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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Casey Manning, Circuit Court Judge

Common Pleas Court Case No.: 2017-CP-40-6773
Appellate Case No. 2021-00502

Nancy Morris, as Personal Representative of the
Estate of David Allan Woods……………………………………………………..Plaintiff

v.

State Fiscal Accountability Authority, South Carolina Insurance
Reserve Fund, Andrew J. Bland, Richard T. Burkholder,
Leemon E. Carner, Priscilla Bland, Jerry Speissegger, Jr. ………………………..Defendants

Of Whom Nancy Morris, as Assignee of Andrew J. Bland, PFC;
Richard T. Burkholder, SGT: Leemon E. Carner, PFC;
Priscilla Garrett Bland, PFC; and Jerry Speissegger, Jr., PFC, is the ………………Appellant

and

South Carolina Insurance Reserve Fund is the …..………………………………Respondent

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APPELLANT'S AMENDED REPLY BRIEF

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RE-INTRODUCTION OF FACTS AND PROCEDURAL BACKGROUND

Nancy Morris ("Appellant"), as personal representative of the estate of her brother, David Woods, filed a lawsuit under 42 U.S.C. 1983 against Andrew Bland, PFC; Leemon E. Carner, PFC; Jerry Speissegger, Jr., PFC; Richard T. Burkholder, SGT; and Priscilla Garrett Bland, SGT (hereinafter "Assignors"). Assignors were correctional officers at Hill-Finklea Detention Center who failed to arrange for medical assistance for Mr. Woods's serious medical need, which ultimately resulted in his death.

Assignors were covered by a tort liability insurance policy written by Respondent South Carolina Insurance Reserve Fund (hereinafter "IRF"). At multiple points in the litigation, IRF refused to offer the full policy limits to settle the case. After receiving an excess verdict, Appellant entered into covenants with Assignors which granted her "any and all claims he/she may have against the South Carolina Insurance Reserve Fund," including failure to act in good faith to effect a settlement within the policy limits, pursuant to *Tyger River Pine Co. v. Maryland Casualty Co.*, 170 S.C. 286, 170 S.E. 346 (1933).

Appellant asserts that the trial court erred in dismissing her bad faith claim against Respondent. On appeal, Respondent's arguments are largely a resubmittal of the trial court's order. Appellant replies herein.

ARGUMENTS IN REPLY

The trial court erred in finding that Ms. Morris's lawsuit was barred by the statute of limitations or rendered non-justiciable by the assignments. The trial court erred in finding that there was no evidence to support Plaintiff's breach of contract and *Tyger River* bad faith claims.

I. Appellant's claim is not barred by the statute of limitations.

In *Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 787 S.E.2d 485 (2016), the South Carolina Supreme Court found that the statute of limitations for a legal malpractice claim

runs from the resolution of the appeal. *Id.* at 534, 787.S.E.2d at 494. Respondent attempts to distinguish this decision by claiming that it applies only to legal malpractice claims. (Resp. Br. 7). However, the reasoning of the Supreme Court in *Stokes-Craven* applies with equal force in the present situation, and that standard should be adopted here.

Respondent argues that Ms. Morris has alleged that the IRF breached its duty of good faith by failing to consult Assignors about the offers to settle and failing to settle prior to trial and judgment. (Resp. Br. 6). Because "all of those alleged breaches of contracted occurred prior to or during the Federal Court trial," the statute of limitations ran from the date of the judgment being entered. (Res. Br. 6).

Stokes-Craven addresses this exact argument. In that case, the plaintiff "alleged that trial counsel failed to: adequately investigate the facts of the case; prepare or serve written discovery; depose witnesses… and settle the case prior to the jury verdict." *Id.* at 522, 787 S.E.2d 485 at 488. Because this conduct occurred prior to a verdict being entered, the trial court found that Stokes-Craven knew or should have known that it had a malpractice claim at or prior to that time, and therefore the claim was barred by the statute of limitations. *Id.* at 523, 787 S.E.2d at 488.

The Supreme Court overruled the trial court. In its decision, the Court articulated several policy and legislative reasons for finding that the resolution of the appeal serves as the date the statute of limitations begins to run. Those reasons apply with similar force in the present situation.

