm on 04/04/2014)].

State Farm's internal claims processing notes showed, as of July 30, 2014, and again on February 9, 2015, that State Farm thought that Ms. Johnson had three policies that provided UIM coverage—not two, as it now claims. [Ex. B (Johnson SF 054, 057) to Ms. Johnson's Reply to State Farm's Motion for Summary Judgment (State Farm's claims notes entry of 07-30-2014 indicating that Ms. Johnson had "3 pol[icie]s" with combined "250k uim" coverage and entry of 04-09-2015 (indicating Ms. Johnson has "avail uim—250k (2x100/300, plus 50/100))")].

Ms. Johnson specifically denied in her deposition that her husband ever requested to backdate cancellation. [Ex. C (Terri Johnson's deposition) to State Farm's April 10, 2019, Supplemental Summary Judgment Motion at 76:3-9 ("Q... So you did not – when you made this cancelation request or when your husband made the cancelation request, he did not ask State Farm to backdate the coverage back to some earlier period in time, right? A. No.")].

The "Cancellation" section of the Scion Policy reads as follows:

> 8. **Cancellation**
>
> a. **How You May Cancel**
>
> *You* may cancel this policy by providing to *us* advance notice of the date cancellation is effective. *We* may confirm the cancellation in writing.
>
> b. **How and When We May Cancel**
>
> *We* may cancel this policy by mailing or delivering a written notice to the most recent policy address that *we* have on record for the named insured who is shown on the Declarations Page. The notice will provide the date cancellation is effective.
>
> (1) If *we* mail or deliver a cancellation notice:
>
> (a) during the first 90 days following this policy's effective date; or
>
> (b) because the premium is not paid when due,
>
> then the date cancellation is effective will be at least 15 days after the date *we* mail or deliver the cancellation notice.

Otherwise, the date cancellation is effective will be at least 20 days after the date *we* mail or deliver the cancellation notice.

(2) After this policy has been in force for more than 90 days, *we* will not cancel this policy before the end of the current policy period unless:

(a) the premium is not paid when due; or

(b) *you*, any *resident relative*, or any other *person* who usually drives *your car* has had his or her driver's license under suspension or revocation:

(1) during the policy period; or

(2) if the policy is a renewal, during its policy period or the 90 days immediately preceding the last anniversary of the effective date of the policy.

c. **Return of Unearned Premium**

If *you* cancel this policy, then premium may be earned on a short rate basis. If *we* cancel this policy, then premium will be earned on a pro rata basis.

Any unearned premium may be returned within a reasonable time after cancellation. Delay in the return of any unearned premium does not affect the cancellation date.

[Stipulation of Facts Ex. 1b at "43"].

ARGUMENT

I. Standard of Review for All Issues

"When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court. A grant of summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109-10 (2008) (citations omitted). The non-moving party is entitled to "all reasonable inferences" from the record and to have all disputed issues of fact decided in its favor. *E.g.*, *Summer v. Carpenter*, 328 S.C. 36, 42 (1997) (citation omitted). So long as the burden of proof at trial is one of preponderance of the evidence, a non-moving party will survive summary judgment if "a mere scintilla of evidence" on a material issue exists. *E.g.*, *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330 (2009).

II. Summary Judgment Was Not Appropriate for the Breach of Contract Because, on this Record, the Scion Policy Was in Effect and Valid on February 19, 2014.

Below, the circuit court offered two independent reasons for concluding as a matter of law that the Scion Policy was not in effect on February 19, 2014: The policy had been cancelled or, alternatively, Ms. Johnson had no insurable interest on that date. [5/7/19 MSJ Order at 2-3]. The circuit court was, however, wrong on both counts; the breach-of-contract claim should have been set for trial.

A. The Circuit Court Erred in Concluding that the Scion Policy Had Been Cancelled Before the Accident on February 19, 2014.

