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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS
James Lockemy, Court of Appeals Judge
Thomas Huff, Court of Appeals Judge
Blake A. Hewitt, Court of Appeals Judge

Calvin Felder, Claimant,

v.

Central Masonry Inc. & Arnold Construction Co., Employer, and AmGuard Insurance Co.,/Old Republic Insurance Co., and South Carolina Uninsured Employers Fund, Carriers, Defendants,

Of which AmGuard Insurance Co. is the Appellant and Central Masonry Inc. and South Carolina Uninsured Employers Fund are the Respondents.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for AmGuard Insurance Company ("Guard") hereby certifies that their Petition for Rehearing to the Court of Appeals was denied via Order filed on September 28, 2021.

QUESTIONS PRESENTED

1) First, did the Court of Appeals employ an incorrect standard of review to this case by deferring to the South Carolina Workers Compensation Commission's ("Full Commission") findings of fact when the underlying issues of estoppel and agency presented in this case sound in equity, thereby rendering *de novo* as the correct standard of judicial review?
2) Did the Court of Appeals misapply the law of insurance coverage by estoppel established by this Court when it concluded that it was not necessary for a party asserting estoppel to actually prove that its reliance was *induced by* the purported misleading statement of the party being estopped?
3) Did the Court of Appeals otherwise err in failing to REVERSE the Full Commission's decision that Guard was estopped from denying coverage for the underlying claim, when that decision was based upon fundamental misunderstandings of both the law of estoppel and agency as they pertain to workers compensation insureds, insurers, and brokers?

STATEMENT OF THE CASE

Calvin Felder ("Claimant") sustained compensable injuries arising out of and in the course of his employment for Central Masonry ("Central"), a Georgia-based company, on December 30, 2015. Specifically, Claimant was performing construction work on a new Kroger shopping center in northeast Richland County, S.C. ("Kroger Job") when he slipped and fell off a scaffold onto his

outstretched right arm and fractured his wrist. Claimant incurred substantial medical treatment for his injury, including fusion of his wrist, compensable lost wages from December 30, 2015 until May 6, 2016, and permanent partial disability for loss of use of arm. Central had worker's compensation insurance with endorsements confirming coverage in Georgia and North Carolina only under the Georgia assigned risk plan. Central's coverage was assigned to AmGuard Insurance Company ("Guard"). It is undisputed that Guard's policy as written did not provide coverage in South Carolina.

On August 18, 2015, Central's broker, Lloyd Pro Group ("Lloyd"), issued an ACCORD form Certificate of Insurance to the Kroger Job's general contractor, Collins and Arnold Construction Co. ("Collins") on behalf of Central purporting valid insurance coverage in South Carolina. The certificate plainly and prominently states in bold on its face the following:

> **This certificate does not affirmatively or negatively amend, extend, or alter the coverage afforded by the policies below. This certificate of insurance does not constitute a contact between the issuing insurer, authorized agent or producer, and the certificate holder.** (R. p. 206)

The policy number reflected on the certificate was not even the correct Guard policy # for Central. R. p. 302 (Affidavit from Rose Ferrell – Guard's coverage and underwriting specialist). In addition, the certificate issued by Lloyd was defective and not in compliance with WCC Regulation R. 67-415 (A)(2) because it did not confirm SC was an endorsed state in the 3A and 3C sections of the policy.

On August 19, 2015, the day after the certificate purporting valid coverage in South Carolina was issued, Lloyd's employee, Patrick Barger, emailed Central's representative that he just requested that South Carolina be added to the policy and "we should all be good at this point." (R. p. 385). Thereafter, Lloyd advised Central that Guard declined to add South Carolina coverage under its policy until all payroll on S.C. jobs were produced. (R. p. 373).