First, the Court was concerned to preserve the attorney-client relationship. *Id.* at 532, 787 S.E.2d at 493. "Clearly, if a client files a legal malpractice cause of action while the client is still represented by counsel during an appeal, the attorney-client relationship is compromised and there are simultaneous lawsuits advocating conflicting positions." *Id.* The Court expressed this

concern despite the fact that Stokes-Craven had parted ways with its original, allegedly-negligent, attorney, and hired a new attorney to represent itself on appeal. *Id.* at 517, 522, 787 S.E.2d 487.

Similar conflicts arise in a bad faith claim. In a bad faith action, a first-party insured is bringing a claim against his insurer. In the present case, that insurer has, by way of its contract of indemnity, reserved "the right and duty to defend any suit against the insured." (R. p. 205). Among those rights and duties are those of selecting, hiring, consulting with, and paying the insured's attorney.

The conflict is apparent, and heightened by the fact that—unlike the plaintiff in *Stokes-Craven*—an insured does not have the option of firing its insurance company midstream and finding a new insurer that will defend him in a suit or appeal and still provide coverage for his damages. The insured is tied to the insurer for the duration of the appeal, and requiring an insured to bring a bad faith action during the pendency of an appeal will create the types of conflict that the Supreme Court sought to avoid.

In *Stokes-Craven*, the Court next determined when the injury to the client arose as a matter of law. The Court acknowledged that a legal malpractice plaintiff's "predicate injury or damage may take many forms." *Id.* at 416 S.C. 517 at 533-34, 787 S.E. 2d 485 at 494. However, in cases where the cause of action is predicated on the failure of an underlying suit, "there can be no legal malpractice cause of action without an adverse verdict, judgment, or ruling." *Id.* at 534, 787 S.E.2d at 494. Therefore, "any basis for the legal malpractice cause of action is stayed by Rule 241(a) while the appeal is pending."

Similarly, the Assignors' predicate damages take multiple forms, as pointed out in Respondent's brief. (See Resp. Br. P. 8, "Appellant sought recovery for the Assignors' 'suffering the mental anguish, anxiety, and stress of being sued by Plaintiff.'"). However, just as

in a legal malpractice case, Assignors' cause of action is predicated on the failure of the underlying suit and the excess verdict entered against them. The bad faith cause of action should accordingly have been stayed by Rule 241(a) while the appeal was pending.

Stokes-Craven delves further into how the South Carolina Appellate Rules interact with legal malpractice causes of action. Rule 205, SCACR provides that, "As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." *Id.* at 533, 787 S.E.2d at 493. The Court found this rule "necessarily would include a legal malpractice cause of action that is based on the outcome of the appealed verdict, judgment, or ruling." *Id.* at 534, 787 S.E.2d at 494. "Consequently, until the appeal is resolved against the client, there is no legally cognizable cause of action for an attorney's alleged malpractice." *Id.* Only upon resolution of the appeal does the cause of action accrue. *Id.* This result is "mandated by our appellate court rules." *Id.* at 535, 787 S.E.2d at 494.

The same result is mandated in a bad faith claim. A bad faith claim is "based on the outcome of the appealed verdict, judgment, or ruling." Therefore, the notice of appeal served to stay the matter, and Assignors had no legally cognizable claim of action until the appeal had been resolved against them. That was the date when their cause of action began to accrue.

Finally, the *Stokes-Craven* court examined how the statute of limitations coheres with the discovery rule. The discovery rule states that "The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Id.* The Court found, as a matter of law, that "a client knows or should know that he or she has a legally cognizable cause of action for legal malpractice at the conclusion of the appeal." *Id.*

A defendant in a bad faith claim is in the exact same situation as the plaintiff in a legal malpractice claim with regard to when he or she will know if he or she has a claim. The insured has no way of knowing the insurer was negligent in refusing to pay the policy limits, or whether that failure caused him harm by way of an excess verdict until that verdict is affirmed on appeal. That is the accordingly the date on which an insured's statute begins to run.

Respondent does not address any of the substantive policy in *Stokes-Craven*, because it cannot. The Supreme Court has thoroughly disposed of each and every one of its arguments. All Respondent can do is attempt to brush aside the precedent and claim that it applies only to legal malpractice actions. (Resp. Br. 7). However, this Court should not ignore the underpinnings of the decision, and should apply a similar rule regarding the statute of limitations. In the alternative, Appellant reiterates her arguments in her initial brief regarding equitable tolling, and urges the Court to apply these considerations in tolling the statute of limitations.

