THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS
Edgar W. Dickson, Circuit Court Judge

Case No: 2021-000797

Saundra R. Hoffman,……..…….…..Appellant,

v.

State Farm Fire and Casualty
Company,…….……...Respondent.

FINAL REPLY BRIEF

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A. The Standard For Summary Judgment Views The Facts In The Light Most Favorable To the Plaintiff.

The Defendant will agree the standard in a summary judgment would require the Court "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party". *Koester v. Carolina Rental Ctr.,* 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) citing *Hancock v. Mid-South Mgmt. Co.,* 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). However, throughout their brief the Defendant incorrectly challenges the factual statement of the Plaintiff. Where there is any conflict in the facts they are resolved in favor of the Plaintiff.

For instance, the Defendant claims the Plaintiff's facts are "unsupported by the record" *(Br. Of Respondent at 3, footnote 4.)* The Plaintiff's diligence in pursuing a claim with thousands of items over the years where she was submitting information required by State Farm for her damages cannot be disputed and the allegations of State Farm the Plaintiff's factual allegation regarding the November 9, 2015, contact between the parties is simply incorrect.

The claims file indicates a call from the Plaintiff to State Farm on November 9, 2015 at 2:07 PM by the "NI" named insured with questions regarding problems - "trouble with the PP forms' . *(Edwards Depo. Pg 37-38 R. 138; SF Claims file pg 7; R. p. 167.)* The claims file indicated a return phone call by the adjuster T. Edwards at 2:44pm who discussed: the uploading of contents into claim, discussions of the computer capabilities of the NI, named insured, the Plaintiff; discussions of emailing by State Farm of information and finally information regarding replacement costs provisions. The adjuster, referencing the claims file, testified to the two phone conversations, a call made to State Farm and from State Farm. *Id.*

The Defendant claiming that the Plaintiff's testimony regarding a call from the State Farm adjuster is somehow not supported by the record where the claims file and the claims adjuster

testifying with the benefit of the claims file to reference, are somehow unsupported by the record is incorrect and a misrepresentation of the facts of the case. The record indicates not only, are the facts asserted by the Plaintiff supported by the record, but any inferences are viewed in the Plaintiff's favor. The Defendant challenging supported facts is a fruitless attempt to defend the lowers court's dismissal of the Plaintiff's entire case.

Likewise, in the same footnote the Defendant claims the Plaintiff "attempts to suggest Hoffman informed State Farm of the seven hundred items prior to October 2017 through bald allegations that State Farm communicated with Hoffman "throughout the process" and "throughout 2017" are not supported by the record. *(Br. of Appellant at 12.) see (Br. Of Respondent at 3, footnote 4.)* The only bald allegations are those of the Defendant challenging the facts of the case. The Defendant's own claims file shows the Plaintiff called State Farm on April 3, 2017 when the adjuster "received voice mail from NI" the named insured, Plaintiff "found wet bags of clothes her daughter put in the attic". *(SF Claims file note, pg 4, dated 4-3-2017 – 11:37 AM;R. p. 164).* If the Defendant is attempting to create a factual dispute with allegations of 'bald allegations' then the determination of a factual dispute is properly submitted to a jury.

B. The Plaintiff Has Clearly Alleged the Statute of Limitations for her Contract Claims is Three Years and the Plaintiff Filed Her Complaint Within Three Years of the Wrongful Breach of Contract.

The Court has found the three year statute of limitations is applicable to an insurance contract, and "the statute of limitations is subject to the discovery rule and runs not from the date of injury but rather from the date the injured party knew or should have known a cause of action existed. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996); *Tollison v. B & J Mach. Co.*, 812 F. Supp. 618, 619 (D. S.C. 1993). *S.C. Farm Bureau Mut. Ins. Co. v. Kelly*, 345 S.C. 232, 237, 547 S.E.2d 871, 873-74 (Ct. App. 2001). The Plaintiff's three causes of action,

breach of contract, breach of contract accompanied by fraud, and bad faith are all grounded in, and require a contract between the parties that here, State Farm wrongfully breached.

