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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2016-CP-26-06091

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SC Court of Appeals

ACCC Insurance Company, Respondent,

vs.

Patricia Williams, Ronald Williams, Patrick Benjamin Myers, Brittany Stanley
a/k/a Brittany Standley, and State Farm Mutual Automobile Insurance
Company, Defendants,

Of Whom
Patricia Williams and Ronald Williams are Appellants,

And
State Farm Mutual Automobile Insurance Company is Respondent.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Judge apply the proper standards in ruling upon the Motion to Dismiss?
2. Should the Circuit Judge have granted the Motion to Dismiss with prejudice given the evidence in the record?
3. Did the Circuit Judge err in granting Plaintiff/Respondent relief that was not sought in its pleadings and which was directly contrary to the declaratory relief it previously obtained in this action?
4. Should the Circuit Judge have first addressed Appellants' pending motions before ruling on the Motion to Dismiss?

STATEMENT OF THE CASE

Respondent ACCC Insurance Company ("ACCC") filed this action on September 14, 2016. Its Complaint (styled "Petition for Declaratory Judgment and Other Relief") sought a declaratory judgment that, under a motor vehicle liability insurance policy it issued (the "Policy"), "it owe[d] no coverage to or duty to defend and/or indemnify" Patrick Benjamin Myers ("Myers") and Brittany Stanley a/k/a Brittany Standley ("Stanley") for personal injury claims asserted by Appellants as a result of a vehicular collision that occurred in Horry County, South Carolina, on March 18, 2016. (R. pp. 21-22, ¶¶ 21, 24).

Appellants filed an Answer on September 19, 2016. (R. p. 23). Their Answer admitted virtually all operative factual allegations and admitted ACCC was entitled to the requested declaratory judgment of no liability coverage. (R. p. 23).

Myers and Stanley did not respond to the Complaint. ACCC moved for a default declaratory judgment against them. (R. p. 27). On December 16, 2016, Circuit Court Judge

Larry B. Hyman issued an Order granting a default judgment against Myers and Stanley and granting the declaratory relief sought by ACCC against them. (R. p. 3).

Respondent State Farm Mutual Fire Insurance Company (“State Farm”) filed an Answer on December 6, 2016. (R. p. 25). Its Answer asserted a lack of knowledge to respond to most of the operative factual allegations, so it denied them and denied ACCC was entitled to the requested declaratory judgment. (R. pp. 25-26).

On August 4, 2017, Appellants filed a motion to require ACCC and State Farm to comply with the mandatory alternative dispute resolution process. (R. p. 35). Later that day, ACCC and State Farm filed a Joint Consent Motion to Dismiss (“Motion to Dismiss”) – to which neither Myers, Stanley, nor Appellants consented – requesting that the Circuit Court dismiss this action with prejudice pursuant to Rule 41, SCRCF. (R. p. 37).

Appellants thereafter filed a Motion for Status Conference and Scheduling Order on August 7, 2017 (R. p. 33), a Motion to Amend Answer to Assert Counterclaim on September 6, 2017 (R. p. 67), and a Motion to Compel Deposition of ACCC pursuant to Rule 30(b)(6), SCRCF, on October 26, 2017. (R. p. 108). Additionally, in opposition to the Motion to Dismiss, Appellants filed both a memorandum (R. p. 39) and the affidavit of their expert witness. (R. p. 145).

The pending motions came before Judge Hyman for a hearing on November 1, 2017. (R. p. 170). He orally granted the Motion to Dismiss under Rule 41, SCRCF (R. p. 187, lines 5-10) and issued a Form 4 Order to that effect. (R. p. 5). In the Form 4 Order, Judge Hyman also ruled that two of Appellants’ motions were moot.¹ (R. p. 5).

¹ The Form 4 Order referred to Appellants’ “Motion to Compel and Motion o [sic] Alter and Amend.” (R. p. 5). Given the pending motions and what was argued at the hearing, this

Appellants filed three Motions for Reconsideration on November 10, 2017. (R. pp. 127, 130, 132). Before hearing these motions, Judge Hyman issued a formal Order on November 15, 2017 granting the Motion to Dismiss with prejudice and ruling that Appellants' Motion to Compel ADR and Motion to Amend Answer to Assert Counterclaim were moot. (R. pp. 8, 10).²

On November 21, 2017, Appellants filed a Motion for Reconsideration of the November 15, 2017 Order pursuant to Rule 59(e), SCRPC. (R. p. 135). Judge Hyman denied Appellants' Motions for Reconsideration by Order dated February 1, 2018. (R. p. 14).³

On March 5, 2018, Appellants filed a timely Notice of Appeal as to Judge Hyman's Orders granting the Motion to Dismiss and denying the Motions for Reconsideration. That same day, Appellants filed an Amended Notice of Appeal to correct an erroneous mailing address for opposing counsel.