An insurance policy can be cancelled in two ways, with "the burden of proving that there has been a cancellation of a policy rest[ing] on the party asserting it." *Dill v. Lumbermen's Mut. Ins. Co.*, 213 S.C. 593, 600 (1948) (citation omitted). First, "either party has the right by complying with the terms of the policy, to terminate the contract. The consent of the other party is not necessary to effect a cancellation." *Dill v. Lumbermen's Mut. Ins. Co.*, 213 S.C. 593, 599 (1948). Second, the parties can effect a cancellation by agreement, so long as there is "a meeting of minds, or mutual assent, to constitute a valid cancellation." *Id.* Whether a cancellation was intended, and on what terms, "[o]rdinarily...is [a question] for determination by the jury." *Id.* (citation omitted).

As a matter of law, Mr. Johnson did not unilaterally cancel the Scion Policy that covered both him and his wife. That policy, by its terms, required him to specify "advance notice of the date cancellation is effective." [Stipulation of Facts Ex. 1b at "43"]. Thus, insofar as State Farm would contend that anything the record would indicate that Mr. Johnson requested to backdate cancellation, such a request would not comply with the Scion Policy's requirement that he provide "*advance notice* of the date cancellation" [Stipulation of Facts Ex. 1b at "43" (emphasis added)]. Further,

such a contention would be contradicted by the deposition testimony of Ms. Johnson, which denied any request for backdating. [Ex. C (Terri Johnson's deposition) to State Farm's April 10, 2019, Supplemental Summary Judgment Motion at 76:3-9 ("Q... So you did not – when you made this cancelation request or when your husband made the cancelation request, he did not ask State Farm to backdate the coverage back to some earlier period in time, right? A. No.")].

Cancellation by mutual intent was unavailable as a matter of law, too. Any contention that Scion Policy was already cancelled as of the time of the February 19, 2014, accident is inconsistent with the plain text of the parties' binding stipulations of fact entered pursuant to Rule 43(k), SCRCP, that "[a]the time of [the February 19, 2014] accident, all premiums for the .... Scion Policy had been paid up to date." [Stipulations of Fact ¶16]. No premium could have been paid on a policy that was not in existence. *See also* [Ex. B (Johnson SF 054, 057) to Ms. Johnson's Reply to State Farm's Motion for Summary Judgment (State Farm's claims notes entry of 07-30-2014 indicating that Ms. Johnson had "3 pol[icie]s" with combined "250k uim" coverage and entry of 04-09-2015 (indicating Ms. Johnson has "avail uim—250k (2x100/300, plus 50/100))")].

Alternatively, at least an issue of fact exists as to the date that the Mr. Johnson and State Farm agreed that any cancellation would be effective. After all, on February 10,

2014, State Farm charged the Johnsons a premium for the Scion Policy even though State Farm had—three days prior—internally requested a backdated cancellation to January 6, 2014. [Stipulation of Fact ¶¶ 14-15]. While State Farm issued a refund on March 10, 2014, a jury ought to decide (1) the meaning of State Farm's February 10, 2014, actions and/or (2) the delay in issuing the refund that State Farm says was due and owing for at least a month following the internal cancellation document and/or (3) the delay in issuing the acknowledgement of cancellation. A jury might decide that the parties would not have agreed that the cancellation would be effective until the Johnsons received actual notice and/or a refund. *See generally* [Stipulation of Facts Ex. 1b at "43-44" (providing that cancellation by State Farm would, depending on the reason, be "effective at least 15 [or 20] days after the date ***we*** mail or deliver the cancellation notice" if cancellation occurs during the first 90 days of the policy); *id.* at 44 (providing that "[a]ny unearned premium may be returned within a reasonable time after cancellation")].

Accordingly, the cancellation issue is not an issue that entitled State Farm to summary judgment below.

