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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM WILLIAMSBURG COUNTY

Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No: 2021-000494

South Carolina Farm Bureau Ins. Co, Appellant
v.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, Estate of Arthur McKenzie, The Travelers Home and Marine Insurance Company, The United States of America acting by and through Its agency, The Internal Revenue Service, and The South Carolina Tax Commission, Defendants,

Of Which The Travelers Home and Marine Insurance Company is the Respondent.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. Should Grant of Summary Judgment Be Reversed Because (a) Discovery Had Not Been Completed, (b) Additional Inquiry Into the Facts Was Needed To Clarify The Law, (c) The Case Involves a Novel Issue of Law And (d) The Circuit Court Failed To Exercise Discretion?

2. Did The Court Err In Failing To Properly Consider The *Pro Rata* Statute, The Equitable Indemnity Claim, And Whether The Statute Creates A Special Relationship Between Farm Bureau and Travelers?

3. Did Travelers Act Improperly In Settling With Its Insured & Paying Out Much Of Its Coverage While It Had A Claim For Interpleader Pending And Did The Circuit Court Err In Allowing Partial Interpleader After Travelers Paid And Settled With Knowledge Of This Action And The Claims?

4. Are There Genuine Issues Of Material Fact Such That Summary Judgment And Interpleader To Travelers Should Have Been Denied?

STATEMENT OF THE CASE

After conducting an investigation and taking Examinations Under Oath, the Appellant filed this declaratory judgment action on March 7, 2014. **(R. pp. 47-139)** It asked that the Court inquire into the circumstances of an insurance claim filed by Respondents and seeking declarations, including the following: (a) The insurable value of the property at the time of the subject loss; (b) The ownership/rental/insurable interests, if any, held by the parties in the property at the time of the subject loss; (c) The amount due from each policy and to whom that amount is due on account of this loss, if any, considering all relevant factors, including ownership, valuation, the damage incurred, and the relevant policy provisions; and (d) That no sums are due from Farm Bureau to its insured for this loss because the insured's late notice substantially prejudiced Farm Bureau

and/or denied Farm Bureau's right to investigate the subject loss, an apparently intentionally set fire. **(R. pp. 57-58)**

The Driggers Respondents (Marion L. Driggers, Shiralee Driggers and Tammy D. Floyd) answered on April 8, 2014. **(R. pp. 140-149)** They asserted counterclaims, including the following: (a) Against Respondent McKenzie (1) For an Order that the Driggers had complied with and terminated the subject "rent to own" contract so that McKenzie no longer had an interest in the subject property after his ejectment by a Magistrate, and (2) For an Order quieting title to the Driggers Respondents to the exclusion of Respondent McKenzie; (b) Against Respondent Travelers: (1) For an Order that Travelers conspired with McKenzie to avoid payment to the Driggers Respondents for their lawful ownership interest, (2) For an Order that due to Travelers' delay in processing, investigating and paying the McKenzie claims, that the Driggers Respondents had to defend this action and claim against the Farm Bureau policy, which should have been secondary; and (3) For an Order that Travelers acted in bad faith towards the rights of the Driggers Defendants. **(R. pp. 147-148)**

Travelers served its answer on May 16, 2014, denying liability to Farm Bureau in any amount, and alleging a counterclaim for Interpleader. **(R. pp. 158-164)** This counterclaim sought to pay the entire policy proceeds into the Court to be paid in such amounts as the Court determined, and that Travelers then be discharged from liability. **(R. p. 163)** McKenzie served his answer to Driggers' crossclaims on July 2, 2014, alleging crossclaims against the Driggers Respondents for breach of the "rent to own" contract accompanied by a fraudulent act and for civil conspiracy, seeking actual and punitive damages and alleging that he was never given proper credit for payments under the agreement. **(R. pp. 170-175)** The Driggers Respondents replied to McKenzie's cross claims, denying that payments were improperly applied, and alleging various defenses

including *res judicata*, collateral estoppel, a punitive damages defense, and lodging a new cross claim against McKenzie for frivolous civil proceedings. **(R. pp. 176-181)**

The IRS answered, submitting its interest to the court for protection and consenting to a reference. The parties replied to the various counterclaims, alleging various affirmative defenses. **(R. pp. 156-157)**