ARGUMENT

1. The Circuit Judge erred by failing to apply the proper standards in ruling upon the Rule 41, SCRPC, Motion to Dismiss.

South Carolina Rule of Civil Procedure 41(a)(2) states:

Except [by the plaintiff before appearance by a defendant or by consent of all parties], an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim

apparently referred to Appellants' Motion to Compel ADR and Motion to Amend Answer to Assert Counterclaim. (*See also* R. pp. 8, 10).

² Judge Hyman never specifically ruled on Appellants' Motion for Status Conference and Scheduling Order and Motion to Compel Deposition of ACCC.

³ He initially denied the motions via a Form 4 Order dated January 11, 2018 which stated a formal Order would follow. (R. p. 11).

can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.⁴

In a typical case, the parties' interests are such that – in the absence of agreement among all parties – a plaintiff seeking dismissal would prefer for the case to be dismissed without prejudice to its right to refile but, on the other hand, a defendant would prefer for it to be dismissed with prejudice (or for the case to remain pending for strategic reasons). Thus, Rule 41(a)(2) and the decisions construing it have developed standards for courts to consider in addressing motions to dismiss under this rule.

As a general consideration, though, in exercising discretion whether to grant a motion under Rule 41(a)(2), the hearing judge must do so “with regard to the interests of the parties and the public.” *Prime Medical Corp. v. First Medical Corp.*, 291 S.C. 296, 299, 353 S.E.2d 294, 296 (Ct. App. 1987).

Specifically, the rule itself recognizes that a counterclaiming defendant has an interest in continuing an action notwithstanding the plaintiff's desires to dismiss it. As a result, a defendant can object and prevent dismissal under those circumstances.

Also, a defendant can successfully oppose a plaintiff's effort to dismiss without prejudice if it can show the dismissal would cause it legal prejudice. *See, e.g., Bowen & Smoot v. Plumlee*, 301 S.C. 262, 266, 391 S.E.2d 558, 560 (1990). If the defendant demonstrates legal prejudice,

⁴ This rule was previously codified as Circuit Court Rule 45(2). *Prime Medical Corp. v. First Medical Corp.*, 291 S.C. 296, 298, 353 S.E.2d 294, 295 (Ct. App. 1987). As a result, cases interpreting the previous rule are authoritative in construing the current rule. *Id.*

In addition, the Reporter's Notes to Rule 41, SCRPC, state: “This Rule 41 is the same as the Federal Rule....” Thus, in the absence of applicable South Carolina precedent construing the rule, Appellants have cited in this brief pertinent court cases construing Fed. R. Civ. P. 41(a)(2). *See Prime Medical Corp. v. First Medical Corp.*, 291 S.C. 296, 299-300, 353 S.E.2d 294, 296-97 (Ct. App. 1987) (citing the federal rule and cases construing it because “Rule 41(a)(2) of the Federal Rules of Civil Procedure is identical to Circuit Court Rule 45(2).”).

the court can impose appropriate conditions on the dismissal, *Mauro v. Clabaugh*, 302 S.C. 195, 198, 383 S.E.2d 244, 246 (Ct. App. 1989), including requiring that the dismissal be with prejudice. *See, e.g., Diamond State Ins. Co. v. Genesis Ins. Co.*, 379 Fed. Appx. 671 (9th Cir. 2010). However, the possibility of having to defend the same claim in another action does not alone constitute legal prejudice. *Knight v. Waggoner*, 359 S.C. 492, 495, 597 S.E.2d 894, 896 (Ct. App. 2004).

The protections afforded by these standards arise from the goal of balancing and protecting the interests of the parties as movant and non-movant, not simply based on their designations as plaintiff and defendant. As a result, the focus is on whether the party desiring a dismissal with prejudice would suffer legal prejudice if the dismissal were granted without prejudice. Usually, that party is a defendant; but here one of the parties seeking dismissal with prejudice is a plaintiff (ACCC).

