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Nov 18 2021
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-001134
Trial Court Case No. 2017-CP-40-04048

Glenda R. Couram, ...Appellant,

v.

Nationwide Mutual Insurance Company; Titan Indemnity Company;
Eugene Matthews, in his individual capacity;
Sherwood Plumbing SVC, LLC; Beatrice T. Tidwell;
Rick Skurko in his official and individual capacity; and
Tracey Peer, in her official and individual capacity.....Respondents.

RESPONDENTS NATIONWIDE MUTUAL INSURANCE COMPANY'S AND TITAN INDEMNITY COMPANY'S PETITION FOR REHEARING AND MEMORANDUM IN SUPPORT

Respondents Nationwide Mutual Insurance Company ("Nationwide") and Titan Indemnity Company ("Titan") (collectively "Insurers"), respectfully move and petition pursuant to Rules 219 and 221, SCACR, for rehearing of the above-referenced matter.

SUMMARY

The Court's blanket reversal order is premised solely on the defenses of res judicata and collateral estoppel no longer being valid:

> In light of our recent opinion in *Couram v. Tidwell*, Op. No. 2021-UP-367 (S.C. Ct. App. filed Oct. 27, 2021), Couram's present action is not barred by the doctrine of res judicata or collateral estoppel because a final judgment on the merits does not exist. Accordingly, we reverse and remand.

(November 3, 2021 Opinion) (citations omitted). The Insurers' Motion to Dismiss was not decided on res judicata or collateral estoppel grounds. Rather, the Circuit Court found that Appellant had failed to allege facts sufficient to support two required elements each of the two claims she alleged against the Insurers (intentional infliction of emotional distress and civil conspiracy). Only dismissal of a negligence cause of action – not alleged against the Insurers – was premised on res judicata or collateral estoppel grounds. It appears the Court overlooked this distinction and failed to properly consider each cause of action separately.

Reversal must be premises on an issue raised to and ruled on by the lower court. As to the Insurers, the reversal of their dismissal is not so premised. Moreover, the "two issue rule" prevents reversal as to the Circuit Court's granting of Nationwide's and Titan's Motion to Dismiss on the stated grounds. Therefore, the Court's reversal Order should be narrowed to exclude these Respondents and address only the negligence cause of action.

FACTUAL AND PROCEDURAL BACKGROUND

On July 19, 2017, Appellant filed her current Amended Complaint in the Richland County Court of Common Pleas against Nationwide, Titan, and others. As to Nationwide and Titan, her Amended Complaint only alleged the following causes of action: (1) "intentional infliction and or negligent of emotion distress common law"; and (2) "common law civil conspiracy." (Second Am. R pp. 31-35, Am. Compl.); (Second Am. R. pp. 2-3, April 20, 2018 Order (recognizing that these are the only causes of action pled against Nationwide and Titan)). Titan Indemnity Company issued a personal auto policy to Beatrice Tidwell. Appellant alleges that Titan's and Nationwide's refusal to settle her liability claim against Tidwell for more than $20,000 and their actions in defending Mr. Tidwell in an underlying action resulted in damages to her. *See* (Second Am. R. pp. 25-37, Am. Compl.). On August 28, 2017, Nationwide and Titan filed a Motion to Dismiss and

Motion for Sanctions based on Appellant bringing a frivolous proceeding against them. On September 8, 2017, Nationwide and Titan filed a Memorandum in Support of their Motion to Dismiss. (Second Am. R. pp. 148-162). As explained in the Memorandum, the grounds for the Motion were:

> Plaintiff has failed to allege facts sufficient to state a claim under any of the causes of action she alleges. Moreover, although labeled as other causes of action, Plaintiff's allegations demonstrate that she is suing the insurers for failure to pay third-party benefits. Under South Carolina law, a third party does not have standing to pursue a tort action for an insurer's bad faith refusal to pay benefits. Additionally, Plaintiff's Complaint is based on allegations of the insurers' actions taken to defend the insured, Tidwell. Acts taken pursuant to an insurer's contractual and legal duty to defend its insured are not a proper basis for liability to a third party. Therefore, Plaintiff's claims against Nationwide and Titan should be dismissed.