On July 13, 2016, the Plaintiff filed an amended Complaint. **(R. pp. 300-391)** It clarified the confusing and complex facts. It also specifically referenced the *Pro Rata* statute referenced by statutory mention in the first Complaint. The most important change in the amended Complaint was to allege a claim for equitable indemnity against Travelers. **(R. p. 310).** On September 13, 2016, Travelers filed an Answer that admitted that during adjustment, it was aware of and denied Mr. Driggers' claim to its policy proceeds and that Mr. Driggers had or "may have had" an owner's policy with Farm Bureau insuring the same property covered by its owner's policy with Mr. McKenzie. **(R. pp. 442-450; p. 445 ¶20)** Travelers alleged various defenses, including failure to state a claim, the lack of a special relationship with Farm Bureau, that Farm Bureau would be liable for some pro-rated share of the loss, and, oddly, alleging that Farm Bureau would be liable to Travelers for this pr-rata share, despite Travelers denial of the claim of Farm Bureau's insured, Mr. Driggers. Travelers, Answer also alleged counterclaims for Interpleader and Contribution. **(R. pp. 447-450)**

Farm Bureau replied to Traveler's counterclaims, asking the court to deny Interpleader and alleging numerous reasons for the denial, and pleading that first, the ownership and valuation and coverage issues should be determined and that then both carriers could avail themselves of Interpleader by depositing the determined policy amount into the court. The reply alleged numerous reasons why Farm Bureau is entitled to indemnity and why Travelers' claim for

contribution should be denied. It alleged defenses to Travelers claims, including 12(b)(6), negligence, Pro Rata share not exceeded, Failure to comply with SC Contribution Among Tortfeasors Act, and Fault. **(R. pp. 451-460)**

Mrs. Driggers and Ms. Floyd filed an Answer, Counterclaims and Crossclaims through counsel, while Mr. Driggers filed a similar pleading *Pro Se.* **(R. pp. 392-416; R. p. 417)** The Driggers/Floyd pleading alleged, for the first time, that Mr. and Mrs. Driggers procured coverage as an agent for Ms. Floyd, and that policy proceeds are due to Ms. Floyd, who is not an insured or named insured under the Farm Bureau policy. It alleged claims for breach of contract, bad faith, and violation of §38-59-40(1) against both Farm Bureau and Travelers. *SC Code Ann. §38-59-40-1, 1976, as amended.* **(R. pp. 392-416; R. p. 399 ¶39-41)** Mr. Driggers *Pro Se* Answer denied misrepresentation and breach of contract, and denied the Driggers//Floyd claim that he acted as agent for Ms. Floyd, and re-affirmed his ownership and insurable interest. The pleading also alleged "unethical" behavior by Farm Bureau and Travelers and referenced *Tyger River*. *Tyger River v. Maryland Casualty, 170 SC 286, 170 SE 246 (1933).* **(R. p. 417)** Farm Bureau replied to these counterclaims by alleging a number of defenses, including good faith, equitable estoppel, unclean hands and waiver, among others. **(R. pp. 418-433)** Farm Bureau's reply included a motion to dismiss on a number of grounds, including that Floyd was not a Farm Bureau insured and that the Farm Bureau insureds did not own the property, that Floyd never made a claim, that Farm Bureau could not issue coverage to an unnamed principal because of company and policy requirements that the insured be a member of the Farm Bureau Federation. **(R. pp. 427-428, ¶46)**

Motions for Summary Judgment by the parties followed, along with Motions as to Interpleader previously filed by Travelers. Farm Bureau filed a detailed Motion for Reconsideration. These Motions resulted in the following Orders: (1) The Form 4 Order of April

12, 2021 denying Farm Bureau's Motion For Reconsideration; (2) The Order of Dismissal as to Travelers filed April 19, 2021; (3) The March 30, 2021 Order granting Travelers Summary Judgment against Farm Bureau as to its claims, including Equitable Indemnity. **(R. pp. 234-235; R. pp. 461-466; R. pp. 22-45)** Farm Bureau's Motion For Summary Judgment was found to be premature because discovery had not been completed, but the Judge then granted Travelers Motion for Summary Judgment and dismissed Travelers from the case before discovery was completed. **See: (R. p. 623-624; R. pp. 234-235; R. pp 22-45)**

This appeal followed. **(R. pp. 546-568)**

STATEMENT OF THE FACTS

Factual History:

On November 26, 2009, an apparent electrical fire destroyed or severely damaged a house located in Williamsburg County at 3328 Turbeville Highway (also known as 200 W. Highway 378 Bypass, Lake City, South Carolina). The property was originally owned by McKenzie, but he lost it due to taxes, and Elsie Matthews bid the property in as a "straw buyer" for the Driggers/Floyd Respondents. Matthews transferred the property to Floyd and she signed the Contract to Purchas with Liza Gamble, McKenzie's girlfriend, because McKenzie's tax issues prevented him from holding anything in his name. Later, Gamble assigned her interest in the Contract to McKenzie, though none of the Driggers/Floyd parties ever signed off on or agreed to the assignment. **(R. pp. 738-743; R. pp. 744-755; R. pp. 756-757; R. pp. 638-640; R. pp. 646-653)**

At the time of the loss and of the Farm Bureau Policy, the house was titled to Respondent Floyd. It was purchased at a tax sale by Elsie Matthews, a friend of Mrs. Driggers, as a straw buyer because Mr. Driggers was concerned about the legalities as he and his wife holding a second

mortgage at the time. Later, it was transferred to Mr./Mrs. Drigger's daughter, Tammy D. Floyd on behalf of the family. The family had an LLC and Mr. Driggers said his daughter held title to a number of family properties. The property remained titled in the daughter's name. **(R. pp. 636-637; 651-653)** Mr. Driggers said that he and his wife had an oral agreement with their daughter as to ownership of the subject property, just as they did about the ownership of a business property at Myrtle Beach. **(R. pp. 641-642)** Mr. and Mrs. Driggers often bought properties and put them in their daughter, Tammy Floyd's, name. **(R. p. 645)** Payments under the Contract to Purchase were to be made to Mr. Driggers. **Contract To Purchase, #1(d).** Insurance coverage of $80,000 was required to be maintained to protect the seller, either Marion Driggers, Shiralee Driggers or their designee. **(R. pp. 745 - 746; R. p. 761¶2(g)(2)** Floyd was not involved in the eviction action before Judge Shuler, but she became her parents' designee for purposes of the Contract. **(R. pp. 744-755; R.p.761-762)**

At the time of the fire, Travelers insured home occupant McKenzie, and none of the Driggers/Floyd parties were listed on the policy. **(R. pp. 695-737)** Based on its investigation, Travelers suspected arson and turned the claim over to its SIU Department. **See: (R. pp. 810; R.pp. 781-786; R. pp. 787-809)** The fire department felt the fire was suspicious in nature and that after the fire an anonymous person called the FD claiming to know who set the fire and the FD gave the caller SLED's information. **See: (R. pp. 787-809; R. pp. 797-798)** A hotline claim to NICB was traced back to a Brad Darling with two involved parties, Eliza Gamble and Arthur McKinsie. **(R. p. 801)** On January 19, 2010, Travelers spoke with Agent Hudson of SLED who indicated they had received information that this fire was intentional, SLED was following up on this and noted that McKenzie had prior fires in the 1980s that were ruled accidental and looked to

be electrical. **(R. p. 802)** No arson claim was ultimately pursued, although SLED got a statement from McKenzie. **(R. p. 813)**

During its investigation, Travelers became aware that there was a complex history involving the property, noting "odd" issues with the sale by titled owner Floyd, but determining that based on the sale, McKenzie had an insurable interest. **(R. p. 786)** On January 2, 2010, Travelers Claims Representative Ted Alexander got a call from Travelers agent that he'd been contacted by Mrs. Driggers advising of an $80,000 mortgage they held on the subject property. **(R. p. 773)** On January 12, 2010, Alexander's notes for Travelers reflect that he asked the PM (possibly Primary Manager, but exact meaning unknown) about the Driggers' mortgage and "He said that has been taken care of. I advised that we were now on notice of the mortgage." After the call S Driggers left a voice mail. **(R. pp. 801-802)** On or about the same date, Travelers ran an Accurint Search, and was aware of Farm Bureau's involvement and policies for numerous Driggers properties. Travelers even followed up with Farm Bureau investigator Margaret Fleming as to the Driggers' prior fire loss claims located on the Accurint Investigation. **(R. pp. 801-802)** There is no indication that the Travelers' investigator advised Fleming of the circumstances of the present fire or that he followed up to alert her that Farm Bureau likely had a policy on the subject property. Despite Travelers being on notice of the Driggers' mortgage and failing to pay the same, Mr. Driggers was told that he did not have a claim against Travelers because his interest wasn't listed on the policy. **(R. pp. 633-634)**

On January 20, 2010, still less than a month after the fire, Travelers' Investigator Travis went to the Courthouse. He searched for prior criminal records on involved parties and found none. He did locate the prior civil records, including the previous Magistrate(s) action related to the property and the parties, and obtained a copy of the Contract to Purchase, originally between