Therefore, in the present context – a declaratory judgment action where the plaintiff's (ACCC's) interest in seeking a dismissal with prejudice is akin to a typical defendant's interest and the opposing defendants' (Appellants') interests are similar to a typical plaintiff's interest in avoiding a dismissal with prejudice – the Court should disregard the labels of the parties and instead apply Rule 41(a)(2)'s standards to them as “those requesting dismissal with prejudice” and “those opposing a dismissal with prejudice”. Consequently, in considering Appellants' opposition to the Motion to Dismiss, the Court's viewpoint should be the same as if it were evaluating a plaintiff's opposition to a defendant's request that a Rule 41(a)(2) dismissal be with prejudice. In other words, the Circuit Court's first inquiry should have been whether the parties insisting on a dismissal with prejudice (ACCC and State Farm) would suffer legal prejudice if it denied the motion or ordered a dismissal without prejudice.

As such, the Circuit Judge abused his discretion in failing to analyze whether ACCC and State Farm would be legally prejudiced if he denied the Motion to Dismiss or granted it without prejudice. In his Orders, the Circuit Judge made no express findings on the question of legal prejudice to these parties.

In ruling on the motion, the Circuit Judge should also have inquired into the legal prejudice to Appellants. See *Diamond State Ins. Co.*, 379 Fed. Appx. at 673 (in deciding whether to dismiss a declaratory judgment action with or without prejudice, the court properly compared the legal prejudice to the moving party and the opposing party). South Carolina cases addressing Rule 41(a)(2) uniformly require the Court to consider the issue of legal prejudice to the non-moving party. See, e.g., *Burry & Son Homebuilders v. Ford*, 310 S.C. 529, 531, 426 S.E.2d 313, 314 (1992). The fact that those cases typically consider whether a defendant would be legally prejudiced by a dismissal without prejudice does not prevent the Court from considering the legal prejudice to Appellants resulting from a dismissal with prejudice.

While the Circuit Court has discretion whether to grant a Rule 41(a)(2) motion, *Bradshaw v. Ewing*, 297 S.C. 242, 247, 376 S.E.2d 264, 267 (1988), it must still adhere to established standards in doing so. It abuses its discretion if it fails to consider applicable factors, relies upon improper factors, makes a serious mistake in considering those factors, or fails to protect the non-movant from unfair treatment. *Colon-Cabrera v. Esso Standard Oil Co.*, 723 F.3d 82, 88 (1st Cir. 2013); see also *Barr v. Witsell*, 173 S.C. 199, 175 S.E.2d 436, 439 (1934) (“[W]hen it appeared that to grant the motion would work injury to the defendants, it was an abuse of discretion to grant the motion.”).

The Circuit Judge had ample evidence of prejudice to Appellants but abused his discretion in failing to consider it in ruling on the motion.

Rather than considering issues of legal prejudice to the parties as required under Rule 41(a)(2), the Circuit Judge instead undertook an approach not supported by the rule or the case law and decided the motion based upon a one-sided view of the evidence on the ultimate issue presented by this declaratory judgment action. In doing so, he abused his discretion.

2. The Circuit Judge erred in granting the Motion to Dismiss with prejudice given the evidence in the record.

As discussed above, the Circuit Judge abused his discretion in failing to analyze whether ACCC and State Farm would be legally prejudiced if he ruled in Appellants' favor. Had he done so, the only possible finding from the record and case law would have been that neither would suffer legal prejudice from a dismissal without prejudice. Similarly, the Circuit Judge abused his discretion in failing to consider Appellants' legal prejudice from a dismissal with prejudice. Significantly, there is ample evidence in the record of the legal prejudice to Appellants but the Circuit Judge abused his discretion by failing to consider this evidence.

Neither ACCC nor State Farm argued or offered any evidence they would suffer legal prejudice if the Circuit Judge had denied their motion or conditioned the dismissal as being without prejudice. At best, ACCC and State Farm could only argue now they would be prejudiced if they were required to litigate the coverage issue despite their desires (either in the present action if their motion were denied or in a subsequent action if it were granted without prejudice). But this is not legal prejudice. *See, e.g., Knight v. Waggoner*, 359 S.C. at 495, 597 S.E.2d at 896; *Jarrell v Seaboard Systems R.R.*, 294 S.C. 183, 294 S.E.2d 183 (Ct. App. 1987); *Carter v. Mauller*, 2012 WL 3597370 at *2 (S.D.W.Va. 2012) (following a dismissal without prejudice, "State Farm is not legally, much less substantially, prejudiced by the prospect of facing a second law suit.").