(Second Am. R. p. 149). Unlike some of the other defendants' motions to dismiss, Nationwide's was not premised on res judicata or collateral estoppel. *See* (Second Am. R. pp. 148-162, Insurers' Mem. in Supp.).

Likewise, the Circuit Court's Order granting Nationwide's and Titan's Motion to Dismiss was not based on res judicata or collateral estoppel grounds. With respect to the first cause of action alleged against the Insurers – "intentional infliction and or negligent of emotion distress common law," the Circuit Court held that the Appellant's claim failed as a matter of law on: (1) the outrageous conduct element; and (2) the severe emotional harm or distress element of such cause of action. (Second Am. R. pp. 5-8, April 20, 2018 Order). As the Circuit Court's Order explained:

> Here, Plaintiff's allegations demonstrate that Defendants used lawful means to defend their insured in the Prior Action and offered the Plaintiff less than she desired to settle her prior lawsuit. As a matter of law, Plaintiff's factual allegations against Nationwide and Titan fall short of the outrageous conduct required for an emotional distress claim....
>
> In Complaint, Plaintiff states that she suffered "severe emotional distress," "humiliation, embarrassment, mental anguish, emotional distress..." and that "the emotional distress suffered by Plaintiff was and continues to [be] serious and severe." These are "mere bald assertions" of emotional distress insufficient to allege such a

> claim. According to Plaintiff, the manifestation of her "severe emotional distress" was a "fever blister that remained four days after the trial." Again, this allegation fails to rise to the level of "severe" emotional distress required for this cause of action....Therefore, as a matter of law, Plaintiff has failed to allege sufficiently severe emotional distress to support her claim.

(*Id.*).

With respect to the final cause of action alleged against the Insurers – "common law civil conspiracy," the Circuit Court held that the Appellant's claim failed as a matter of law on: (1) the independent acts in furtherance of conspiracy element; and (2) the primary purpose of injuring the plaintiff element of such cause of action. (Second Am. R. pp. 8-11, April 20, 2018 Order). As the Circuit Court's Order explained:

> Plaintiff states that the Defendants "jointly operated to perpetrate the wrongful acts complained of herein" and "agreed and conspired with each other to engage in the alleged wrongful conduct, including Defendants' interference with plaintiff [sic] employment relationships by coming to an agreement between them to do an unlawful act or to do a lawful act in an unlawful way..." Nowhere in the civil conspiracy section of her Complaint does Plaintiff set forth what these alleged "wrongful acts" or "unlawful acts" committed by Defendants are. *See Hackworth*, 385 S.C. at 116, 682 S.E.2d at 875 (stating that complaint must inform the defendants of what acts in furtherance of the alleged conspiracy they are being accused). Therefore, the alleged "wrongful acts complained of herein" must mean those acts previously alleged in the "Facts Common to all Causes of Action" section of Plaintiff's Complaint. Thus, Plaintiff's civil conspiracy claim fails as a matter of law because she has not plead additional acts in furtherance of the conspiracy separate and independent from other acts alleged in the complaint....
>
> The "essential consideration" in a civil conspiracy is "whether the primary purpose or object of the combination is to injure the plaintiff." *Pye*, 369 S.C. at 567, 633 S.E.2d at 511 (quoting *Lee*, 289 S.C. at 13, 344 S.E.2d at 383)....In light of Plaintiff's allegations that: (1) she requested a settlement amount from the insurer that included an amount for lost wages and medical expenses; (2) she refused to settle for less than $20,000 with regards to the previously litigated auto accident; and (3) she brought the Prior Action against Titan and Tidwell, the reasonable inference to be drawn from the alleged responsive acts of the insurer is that its primary purpose was to properly defend its insured, not to injure the Plaintiff. *See First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 575, 511 S.E.2d 372, 383 (Ct. App. 1998) (holding that conspiracy claim failed when it was only supported by mere speculation about motives and not establishment of overt acts pursuant to a common design); *see Ellis v. Davidson*, 358 S.C. 509, 527, 595 S.E.2d 817, 826 (Ct. App. 2004) (holding that plaintiff's civil

> conspiracy claim failed as a matter of law where plaintiff was able to show that defendant undertook alleged act but not that that he undertook act for purpose of injuring plaintiff). Therefore, Plaintiff's civil conspiracy claim fails as a matter of law.