On September 2, 2015 Lloyd's representative Patrick and Guard's underwriter Carley held a brief telephone conference regarding Central's coverages. Carley initially noted at the very beginning of the conversation stated, "Now, I am going to add South Carolina to the policy…." (R. p. 185, lines 9-10). However, after further examination of the relevant underwiring factors, Carley later advised Patrick that adding South Carolina to the policy is unnecessary because Central is not claiming any employee payroll in South Carolina because they are only engaging subcontractors with their own insurance on South Carolina jobs. Patrick acknowledges this point when he sates, "They're [referring to Central] are just going to be hiring subs with certificates." (R. p. 187, lines 5-7). The following exchange later during the call is instructive:

> Patrick: They're saying only jobs three---I made sure she broke that out—was for that, but all the other jobs, including South Carolina [sic] She said they're not even traveling themselves, but they just have to have this added. Ant that's why [sic] *they didn't even assume they had to add South Carolina to the policy*, and the reason why…..
> Carley: Okay. Yeah. *Probably in this case, I wouldn't if it's not our actual payroll.* I mean, for the purposes of this waiver, is the excluded officer overseeing the work? Is that where our policies tie in?
> Patrick: Yes. Yeah.
> Carley: Okay.
> Patrick: I mean, they'll be having somebody that going to be running the job but they're going to be having subs doing the work.
> Carley: Okay. *So--- Yeah. For our purposes on this policy, I'll add the waiver on behalf of the excluded officer only and then just note that he is overseeing the sub work which is all covered; they all have their own insurance.*
> Patrick: Okay. (R. p. 188 ll. 1-25).

Thereafter, Guard never issued a new policy with South Carolina endorsements to Central, nor assessed/collected additional premiums from Central for any South Carolina risks during the interim between the September 2 call and Claimant's date of accident on December 30, 2015.

Claimant initially filed a Form 50 medical and compensation benefits against the South Carolina Uninsured Employers Fund ("UEF") based on no record of applicable coverage for Central in South Carolina per the Commission's records. Following an appearance by Central alleging that it either in fact secured South Carolina coverage or was led to believe by Lloyd that it had secured such coverage, Guard and Collins were added as parties to the claim and further discovery ensued. Email correspondence between Patrick's superior at Lloyd, Jordan Dunn ("Dunn"), and Guard's defense counsel during discovery establishes that Lloyd never believed South Carolina coverage had been added to Central's policy. (R. pp. 262-263). In that email, Dunn reviewed the transactions and prepared a timeline of events.

First, Dunn recounts that on 8/19/2015, one day after Lloyd issued the certificate purporting coverage in South Carolina, Lloyd advised Central that South Carolina could only be added to the policy if it could produce payroll records for all jobs in South Carolina. Central then advised Loyd that work in South Carolina was being performed by insured subcontractors, not employees. (R. p. 262-263). Dunn's acknowledgement here proves Lloyd issued a certificate of insurance purporting that Central had coverage in South Carolina when it knew otherwise. It also supports the notion that Lloyd itself did not believe such coverage was necessary. Second, regarding the 9/2/2015 call specifically, Dunn noted, "phone call between Guard and "the agent" [sic] <u>SC was not added to this policy and will not be added</u>." (emphasis added). Third, after being notified by Guard of Claimant's accident, Dunn noted that Central hired Claimant as an employee under the "belief" that South Carolina had been added to the coverage (R. p. 263). However, Dunn never attributes that belief to any representation from Guard. In fact, nothing changed between the 9/2/2015 call, where Dunn confirmed her understanding that Guard would not be adding South Carolina as a covered state.

Lloyd further confirmed its belief that Guard did not add South Carolina to the policy when Dunn emailed Central's representative on January 15, 2016. (R. p. 370). In that email Dunn stated the following, "I *just* spoke with Guard regarding adding South Carolina to your policy. We were advised you were beginning a job in South Carolina and needed coverage. In order to add coverage, we need payroll and address for the job. We were advised on 8/19/2015 all of your jobs in South Carolina were performed by sub-contractors and there would be no payroll- **thus SC was not added to the policy.**" Dunn goes on to state "[p]lease provide payroll for SC so we can add the state." This email was prompted by an email from Tami Hoover with Guard dated the same date. Hoover's email advises Dunn that "SC was not added to this policy and will not be added. The agent confirmed on 9/2/2015, via phone conversation, that waivers should only be added for the excluded officer." (R. p. 372). In sum, this January 15, 2016 email correspondence confirms Guard's and Lloyd's belief that the 9/2/15 call did not add coverage in South Carolina.