The Circuit Judge should have considered Appellants' pending Motion to Amend the Answer to Assert a Counterclaim (R. p. 67) when he ruled on the Motion to Dismiss. Even though the counterclaim had not been filed yet, it is clear from their Answer and their Motion to Amend that Appellants had a desire to pursue and an interest in achieving a resolution on the merits of the coverage issue presented by this declaratory judgment action. This interest deserves the protection provided expressly in Rule 41(a)(2) for counterclaiming defendants. *Cf. Parnell v. Powell*, 191 S.C. 159, 3 S.E.2d 801, 802 (1939) ("It is well settled that the plaintiff does not possess the unquestioned right at all times and under all circumstances to voluntarily terminate his action, without prejudice to the bringing of a new action by taking a voluntary nonsuit. His right to do so frequently depends upon the effect that it will have upon the defendant's rights. Especially is this true where the defendant has set up a counterclaim or pleaded other affirmative relief. ... A party should no more be compelled to continue a litigation than to commence one, except where substantial rights of other parties have accrued and injustice will be done to them by permitting the discontinuance.").

The Circuit Judge's analysis appears to have ignored the issue of legal prejudice and instead was limited to accepting ACCC's and State Farm's view of the underlying coverage dispute while ignoring contrary evidence offered by Appellants. This approach itself is an abuse of discretion. *See Colon-Cabrera*, 723 F.3d at 90 ("Esso further suggests that the district court's doubts regarding Colon Cabrera's likelihood of success at trial supports dismissal with prejudice. We disagree. The guiding inquiry here is whether defendant would suffer prejudice if the motion were granted. Prejudice does not mean having to defend against a case that the court deems weak. Esso has identified *nothing in Rule 41(a) (2) or the case law that permits the court to use a motion for voluntary dismissal to weed out cases it deems unmeritorious.*" [emphasis added]).

Moreover, a decision on the merits of the underlying coverage dispute should only occur after a full and fair hearing where the judge can consider the evidence and arguments of all parties. That did not happen here. Rather, although State Farm acknowledged that there was “no issue” for the Circuit Judge to decide in dismissing the case (R. p. 180, lines 23-25), the Order prepared by the movants’ attorneys (R. p. 14 and p. 187, line 10), and signed by Judge Hyman suggests that the dismissal was a determination on the merits of the underlying coverage issue. (R. p. 9 [“The Court finds that there is liability coverage under the ACCC policy.”]).

Additionally, any analysis of the facts in connection with a pretrial dispositive motion should be done in a light most favorable to the non-moving party. While, again, it is improper to consider the merits of the parties’ respective positions in the context of a motion pursuant to subsection (a)(2) of Rule 41, once the Circuit Judge nevertheless decided to do so, he should have followed this Court’s guidance regarding motions under subsection (b) of that rule. In *Ex Parte: United Services Auto. Assoc.*, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005), this Court held that because a Rule 41(b) motion to dismiss “has the same effect as summary judgment” the court should “view all evidence in the light most favorable to the non-moving party.” *Id.* at 53, 614 S.E.2d at 653. Because his factual ruling in this declaratory judgment action could arguably prevent litigation of the merits of the subject coverage issue in a subsequent action⁵ and thus may

⁵ Appellants address the potential preclusive impact of the dismissal with prejudice out of an abundance of caution because they anticipate ACCC and State Farm will contend the dismissal of this action was an adjudication on the merits that bars them from further litigating the coverage dispute. By doing so, Appellants do not concede such an outcome is required by the ruling. See *Nelson v. QHG of South Carolina*, 354 S.C. 290, 311, 580 S.E.2d 171, 182 (Ct. App. 2003) (“A case that is dismissed ‘with prejudice’ indicates an adjudication on the merits and, pursuant to res-judicata, prohibits subsequent litigation to the same extent as if the action had been tried to a final adjudication. ... If the first case is dismissed with prejudice on purely procedural grounds without a consideration of the underlying merits of the action, then the party is barred from asserting collateral estoppel or res-judicata.” [citations omitted]), *aff’d in part and rev’d in part (on other grounds)*, 362 S.C. 421, 608 S.E.2d 855 (2005).

have the same effect as summary judgment, the Circuit Judge erred in failing to view the evidence in this fashion; if he had, he would have been obligated to deny the motion.