Gamble and Floyd and later assigned by Gamble to McKenzie, without the consent of the other parties. **(R. p. 802; R. pp. 738-743; R. pp. 744-755; R. p. 756-757; R. pp. 638-640)**

During all of this time, no claim had been filed with Farm Bureau relative to the loss. The fire was on November 26, 2009. No claim was filed to put Farm Bureau on notice until, just under a month before the Statute of Limitations would have run. **(R. p. 53 ¶15; R. p. 304 ¶15)** It is notable that NO action or lawsuit was filed prior to the Statute of Limitations running, and none was ever filed by any of the individual parties. The first action was by Farm Bureau's filing seeking a declaration from the Court as to the issues involved in this very complex case. Mr. Driggers said he did not want to file a claim with Farm Bureau because Travelers should pay, and he was worried about his premium going up with Farm Bureau if he filed a claim. **(R. pp. 631-632)** He also indicated that he didn't file a claim against the Farm Bureau policy until he learned that Travelers was denying his claim and, at that point, he turned the claim into Farm Bureau because the Statute of Limitations was about to run. **(R. pp. 632-635)** Mr. and Mrs. Driggers said that they took out the homeowner's policy with Farm Bureau because Mr. McKenzie was "notorious" for getting insurance and letting it lapse. **(R. p. 631; R. pp. 654-655)** The Driggerses took out the Farm Bureau policy to protect against a loss, should Travelers not pay. **(R. p. 656)**

Essentially, the HO policy from Farm Bureau was taken out as mortgage insurance. Despite Travelers being aware of the $80,000 mortgage debt for the Contract To Purchase, and despite Travelers entry in their records confirming receipt of the notice shortly after the fire, (See above), Travelers never paid Driggers for this interest. Travelers contacted Margaret Fleming of Farm Bureau shortly after this fire to ask about prior fires and losses at the Driggers various rental properties insured by Farm Bureau, but Travelers did not advise Farm Bureau of this loss, not even to note that both companies might insure the same property for the same interest. Mr. Driggers

testified that he was looking to Travelers to pay this loss, and that is why he held off until the Statute of Limitations was about to run to file a claim with Farm Bureau. If Travelers honored its obligation to Mr. Driggers, the claim would not have been filed and this DJ would not have been necessary.

It is of note that even after becoming aware, much earlier than Farm Bureau, of the complex facts and legalities involved in this matter, that Travelers never sought a Declaration from the Court of the rights of the parties. Like its failure to pay Driggers' claim on a timely basis, Travelers failure to coordinate with Farm Bureau, to advise Farm Bureau of this loss, or to file a DJ, and forced Farm Bureau to file this action, which has cost the company time, court and discovery costs, and attorney fees.

Travelers chose to diminish its coverage by paying McKenzie and/or his substantial legal fees before depositing the balance into court and walking away from its obligations to the Driggers/Floyd parties and to Farm Bureau. **(R. pp. 765-768; R. pp. 30-35)**

Coverages and Statute Involved:

Travelers covered the subject dwelling for its named insured, Arthur McKenzie, under Homeowners Policy No. 984761288 633 1 for policy period 5/07/09 - 5/07/10 providing, in relevant part, the following coverage: A: Dwelling: $287,000; B. Other Structures: $28,700; C. Personal Property: $200,900; D. Loss of Use: $ 86,10. **(R. pp. 695-737)**

Farm Bureau covered the subject dwelling for its named insured, Marion L. Driggers, on Homeowners Policy No. FI 0401219 for policy period 5/24/09 - 5/24/10 providing, in relevant part, the following coverage: A: Dwelling: $118,000; B. Other Structures: $ 5,900; D. Loss of Use: $ 11,800. **(R. pp. 657-694)**

The *Pro Rata* Statute is also involved. It provides as follows;

Section 38-75-20 - Maximum amounts of fire insurance policies; stated values; contributions by coinsurers

No insurer doing business in this State may issue a fire insurance policy for more than the value stated in the policy or the value of the property to be insured. The amount of insurance must be fixed by the insurer and insured at or before the time of issuing the policy. In case of total loss by fire the insured is entitled to recover the full amount of insurance. In case of a partial loss by fire the insured is entitled to recover the actual amount of the loss but in no event more than the amount of the insurance stated in the contract. If two or more policies are written upon the same property, they are considered to be contributive insurance, and, if the aggregate sum of all such insurance exceeds the insurable value of the property, as agreed by the insurer and the insured, each insurer, in the event of a total or partial loss, is liable for its pro rata share of insurance. This section does not apply to insurance on chattels or personal property.

