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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2020-001144
Case No. 2020-CP-23-2023

Kierra Johnson, ... Appellant,

v.

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

Of which American Southern Insurance Company is, ... Respondent.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This action arises from a motor vehicle accident that occurred on January 7, 2020. The Appellant Kierra Johnson was a pedestrian on Highway 25/White Horse Road in Greenville, South Carolina, when she was allegedly struck and injured by a leaf hose on a sanitation truck owned by the Defendant Greater Greenville Sanitation District and driven by its employee, Marshall Gordon.

Pursuant to the South Carolina Tort Claims Act, the Appellant brought tort claims against several governmental entities, including the Greater Greenville Sanitation District, for negligence for failure to keep a proper lookout and for negligent hiring and supervision. In addition, the Appellant includes in her Complaint causes of action for negligence and abuse of process against the Defendant State Fiscal Accountability Authority ("SFAA") and the Respondent American Southern Insurance Company ("American Southern"). The South Carolina Insurance Reserve Fund ("IRF") is a division of the SFAA and is authorized to provide insurance coverage for the State of South Carolina, its agencies, and political subdivisions. *See*, S.C. Code Ann. § 1-11-140.[1] The Respondent American Southern is the servicing reinsurer for the IRF's automobile

[1] On July 7, 2020, the Appellant voluntarily dismissed her claims against the SFAA. (Stipulation of Dismissal) (R. ___).

liability insurance program.[2] The Greater Greenville Sanitation District was insured at the time of the accident under an automobile liability policy issued by the IRF and reinsured by American Southern.

On May 29, 2020, American Southern filed a motion to dismiss under Rule 12(b)(6), SCRCP. That motion was heard by Circuit Court Judge Perry H. Gravely on July 24, 2021. On that same date, Judge Gravely issued a form order granting the motion to dismiss. (Form Order). Judge Gravely then issued a formal order filed August 3, 2020, which dismissed the claims against American Southern on several bases, including the absence of a private right of action under South Carolina law whereby a third-party tort claimant could bring a direct action against a liability insurer, the Appellant's lack of standing, and the Appellant's failure to allege well-pled facts supporting each element of the abuse of process cause of action. (Order). The Appellant filed a motion for reconsideration pursuant to Rule 59(e), SCRCP, and that motion was denied by Judge Gravely by a form order filed August 11, 2020. (Form Order).

On August 20, 2020, the Appellant filed a timely Notice of Appeal to this Court. That Notice of Appeal identifies the Form Order dated August 11, 2020, as the only order being appealed.

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[2] *See, Sanders v. American Southern Ins. Co.*, 325 S.C. 628, 481 S.E.2d 717 (Ct. App. 1997) (describing American Southern as the servicing reinsurer for the IRF's automobile liability insurance program).

STANDARD OF REVIEW

When reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. *Doe v. Bishop of Charleston*, 407 S.C. 128, 754 S.E.2d 494, 497 (2014). "If the facts alleged and inferences reasonably deducible from the allegations set forth in the complaint, viewed in the light most favorable to the plaintiff, entitle him to relief on any theory, dismissal under Rule 12(b)(6) is improper." *Id.*

"When reviewing a motion to dismiss for failure to state facts sufficient to constitute a cause of action, the pleadings must be construed liberally, and all well pled facts must be presumed true." *Doe*, 754 S.E.2d at 497-498. However, only "well pled facts" are to be presumed true. In contrast, issues of law -- which are not "well pled facts" -- are for the Court and are reviewed *de novo*. 754 S.E.2d at 498. This Court has previously explained that, on a Rule 12(b)(6) motion, "the court is required to presume all well pled *facts,* not propositions of law, to be true." *HHHunt Corp. v. Town of Lexington,* 389 S.C. 623, 699 S.E.2d 699, 705 (Ct. App. 2010). (Emphasis in original).

ARGUMENTS

The trial court dismissed the Appellant's causes of action against the Respondent American Southern Insurance Company on three separate and independent grounds. First, the trial court ruled that "South Carolina law does not allow a direct action against a third party insurer by a tort claimant." (Order, p. 1). Second, the trial court determined that a third-party claimant "lacks standing to commence any action seeking any relief against ASIC." (Order, p. 2). Finally, as to the cause of action for abuse of process, the trial found that no claim could be asserted against a third-party insurer because the Appellant "cannot establish that Defendant ASIC caused any process to issue or improperly used process after it had been issued." (Order, p. 3). Each of those rulings was correctly decided and provides an independent basis for the dismissal of the Appellant's Complaint against American Southern.[3]

[3] In her Statement of Issues on Appeal, the Appellant presents a single issue for appeal stated as follows: "Whether the fact that companies engage in the business of insurance makes them immune from lawsuits." *See*, Appellant's Brief, p. 1. Rule 208(b)(1)(B), SCACR, states: "A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. The Appellant has not stated issues on appeal with respect to any of the trial court's dispositive rulings. Clearly, the trial court never determined that American Southern is entitled to immunity from suit. Likewise, American Southern did not raise any immunity defense in its motion to dismiss.

