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,

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SC Court of Appeals

v.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,

Respondent.

FINAL REPLY OF APPELLANT

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Comes now Appellant Terri L. Johnson and would respectfully reply to Respondent State Farm Mutual Automobile Insurance Company's ("State Farm") brief.

I. 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.

State Farm acknowledges that this Court must apply the same summary-judgment standards as the trial court, [Opp. at 8]. Thus, "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 59 (Ct. App. 1999) (citations omitted). Applying those standards, neither basis upon which the circuit court granted summary judgment—a supposed cancellation of the policy at issue or a supposed lack of insurable interest—entitles State Farm to summary judgment.

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

In her Opening Brief, Ms. Johnson established that parties to an insurance contract (or indeed, any other) can only unilaterally cancel a contract when so allowed by the contract; otherwise, mutual assent through a meeting of the minds is required. [Open. Brief at 10]. Any suggestion from State Farm that the trial court below thought other-

wise (or had not thought about it at all, thereby requiring a motion to reconsider to ensure issue preservation) would require this Court to believe that the trial judge below did not actually read the cases cited in the formal summary judgment order. *Contra, e.g.*, *State v. Ray*, 310 S.C. 431, 437 (1993) ("[T]rial judges are presumed to know the law...."). After all, the two authorities the judge below cited on the unilateral-cancellation issue, *see* [R. 2], condition unilateral cancellation on compliance with a policy's terms. *See Wilbanks v. Prudential Prop. & Cas. Ins. Co.*, 277 S.C. 256, 258 (1982) ("[E]ither party has the right to terminate the contract by complying with the [policy's] requisite terms. The other party's consent is not necessary for an effective cancellation."); *Hicklin v. State Farm Mut. Auto. Ins. Co.*, 176 S.C. 504, 511 (1935) ("[W]hile it takes two to make a contract, in the cancellation of policies, one of the parties to the contract may end it, if the contract itself so provides." (quotation omitted)).

The only contractual provision allowing Mr. Johnson a unilateral right to cancel required him to provide "advance notice of the date cancellation is effective." [R. 74]. Not even State Farm claims that Mr. Johnson provided "advance" notice of a cancellation date. That should, therefore, be enough to defeat summary judgment on that unilateral-cancellation theory.

Ultimately, however, it does not matter whether the trial judge below actually ruled

on whether unilateral cancellation could have comported with the insurance contract at issue. Nor does it matter whether, as State Farm claims, the advance-notice requirement exists solely for the benefit of State Farm and is thus waivable—a dubious proposition given that retroactive cancelation deprives an insured of protection for any losses sustained but not yet known and, in any event, is being sought to prejudice the insured here.

Neither matters because, to help State Farm at all, both must presume that the record establishes that the Scion Policy was not in existence on February 19, 2014. But when Ms. Johnson obtains the benefit of the inferences from the evidence—as is required on summary judgment—the record does not so establish.

State Farm's *own business records* show that State Farm thought, for at least a year after the underlying accident, that Ms. Johnson had *three* policies that provided her with UIM, not just two. [R. 103 (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))")]. Further, the parties stipulated that State Farm "on February 10, 2014, the regularly scheduled payment of premiums was drafted from Plaintiff and Stephen Johnson's bank account... The payment...included the $57.26 premium for the Scion Policy," the policy State Farm says was supposedly cancelled no later than February

7, 2014. [R. 22 ¶15]. Either of those facts alone, or those facts together, and/or those facts in combination with the delay in providing a refund and acknowledgment easily amount to at least "a mere scintilla of evidence" necessary to defeat summary judgment, *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330 (2009), as to when cancellation occurred. Summary judgment on that issue to State Farm was, therefore, improper.

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

As Ms. Johnson established in her Opening Brief, the insurable-interest rule exists to prevent 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."). Nonetheless, State Farm makes no showing—much less a persuasive one—that denying Ms. Johnson coverage here would further that policy. After all, no dispute exists that her husband owned the Scion on the date that the poli-

cy was issued. [R. 22 ¶¶ 1 & 2].[1]

Setting aside the policy rationale for the insurable-interest rule, at least a "scintilla" of evidence exists—the minimum needed to have precluded summary judgment to State Farm, *Hancock*, 381 S.C. at 330—that Mr. Johnson was still the owner of the Scion at the time of the February 19, 2014, crash. By statute, the certificate of title is "prima facie evidence of the facts appearing on it." S.C. Code § 56-19-320. The only certificate of title for the Scion in existence on February 19, 2014, showed Mr. Johnson as the owner of the vehicle; the next title showed State Farm as the owner as of April 4, 2014. [R. 106 (showing title to Stephen Johnson issued 07-13-2012)], *with* [R. 102 (showing title issued to State Farm on 04/04/2014)]. At a trial, when the all-inferences-in-favor-of-the-non-moving party do not apply, State Farm can argue that

