THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2020-001144

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 whom American Southern Insurance Company is the.....Respondent.

FINAL BRIEF OF APPELLANT

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s/ Joshua T. Hawkins
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1. WHETHER THE FACT THAT COMPANIES ENGAGE IN THE BUSINESS OF INSURANCE MAKES THEM IMMUNE FROM LAWSUITS

STATEMENT OF THE CASE

The appellant filed suit on April 7, 2020, against several defendants and asserted claims against American Southern for negligence, recklessness, negligent hiring, and abuse of process. The appellant did not assert any cause of action for improper claims practices against American Southern. Nevertheless, American Southern filed a motion to dismiss based upon its assertion that the appellant had filed an improper claims practice cause of action. The Circuit Court heard that motion July 24, 2020. The Circuit Court entered a Form 4[1] order later that day granting American Southern's motion to dismiss and entered a formal order memorializing that ruling on August 3, 2020. The appellant filed a Rule 59(e) motion, which the Circuit Court denied on August 11, 2020. The appellant timely filed a notice of appeal.

STANDARD OF REVIEW

Whether a motion to dismiss should be granted is a question of law. Questions of law are decided *de novo,* meaning that "a reviewing court is free to decide questions of law with no particular deference to the trial court." *Personal Care, Inc. v. Theo,* 426 S.C. 78 S.E.2d 281 (Ct. App. 2019). In reviewing the South Carolina Rules of Civil Procedure, a reviewing court applies the same rules of construction that it uses in interpreting statutes. *Green v. Lewis Truck Lines, Inc*., 314 S.C. 303 (1994). "If the rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary, and the stated meaning should be enforced." *Maxwell v. Genez,* 356 S.C. 617 (2003).

[1] American Southern, the third-party administrator for the State Fiscal Accountability Authority, improperly attempted to assert a counterclaim under the Frivolous Proceedings Act. The Court granted the appellant's motion to dismiss the counterclaim in the Form 4, as there is no cause of action for frivolous proceedings. Because the cause of action was dismissed, the appellant could have made a frivolous proceedings motion against American Southern but chose not to do so.

FACTUAL BACKGROUND

On January 7, 2020, Kierra Johnson was walking on a sidewalk toward a bus stop on White Horse Road in Greenville, South Carolina when she was struck by a Greater Greenville Sanitation District truck. After striking the appellant, the truck dragged her down the road for a significant distance. As a result of this incident, Johnson sustained severe facial injuries, including broken teeth and potentially permanent scarring/disfigurement.[2] The truck that hit Johnson was insured by the State Fiscal Accountability Authority, which uses Southern American Insurance Company as a third-party administrator to handle its claims. There is at least some indication that the driver of the truck and one or more defendants had knowledge of the defect that caused the malfunction and resulted in the collision. A trooper with the South Carolina Highway Patrol generated a collision report, which was available for review by the appellant and American Southern, among others.

The appellant attempted to avoid litigation by making a pre-suit demand within the amount allowed by the Tort Claims Act.[3] On January 28, 2020, American Southern responded to that demand with a letter that stated, in part:

> Our investigation revealed that the leaf vacuum hose that was connected to our insured's truck on the passenger side detached from the small hook holding it in place. We were advised this caused the leaf vacuum hose to make contact with your client waking (sic) as a pedestrian going northbound on the sidewalk of U.S. 25.

Despite acknowledging that a malfunction caused the collision that injured the appellant, American Southern denied liability[4] and forced the appellant to file suit on April 7, 2020. American Southern

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[2] Photographs of the appellant's injuries are included in the complaint. The Circuit Court denied the South Carolina Department of Transportation's motion to strike the photographs.

[3] The Tort Claims Act applies to the insured, Greater Greenville Sanitation District.

[4] Presumably, American Southern hired legal counsel, which raised several defenses in its insured's answer denying liability.

filed a motion to dismiss, citing cases addressing the Improper Claims Practices Act, even though the appellant did not bring a claim pursuant to that statute and even though American Southern is not actually the insurer of the truck that caused the injury. The Circuit Court granted the motion to dismiss. This appeal follows.