S.C. Code Ann., § 38-75-20, 1976, as amended.

Where other insurance also covers a loss, Farm Bureau's Policy provides as follows:

7. Other Insurance. If a loss covered by this policy is also covered by other insurance, a service contract or a warranty provision, we will pay only the proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss.

Conditions (A)(7) **(R. p. 685)**

As to insurable interest and limit of liability, Farm Bureau's Policy provides as follows:

1. Insurable Interest and Limit of Liability. Even if more than one person has an insurable interest in the property covered, we will not be liable in any one loss:

a. to the insured for more than the amount of the insured's interest at the time of the loss ; or

b. for more than the applicable limit of liability.

Conditions (A)(1) **(R. p. 681)**

Farm Bureau's Policy also obligates the insured to perform certain duties after a loss, to wit;

> **2. Your Duties After Loss. In case of a loss to covered property, you must see that the following are done:**
>
> **b. give prompt notice to us or our agent;**
>
> Conditions (A)(2) **(R. p. 681)**

STANDARD OF REVIEW

The instant case presents a novel issue of law in South Carolina as to the duties of carriers involved in a *Pro Rata Statute* coverage relationship.

On appeal from an order granting summary judgment, the appellate court applies the same standard that governs the trial court. The appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below. *Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001); Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).*

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. §§ 14-3-320 and -330 (1976 & Supp. 2005),* and *S.C. Code Ann § 14-8-200 (Supp.2005)*; *Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000).Madison ex rel. Bryant v. Babcock Center, Inc. 371 S.C. 123, *134, 638 S.E.2d 650, 655 - 656 (S.C., 2006)*

ARGUMENT

1. Should Grant of Summary Judgment Be Reversed Because (a) Discovery Had Not Been Completed, (b) Additional Inquiry Into the Facts Was Needed To Clarify The Law, (c) The Case Involves a Novel Issue of Law And (d) The Circuit Court Failed To Exercise Discretion?

The Trial Court granted Summary Judgment to Travelers, allowing Interpleader and deposit of the partial, remaining coverage, and dismissing Farm Bureau's claim for equitable indemnity. **(R. pp. 19-35)** At the time, depositions and discovery were not complete, the deposition of Travelers had not been taken and key parties Mr. and Mrs. Driggers had not been deposed, though depositions were scheduled. To date, Travelers has never been deposed.

In granting Summary Judgement, the Order noted the age of the case. **(R. pp. 30-35; R. p.33, n.1)** However, it failed to consider the delays caused by the death of Mr. McKenzie, which required an estate to be established and a Personal Representative to be appointed. It failed to consider the contentious issues of Mr. Driggers to Mr. McKenzie's attorney, Mr. Corbin, participating in this case because of Corbin's past history with the matter making him a witness, according to Driggers. It failed to consider that Mr. and Mrs. Driggers and Ms. Floyd had a couple of changes of counsel and that ultimately Mr. Driggers elected to proceed *Pro Se.* It failed to consider that there were times when Mr. Driggers, because of the referenced issues, refused to appear for depositions and refused to be deposed unless all lawyers were deposed. It failed to consider that depositions were scheduled and commenced previously, but Mr. Driggers left and refused to participate due to his belief that his issues should prevent Mr. Corbin's representation as counsel. It refused to consider that depositions of the insurance carriers were set a second time, but were canceled by a party or that Travelers first counsel retired during the litigation. It refused to consider the impact of COVID, after Mr. Corbin tested positive and had to quarantine, complicated by the technical issues posed by a *Pro Se* party who could not participate by zoom.

The technical issues also caused delays in discovery caused by pending Motions which needed to be held in person at the Williamsburg County courthouse, during a scheduled term, which terms were rare to nonexistent at times during the pandemic. It failed to consider the constitutional protection granted to *pro se* parties to allow them to fully participate.