B. The Insurable-Interest Rule Did Not Void the Scion Policy.

South Carolina, like other states, requires an insured to have an insurable interest before obtaining an insurance policy. *E.g.*, *Am. Mut. Fire Ins. Co. v. Passmore*, 275

S.C. 618, 621 (1981) (citation omitted). The requirement stems from the public policy against gambling. *See, e.g.*, *Hedrick v. Kelley*, 734 S.W.2d 529, 533 (Mo. Ct. App. 1987) ("[T]he public policy requiring an insurable interest is based upon disapproval of wagering contracts."). Given the narrow public policy at issue, the law takes an expansive view of insurable interests: "The insurable interest required does not depend upon the named insured having either a legal or equitable interest in the property, but it is enough that the insured may be held liable for damages to its operation and use." *Passmor*e, 275 S.C. at 620-21 (quotation omitted).

Here, at the time of the accident, Mr. Johnson was still a titled owner of the vehicle because the certificate of title was not formally issued out of Mr. Johnson's name and into State Farm's name until April 4, 2014. *Compare* [Ex. B (Scion title) to State Farms' Amended Memorandum filed April 10, 2019 (showing title to Stephen Johnson issued 07-13-2012)], *with* [Ex. A (Scion Title) to Ms. Johnson's Reply to State Farm's Motion for Summary Judgment filed Oct. 24, 2018 (showing title issued to State Farm on 04/04/2014)]. The certificate of title in his name made him an owner of the Scion as a matter of law for several purposes. *See* S.C. Code § 56-19-10(21) ("'Owner' means a person, other than a lienholder, having the property in ***or title to a vehicle.*** The term includes a person entitled to the use and possession of a vehicle subject to a security interest in another person but excludes a lessee under a lease not in-

tended as security." (emphasis added)). He was, therefore, required to keep insurance on the vehicle until he no longer was an owner. S.C. Code § 56-10-10 ("Every owner of a motor vehicle required to be registered in this State shall maintain the security required by Section 56-10-20 with respect to each motor vehicle owned by him throughout the period the registration is in effect."). He also would have been liable for damages during its transport to the scrap yard. S.C. Code § 56-5-4230 ("Any person driving or moving any vehicle...upon any highway or highway structure shall be liable for all damages which such highway or structure may sustain as a result of any illegal operation, driving or moving of such vehicles.... Whenever such driver is not the owner of such vehicle..., but is so operating, the owner and driver shall be jointly and severally liable for any such damage."). And he would have (if State Farm had filed for bankruptcy, for example), been liable for any storage fees at the repair shop for the vehicle. *See* S.C. Code § 29-15-10(D) (providing for storage liens to be satisfied by sale of vehicle with excess returned to the "owner of the vehicle or entitled lienholder"); S.C. Code § 56-5-5635 (providing for storage liens when impoundment of vehicle is requested at direction of law enforcement and requiring notice to "the owner and lienholder of the vehicle" before execution of the storage lien).

Further, regardless as to any other evidence in the record, the fact that the certificate of title still listed him as the owner is at least "a mere scintilla of evidence"—all

that is required to defeat summary judgment, *Hancock*, 381 S.C. at 330—that he was in fact the true owner on the date of the accident. *See* S.C. Code § 56-19-320 ("A certificate of title issued by the Department of Motor Vehicles is prima facie evidence of the facts appearing on it.").

To whatever extent Mr. Johnson did not have any rights at all in the Scion at the time of the accident, such a fact still should not render the insurance policy void.

First, the Johnsons clearly have an insurable interest in themselves. While UIM may be required to be offered in connection with an auto liability policy, nothing in South Carolina prohibits a party from agreeing to indemnify an auto-less person who is injured by an underinsured driver. Indeed, precedents from the Supreme Court routinely have repeatedly affirmed that UIM is "personal [to] and portable" with the insured. *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 396 (2012) (noting "South Carolina's well-settled public policy that UIM coverage is personal and portable").