ARGUMENTS

I. South Carolina law requires denial of a motion to dismiss where a plaintiff has stated a cause of action for which relief can be granted.

South Carolina Rule of Civil Procedure 12(b)(6) allows a defendant to move to dismiss an action where a plaintiff has failed to set forth sufficient facts to constitute a cause of action. A court should deny a defendant's motion to dismiss, if, upon an examination of the pleadings, "the facts alleged, and inferences therefrom would entitle the plaintiff to any relief on any theory." *Stiles v. Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995). A court must weigh not only facts, but also *inferences* in the nonmoving party's favor when considering a motion to dismiss. *Dye v. Gainey,* 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995). A motion to dismiss "cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case." *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985); and *Glass v. Glass*, 276 S.C. 625, 281 S.E.2d 221 (1981).

In determining whether to grant a motion to dismiss, "the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995) citing *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court," Rule 12, *SCRCP*, dictates that "the motion shall be treated as one for

summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

There is no case law or statute that makes an insurer immune from suit solely because it is an insurer. Even if there were, such law would have no bearing on the matters before this Court. By its own admission, American Southern is not an insurer, but rather a third-party administrator. American Southern's role in some respect is similar to that of a private investigator, who obviously can be sued for tortious conduct. (See also *Hidden Dangers of Using Private Investigators*, 17 S. Carolina Lawyer 18, 20-1 (2005) and *Charleston v. Young Clement Rivers & Tinsdale, LLP*, 359 S.C. 635 (Ct.App. 1993)). In order to survive a motion to dismiss pursuant to Rule 12(b), therefore, the appellant need only met the standard outlined above.

a. The appellant stated a valid cause of action for negligence against the respondent and, as a result, the Circuit Court should not have dismissed the respondent from the action.

In order to successfully plead a cause of action for negligence, a plaintiff must allege: "the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." *Bloom v. Ravoira*, 529 S.E.2d 710 (S.C. 2000). In her complaint, the appellant clearly outlines the duties of care owed to her by each defendant, the breaches of those duties by negligent acts and/or omissions, and the damages that the appellant sustained as a proximate cause of each defendant's conduct. With respect to the respondent, the appellant alleged that the respondent owed duties of care to "fairly evaluate claims, especially in cases of clear liability," "avoid causing financially vulnerable individuals such as the plaintiff to file suits and incur expenses unnecessarily," and to "avoid causing the plaintiff unnecessary delay in being made whole after she was injured," among

others (R. p. 17, ¶ 33). The appellant alleged that the respondent breached these duties by "failing to fairly evaluate claims, especially in cases of clear liability" and "in causing the plaintiff to needlessly incur the costs associated with litigation," (R. p. 17, ¶ 35). The appellant then enumerated multiple damages that she sustained as a result of this incident, and which she alleges were proximately caused by the respondent's breaches of duties (R. p. 18, ¶ 36). If taken as true, these allegations and the inferences drawn therefrom would allow the appellant to recover against the respondent. As a result, based solely upon the pleadings, the Circuit Court should have denied the respondent's motion to dismiss with respect to the appellant's negligence cause of action.

b. The appellant stated a valid cause of action for abuse of process against the respondent and, as a result, the Circuit Court should not have dismissed the respondent from the action.

Under South Carolina law, "[t]he 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." *Food Lion v. United Food & Commercial*, 351 S.C. 65, 567 S.E. 2d 251 (Ct. App. 2002). Although the term "process" has not been clearly defined, South Carolina courts acknowledge that the term, "as it pertains to the abuse of process tort, embraces the full range of activities and procedures attendant to litigation." *Food Lion* at 70 citing *Hart v. O'Malley*, 436 Pa. Super. 151, 647 A.2d 542, 551 (Pa. Super.Ct.1994) and *Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876, 880 (Ariz.App.1982). This broad definition of process has allowed plaintiffs to assert abuse of process claims under a variety of circumstances, including: an appeal of a trial court's judgment (*Cisson v. Pickens Sav. & Loan Ass'n*, 186 S.E.2d (1972)); wrongful intervention (*Ibid.*); an appeal of a decision of a Board of Adjustment (*LaMotte v. Punch Line of Columbia, Inc.*, 370 S.E.2d 711 (1988)); improper venue (*Mercury Marine Division of Brunswick Corp. v. Costa*, 342 S.E.2d 632

(Ct.App. 1986)); filing suit after voluntary dismissal (*Ibid*.); and filing a complaint with an administrative agency (*Hainer v. American Medical Internat'l, Inc*., 465 S.E.2d 112 (Ct.App. 1995)).