(*Id.*). In fact, only the "vicarious liability/respondeat superior negligent entrustment and or (common law negligence if applicable)" cause of action – alleged solely against other defendants – was decided on res judicata/collateral estoppel grounds. (*Id.* at pp. 3-5). Therefore, the Court's wholesale reversal of the Circuit Court's Order on the basis that there is no longer any res judicata/collateral estoppel was improper. As to the Insurers, their Motion to Dismiss was not decided on such grounds.

ARGUMENT

The Court's across-the-board reversal order is premised solely on the defenses of res judicata and collateral estoppel no longer being applicable. (November 3, 2021 Opinion). Because the Insurers' Motion to Dismiss was not decided on res judicata or collateral estoppel grounds, such reversal is improper as to Nationwide and Titan. Reversal must be premises on an issue raised to and ruled on by the lower court. As to the Insurers, the reversal is this case is not so premised. Moreover, the Insurers' Motion to Dismiss was decided on the basis that Appellant had failed to allege facts sufficient to support each required element of the two causes of action alleged against the Insurers. Therefore, even if res judicata or collateral estoppel was an additional sustaining ground for the Insurers' Motion to Dismiss, the "two issue rule" prevents reversal as to the Circuit Court's granting of Nationwide's and Titan's Motion to Dismiss on the stated grounds.

I. This Court's reversal was overly broad, failing to take into account the separate causes of action, motions to dismiss, and defendants addressed by the Circuit Court's Order.

Under Rule 220(c), the "appellate court may **affirm** any ruling, order decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR (emphasis added);

Law v. South Carolina Dep't of Corr., 368 S.C. 424, 440 n.3, 629 S.E.2d 642, 651 n.3 (2006) (same); *see also* Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record...."). However, "[a]n appellate court may not, of course, *reverse* for any reason appearing in the record." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) (emphasis in orig.). As the Supreme Court explained, reversal must be premised on issues raised to and ruled upon by the lower court. *Id.* As to the Insurers, this Court's reversal was not based on an issue raised to and ruled upon by the lower court. As demonstrated by its Order, the Circuit Court did not grant Nationwide's and Titan's Motion to Dismiss on the basis of res judicata or collateral estoppel. *See* (Second Am. R. pp. 5-11, April 20, 2018 Order). Therefore, as to Nationwide and Titan, the reversal was improper.

This Court's November 3, 2021 wholesale reversal fails to separately consider the causes of action Appellant alleged and the individual grounds for dismissal of those causes of action. For example, in *Dye v. Gainey*, the Circuit Court granted a motion to dismiss with respect to three (3) causes of action for failure to state a claim. 320 S.C. 65, 66, 463 S.E.2d 97, 98 (Ct. App. 1995). This Court affirmed in part and reversed in part, affirming dismissal of the intentional infliction of emotional distress cause of action because the plaintiff failed to plead facts sufficient to support such claim. *Id.* at 69, 463 S.E.2d at 99. This Court looked separately at each cause of action to determine whether dismissal was appropriate. *Id.*; *see, e.g., Gaskins v. Southern Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 674, 541 S.E.2d 269, 273 (Ct. App. 2000), *aff'd as modified*, 354 S.C. 416, 581 S.E.2d 169 (2003) (analyzing each cause of action separately to determine if dismissal was proper); *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010) (same). Likewise, here, this Court should have looked separately at the three (3) causes of action Appellant pled. Since only dismissal of the negligence cause of action was premised on res