Central essentially asserts a "coverage by estoppel" theory against Guard. Crescent Co. of Spartanburg, Inc. v. Ins. Co. of North America, 266 S.C. 598, 225 S.E.2d 656 (1976). The test to be applied to disputes involving the scope of insurance coverage entail the normal elements of equitable estoppel: 1) ignorance of the party invoking it as to the truth of the facts in question; 2) representations or conduct *by the party to be estopped* which mislead; 3) reliance on the representations or conduct; and 4) prejudicial change in position as the result of such reliance. Pitts v. New York Life Ins. Co., 247 S.C. 552, 148 S.E. 369 (1966).

Central's arguments are based on the following alleged actions and representations: a) Central asked its broker, Lloyd, to secure coverage for its operations in South Carolina; b) Guard represented to Central via Lloyd that it would add an endorsement covering South Carolina under the policy during the September, 2, 2015 telephone conversation between their respective

representatives; c) Guard otherwise represented to Central that South Carolina was covered when Lloyd issued a certificate of insurance for the Kroger job; and d) Central relied upon such actions/representations by Guard and/or Lloyd to its detriment in believing it was covered in South Carolina.

By Order dated June 20, 2017, Commissioner Melody James rejected Central's arguments and made the following findings, *inter alia,* regarding the responsible entity for the claim: 1) Central was subject to the Act; 2) Guard's Georgia assigned risk policy on its face does not provide coverage for claims arising under South Carolina law; 3) Guard is not estopped from denying coverage based on the 9/2/15 call because the evidence establishes that a) its representative never represented that South Carolina would be added to the policy, and in fact indicated to the contrary, and b) Lloyd was not Guard's agent and cannot be bound by Lloyd's actions/representations; 4) Collins as Claimant's "statutory employer" met all essential requirements for imposing liability on the UEF via the collection of a certificate of insurance purporting valid coverage under WCC Regulation 67-415; and 5) Central and the UEF are responsible for the award to Claimant. (R. pp. 39-50)

Thereafter, Central appealed the Hearing Commissioner's decision to the Full Commission. Central did not appeal the Commissioner's findings that the policy itself did not provide coverage in South Carolina; therefore, they remain the law of this case. Central only argued that Guard is nevertheless estopped from denying coverage. The UEF likewise did not appeal the adverse ruling against them as to the transfer of liability issue from Collins, but it joined in Central's estoppel arguments against Guard to defeat their liability for the claim. Since no other party contends Collins should be liable for the Commissioner's award, Collins was dismissed from the case via consent of the parties.

By Order dated April 17, 2018, the Full Commission reversed, finding, *inter alia,* that Guard was estopped from denying coverage based on representations made by its employee during the September 2, 2015 telephone call to Lloyd as Central's agent. (See Findings of Fact # 5 and #10 R. pp. 24 and 25). Although not clear, the Full Commission also seems to imply that Lloyd acted as *Guard's agent* when it issued the Certificate of Insurance for the Kroger job to Collins. (Findings of Fact # 2 and # 6- R. p. 24 and p. 25). The Commission never reconciled how Lloyd could have possibly been acting as both Guard's and Central's agent in this case. The Full Commission ultimately ordered that Guard was responsible for paying Claimants benefits and award. Guard thereafter appealed to the Court of Appeals.

The Court of Appeals issued its Opinion on September 1, 2021 affirming the Full Commission decision that Guard is estopped from denying coverage based on the September 2, 2015 telephone call. The Court of Appeals did not address the agency issue pertaining to the issuance of the certificate of insurance by Lloyd. The Court initially states, "[t]his case is controlled by the Commission's findings of fact," which are supported by the record. Regarding the reliance element of estoppel, the Court states it is a "straightforward" matter, noting that "Central hired Mr. Felder believing it had worker's compensation coverage and did not seek coverage elsewhere."