Just American Southern's status as a third-party administrator does not make it immune to suits arising out of negligence, similarly, it does not prevent injured parties from bringing claims for abuse of process. An insurer and third-party administrator are allowed to investigate. However, that process is not designed for the denial of virtually all claims, especially those in which liability is patently clear. In this case, the Circuit Court interpreted the term "process" more narrowly than the law allows in its August 3, 2020 order when it ruled "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," citing *Rycroft v. Gaddy*, 314 S.E.2d 39 (Ct. App. 1984)[5](August 3, 2020 Order).

In order to survive a motion to dismiss an abuse of process claim, a plaintiff need only allege "1) an 'ulterior purpose' and 2) a 'willful act in the use of the process not proper in the conduct of the proceeding.'" *Food Lion v. United Food & Commercial*, 567 S.E.2d 251 (Ct. App. 2002); *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967); *Whitfield Const. Co. v. Bank of Tokyo Trust Co.*, 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999). In her complaint, the appellant alleged both (R. p. 19, ¶ 44-47), as well as that these actions proximately caused the appellant's damages (R. p. 20, ¶ 48). The appellant also supported this cause of action with further allegations, including the following: "SFAA uses American Southern to further complicate the processing of claims and to deny the vast majority of all claims made" (R. p. 13, ¶

[5] *Rycroft v. Gaddy*, 281 S.C. 119, 125, 314 S.E.2d 39, 44 (Ct.App.1984) held there was no ulterior purpose where defendants' use of subpoena to obtain bank records was for the "entirely legitimate purpose" of gathering evidence.)

19); "both American Southern and SFAA systematically collude and abuse the legal process by forcing injured people to file lawsuits in cases where lawsuits should not be necessary" (R. p. 14, ¶ 21); and "SFAA and American Southern caused additional delay and also caused the plaintiff to incur filings fees and other legal costs" (R. p. 14, ¶ 22). Because the appellant properly pleaded a cause of action for abuse of process against the respondent, the Circuit Court erred in granting the respondent's motion to dismiss.

II. The Plain Language of the Improper Claims Practices Act provides a cause of action for third parties.

Section 38-59-20 of the South Carolina Code of Laws provides:

> Any of the following acts by an insurer doing accident and health insurance, property insurance, casualty insurance, surety insurance, marine insurance, or title insurance business, if committed without just cause and performed with such frequency as to indicate a general business practice, constitutes improper claim practices:
>
> (1) Knowingly misrepresenting to insureds **or third-party claimants** pertinent facts or policy provisions relating to coverages at issue or providing deceptive or misleading information with respect to coverages (emphasis added).
>
> (2) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies, including third-party claims arising under liability insurance policies.
>
> (3) Failing to adopt and implement reasonable standards for the prompt investigation and settlement of claims, including third-party liability claims, arising under its policies.
>
> (4) Not attempting in good faith to effect prompt, fair, and equitable settlement of claims, including third-party liability claims, submitted to it in which liability has become reasonably clear.
>
> (5) Compelling policyholders or claimants, **including third-party claimants** under liability policies, **to institute suits** to recover amounts reasonably due or payable with respect to claims arising under its policies by offering substantially less than the amounts

> ultimately recovered through suits brought by the claimants or through settlements with their attorneys employed as the result of the inability of the claimants to effect reasonable settlements with the insurers (emphasis added).
>
> (6) Offering to settle claims, including third-party liability claims, for an amount less than the amount otherwise reasonably due or payable based upon the possibility or probability that the policyholder or claimant would be required to incur attorneys' fees to recover the amount reasonably due or payable.
>
> (7) Invoking or threatening to invoke policy defenses or to rescind the policy as of its inception, not in good faith and with a reasonable expectation of prevailing with respect to the policy defense or attempted rescission, but for the primary purpose of discouraging or reducing a claim, including a third-party liability claim.
>
> (8) Any other practice which constitutes an unreasonable delay in paying or an **unreasonable failure to pay or settle in full claims, including third-party liability claims**, arising under coverages provided by its policies (emphasis added).