judicata/collateral estoppel grounds, the Court's reversal on this basis as to all of the causes of action was improper. *See* (Second Am. R. pp. 3-5, April 20, 2018 Order). With respect to her negligence cause of action, Appellant only asserted this claim against Defendants Sherwood Plumbing SVC, LLC dba Sherwood Tidwell and Beatrice Tidwell, not against the Insurers. (Second Am. R. pp. 29-31 ¶¶ 33-39, Am. Compl.). Therefore, the Court's November 3, 2021 res judicata/collateral estoppel decision should not have affected the Circuit Court's dismissal of the other two causes of action and other defendants. *See Gray v. Green Const. Co. of Indiana*, 263 S.C. 554, 559, 211 S.E.2d 871, 874 (1975) (stating that a judgment may be reversed as to one defendant "without affecting the judgment as to the others").

Moreover, the Supreme Court in *I'On* advised that "it would be inefficient and pointless to require a respondent to return the [Circuit Court] judge and ask for a ruling on other arguments to preserve them for review." *I'On, L.L.C.*, 338 S.C. at 419, 526 S.E.2d at 723. Likewise, here, it would be inefficient and pointless for the Insurers to return to the Circuit Court for an additional ruling on their Motion to Dismiss when their Motion was not decided on res judicata or collateral estoppel grounds. At the time the Court entered its November 3, 2021 Opinion, the Insurers had fully briefed the issues before this Court, and those issues remain ripe for adjudication. *See id.* at 421, 526 S.E.2d at 723 ("An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies."). Therefore, efficiency and judicial economy also favor limiting the Court's reversal order to the negligence cause of action actually decided on res judicata or collateral estoppel grounds.

II. Under the "two issue rule," the Court's wholesale reversal of the Circuit Court's Order was improper.

Even if res judicata/collateral estoppel had been an additional sustaining ground for the Insurers' Motion to Dismiss, reversal would have been improper on that basis. As to the Insurers,

the "two issue rule" prevents the Court's reversal of the Circuit Court's Order on the stated basis of the present action not being "barred by the doctrine of res judicata or collateral estoppel." *See* (November 3, 2021 Opinion). As the South Carolina Supreme Court in *Jones v. Lott* explained:

> Under the two issue rule, 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. This Court has explained that the two issue rule is applicable in situations not involving a jury. It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, ***the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.***

Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903–04 (2010), *abrogated on other grounds by Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018) (citations omitted) (emphasis added); *see Mason v. Mason*, 412 S.C. 28, 48, 770 S.E.2d 405, 415 (Ct. App. 2015) (applying two issue rule to special referee's order); *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 452, 814 S.E.2d 643, 654 (Ct. App. 2018) (applying two issue rule to affirm grant of summary judgment). With respect to the Insurers' Motion to Dismiss, the Circuit Court granted such Motion on the grounds that Appellant has failed to plead sufficient facts to support two (2) required elements of each of her claims against these defendants. (Second Am. R. pp. 5-11, April 20, 2018 Order). This Court's Opinion fails to address any of those grounds. Therefore, as to these dismissed Respondents and causes of action, reversal was improper.

CONCLUSION

For the above-stated reasons, Nationwide and Titan respectfully request that the Court grant their Petition for Rehearing. It appears the Court overlooked that the Circuit Court's dismissal order dismissed three separate causes of action on distinct grounds. This Court's reversal

states a single ground that is not applicable to all the causes of action or defendants, specifically Nationwide and Titan. As to the Insurers and the causes of action alleged against them, the Court's stated basis for reversal is inapplicable and improper under both fundamental reversal rules and the "two issue rule." Therefore, these Respondents respectfully request that the Court limit is reversal order to the negligence cause of action and those defendants against whom Appellant asserted such cause of action.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing and Memorandum in Support of Respondents by depositing a copy of it in the United States Mail, postage prepaid, on November 18, 2021, addressed to:

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