I. South Carolina law does not allow a direct action against an insurer. Additionally, South Carolina law does not permit a private right of action under the Claims Practices Act or any cause of action for "wrongful adjustment" against an insurer.

The Appellant is the third-party tort claimant who has brought a direct action against the auto liability insurer (SFAA/South Carolina Insurance Reserve Fund) and its servicing reinsurer (American Southern).[4] She alleges that "American Southern provided coverage for Gordan's actions at the time that Gordan injured the plaintiff." *See*, Complaint, ¶ 30. (R. __). The Appellant further alleges that "American Southern neither paid the claim nor made any effort to make the plaintiff whole." *See*, Complaint, ¶ 20. (R. __).[5] She maintains that American Southern "abuse[s] the legal process by forcing people to file lawsuits in cases where lawsuits should not be necessary." *See*, Complaint, ¶ 21. (R. __). In effect, as the trial court determined, the Appellant is attempting to bring a claim for improper claims handling or the wrongful adjustment of a claim.

In *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 581 S.E.2d 858 (Ct. App. 2003), this Court explained that "[u]nder the common law, no privity of contract exists between an injured person and the tortfeasor's liability insurer, and the injured person has no right of action at law against the insurer." 581 S.E.2d at 861.

[4] As noted above, the Insurance Reserve Fund – more specifically the SFAA – was voluntarily dismissed by the Appellant.

[5] Despite now claiming in her brief that American Southern is not an insurer, the cited allegations from her Complaint state otherwise.

Similarly, in *Thibault v. Cleland*, 294 S.C. 138, 363 S.E.2d 114 (Ct. App. 1987), this Court affirmed the trial court's grant of a motion to dismiss on a direct action brought against an insurer. This Court explained that "no right to maintain a lawsuit directly against an insurer exists absent privity of contract between the claimant and the insurer, and because direct actions against insurers contravene the common law, such right must be expressly sanctioned by the legislature." 363 S.E.2d at 115.[6]

Thus, a direct action against an insurer is permitted only if provided for by statute. In a number of cases, the South Carolina appellate courts have ruled that the Claims Practices Act, S.C. Code Ann. § 38-59-10 to -50, "does not create a private cause of action." *Gaskins v. Southern Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 541 S.E.2d 269, 272 (Ct. App. 2000). *See, Swinton v. Chubb & Son, Inc.*, 283 S.C. 11, 320 S.E.2d 495 (Ct. App. 1984) (holding S.C. Code Ann. § 38-37-1110, the predecessor statute, recodified by 1987 Act No. 155, § 1 to S.C. Code Ann. § 38-59-20, did not allow a private cause of action).

Instead, the Claims Practices Act "provides relief for a third party victim of an improper claims practice" but only entitles that third-party claimant to an

[6] *See, McPherson v. Michigan Mut. Ins. Co.*, 306 S.C. 456, 412 S.E.2d 445, 449 (Ct. App. 1991) (holding the insured clients of an insured party were not in contractual privity with insured's reinsurance company because they were not a party to the reinsurance contract), *aff'd as modified by,* 310 S.C. 316, 426 S.E.2d 770 (1993) (addressing whether the injured party could sue the tortfeasor's insurance company, pursuant to the policy, and not addressing whether the insured party could sue the reinsurance company).

administrative remedy with the Department of Insurance. *Gaskins*, 541 S.E.2d at 272. This Court in *Gaskins* therefore affirmed the trial court's dismissal of the cause of action for "wrongful adjustment." Similarly, in *Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 556 S.E.2d 371, 377 (2001), the South Carolina Supreme Court, relying in part on *Gaskins*, ruled that "[t]hird parties do not have a private right of action under S.C. Code Ann. § 38-59-20. Instead, third parties are entitled to administrative review before the Chief Insurance Commissioner." 556 S.E.2d at 377.