However, the Court of Appeals' decision fails to "connect the dots" as to how Central's belief that it was covered in South Carolina was actually induced by Guard's words or conduct. The Record conclusively establishes that Central's belief that it had South Carolina coverage was based <u>solely</u> on Lloyd's issuance of the certificate of insurance, not the September 2, 2015 call. Both witnesses called by Central (Max Gallardo and Sandra Sturkie) testified they relied exclusively upon its agent Lloyd and the issuance of the certificate of insurance to the general contractor on the Kroger job for their belief that Central was covered in South Carolina. [R. p. 157

ll. 14-18; R. p. 161 ll. 10-13; R. p. 93 ll. 19-23]. To reiterate, Central never called a witness from its agent, Lloyd, to testify that it relied on the September 2, 2015 call for the belief on behalf of Central that South Carolina was covered.

ARGUMENTS

Guard submits the Court of Appeals' Opinion constitutes an erroneous application of South Carolina law regarding insurance coverage, apparent agency/apparent authority, and principles of equitable estoppel. Lloyd is clearly the star of this sordid saga but regrettably they are not a party to this action and cannot be called to account for their egregious actions and outright frauds. At the end of the day the tough question awaiting this Court's answer is which actual party to the case – the UEF/Central or Guard, whose hands are all clean here- bears the cost of Lloyd's dubious actions. The Commission, nor the Court of Appeals, resolved the threshold question of whose behalf Lloyd was acting at the times in question. **In short, was Lloyd an agent of Central or an agent of Guard?** The answer to that question is not only just a simple application of law to these facts- there are also indeed bigger practical business and policy implications here that merit very careful reflection by the Court.

I. THE COURT OF APPEALS ERRED IN APPLYING THE 'SUBSTANTIAL EVIDENCE' STANDARD OF REVIEW TO THIS CASE WHEN THE ESTOPPEL AND AGENCY ISSUES PRESENTED HERE SOUND IN EQUITY AND ARE THEREFORE SUBJECT TO A *DE NOVO* STANDARD OF REVIEW.

The determination of coverage under an insurance policy is a question of law for the Court. Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 597 S.E.2d 165 (Ct. App. 2004). Moreover, the appellate court's standard of review in equitable matters is *de novo*, meaning the court may rely on its own view of the preponderance of the evidence. *See* Belle Hall Plantation Homeowner's

Association v. Murray, 419 S.C. 605, 799 S.E.2d 310 (Ct. App. 2017) (it is the appellant's burden to satisfy the appellate court that the *preponderance of the evidence* is against the findings of the master) (*emphasis added*). Pursuant to these authorities, this Court owes no deference to the Commission's factual findings regarding insurance coverage, especially when equitable estoppel is the basis for imposing coverage.

The Court of Appeals found this case is "controlled by the *Commission's* findings of fact." This is clear error. The Court had the authority to assess for itself whether Guard's representative misrepresented or misled Lloyd as Central's agent in the September 2, 2015 because a misleading statement is an essential element of equitable estoppel. *See* Pitts *supra.* As such, the Court owed no deference to the Full Commission's determination that Guard misled Lloyd in the call. Since the substance of the 9/2/15 call is inextricably linked to the issue of Central's coverage under Guard's insurance policy, and that coverage determination is a matter of law, the Court is free to draw its own conclusions and make its own findings consistent or inconsistent with those of the Full Commission.

Here, the preponderance of the evidence in the Record establishes otherwise, including, but not limited to the following: 1) analysis of the entire conversation between Guard's and Lloyd's respective representatives in the 9/2/2015 call, not just a single utterance at the outset of the conversation taken out of context (R. pp.184-188); 2) subsequent email correspondence from the manager/supervisor from Lloyd confirming the belief South Carolina risks were not added to the coverage (R. pp. 262-263); and 3) the fact that Central failed to call any witnesses from Lloyd to testify regarding its state of mind following the call.