Second, unlike the insured in *Nationwide Mut. Ins. Co. v. Smith*, 376 S.C. 60 (Ct. App. 2007), who lacked an insurable interest "at the time the contract for insurance was made," thus rendering the policy "void from its inception," *id.* at 69 (citation omitted), everyone agrees that the Johnsons had an insurable interest in the Scion at the time the policy was written. Indeed, State Farm had already paid one claim on it. Given the insurable interest at the outset, the policy rationale behind the insurance-

interest requirement is lacking. "When the reason for [a] rule ceases, the rule ceases." *Penning v. Reid*, 167 S.C. 263, 289 (1932) (quoting from circuit court decision that was affirmed ordered to be reported). *See also Kelley*, 734 S.W.2d at 533 ("There is and can be no claim that mother or daughter was gambling. The term insurable interest should be broadly construed in situations such as this where... the overall evidence indicates the policy was obtained in good faith."). Consequently, the circuit court below should not have deemed *Smith* controlling.

Smith, is however, not controlling for additional reasons. Its holding that an insurable interest in an auto is a precondition for uninsured motorist coverage ("UM") is only persuasive authority where, as here, UIM is involved and should thus can be limited to its facts. But more fundamentally, the majority opinion rested its holding that UM requires an insurable interest in an auto on the belief that "in South Carolina all automobile insurance policies are statutorily required to contain UM coverage." *Smith*, 376 S.C. 66. Our Supreme Court has, however, held otherwise in the context of UIM, like at issue here. *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 621-22 (2013) ("UIM is not mandatory coverage.").[1]

Accordingly, the insurable-interest issue also did not entitle State Farm to summary

judgment below.

III. Because State Farm Was Not Entitled to Summary Judgment Concerning the Effective Date of the Cancellation of the Scion Policy, It Was Not Entitled to Summary Judgment on the Claims for Bad-Faith Claims Handling.

Insurance companies owe a common-law and statutory duty to process insurance claims in good faith. *See, e.g.*, S.C. Code § 38-59-20(8) (defining as improper claims practice, among other things, an insurance company's "unreasonable delay in paying or an unreasonable failure to pay or settle in full claims...arising under coverages provided by its policies); *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340 (1983) ("[I]f an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action.").

Below, the circuit court ruled that State Farm was entitled to summary judgment as to common-law bad faith (Count II) and statutory bad faith (Count III) because "it was reasonable as a matter of law for State Farm to conclude the Scion policy did not provide coverage for the February 19, 2014 accident where the insured had requested that the policy be cancelled before the accident." [5/7/19 MSJ Order at 4]. As indicated

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[1] To whatever extent that the Court should nonetheless find *Smith* controlling, Ms. Johnson respectfully submits that the cases was wrongly decided, for the reasons set forth above and for the reason set forth in Judge Anderson's dissent in that case.

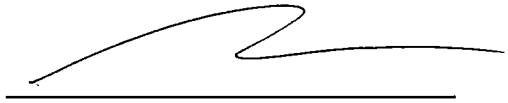
above, however, at least a genuine issue of fact exists as to the effective date of any cancellation of the Scion Policy. Consequently, summary judgment on bad faith was not appropriate.

CONCLUSION

Because State Farm was not entitled to judgment as matter of law and/or genuine issues of fact exist, this Court should vacate the judgment below and remand for trial on the merits of the UIM claim (Count I) and bad-faith claims concerning UIM (Counts II and III).[2]

Dated this 25th day of September, 2019.

TERRI L. JOHNSON



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[2] Ms. Johnson does not assert on appeal those portions of her Second Amended Complaint concerning non or mis-payment of Personal Injury Protection benefits, nor concerning negligent misrepresentation.

THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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L. Casey Manning, Circuit Court Judge
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TERRI L. JOHNSON,

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

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I, the undersigned, served a copy of Appellant's Initial Brief and Appellant's Designation of Matter to Be Included in the Record on Appeal on the following counsel of record this 25th day of September, 2019, by U.S. Mail, First-Class Postage prepaid:

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SUBSCRIBED TO AND SWORN TO
Before me this 25th day of September, 2019

(L.S.)
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