Summary Judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *BPS, Inc. v. Worthy, 362 S.C. 319 (S.C. Ct. App. 2005), citing Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001); Baughman v. American Tel. Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991); see also Schmidt v. Courtney, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct.App. 2003).* Additionally, Summary Judgment is not appropriate if further inquiry into the facts is needed to clarify the application of the law. *Lanham v. Blue Cross and Blue Shield of South Carolina, 349 SC 356, 563 SE2d 361 (2002).* Summary Judgment is not appropriate in a case involving a novel issue of law *Schmidt, supra.*

Given the complex facts of this case, and the procedural history and impediments noted above, it was error for the Court to grant Summary Judgment to Travelers prior to the Plaintiff having a full and fair opportunity to complete discovery. Further, there are disputed facts as to Travelers notice of the involvement of Farm Bureau, as to Travelers contact with Farm Bureau that did not notify Farm Bureau of this claim, as to Travelers settlement with McKenzie and its failure to pay its full coverage into Court, and as to the total value of the property and assessment of each party's interest particularly in view of the *Pro Rata* statute. And here, there is a novel issue of law as to whether insurance companies that provide Homeowner's Policies covering an ownership issue in the same property owe a duty to each other by virtue of the operation of law.

Given the incomplete status of discovery, with Travelers not even having been deposed, considering the long history of the case, particularly with prior attempts to take the depositions that were impeded by the factors noted above, and considering the complex history of the property requiring evidence to determine valuation and ownership interest, there were contested facts and a need for additional evidence to clarify the application of the law. Given all of the foregoing, and the novel issue of law involved here, the Court's grant of Summary Judgment to Travelers, and its use of a Form Order to deny Farm Bureau's detailed and extensive Motion to Alter, Amend, Reconsider – amounts to a failure of the Circuit Court to exercise discretion. **(R. pp. 536-545)**

A Circuit Court's failure to exercise discretion constitutes an abuse of discretion. *Schmidt, supra; In Re Robert M., 294 SC 69, 362 SE2d 639 (1987); State v. Smith, 276 SC 494, 280 SE2d 200 (1981); Fields v. Regional Med. Ctr. Orangeburg, 354 SC 445, 581 SE2d 489 (Ct. App. 2003).* "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly," *Balloon Plantation, Inc. v. Head Balloons, Inc, 303 SC 152 at 155, 399 SE2d 439 at 441 (Ct. App 1990).* Here, the Circuit Court's failure to exercise discretion alone constituted a reversable error.

For the foregoing reasons, this Court should reverse the Circuit Court's Order and remand the case.

2. Did The Court Err In Failing To Properly Consider The *Pro Rata* Statute, The Equitable Indemnity Claim, And Whether The Statute Creates A Special Relationship Between Farm Bureau and Travelers?

The *Pro Rata Statute, S.C. Code Ann., § 38-75-20, 1976, as amended*, provides that insurers homeowner's coverage for fire loss is limited to the value of the property. Further, it provides that if two or more policies are written for the same property, they are contributive insurance and if the aggregate of all insurance exceeds the property value, each insurer is liable

for its *Pro Rata* share. *Id.* Here, the total combined coverage on the involved dwelling was Four Hundred Five and no/100 ($405,000) Dollars. **See: (R. p. 657; R. pp. 695-701)** Farm Bureau contends that this coverage exceeded the value of the property.

Although both policies were Homeowners Policies covering an ownership interest, the percentage of that ownership interest had to be established. Mr. McKenzie was buying the property under, essentially, a "rent to own" agreement. McKenzie contended that his payments were not properly calculated and applied, and the Driggers/Floyd parties contended that McKenzie's payment history was spotty and that no payments were made after the fire. **See: Statement Of Facts.** Under the Contract, the purchase price to be paid was Eighty Thousand and no/100 ($80,000) Dollars and there was also a financing agreement. There was a lump sum of Eight Thousand and no/100 ($8,000) Dollars due at signing, and monthly payments were to be Six Hundred Ninety-Four and 81/100 ($694.81) Dollars. **(R. pp. 744-755)**

There were numerous complexities involved as to valuation and ownership interest, and Farm Bureau had a claim for Equitable Indemnity as to Travelers, Had Travelers paid the claim of Driggers/Floyd, then no claim would have been made under the Farm Bureau Policy. If Travelers had notified Farm Bureau of the claim or contacted Farm Bureau as to potential *Pro Se* issues, then Farm Bureau could have had timely notice and it would not have been prejudiced in adjusting the fire loss claim, as such claims are especially time sensitive, particularly where arson is or may be involved. Travelers was aware of the suspicious nature of the fire almost immediately, had contact with Mr. and/or Mrs. Driggers, and ran an ISO search on Driggers, located Farm Bureau's history of insuring their properties, and it even contacted Margaret Fleming weeks after the fire to ask about Farm Bureau's investigation of prior fires at rental properties. **See: (R. pp. 801-802; R. p. 773; R. p. 802; R. pp. 738-743; R. pp. 744-755; R. pp. 756-757; R. pp. 638-640)** Despite all of

the foregoing, including Travelers discovery of the complex nature of the property history and ownership issues within weeks of the fire, Travelers did not provide information about this fire to Margaret Fleming when it called her about prior fires at Driggers' properties, nor did it file a Declaratory Judgment action to submit the known issues to the Court. Travelers inaction compelled Farm Bureau to file this action, seeking a declaration as to the coverage, valuation, and associated issues.