Because the Court of Appeals inexplicably failed to apply the correct standard of review, the Supreme Court should GRANT Guard's Petition for a Writ of Certiorari, review the case under

the correct standard, REVERSE the Court of Appeals and the Full Commission for the reasons stated herein, and reinstate the Hearing Commissioner's findings that the UEF is liable for benefits awarded in the underlying claim.

II. THE COURT OF APPEALS INEXPLICABLY OVERLOOKED FACTS AND APPLICABLE LAW REGARDING THE RELIANCE ELEMENT OF ESTOPPEL.

Regarding the reliance element, the Court's Opinion states it is a "straightforward" matter, noting that "Central hired Mr. Felder believing it had worker's compensation coverage and did not seek coverage elsewhere." Appellants do not necessarily dispute that Central believed it had applicable coverage in South Carolina and acted accordingly in reliance thereon. However, the relevant inquiry is a simple matter of cause and effect- whether Central's belief to that effect was actually induced by Guard's words or conduct, specifically, the September 2, 2015 call between Guard's and Central's agent's respective representatives. The Court's Opinion does not addresses this fundamental crux of the case.

Even assuming *arguendo* that Guard's representative made a misleading statement regarding South Carolina coverage to Central's agent during the September 2, 2015 call, it is elementary that Central must still prove it *relied to its detriment on that conversation* for its belief. Any alleged misleading statement in the call is immaterial in a vacuum. The elements of equitable estoppel essentially mirror those of coverage by estoppel set forth in Pitts v. New York Life Ins. Co., 247 S.C. 545, 148 S.E.2d 369 (1966). As to the party claiming the estoppel are as follows: 1) lack of knowledge and means of knowing the truth as to the fact in question; 2) reliance upon the representations or conduct of the estopped party; and 3) a prejudicial change in position. Dozier v. American Red Cross, 411 S.C. 274, 768 S.E.2d 222 (Ct. App. 2014). As to the party being estopped, the elements are as follows: 1) conduct by the estopped party amounting to a false

representation or concealment; 2) *an intention that such action be acted upon by the other party*; and 3) actual or constructive knowledge of the true facts. *Id.* Reading these elements in conjunction, the purported misleading statement of the party being estopped must actually induce the party claiming estoppel's reliance. The party asserting estoppel carries the burden of proving these elements. Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965).

In the instant case, there is no evidence in the Record connecting the dots between the September 2, 2015 call and Central's belief that it had South Carolina coverage. **The evidence in the Record conclusively establishes that Central's belief that it had South Carolina coverage was based on solely on Lloyd's issuance of the certificate of insurance to the general contractor on the job in question.** Both witnesses for Central (Max Gallardo and Sandra Sturkie) testified they relied exclusively upon its agent Lloyd and the issuance of the certificate of insurance to the general contractor on the Kroger job for their belief that Central was covered in South Carolina. [R. p. 157 ll. 14-18; R. p. 161 ll. 10-13; R. p. 93 ll. 19-23]. Email correspondence between Lloyd's representative and Central on August 19, 2015 indicating "we should be all good at this point." [R. p. 385] is further evidence of the basis for Central's reliance. However, this email exchange occurred *three weeks before* the September 2, 2015 call. In sum, there is no evidence whatsoever that Central had knowledge at all of the September 2, 2015, much less that the call was the basis of its reliance that it had coverage in South Carolina.

To reiterate, Central never called a witness from its agent, Lloyd, to testify that it relied on the September 2, 2015 call for the belief on behalf of Central that South Carolina was covered. As noted previously, the only other evidence in the Record addressing Lloyd's knowledge of South Carolina coverage is email correspondence between Lloyd's representative and Central on August 19, 2015 indicating "we should be all good at this point." [R. p. 385]. However, this email

exchange occurred the day after the certificate of insurance was issued *and three weeks before* the September 2, 2015 call. The Certificate of Insurance is clearly the star of this saga. As such, the September 2, 2015 call must necessarily be eliminated as the source of Central's alleged belief that it had South Carolina coverage.