The Plaintiff was only notified, or had any reasonable belief, State Farm was going to refuse to honor the contract of insurance when she received a letter January 10, 2018 from State Farm. *(SF letter, R. p. 173-175)* The Plaintiff was ***not injured*** by State Farm until the Defendant refused to pay the claim under the insurance policy. Until State Farm refused to pay the policy, the Plaintiff had no reason to sue the Defendant, she had suffered no injuries, had no damages. Prior to January 10, 2018, there was no cause of action against the Defendant, South Carolina does not recognize a Cause of action against an insurance company for actively adjusting and paying an insurance claim.

The Defendant grasping at straws offers potential 'additional sustaining grounds' including establishing that the statute of limitations would begin to run from May 5, 2014 – 90 days after the Plaintiff made a claim for formal benefits. However, the statute cited by the Defense is a statute providing attorney fees when "an insurer has not paid a claim within 90 days" *(S.C. Code Ann. § 38-59-40.)* The insurer denied the claim by letter dated January 10, 2018 and no time before that was the Plaintiff ever on any reasonable notice her claim was being denied by State Farm. The statute of limitation runs from the denial of the claim as enumerated in the statute.

C. The Discovery Rule Supports the Plaintiff's Diligent Pursuit of Her Claim Within the Statute of Limitations.

To claim the protection of the discovery rule, the injured party must have been reasonably diligent in discovering whether a cause of action existed. *Grillo v. Speedrite Prods., Inc.*, 340 S.C. 498, 502-03, 532 S.E.2d 1, 3 (Ct. App. 2000). Reasonable diligence requires that "the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable

person of common knowledge and experience on *notice* that a claim against another party might exist." *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647 (citation omitted). "The date on which discovery should have been made is an objective, not subjective, question." *Kreutner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995); *S.C. Farm Bureau Mut. Ins. Co. v. Kelly,* 345 S.C. 232, 237, 547 S.E.2d 871, 874 (Ct. App. 2001)

In *Kreutner*, the court ruled a Plaintiff must act with reasonable diligence in pursuing a claim where the Defendant had stonewalled more than nine requests by the Plaintiff relating to production of a mortgage and title. *Kreutner 320 at 286.* After the stonewalling the Plaintiff failed to file suit or pursue the Defendant for damages for over 6 years. *Id.* The court found failure to assert a claim that a person of common knowledge should have known about for over 6 years was not diligent.

The reasonable diligence requirement is that of **determining there was a cause of action.** The Defendant's claims that the length of time the Plaintiff took to submit her items under the policy to State Farm demonstrates lack of diligence, is misplaced. The reasonable diligence test applies to the determination of a claim against the Defendant and that the Plaintiff has been injured or incurred damages, not in relation to her submitting items pursuant to her contract of insurance with the Defendant. The Defendant's rendition of facts related to the submission of items from 2014 to 2017 is irrelevant. The only facts or 'set of circumstances' the Defendant intended to breach their contract of insurance was a single letter dated January 10, 2018. *(R. p. 173)* If the Defendant's asserted statute actually began to run from the date of the event that triggered the policy, not the date the Defendant breached the contract with the Plaintiff, then a bad faith cause of action against an insurance company in a motor vehicle case would accrue from the date of the motor vehicle collision NOT the date of the insurance company's refusal to pay benefits. The

logic is clearly flawed in practical application. The Plaintiff was wrongfully harmed by the Defendant on January 10, 2018 when the Defendant breached their contract of insurance.

The Plaintiff filed a complaint 9 months later. *(R. p. 23)* The time frame of "diligence" is between reasonable knowledge of the wrongful conduct and the filing of the claim that same year in 2018. The Defendant cannot show any other facts the Plaintiff failed, with reasonable diligence, to ignore in filing her claim for breach of contract damages. The statute of limitations began to run January 10, 2018, when the Defendant wrongfully advised the Plaintiff, they were denying her valid claim.

D. The Defendant Is Not Entitled To Have The Courts Save Them From The Contract Language Drafted By State Farm.

Where " the intention of the parties is clear, courts have no authority to change insurance contracts in any particular or to interpolate a condition or stipulation "not contemplated either by the law or by the contract between the parties" *See Torrington Co. v. Aetna Cas. & Sur. Co.*, 264 S.C. 636, 216 S.E.2d 547 (1975); *Blanton v. Nationwide Mut. Ins. Co.*, 247 S.C. 148, 146 S.E.2d 156 (1966); *Allstate Ins. Co. v. Mangum*, 299 S.C. 226, 383 S.E.2d 464 (S.C. App. 1989); *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 421, 392 S.E.2d 460, 461-62 (1990). The Court is not permitted to rewrite the policy and create a limitation on coverage that does not exist. As the South Carolina Supreme Court aptly stated, "We are without authority to alter a contract by construction or to make new contracts for the parties. Our duty is limited to the interpretation of the contract made by the parties themselves, regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully." *C.A.N. Enterprises, Inc. v. S. Carolina Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (citing *Gilstrap v. Culpepper*, 283 S.C. 83, 320 S.E.2d 445 (1984)).