"[C]ourts faced with the distasteful chore of apportioning liabilities among multiple insurers should look to the language of the policies to ascertain whether the policies are intended to provide primary or secondary coverage." *S.C. Ins. Co. v. Fid. Guar. Ins. Underwriters,Inc., 327 S.C. 207, 214, 489 S.E.2d 200, 203 (1997); Blanding v. Long Beach Mortg. Co.*, 379 S.C. 206, 215 (S.C. 2008). The relevant issue is the total insuring intent within the policy, and one way to ascertain this is to review the "Other Insurance" provision. Farm Bureau's policy mirrors the language and intent of the statute via its "Other Insurance" and "Insurable Interest" provisions which limit Farm Bureau's coverage to its *Pro Rata Share,* and to the amount of the insured's interest, if more than one person has an insurable interest. **(R. p. 681; R. p. 685)** The "Other Insurance" and "Insurable Interest" in the Travelers policy are substantially similar, calling for proportional payment if other insurance applies and limiting coverage to the value of the insurable interest. **(R. p. 721; R. p. 723)**

The South Carolina Supreme Court reviewed issues as to "Other Insurance" and "Insurable Interest" clauses in an excellent opinion answering a District Court Certified Question as to whether a blanket policy or a specific policy should have payment priority. *South Carolina Insurance v. Fidelity & Guaranty Insurance Underwriters, Inc., 327 SC 207, 489 SE2d 200 (1997).* The Court stated that there are four (4) types of "Other Insurance" provisions and, of these, "pro

rata" clauses provide that each policy will pay its share of the loss in the proportion of its limits to aggregate available coverage. *Id.* The Court advised that prior state precedents suggest that if two policies insure the same entity against the same risk to the same object, then they are concurrent and the loss should be prorated between the issuing insurers. *South Carolina Insurance v. Fidelity & Guaranty, supra.* The Court found that prior state decisions consider that the "only prerequisite" to prorating a loss between insurers is that the policies involved cover the same peril as to the same property and the same interest. *South Carolina Insurance v. Fidelity & Guaranty, supra; citing Lucas v. Garrett, 209 SC 521, 41 SE2d 212 (1947);* and *Murdaugh v. Traders Mechanics Insurance Co., 218 SC 299, 62 SE2d 723 (1950).*

Here, the Farm Bureau and the Travelers policies cover the same peril (fire) as to the same property (the subject dwelling) and the same interest (homeowner). Under the terms of the Pro Rata Statute, both policies, and prior case law interpreting the same or substantially similar "Other Insurance" and "Insurable Interest" provisions, this is a proportional coverage case. The Circuit Court was required to hear the evidence, decide the percentages of ownership, the percentages of applicable coverage and then issue an opinion applying the Statute and Policy provisions proportionally to determine coverage. This case presents exactly the type of "overinsurance" situation that the Pro Rata Statute was intended to Prevent.

The Circuit Court granted Summary Judgment as to the Equitable Indemnity Claim, failed to rule on the relationship between that claim and the Pro Rata Statue, and granted a general dismissal without specifically addressing the Pro Rata Claim. Farm Bureau contends that a special relationship existed between the carriers by virtue of the Pro Rata statute. This goes to the heart of Farm Bureau's Equitable Indemnity Claim.