If the Circuit Court's findings of facts and its dismissal with prejudice were to have this preclusive effect, Appellants would be prevented from offering evidence to dispute the position ACCC took at the hearing⁶ and State Farm's position. Barring Appellants from their "day in court" on the coverage issue due to procedural maneuvering by ACCC and State Farm is the clearest form of legal prejudice. Appellants' counsel argued this legal prejudice to the Circuit Judge by pointing out the evidence contrary to the position taken by ACCC and State Farm in the Motion to Dismiss (R. p. 145 and p. 181, line 10, to p. 185, line 9), which they could have introduced and relied upon in a full hearing on the merits of this dispute. The Circuit Judge evidently disregarded this evidence in granting the motion. He not only abused his discretion in refusing to consider this evidence (if he were going to evaluate the parties' substantive positions) but also in failing to find legal prejudice to Appellants.

Several courts have found that a party in a situation similar to Appellants' would be prejudiced by the dismissal of a declaratory judgment action with prejudice under Fed. R. Civ. P. 41(a)(2).

For example, in *Morrow v. Boston Mut. Life Ins. Co.*, 2008 WL 2704751 (D. Ariz. 2008), the plaintiff and two defendants sought to dismiss an action with prejudice but other defendants objected. The court denied the motion, concluding a dismissal with prejudice would effectively result in "a declaratory judgment regarding the liability of the remaining Defendants" which would not be a proper term or condition of dismissal under Rule 41(a)(2). *Id.* at *1.

⁶ Notably, the relief requested by ACCC in the Motion to Dismiss was different than and contrary to that sought in its Complaint (which it did not seek to amend) and the opposite of the relief it requested – and Judge Hyman granted – in its Motion for Default Judgment against Myers and Stanley. (R. pp. 3, 27). This fact is discussed further under heading 3 below.

Likewise, in *Newton v Auto-Owners Ins. Co.*, 2007 WL 136700 (S.D. Ala. 2007), the court refused to dismiss an insurance coverage declaratory judgment action with prejudice because it would defeat a party's right to litigate his claims in a separate declaratory judgment action, noting: "[T]he Court can fathom no justification for such a punitive result." *Id.* at *2; *see also Great American Ins. Co. v. Goin*, 2017 WL 4238698 (N.D. Tex. 2017) (where the court dismissed claims in an insurance coverage declaratory judgment action without prejudice because it acknowledged the coverage dispute would be decided on its merits in another action).

Here, to the extent the dismissal with prejudice prevented Appellants from litigating the subject coverage issue via their proposed counterclaim and may arguably bar their attempt to do so in a separate declaratory judgment action, it would have the effect of rendering a declaratory judgment action against Appellants without a trial (as denounced by the court in *Morrow*) and would be an unfairly punitive result for Appellants (as rejected by the court in *Newton*). In summary, it was an abuse of discretion for the Circuit Judge to grant the dismissal with prejudice because it may prevent Appellants from resolving this coverage dispute on its merits.

3. The Circuit Court erred in granting ACCC relief that was not sought in its pleadings and which was directly contrary to the declaratory relief it previously obtained in this action.

As noted above, in the Motion to Dismiss, ACCC sought relief that was the opposite of that prayed for in its Complaint. In addition, it requested relief directly contrary to that which it sought and obtained from Judge Hyman against co-Defendants Myers and Stanley.

Specifically, ACCC alleged in its Complaint:

16. Neither [Myers nor Stanley] have [sic] an ownership interest in the 2004 Chevrolet Monte Carlo involved in the Accident.

17. Patrick Myers and Britany Stanley aka Brittany Standley made material misrepresentations while applying for insurance with ACCC for the Policy.

18. ACCC maintains that Patrick Benjamin Meyers and Britany Stanley a.k.a Britany Standley are not entitled to coverage or a defense under the Policy for any claims or damages arising from the Accident.

21. ACCC is entitled to a declaratory judgment declaring that it owes no coverage to or duty to defend and/or indemnify any of the Defendants for any claims, damages, injuries, or actions arising out of the above-referenced collision.

(R. p. 21, ¶ 16-18, 21). ACCC never sought to amend its Complaint.

It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet at trial. *S.C. Nat'l Bank v. Joyner*, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986); *see also Langston v. Niles*, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) ("The purpose of pleadings is to place the adversary on notice as to what the issues are.").