As interpreted by South Carolina courts, the Improper Claims Act does not allow a person injured by a tortfeasor's negligence to sue the insurer of the tortfeasor.[6] *Gaskins v. Southern Farm Bureau Cas. Ins. Co*., 343 S.C. 666, 541 S.E.2d 269, 272 (Ct. App. 2000). The appellant seeks to change the law concerning improper claims practices because the plain language of the statute allows a plaintiff to sue an insurer directly and because public policy favors protecting individuals treated unfairly by insurance companies with unlimited resources.

First, the plain language of Section 38-59-20 to provides for a private cause of action. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Charleston County Sch. Dist. v. State Budget and Control Bd*., 313 S.C. 1, 437 S.E.2d 6 (1993);

[6] 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 appellant preserved this issue for appeal, because the law should be modified to conform with the plain language of the statute.

Hodges v. Rainey, 533 S.E.2d 578 (2000). Indeed, if the legislature did not intend to create a private cause of action for improper claims practices, then it is unclear why it enacted this legislation at all. While the statute provides for a hearing, an individual harmed by insurance companies is not always afforded the right to a hearing. If individuals harmed by insurance companies are not entitled to hearings and they are not allowed to file suit against those companies, then the statute serves no purpose. The statute essentially has no meaning, which is the result of an interpretation antithetical to the rules of statutory interpretation.

Second, public policy supports protecting people from the improper actions of insurance companies. Both insureds and individuals harmed by insureds' tortious conduct need remedies that motivate insurance companies to act in good faith. The appellant is one such individual. In this case, the State Fiscal Accountability Authority, through American Southern, denied a claim and refused to tender payment to a financially vulnerable individual harmed by the insured's gross negligence. In doing so, the insurer "[k]nowingly misrepresent[ed] to [a] third-party claimant pertinent facts… [and were] deceptive…with respect to coverages." American Southern knew that liability was clear, knew that the appellant sustained extensive injuries, and knew that the appellant's pre-suit demand was within the amount allowed by law. The respondent nevertheless denied liability. As a result, the appellant was forced to incur additional expense by filing suit to recover her damages.

Equity also supports extending the interpretation of the Improper Claims Act to allow what its plain language provides – that injured third parties be allowed to hold insurers accountable. It is fundamentally unfair to injured individuals to allow insurers to achieve unjust results by relying upon cases such as *Kleckley v. Northwestern Nat. Cas. Co*., 526 S.E.2d 218 (2000), *Swinton v. Chubb & Son, Inc*., 320 S.E.2d 495 (Ct. App. 1984), and *Gaskins v. Southern Farm Bureau Cas*.,

541 S.E.2d 269 (Ct. App. 2000). South Carolina Courts have made exceptions to precedents when required by equity. *Ateyeh v. Volkswagen of Florence, Inc*., 288 S.C. 101, 341 S.E. 2d 378 (1986). Such a need exists in this case, as the respondent otherwise faces no consequences for its improper treatment of the appellant.

It should not be disputed by anyone, including the respondent, that the Improper Claims Act exists to provide checks on insurers' dealings with insureds and injured third parties. To interpret the statute as providing only administrative penalties misconstrues the legislative intent to provide protection to injured parties. Further, it is clear that the Improper Claims Practices Act grants rights to injured third parties, as the statute directly addresses what an insurer can and cannot do with respect to third-party claimants, such as the appellant. In order to give effect to legislative intent to prevent the improper handling of claims by insureds, this Court should find that insureds and the third parties that they injure through tortious conduct have the right to bring claims against insurers pursuant to the Improper Claims Practices Act.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests the Court reverse the Circuit Court's dismissal of the appellant's claims against American Southern Insurance Company.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

Respectfully submitted,

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