In her opening brief, the Appellant acknowledges that "[a]s interpreted by South Carolina courts, the Improper Claims Act [sic] does not allow a person injured by a tortfeasor's negligence to sue the insurer of the tortfeasor." *See*, Appellant's Brief, p. 9. Nonetheless, the Appellant "seeks to change the law" and argues that S.C. Code Ann. § 38-59-20 does provide for a private right of action. As discussed above, that is contrary to established precedent from this Court and the Supreme Court. It is well settled that this Court cannot overrule established precedent from the Supreme Court. *See*, S.C. Const. art V, § 9 ("[t]he decisions of the Supreme Court shall bind the Court of Appeals as precedents"); *Freeman v. Freeman*, 323 S.C. 95, 473 S.E.2d 467, 473 (Ct. App. 1996) ("[the Court of Appeals is] bound by the decisions of the South Carolina Supreme Court"); *State v. Cheeks*, 400 S.C. 329, 733 S.E.2d 611, 618 (Ct. App. 2012) ("this court lacks the

authority to rule against prior published precedent from our supreme court, but is bound by the decisions of the supreme court").

Notwithstanding the fact that this Court must apply existing Supreme Court precedent, there is no valid basis for overruling that existing precedent. In *Swinton, supra*, this Court accurately warned that "wrongful adjustment" claims would result in the courts being "potentially besieged with so called 'bad faith' suits in every instance in which or whenever third party claimants, rightly or wrongly, disagreed with adjusters over the handling or settlement of claims against their insureds. Clearly the legislature did not intend such a course." *Swinton*, 320 S.E.2d at 497. Moreover, in *Kleckley v. Northwestern National Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000), the Supreme Court recognized as follows:

> Furthermore, the South Carolina Claims Practices Act, S.C. Code Ann. §§ 38-59-10 to -50 (1989 & Supp. 1998) provides an adequate remedy for third parties who have been wronged by improper claims practices. Specifically, section 38-59-20 permits an administrative action before the Chief Insurance Commissioner by third parties for improper claims practices where the insurer: (1) knowingly misrepresents facts or policy provisions relating to coverage or provides deceptive or misleading information with respect to coverage; (2) fails to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies; (3) fails to adopt and implement reasonable standards for the prompt investigation of claims; and (4) not attempting in good faith to effect prompt, fair, and equitable settlement of claims. Therefore, the Legislature has specifically provided a remedy for Kleckley to assert as a third party against Northwestern.

526 S.E.2d at 221. Importantly, if the General Assembly had intended to provide for a private right of action for a violation of the Claims Practices Act, it would have done so. As this Court has acknowledged, the recognition of a private right of action is the prerogative of the legislative branch. *See*, *Palmer v. State of South Carolina*, 427 S.C. 36, 829 S.E.2d 255, 261 (Ct. App. 2019) (recognizing that "it is not for this court to create such an action when the legislature has specifically declined to do so").

In the present case, the Appellant did not specifically alleged a cause of action for bad faith against American Southern, but she does include allegations suggestive of bad faith. In addition to rejecting claims for "wrongful adjustment," the Supreme Court has also explicitly rejected third-party bad faith claims. In *Kleckley*, *supra*, the Supreme Court held that "[a] tort action for an insurer's bad faith refusal to pay benefits does not extend to third parties who are not named insureds." 526 S.E.2d at 219. As the trial court explained in this case, a bad faith claim by a third-party claimant premised on improper claims handling is not viable under South Carolina law.

In sum, the same analysis and reasoning applies to any direct action brought by a third-party tort claimant against an insurer, including the negligence and abuse of process claims alleged by the Appellant. The trial court correctly ruled that the Appellant is barred from asserting a direct claim against American Southern for a

violation of the Claims Practices Act, for "wrongful adjustment," for negligence, or for "abuse of process," regardless of the label actually attached to the claim.

II. Under South Carolina law, a third-party tort claimant lacks standing to sue an insurer for any relief where there is no contractual relationship and the tort claimant had not yet received a judgment against the insured.

As an additional basis for the dismissal of the Appellant's claim against American Southern, the trial court ruled that a third-party tort claimant lacks standing to commence any action seeking any relief -- even a declaratory judgment action which this not -- against an insurer.[7] In *Park v. Safeco Ins. Co. of America*, 251 S.C. 410, 162 S.E.2d 709 (1968), the Supreme Court ruled that a tort claimant lacks standing to pursue a declaratory judgment action against a liability insurer where there was no contractual relationship and the tort claimant had not yet received a judgment against the insured. The Supreme Court explained:

> Counsel for plaintiff argues, with some appeal, that an injured party should have as much right to ask the court to determine the validity of a tortfeasor's liability insurance policy as the insurer or the insured. We think

[7] The Appellant did not appeal from the trial court's ruling that she lacks standing to bring a direct action against American Southern. As a result, the judgment below may be affirmed by application of the "two-issue" rule. The Supreme Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

> the fallacy of this argument lies in the fact that the injured person is not a party to the contract and has, under the facts of this case, no primary standing to litigate a dispute between the insured and insurer until and unless he establishes liability against [the insured]. Before judgment is obtained on a tort claim, the standing of the parties to the policy and the standing of the injured party are greatly different.

