

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

Kierra Johnson, )  
 )  
Plaintiff, )

Civil Action No. 2020-CP-23-2023

v. )

ORDER

Greenville County, Greater Greenville )  
Sanitation District, the South Carolina )  
Department of Transportation, American )  
Southern Insurance Company, and the )  
State Fiscal Accountability Authority, )  
 )  
Defendants. )

**RECEIVED**  
**Aug 20 2020**  
**SC Court of Appeals**

This matter is before the Court on Defendants Greater Greenville Sanitation District (GGSD) and American Southern Insurance Company (ASIC) motion to dismiss/strike. A hearing on this motion was held on Friday, July 24, 2020, with counsel for all parties present. The hearing was held by WebEx Video Conference and phone, which was consented to by all parties. After reviewing the complete file, the motions and memorandum in support, and hearing arguments from all parties, the undersigned now grants these Defendants motion to dismiss/strike as follows.

Initially, counsel for Defendants GGSD and ASIC argued that the Plaintiff, who is a third party tort claimant, could not bring a direct action against ASIC, as South Carolina law does not allow a direct action against a third party insurer by a tort claimant. *See Trancik v. USAA Ins. Co.*, 354 S.C. 549, 581 S.E.2d 858 (Ct. App. 2003) (no privity of contract exists between an injured person and the tortfeasor's liability insurer, and the injured person has no right of action.); *see also Thibault v. Cleland*, 294 S.C. 138, 363 S.E.2d 114 (Ct. App. 1987). This Court agrees and find that there can be no direct action against a third party insurer by a tort claimant. This court also

finds that to the extent the Plaintiff is attempting to bring a claim for improper claims handling or wrongful adjustment of a claim, that claim is also barred by clearly established law. *See Gaskins v. Southern Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 541 S.E.2d 269, 272 (Ct. App. 2000); *Swinton v. Chubb & Son, Inc.*, 283 S.C. 11, 320 S.E.2d 495 (Ct. App. 1984); *Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 556 S.E.2d 371, 377 (2001).

Finally, counsel for these Defendants asserted that while the Plaintiff did not specifically allege a cause of action for bad faith against Defendant ASIC, she does allege in her Complaint that American Southern engaged in bad faith. Counsel for these Defendants argued that the South Carolina Supreme Court has explicitly rejected such third-party bad faith claims. *See Kleckley v. Northwestern National Casualty Company*, 338 S.C. 131, 134, 526 S.E.2d 218, 219 (2000). This Court finds the clearly established law bars any claim, including one for bad faith against a third party insurer by a tort claimant. Plaintiff, as a third-party tort claimant, lacks standing to commence any action seeking any relief against ASIC. *Park v. Safeco Ins. Co. of America*, 251 S.C. 410, 162 S.E.2d 709 (1968). Therefore, this Court finds as a matter of law that the Plaintiff, as a third party tort claimant, has no viable claim against Defendant ASIC.

The only cause of action against Defendant ASIC is for abuse of process. While this Court has ruled that there can be no claim brought by the Plaintiff against this Defendant, this Court specifically finds that a claim for abuse of process against a third party insurer must fail as the Plaintiff cannot establish that Defendant ASIC caused any process to issue or improperly used process after it had been issued. *See Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984). Therefore, based on the clearly established law, there can be no claim brought against Defendant ASIC by the Plaintiff, and Defendant ASIC must be and is dismissed from this action with prejudice.

The Plaintiff also asserted a claim for punitive damages against Defendants GGSD and ASIC, which are clearly barred by the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-120(b). Therefore, this Court strikes all claims for punitive damages with prejudice.

Counsel for these Defendants also asserted Plaintiff failed to properly serve Defendant GGSD by mailing the Complaint to them by certified mail, which is clearly not proper service on a governmental entity, as service can only be accomplished by personally serving it on the governmental entity. *See* Rule 4, SCRCP. However, counsel for Defendant GGSD has agreed to accept service of the amended complaint on behalf of Defendant GGSD, and therefore, this issue is now moot.

**IT IS THEREFORE ORDERED** that Defendant ASIC is dismissed from this action with prejudice, all claims for punitive damages against Defendants GGSD and ASIC are stricken from the Plaintiff's Complaint with prejudice, and counsel for Defendant GGSD will accept service of the amended complaint.