Although the Court's Opinion suggests that Claimant's mere hiring demonstrates Central's reliance on the phone call with Guard, there is no evidence in the Record to that effect. This conclusion is not a reasonable circumstantial inference when Claimant was hired on December 9, 2015, over three months after the phone call. [R. p. 154 ll. 9-12]. Again, Central obviously hired Claimant as an employee thinking it had valid coverage in South Carolina, but there is no evidence in the Record that such belief was actually induced by the September 2, 2015 phone call.

For these reasons, the Court of Appeals Opinion must be REVERSED.

III. THE FULL COMMISSION ERRED BY FINDING THAT LLOYD WAS ACTING AS GUARD'S AGENT WHEN IT ISSUED THE CERTICIATE OF INSURANCE PURPORTING COVERAGE IN SOUTH CAROLINA.

In the instant case, the Full Commission found that that Central relied to its detriment upon Guard's alleged misleading representations to Lloyd in the 9/2/15 call, as well as the issuance of the certificate of insurance for the Kroger job on its behalf by Lloyd. The former obviously hinges on the proposition that Lloyd was acting as Central's agent when Guard allegedly represented to it that coverage would be extended, whereas the latter implies that that Lloyd was acting as Guard's agent when it issued the certificate. However, both cannot be true under these circumstances, and as noted earlier, the Full Commission never reconciled this fundamental conflict. For the following reasons, Lloyd was not acting as Guard's agent when it issues the certificate of insurance.

First, the Full Commission found that the insurance contract between Guard and Central "clearly and unambiguously invites it [Central] to rely on the agent to obtain proof of insurance"

and enabled Central to "obtain and rely upon such Certificate of Insurance provided by the agent." (R. p. 24, lines 9-11 – p. 25, lines 1-5). Looking to the policy language in question, it merely states:

> **To request Certificates of Insurance:**
> If you are *represented by an agency*, they can provide you with the certificates you need....Either way, be prepared to provide the company name, address, fax number, and contact person of the entity requesting the certificate. (*emphasis added)* (R. p. 267).

This provision is merely advisory on how an insured may call *its own agent* to request a certificate of insurance. This language clearly does not create an agency relationship between the entity that placed the coverage at issue and Guard for the issuance of certificates. As such, this language is not evidence that Lloyd was authorized by Guard to issue a certificate of insurance or that Lloyd was acting at Guard's instance or request. More importantly, neither witness from Central testified they actually ever read that provision, which clearly begs the question how it could possibly be the source of any reliance that Lloyd was acting as Guard's agent.

As discussed previously, both witnesses for Central (Max Gallardo and Sandra Sturkie) testified they relied exclusively upon the mere issuance of the certificate on the Kroger job for their belief that Central was covered in South Carolina. (R. p. 157 – p. 161 – p.93 – pp. 105-106). Sandra Sturkie confirmed she never even spoke with anyone with Guard. (R. p. 106, lines 17-21). The only other evidence in the Record regarding South Carolina coverage is the email correspondence between Lloyd and Central on August 19, 2015, which is the day after the certificate of insurance was already issued and three weeks before the 9/2/15 call. (R. p. 385). For either or both of those actions and representations to estop Guard from denying coverage in South Carolina, Lloyd would have to have been acting as Guard's agent.

South Carolina law makes a clear distinction between "agents" of the insurer and "brokers" for the insured. S.C. Code §38-43-10 provides that an "agent" of an insurance company is:

> Any person who (a) solicits insurance on behalf of any insurance company, (b) takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company, (c) advertises or otherwise gives notice that he will receive or transmit any such application or policy, (d) shall receive or deliver a policy of insurance of any such company, (e) shall examine or inspect any risk, (f) shall receive, collect or transmit any premium of insurance, (g) shall make or forward any diagram of any building or buildings, (h) shall do or perform any other act or thing in the making or the consummating of any contract of insurance for or with any such company, other than for himself, or (i) shall examine into and adjust or aid in adjusting any loss for or in behalf of any such insurance company, whether any such acts shall be done by employee of such insurance company or at the instance or request of such insurance company, shall be held to be acting as the agent of such insurance company for which such act is done or risk is taken.