Evanston Ins. Co. v. Watts, 52 F. Supp. 3d 761, 769 (D.S.C. 2014) The Defendant cannot show where the insurance contract placed a limit on the submission of damages by the Plaintiff. The Defendant has failed to offer any language of a limitation the Plaintiff was required to comply with pursuant to the policy, or any language that would reasonably put the Plaintiff on notice of a limitation under their policy.

The Defendant throughout their brief is requesting the Court save State Farm from their own contract language. The twenty-five page policy spells out the contractual insurance coverage between the party in detail down to defining terms in the policy. *(R. p. 103).* Breach of that contract occurred when State Farm wrongfully refused to honor their own contract on January 10, 2018, prior to that occurrence the Plaintiff did not have standing to sue State Farm as the Defendant was honoring their contract. The Defendant cannot now look to the Courts to save them from their own failure to establish a limitation of time to submit damages in their insurance policy. There is no dispute the Plaintiff timely reported the claim. The statute of limitations is not the time limit for filing a claim under the policy (that limitation is included in the policy language) but the limitation set by law with which the Plaintiff has to pursue contractual damages against State Farm she incurred due to the wrongful conduct of the Defendant. Until January 10, 2018, there was no wrongful conduct of the Defendant who was continuing to evaluate and adjust the Plaintiff's damages.

E. <u>The Plaintiff Properly Raised The Elements of Estoppel to the Lower Court As Raised by The Defendant In Their Motion For Summary Judgment.</u>

The Defendant claims the Plaintiff failing to use the term estoppel would preclude the Court from determining the Defendant was equitably estopped from claiming a statute of

limitations arose three years from the date the Plaintiff's policy was triggered. Our Courts do not require 'magic language' to assert or preserve a claim or defense. For instance, in causal connection testimony and " in determining whether particular evidence meets this test it is not necessary that the expert actually use the words "most probably." ." *Baughman v. American Tel. & Tel. Co.,* 306 S.C. 101, 410 S.E.2d 537 (1991) (citing *Eubanks v. Piedmont Natural Gas Co.,* 198 F. Supp. 522 (S.C. 1961)); *Scoggins v. McClellion,* 321 S.C. 264, 268, 468 S.E.2d 12, 14-15 (Ct. App. 1996). It is enough that the testimony "judicially impress that the opinion . . . represents his professional judgment as to the most likely one among the possible causes." *Baughman at 111; citing Norland v. Washington Gen. Hosp.,* 461 F.2d 694, 697 (8th Cir. 1972)). The use of the terms "probable" and "possible" as a basis for test of qualification or lack of qualification in respect to a medical opinion has frequently converted this aspect of a trial into a mere semantic ritual or hassle. The courts have come to recognize that the competency of a doctor's testimony cannot soundly be permitted to turn on a mechanical rule of law as to which of the two terms he has employed. *Norland v. Wash. Gen. Hosp.,* 461 F.2d 694, 697 (8th Cir. 1972)

Here, the Plaintiff presented sufficient evidence throughout her brief and argument to the lower Court the Plaintiff relied on the actions of State Farm in continuing to investigate and evaluate her claim into 2017, past any three-year limitation the Defendant claims would constitute a three year statute of limitations. The Plaintiff addressed estoppel in the Defendant's claim of lack of diligence in pursuing her claim and submitting her damages over the four-year period because clearly diligence related to the statute of limitation would be the diligence in filing a claim after reasonable notice of the claim January 10, 2018. The semantic ritual of the use of the word estoppel is not required where the Plaintiff alleged reliance to the lower court.

The Defendants factual misrepresentation of the Plaintiff's diligence in claiming State Farm's only contact with the Plaintiff throughout 2017was a twenty-minute phone conversation is not supported by the facts, as the claims file clearly shows multiple phone conversations and emails between the parties. *(Br. Of Respondent at 11; R. p. 162)* The facts before the lower court properly raised the Plaintiff's entitlement to an estoppel claim and equitable tolling.