**IT IS SO ORDERED.**

*Signature of Judge Gravely on following page*



Greenville Common Pleas

**Case Caption:** Kierra Johnson vs. Greenville County , defendant, et al  
**Case Number:** 2020CP2302023  
**Type:** Order/Dismissal

So Ordered

s/ Honorable Perry H. Gravely, #2755

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|--|---|------------------------------|
| STATE OF SOUTH CAROLINA                          | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE                             | ) |                              |
| Kierra Johnson,                                  | ) | CASE NO. 2020-CP-23-02023    |
|  | ) |                              |
| Plaintiff,                                       | ) | <b>PLAINTIFF'S</b>           |
|  | ) | <b>MOTION TO RECONSIDER</b>  |
| vs.  | ) |                              |
|  | ) |                              |
| Greenville County, Greater Greenville Sanitation | ) |                              |
| District, the South Carolina Department of       | ) |                              |
| Transportation, American Southern Insurance      | ) |                              |
| Company, and the State Fiscal Accountability     | ) |                              |
| Authority  | ) |                              |
| Defendants.                                      | ) |                              |

COMES NOW, the plaintiff, and respectfully requests that the Court reconsider its ruling of August 3, 2020, which dismissed defendant American Southern Insurance Company.

The plaintiff respects the Court's ruling, but the plaintiff is required to file a Rule 59(e)<sup>1</sup> motion to preserve certain issues for appeal. The plaintiff respectfully submits that the Court should alter or amend its ruling, and that American Southern Insurance Company should not be dismissed. In its ruling, the Court relied on *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 581 S.E.2d 858 (Ct. App. 2003). However, the plaintiff did not sue ASIC for breach of contract. The Court also relied on *Gaskins v. Southern Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 541 S.E.2d 269, 272 (Ct. App. 2000). However, the plaintiff did not bring an action for improper claims practices, even though ASIC clearly engaged in improper claims practices<sup>2</sup>. Finally, the Court relied on *Kleckley*

<sup>1</sup> The plaintiff makes this motion pursuant to South Carolina Rules of Civil Procedure 54, 59, including subpart (e), 60, and all other applicable Rules.

<sup>2</sup> Currently, South Carolina does not recognize a private cause of action for improper claims practices, even though the plain language of the statute unambiguously provides one. The plaintiff preserves this issue for appeal, because the law should be modified to conform with the plain language of the statute.

*v. Northwestern National Casualty Company*, 526 S.E.2d 218 (2000), but the plaintiff did not sue ASIC for bad faith.

The plaintiff respectfully submits that ASIC's motion and memorandum amounted to an effort to manufacture a basis for dismissal where none existed. This is evidenced by the cases cited by ASIC, none of which pertain to the allegations contained in the complaint. The plaintiff may sue any entity for its negligence and recklessness which causes the plaintiff to sustain damages, and the plaintiff has done so in this case. Dismissal of the plaintiff's claims against ASIC for negligence and recklessness was therefore improper.

The plaintiff also stated a cause of action against ASIC for abuse of legal process. In dismissing this cause of action, the Court relied on *Rycroft v. Gaddy*, 314 S.E.39 (Ct. App. 1984), a case with facts different from those in this case. However, the language of *Rycroft* actually supports the plaintiff's position:

The essential elements of abuse of process are: first, an ulterior purpose and second, a willful act in the use of process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of process is required. *Huggins v. Winn-Dixie*, 249 S.C. 206, 153 S.E. (2d) 693 (1967).

The plaintiff pled: 1) ASIC's ulterior purpose (Paragraph 44 of the Complaint states ASIC used legal process for an "improper purpose."); 2) a willful act in the use of process which is not proper (Paragraphs 44-47); and 3) an act by ASIC that is aimed at an illegitimate objective (Paragraphs 46 and 47). If the Court's ruling were based on the fact that some of ASIC's tortious conduct occurred before process was issued, then the proper ruling is an amendment to add a malicious prosecution claim, not dismissal (See *Huggins* "...the distinction between...malicious prosecution and...abuse of process is 'that a malicious prosecution consists in maliciously causing process to be issued, whereas an abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect.'").

The Court stated that service on a governmental entity is improper. Neither Rule 4(d)(5) nor 4(d)(6) requires that service be accomplished by hand-delivery. Rather, both subsections state that “deliver[y of] a copy of the summons and complaint” completes service. It appears this issue will not affect litigation going forward, but the plaintiff preserves this issue in an abundance of caution.

The plaintiff preserves for appeal all issues related to this litigation and the hearing that was held on July 24, 2020 and the order of August 3, 2020<sup>3</sup>.

Hawkins & Jedziniak, LLC

*s/ Joshua T. Hawkins*

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Greenville, South Carolina  
August 3, 2020

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<sup>3</sup> The plaintiff preserves for appeal all issues related to State and Federal constitutional violations, including violations of the Equal Protection Clause, the Seventh Amendment right to a jury trial, the right to Due Process, and all other issues which may be briefed on appeal. The plaintiff preserves for appeal the Court’s dismissal of the plaintiff’s prayer for punitive damages, as ASIC is not immune from punitive damages and as the law that protects governmental entities from punitive damages should be modified.