If one becomes an "agent" for the insurer by reason of operation of this statute, the extent of the authority of the statutory agent must still be determined. Allstate Ins. Co. v. Smoak, 256 S.C. 382, 182 S.E.2d 749 (1971). Every statutory agent cannot be said to be a general or unlimited agent. *Id.* The extent of the statutory agent's authority is a question of fact for the fact finder. *Id.*

Pursuant to § 8726 of Appleman Insurance Law and Practice, "a broker is ordinarily one who acts as a middleman between the insured and insurer and who solicits insurance from the public under no employment from any special company, but having secured an order, either places the insurance with a company selected by the insured or with a company selected by the broker himself." A broker is also ordinarily employed by the individual seeking to purchase insurance and should be distinguished from the ordinary insurance agent who is employed by an insurance company to solicit and write insurance in the company. Allstate *supra*. The mere fact that a broker receives a commission from the insurer for placing the policy does not change his character as an agent of the insured. *Id.* Where one has no agency license with the insurer and is merely requested by the insured to place the business, then he is a broker. Id. (citing Tri-City Transportation Co. v. Bituminous Casualty Corp., 311 Ill. App. 610, 37 N.E.2d 441 (1941)). A broker, who is the agent of the insured, cannot be converted by reason of the statute into an agent of the insurer without evidence that he was acting at the "instance or request" of the insurer. Allstate 256 S.C. at 386,

182 S.E.2d at 754. This Court has further held that agency by operation of §38-43-10 applies only to persons performing the acts set forth in the statute on behalf of the insurance company. Cook v. Canal Insurance Co., 245 S.C. 238, 140 S.E.2d 166 (1965).

In the instant case, the evidence establishes that Lloyd was a broker selected by Central to procure and place its insurance with a to be designated carrier. (R. pp. 150-151). Again, Central confirmed that it relied exclusively upon Lloyd for its insurance needs, including the issuance of certificates of insurance necessary to secure jobs and in accordance with usual and customary business practices.[1] (R. p. 98, lines 18-25 – R. p. 99, lines 1-13). Central was not eligible for coverage in the voluntary insurance market so Lloyd had to apply for coverage on its behalf under the Georgia assigned risk plan. The coverage was placed with Guard as a participating carrier in the assigned risk plan. There is absolutely no evidence in this Record that Lloyd was acting at the "instance or request" of Guard when it issued the certificate purporting coverage in South Carolina for the Kroger job.

Moreover, Guard cannot be deemed an agent by operation of §38-43-10 because the issuance of a certificate of insurance, even if it were done at the instance or request of Guard, is not one of the acts set forth in the statute that would create statutory agency. *See* Cook *supra.* Finally, there is no evidence that Lloyd was acting at the instance or request of Guard when its representative Patrick emailed Central's business manager, Sandra Sturkie, on August 19, 2015 to confirm "we should all be good at this point" regarding the request to add South Carolina coverage. (R. p. 385-388).

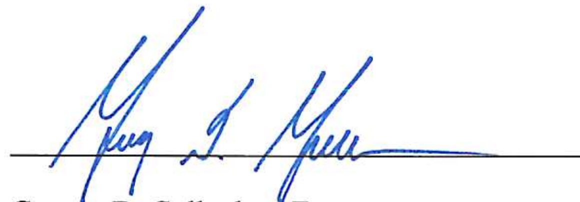
[1] The Commission actually made a finding that Central relied upon usual and customary business practices regarding the procurement and issuance of certificates of insurance from its agent. (Full Commission Finding of Fact # 1 R. p. 24).