II. Respondent's arguments that the assignments extinguished the Assignors' claims are unavailing.

In its brief, Respondent has taken the position that, by entering into assignments, the Assignors have defeated the right they sought to assign. For support, Respondent relies on *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997). In *Cobb*, the plaintiff was injured in a car accident caused by an at-fault driver who was driving a car he did not own. *Id.* at 578, 482 S.E.2d at 591. The plaintiff signed a covenant not to execute in favor of both the driver and the owner. Id. Later, the plaintiff discovered that the driver had a separate insurance policy, and attempted to recover from that policy as well. *Id.* The court ruled that the covenant precluded recovery because "[i]n the covenant, Cobb explicitly reserved the right to collect proceeds from [her] UIM carriers[, but s]he did not reserve the right to collect from any undiscovered liability carriers." *Id.* at 578, 482 S.E.2d at 592.

The difference in *Cobb* and this case is immediately apparent. The assignments in this matter plainly reserved "any and all claims… against the South Carolina [IRF] and any other… government organizations or entities" and additionally contemplate "any cause of action brought against the [SFAA.]" (R. p. 232)

Respondent's efforts to distinguish this case from *Fowler v. Hunter*, 388 S.C. 355, 697 S.E.2d 531 (2010) are likewise unavailing. Respondent claims the Assignments in this matter are different because they "did not facilitate any settlement," and that the assignments "have actually generated more litigation, not less." (Resp. Br. 13). Respondent's assertion wholly ignores the fact that Ms. Morris had initiated supplementary proceedings against the Assignors, and that the assignments extinguished those proceedings against Assignors' personal assets. This type of callous disregard for Assignors' interests exemplifies the reason that this bad faith action was brought in the first place.

III. The trial court erred in finding that there was no breach of any contractual duties because Appellant pled breach of contractual duties that raise questions of fact.

Appellant reiterates her arguments that summary judgment was inappropriate on these questions of fact.

IV. Respondent's arguments concerning the elements of a "Tyger River" claim invite questions of fact.

In its initial order, the trial court found that Appellant had not established the elements of a *Tyger River* claim because she had never made a demand within the policy limits. Although this section of the trial court's order never mentions the word "causation," Respondent maintains that is the basis of the court's dismissal. (Resp. Br. 16). Specifically, Respondent claims that "there is no evidence in the record" that Ms. Morris would have settled the case for the policy limits at they at any point been tendered. (Resp. Br. 17).

That is not the standard for summary judgment. Summary judgment is appropriate where

"the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 375, 534 S.E.2d 688, 690 (2000).

Ms. Morris's mental state, and what she would or would not have done at certain points in the litigation, is a material fact that is very much in dispute. It is not a question of law for the trial court, but a question of fact for the jury to decide.

Respondent cites *Hoard v. Roper Hospital, Inc*., 387 S.C. 539, 694 S.E.2d 1 (2010) in support of its position that causation "is not necessarily" a jury question. (Resp. Br. 16). *Hoard* is a medical malpractice case in which summary judgment was granted based on a lack of expert testimony. *Id.* In medical malpractice cases, "When one relies solely upon the opinion of medical experts to establish a causal connection between the alleged negligence and the injury, the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence." *Id.* at 546, 694 S.E.2d 5. Such expert testimony "must provide a significant causal link between the alleged negligence and the plaintiff's injuries, rather than a tenuous and hypothetical connection." *Id.* However, in its review of "the deposition testimony of several experts," the Court found the experts had failed to meet this evidentiary burden, and therefore upheld the dismissal. *Id.* at 547, 694 S.E.2d 5.

Hoard is readily distinguishable from this case. This is not a medical malpractice claim that "relies solely" upon medical or expert testimony. Expert testimony is not required to establish the causal link in a bad faith claim. The necessary evidence can and will be provided by Ms. Morris's testimony as to what she would or would not have done. Finally, the *Hoard*

decision specifically referenced multiple expert depositions that were taken over the course of litigation, and it was only upon reviewing those that summary judgment was granted. In this case, practically no discovery has taken place, as Respondent objected to a vast number of Ms. Morris's interrogatories and requests to produce, and no depositions have been taken by either party. Summary judgment is therefore inappropriate or, at the very least, premature.

CONLCUSION

For these reasons, Respondent's arguments are not compelling, and this Court should reverse and remand.

Respectfully submitted,

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and

South Carolina Insurance Reserve Fund is the …..………………………………Respondent

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PROOF OF SERVICE

I hereby certify that the enclosed was served on all other parties to this matter by electronic

mail on this day and properly posted for delivery to the following address:

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January 26, 2022