F. <u>The Order Addressing the Plaintiff's Amendment of the Pleadings, to State a Cause of Action For Fraud With More Particularity Does Not Warrant Dismissal.</u>

The South Carolina Rule of Civil Procedure require "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."*(S.C. Rule Civ. Pro 9(b)).* The Plaintiff has maintained that in the July 10, 2019, hearing not only did Counsel assert the fraud allegations were sufficiently particular but when it came time to submit proposed orders the Plaintiff declined to submit one for Judge Manning's consideration as she was not contesting the change of venue or the Court's ruling <u>denying</u> the Defendant's dismissal of the Fraud cause of action and permitting amended pleadings. Defense counsel will surely confirm he emailed the Court on August 16, 2019, and confirmed the Plaintiff was not submitting a proposed order and 'has not contested that she is a resident of Lexington County'. Furthermore, the Defense allegation the Plaintiff did not ". . . attempt to amend her complaint. . ." is once again not supported by the record as such attempt was made in the motion hearing on December 17, 2020 when the Plaintiff indicated to the lower court "if we still need to amend the complaint to do that, (plead more specificity) we can do that". *(Hearing Tr. 8 ln 2-3, R. p. 46*) Plaintiff's fraud allegations are sufficiently plead and dismissing a properly plead cause of action based on a misconstrued court

order without any showing of intent, willful disobedience of the order was improper and this Court should reverse the order and remand the case for findings by a jury.

The Order issued June 10, 2019 did not make a finding of insufficient pleadings nor did the Order require dismissal of the Plaintiff's fraud cause of action for failing to amend with more particularity. *(R. 21)* The Defendant is attempting to assert the rules of statutory construction to a judge's motion order drafted by Defense counsel, not only is the analysis stretched but the result was a drastic remedy without any finding on the pleadings required for the dismissal of the Plaintiff's cause of action.

The Defense challenges the statement of the Plaintiff related to the hearing on June 10, 2019. Anticipating this, and rather than dispute the representations made at the hearing, Plaintiff requested a hearing transcript in October 2021. Elizabeth Harris, the court reporter for the hearing could not produce a transcript indicating her computer had been corrupted and after having her local IT guy attempt and sending the computer off to California she still has not been able to recover the hearing and produce a transcript. The attorneys dispute the court's instructions and representations made in the hearing, Plaintiff's counsel continues to assert the court informed the Defendant the Plaintiff's cause of action for fraud would not be dismissed, as she could amend and plead more specificity. This is consistent with the Defendant's proposed order, that was later signed by the court, which only included an amendment not the dismissal of the cause of action.

G. <u>The Defendants Concocted Statute of Limitations Excuse for Breaching Their Insurance Contract Is Unreasonable.</u>

The only disputed element for the Bad Faith claim is the Defendant's unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract. *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393, 396-97 (S.C. 1992). State Farm

Insurance Company, like the Plaintiff, is charged with knowledge of South Carolina's three-year statute of limitations. *City of Myrtle Beach v. Juel P. Corp*., 337 S.C. 157, 179, n. 11, 522 S.E.2d 153 (Ct. App. 1999) ("Ignorance of the law, which everyone is bound to know, excuses no man.") (quoting Black's Law Dictionary 573 (5th ed. 1979)), *rev'd on other grounds* 344 S.C. 43, 543 S.E.2d 538 (2001). The Defendant insurance company is expected to be able to properly apply the statute of limitations for a breach of contract claim. The Defendant has been doing so for years in bad faith automobile claims. The Defendant's concocted reason for suddenly and without any warning to their insured, asserting a statute of limitations over a year after they claim it had occurred is not reasonable and does not save the Defendant. *(R. p. 163)* Neither is the fact a lower court misinterpreted the statute of limitations for a breach of contract. Reckless misinterpretation of the law and their contract is an unreasonable action in breaching the covenant of good faith and the contract of insurance. The Plaintiff has offered sufficient facts with which a jury could find the Defendant breached an implied covenant of good faith and fair dealing when they wrongfully denied their insurance contract.

CONCLUSION

For all the forgoing reasons the Court should reverse the grant of summary judgment and remand the matter for trial.

Respectfully submitted:

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RULE 211(b) CERTIFICATION

Counsel for Appellant hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b) SCACR.

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