For all these reasons, Central's estoppel arguments premised on the assumption that Lloyd was acting as Guard's agent when it issued the certificate of insurance for the Kroger job are invalid. Therefore, the Full Commission Order must be reversed.

CONCLUSION

Guard respectfully submits that the Court of Appeals misapprehended the reliance element of equitable estoppel and agency. Specifically, there is no evidence in the Record connecting the dots between Guard's purported misleading statement in the September 2, 2015 call and Central's alleged reliance on same for its belief that it had valid coverage in South Carolina. As such, Central has failed to meet its burden of proof and Guard cannot be estopped to deny coverage for the underlying claim. Moreover, Lloyd was not acting as Guard's agent either when it issued the certificate of insurance for the Kroger job. For these reasons, Guard prays that this Court grant it Petition for a Writ of Certiorari to correct these fundamental errors.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS
James Lockemy, Court of Appeals Judge
Thomas Huff, Court of Appeals Judge
Blake A. Hewitt, Court of Appeals Judge

Calvin Felder, Claimant,

v.

Central Masonry Inc. & Arnold Construction Co.,
Employer, and AmGuard Insurance Co.,/Old Republic
Insurance Co., and South Carolina Uninsured Employers Fund,
Carriers, Defendants,

Of which AmGuard Insurance Co. is the Appellant and
Central Masonry Inc. and South Carolina Uninsured
Employers Fund are the Respondents.

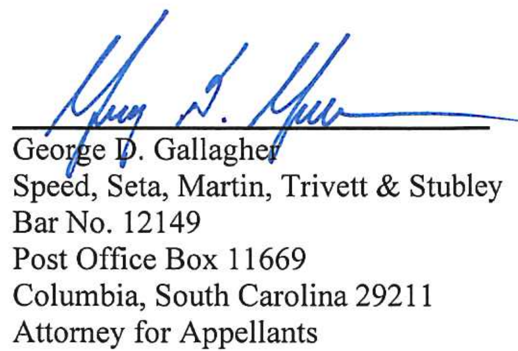
PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Central Masonry Inc and South Carolina Uninsured Employers Fund by depositing a copy of it in the United States Mail, postage prepaid, and/or via electronic mail on October 28, 2021, addressed to their respective attorneys as follows:

Lisa C. Glover
SC Uninsured Employers' Fund
P:O Box 1815
Lexington SC 29071
lglover@saf.sc.gov
Attorney for Respondent

Jonathan R. Hendrix
Hendrix & Steigner
PO Box 6398
West Columbia SC 29171
jhendrix@hendrixsteigner.com
Attorney for Respondent

October 28, 2021



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Bar No. 12149
Post Office Box 11669
Columbia, South Carolina 29211
Attorney for Appellants

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BRIGGS P. TUCKER (SC)
BRITTANY BELL TURNER (GA & FL)
LILY D. WILKERSON (GA & FL)

GEORGE D. GALLAGHER (SC)
CHARLES A. KINNEY (GA, NC & SC)

October 28, 2021

RECEIVED
Oct 28 2021
SC Court of Appeals

VIA EMAIL: supctfilings@sccourts.org
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: ***Calvin Felder v. Central Masonry, Inc. et al.***
WCC No.: 1521141
Our File No.: 1700-0555
Appellate Case Number: 2018-000939

Dear Mr. Shearouse:

Please find enclosed our Petition for Writ of Certiorari for filing in the above-referenced matter. Our firm's check in the amount of $250 for the filing fee has been placed in the mail to your office.

By copy of this letter to Lisa Glover and Jonathan Hendrix, attorneys for Respondents, and The Honorable Jenny Abbott Kitchings, I am serving them a copy of this Petition.

Sincerely,

George D. Gallagher

GDG/kgl
Enclosures
cc: Lisa C. Glover, Esq.
Jonathan R. Hendrix, Esq.
The Honorable Jenny Abbott Kitchings (w/encl)
The Honorable Amy Bracy (w/encl)
Kristie Ozark