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[1] As State Farm notes, [Opp. at 23 n. 9], the policy at issue contains the following clause: "[State Farm] agree[s] to provide insurance according to the terms of this policy...in reliance upon the following statements: (1) The named insured shown on the Declarations Page is the sole owner of ***your car***." [Stipulation of Facts Ex. 1 at "This Policy" § 3(b)(1) (original emphasis)]. It is unclear why State Farm thinks that provision helps its case given that the representation does not expressly purport to be a continuing one—meaning that it is not, *see, e.g.*, *Spinx Oil Co. v. Federated Mut. Ins. Co.*, 310 S.C. 477, 481 (1993) ("Ambiguous or conflicting terms in an insurance contract should be construed in favor of the insured and strictly construed against the insurer." (citations omitted)). Even if the representation were meant as a continuing one, the policy also provides that "[n]o change of interest in this policy is effective unless ***we*** consent in writing." [Stipulation of Facts Ex. 1 at "General Provisions" § 4(b)(1) (original emphasis)]. No written confirmation was, however, issued from State Farm until the day after the accident. [R. 23 No. 18].

the jury should find that it owned the Scion on February 19, 2014, notwithstanding the failure to have a certificate of title on that date. That is, as State Farm notes, what happened in *Grain Dealers Mut. Ins. Co. v. Julian*, 145 S.E.2d 685 (S.C. 1965) (involving bench trial by special referee). In deciding the date that title transfer finally concluded, the jury can decide how to reconcile (a) the certificate of title still in Mr. Johnson's name, (b) State Farm's position that the Scion Policy became void due to a sale of the Scion to State Farm, (c) State Farm's continued billing for policy on a car that supposedly State Farm owned, and (d) State Farm's internal records showing that State Farm thought that coverage still existed at the time of the accident at issue. *See* [R. 103 (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))")]. It is, however, improper to reconcile those inferences on summary judgment.

Even if State Farm could have established no dispute that title had already fully passed as of the date of the accident, Ms. Johnson showed in her Opening Brief that summary judgment on no-insurable-interest grounds still was improper because Ms. Johnson had an insurable interest in herself.

Below, the trial judge quoted this Court's uninsured motorist (UM) decision in *Nationwide Mutual Insurance Company v. Smith*, 376 S.C. 60 (Ct. App. 2007) and ap-

plied it equally in this underinsured motorist (UIM) context: "Where a named insured does not have any insurable interest in the vehicle, the insurance policy is illegal." [R. 3 (quoting *Smith*)]. State Farm says that (by that point, *pro se*) Ms. Johnson, to preserve her issue, should have asked the trial court to reconsider its order. But given that the trial court clearly felt bound by *Smith*'s (UM) holding that individuals do not have an insurable interest in themselves and given that trial judges understand that they must follow this Court's precedents, such a motion would have been futile. A formal motion to reconsider was not, therefore, required. *See, e.g.*, *State v. Pace*, 316 S.C. 71, 74 (1994) (excusing trial counsel's failure to object where "any objection would have been futile").[2]

As Ms. Johnson established in her Opening Brief, *Smith* is distinguishable—particularly given that it rested upon the mandatory nature of UM coverage, which the Supreme Court has since held does not apply in the UIM context. *Carter v. Standard Fire Ins. Co.*, 406 S.C. 609, 621-22 (2013) ("UIM is not mandatory coverage."). But even if it were not distinguishable, the dissent in that case should have prevailed. In either event, the case likewise should not provide a reason for summary judgment to State Farm.

[2] The portability issue was referenced in the written briefs. *See* [R. 98-99].

II. 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.

As Ms. Johnson conceded in her Opening Brief, she must show a genuine issue of fact as to the date of the cancellation of the Scion Policy to overcome summary judgment on the bad faith claim. A jury could determine that any agreement to cancel the Scion Policy was not yet in effect as of the date of the accident. After all, that is what State Farm's internal records showed. *See* [R. 103 (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))")]. Consequently, the premise for the trial court's grant of summary judgment—that where coverage has been actually cancelled, it is reasonable not to pay—is removed, and the cause of action must be subject to trial.

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).

Dated this 26th day of December, 2019.

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