Generally, parties are bound by and restricted to their pleadings. *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015).

[T]he general rule [is] that the parties to an action are judicially concluded and bound by such unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible.

Id., quoting *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964).

In the present case, ACCC's Complaint put Appellants and the other Defendants in this action on notice that it was denying coverage to Myers and Stanley because of their misconduct in procuring the Policy. ACCC maintained this position in its pleading throughout this litigation.

without amendment.⁷ The Circuit Judge should not have entertained any argument by ACCC contrary to that position and erred in doing so.

The impropriety of ACCC's change in position is reinforced by the fact that it also moved for a default declaratory judgment against Myers and Stanley "that ACCC Insurance Company does not have automobile liability insurance coverage for a March 18, 2016 date of accident in Horry County involving defendants Benjamin Patrick Myers and Patricia Williams." (R. p. 27). Judge Hyman granted this motion. (R. p. 3). As such, he certainly should have been aware of ACCC's effort to change its position – and disallowed that effort – when he heard the Motion to Dismiss.

Beyond being limited by its unamended pleading, ACCC should have been judicially estopped from seeking the relief requested in the Motion to Dismiss. "Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004).

The elements of judicial estoppel, as germane to this case, are:

1. two inconsistent positions taken by the same party;
2. the positions must be taken in the same proceedings involving the same party;
3. the party taking the position must have been successful in maintaining that position and have received some benefit;
4. the inconsistency must be part of an intentional effort to mislead the court; and

⁷ Certainly, if ACCC had sought to amend its Complaint to make the contrary factual argument and to seek the opposite relief, and had the Circuit Court allowed such an amendment, Appellants would have had the right to file an Answer to the Amended Complaint, which would have included a counterclaim seeking a declaration that Myers and Stanley were uninsured. Appellants would not have needed a Court Order to file their counterclaim under these circumstances. But, because ACCC never moved to amend its pleadings, Appellants did not have this opportunity.

5. the two positions must be totally inconsistent.

Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 598, 748 S.E.2d 781, 788 (2013).

In the instant case, elements 1, 2, 3, and 5 are satisfied without debate. ACCC is the party that – in this same action – first took the position Myers and Stanley were not covered under its insurance policy and later took the totally inconsistent position that they were insured under its policy. ACCC successfully maintained the former position in obtaining a default declaratory judgment against Myers and Stanley.

With respect to the fourth element, ACCC's intent is manifest from its conduct in relation to the Motion to Dismiss. Clearly, it intended to file the motion. Moreover, the fact ACCC sought to mislead the Circuit Court is inferable from its conduct. It did not amend its Complaint or even seek to do so, nor were there any new facts learned in discovery that could have changed its position. (R. p. 41 [“[N]othing has changed in this period which supports ACCC's change in position. On the other hand, the facts are exactly the same as they were during the prolonged period in which ACCC stated that the Policy did not provide coverage to Myers and Stanley.”]).

Instead, ACCC's attorney argued at the motion hearing that its position was originally “whether or not the Defendants have an insurable interest” (R. p. 178, lines 20-23) – which is not what it asserted in its Complaint. (R. p. 21, ¶ 16). This statement is also at odds with ACCC's request “that this Court declare that ACCC has no obligation to provide coverage or a defense regarding the Policy or the Accident.” (R. p. 22, ¶ 24). In addition, ACCC's counsel contended at the hearing that additional facts from discovery had changed its position (R. p. 178, line 24, to p. 179, line 6) but submitted no evidence in the record to support this contention. Importantly, in the Motion to Dismiss and arguments in support, ACCC never even mentioned the default declaratory judgment it obtained against Myers and Stanley; additionally, ACCC never asked the Court to vacate that judgment.

These facts demonstrate an intentional effort by ACCC to mislead the Circuit Court about its factual position. The Circuit Court erred in allowing ACCC to do so.

The Circuit Judge erred in granting the Motion to Dismiss because ACCC should have been judicially estopped from asserting a position that is inconsistent with the one that it asserted in its unamended Complaint and on which it had obtained relief previously.

4. The Circuit Judge erred in ruling on the Motion to Dismiss without first addressing Appellants' pending motions.

As noted above, if the Circuit Judge had ruled favorably on Appellants' Motion to Amend the Answer and allowed them to assert a counterclaim, then the express terms of Rule 41(a)(2) would have deprived him of the discretion to dismiss this action in its entirety.