162 S.E.2d at 711. The Supreme Court further explained that "no right to recover can accrue to plaintiff against [the] insurance company until and unless [an insured] becomes liable to pay." 162 S.E.2d at 710. In sum, the Supreme Court affirmed the dismissal of the declaratory judgment action because the plaintiff lacked standing and did not present a justiciable claim.[8]

In the case at bar, the Appellant lacks standing and has not presented any justiciable claim against American Southern. Although the Appellant does not seek declaratory relief, the trial court correctly ruled that the Appellant cannot seek any relief -- declaratory or monetary -- against an insurer in absence of a contractual relationship with the insurer and where the tort claimant has not even obtained a judgment against the insured.

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[8] In *Otterbacher v. Snyder*, 2015 WL 4068204 (S.C. Ct. App. 2015), this Court more recently applied the *Park* decision and vacated a declaratory judgment issued by the circuit court in a declaratory judgment action commenced by an auto accident victim against the alleged tortfeasor's insurance company before the liability of the alleged tortfeasor had been established. Being an unpublished decision, *Otterbacher* cannot be cited as precedent, but it does demonstrate that *Park* is still "good law" and has been applied in recent years by this Court under similar circumstances as present in the case at bar.

III. The Appellant's Complaint does not allege well-pled facts to satisfy the elements for a cause of action of abuse of process by a third-party claimant against an insurer.

As a third basis for dismissing the Appellant's Complaint against American Southern, the trial court ruled that an abuse of process claim cannot be asserted against a third-party insurer because the Appellant "cannot establish that Defendant ASIC caused any process to issue or improperly used process after it had been issued." (Order, p. 3).

"The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Guider v. Churpeyes, Inc.*, 370 S.C. 424, 635 S.E.2d 562, 566 (Ct. App. 2006). A plaintiff alleging abuse of process must prove two essential elements: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding." *Hainer v. American Medical International, Inc.*, 328 S.C. 128, 492 S.E.2d 103, 107 (1997). "The focus in an abuse of process action is on the improper use of process after it has been issued." *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39, 43 (Ct. App. 1984).

Based upon the allegations in the Complaint, the trial court concluded that "the Plaintiff cannot establish that Defendant ASIC caused any process to issue or improperly used process after it had been issued." (Order, p. 2). The Appellant complains on appeal that the trial court construed the term process "narrowly" and

cites to several conclusory allegations in her Complaint. Yet, she has not identified any well-pled facts in the Complaint showing that American Southern issued any process or improperly used any process after it was issued. Clearly, an abuse of process does not arise where an insurer refuses to settle a claim prior to suit being filed. Not surprisingly, the Appellant has not cited a single reported decision from South Carolina or any jurisdiction holding to the contrary. On this additional basis, the decision of the trial court should be affirmed.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent American Southern Insurance Company respectfully requests that the Court affirm the orders issued by Circuit Judge Perry H. Gravely dismissing American Southern as a party-defendant.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: *s/ Andrew F. Lindemann*

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

Of which American Southern Insurance Company is, ... Respondent.

CERTIFICATE OF SERVICE

In accordance with Section (c)(5) of the Supreme Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (as amended May 29, 2020), the undersigned employee of Lindemann & Davis, P.A., counsel for the Respondent American Southern Insurance Company, does hereby certify that service of the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in Record on Appeal** was made upon Appellant's counsel by email only this the 16th day of June 2021:

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June 16, 2021

Via Email Only
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Kierra Johnson v. American Southern Insurance Company
Appellate Case Number: 2020-001144
Civil Action Number: 2020-CP-23-2023
Claim Number: 7045583-CJ
Our File Number: 23.20315

Dear Ms. Kitchings:

In accordance with Section (c)(5) of the Supreme Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (as amended May 29, 2020), please find enclosed for filing the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in Record on Appeal** in the above referenced matter. In accordance with Section (g)(3) of this same order, I am hereby serving copies on all counsel of record by email only.

If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Joshua T. Hawkins, Esquire *(w/ Enclosures, Via Email Only)*
Helena L. Jedziniak, Esquire *(w/ Enclosures, Via Email Only)*