By granting the Motion to Dismiss, the Circuit Judge not only denied Appellants the opportunity to litigate their counterclaim in the context of the present action but – to the extent his dismissal with prejudice may foreclose future litigation of this coverage dispute – precludes them from litigating it at any time. A ruling with this effect is an abuse of discretion.

Additionally, to the extent the Circuit Judge made the decision (albeit erroneous) to rely upon a factual record to rule on the Motion to Dismiss, he should have ruled on Appellants' discovery and discovery-related motions before addressing the Motion to Dismiss in order to permit them to complete discovery and to develop further evidence in opposition to the moving parties' position. In this regard, the Court's approach should have been similar to the procedure it uses in addressing other dispositive pretrial motions that are based upon a factual record.⁸ *See,*

⁸ Notably, this Court has ruled that summary judgment standards apply to motions to dismiss with prejudice under Rule 41(b), SCRCP, because they are based on a review of the facts of the case in light of the applicable law and the effect of a dismissal under that subsection of Rule 41 is the same as a grant of summary judgment. *Ex Parte: United Services Auto. Assoc.*, 365 S.C. at 53, 614 S.E.2d at 653. Certainly, the same can be said of the manner in which the Circuit Judge handled the Rule 41 Motion to Dismiss in this case.

e.g., Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 151, 723 S.E.2d 835, 839 (Ct. App. 2012) (“When [the] plaintiff can show that discovery is necessary in order to meet defendant’s challenge to personal jurisdiction [under Rule 12(b)(1), SCRPC], a court should ordinarily permit discovery on that issue....”); *Charleston County School Dist. v. Harrell*, 393 S.C. 552, 559 n. 4, 713 S.E.2d 604, 608 n. 4 (2011) (when a Rule 12(b)(6), SCRPC, motion is converted to a summary judgment motion, the parties must be “afforded a reasonable opportunity to introduce evidentiary matters’ of their own.” [citation omitted]); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (summary judgment under Rule 56, SCRPC, “must not be granted until the opposing party has had a full and fair opportunity to complete discovery.”).

Because the Circuit Judge treated the Motion to Dismiss as a dispositive motion, he abused his discretion by refusing to allow the additional discovery requested by Appellants.

CONCLUSION

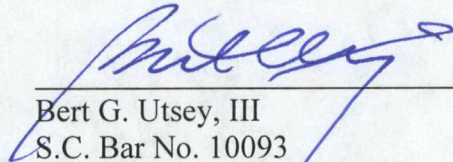
For the reasons set forth above, this Court should reverse the judgment of the Circuit Court granting the Motion to Dismiss and remand this case for resolution on its merits or, at a minimum, with instructions for it to hear and to resolve Appellants’ pending motions before ruling on the Motion to Dismiss. Alternatively, in the event this Court concludes dismissal was appropriate, it should nevertheless reverse the Circuit Court’s decision to dismiss this action with prejudice and instead rule that the dismissal is without prejudice.

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August 17, 2018
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2016-CP-26-06091

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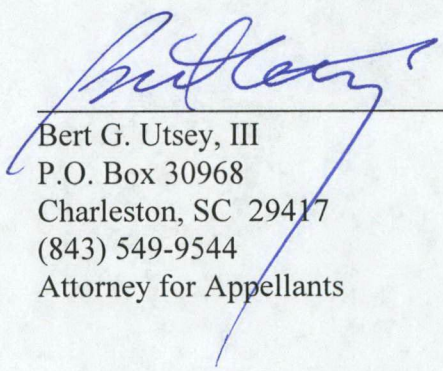
Patricia Williams, Ronald Williams, Patrick Benjamin Myers, Brittany Stanley a/k/a Brittany Standley, and State Farm Mutual Automobile Insurance Company, Defendants,

Of Whom Patricia Williams and Ronald Williams are the Appellants.

And
State Farm Mutual Automobile Insurance Company is Respondent.

CERTIFICATE OF COUNSEL

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



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CERTIFICATE OF SERVICE

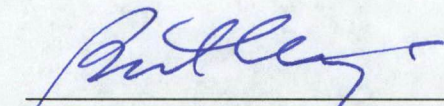
I certify that I have served the Final Brief of Appellants upon the Respondents ACCC Insurance Company and State Farm Mutual Automobile Insurance Company, by depositing a copy of it in the United States Mail, postage prepaid, on August 17, 2018 addressed to counsel of record

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