Indemnity claims may arise when a first party is liable for payment to a second party for a loss or damage that the second party incurs to a third party. *Loyola Federal Savings v. Thomasson Properties, 318 SC 92, 456 SE2d 423 (Ct. App. 1995).* The right to indemnity may arise either by contract or by operation of law as a matter of equity. *Town of Winnsboro v. Wideman-Singleton, Inc., 303 SC 52, 398 SE2d 500 (Ct. App. 1990); aff'd 307 SC 128, 414 SE2d 118 (1992)*. Courts generally allow Equitable Indemnity claims in cases of imputed fault or where a special relationship exists and one party is exposed to liability by the wrongful act of another in which he does not join. *Inglese v. Beal, 403 SC 290, 742 SE2d 687 (Ct. App. 2013).* An indemnity plaintiff may generally recover if the defendant's wrongful acts involved that indemnity plaintiff in litigation or placed the indemnity plaintiff in such a position that it must incur expenses to protect its interests. *Inglese, citing Addy v. Bolton, 257 SC 28, 183 SE2d 708 (1971).*

Once a special relationship is established, an indemnity plaintiff must prove the following to recover: (1) the indemnity defendant caused the damages; (2) the indemnity plaintiff was not at fault in causing the damages; and (3) the plaintiff incurred expenses to protect its interests. *Inglese, supra.*

Farm Bureau does not contend that a special relationship existed between it and Travelers merely because they insured the same property. Rather, it contends that the requirements and duties under the Pro Rata Statute create, of necessity, a special relationship between companies in circumstances to which the Statute applies. The scheme imposed by the Pro Rata Statute can only be carried out by insurers if the carriers act in good faith to communicate and cooperate to meet the requirements of the statute, including - as to issues like those in this case – assessing the coverage and its ratios, computing and adjusting the loss to determine valuation and the percentage of ownership interest. Wisconsin has held that the Pro Rata Statute qualifies the valued policy law

when a dwelling is insured by two or more policies without the consent of the insurers and then, the amount of recovery is governed by the Pro Rata Statute rather than valued policy law. *Wegner v. West Bend Mut. Ins. Co., 298 Wis2d 420, 2007 WI App 18 (Ct. App. 2006).* An earlier decision by the Wisconsin Court contains an excellent discussion of instances when multiple policies insure the same risk, with or without the knowledge of the insurers, and discusses the effect of their state's Pro Rata law in limiting valued policy provisions. *Wisconsin Screw v. Detroit Fire Marine Ins. Co., 183 F. Supp. 183 (ED Wis 1960).*

This case passes the equitable indemnity relationship test because the statute requires a special relationship to achieve its goals. Having met that requirement, the other elements are (1) the indemnity defendant caused the damages; (2) the indemnity plaintiff was not at fault in causing the damages; and (3) the plaintiff incurred expenses to protect its interests. *Inglese, supra.* Here, Travelers caused damages to Farm Bureau by failing to comply with the Pro Rata Statute and did not notify, coordinate and communicate with Farm Bureau as to coverage, valuation, and ownership interest. Farm Bureau was not at fault and did not fail to notify, coordinate or communicate with Travelers – Farm Bureau was unaware of this loss and received no claim for it until the Statute of Limitations for the insured to file a claim was about to run. Because Travelers failed to comply with the Pro Rata Statue in working with Farm Bureau, and it failed to file a Declaratory Judgment action to determine the complex issues, Farm Bureau was forced to file this action, incurring expenses to protect its interests. This case meets the equitable indemnity test.

The Circuit Court erred in failing to properly consider the *Pro Rata* statute, the equitable indemnity claim, and to determine, or even consider, that the statute creates and required a special relationship between Farm Bureau and Travelers.

3. Did Travelers Act Improperly In Settling With Its Insured & Paying Out Much Of Its Coverage While It Had A Claim For Interpleader Pending And Did The Circuit Court Err In Allowing Partial Interpleader After Travelers Paid And Settled With Knowledge Of This Action And The Claims?

Travelers has had a claim for Interpleader pending since its early pleadings in this action. **(R. pp. 158-164)** The Rule states that a party may obtain Interpleader and Release by depositing into Court the amount claimed. *SCRCP, Rule 22(b).* The deposit should be conditioned upon compliance by the Indemnity plaintiff with the further Order of judgment as to the subject matter of the controversy. *SCRCP, Rule 22(b).* While indemnity is a matter of right, the release or discharge of the Interpleader plaintiff is a matter of the Court's discretion. *SCRCP, Rule 22(a)* text and notes, and *SCRCP, Rule 22(b).*

Travelers Policy provided coverage of Two Hundred Eighty-Seven and No/100 ($287,000) Dollars on the subject dwelling. **See: (R. pp. 695-737)** During this litigation, on July 7, 2014, Travelers settled McKenzie's claim for Two Hundred Thirty-Two Thousand Seventy Three and 45/100 ($232,073.45) Dollars, Fifty Four Thousand Nine Hundred Twenty Six and 55/100 ($54,926.55) less than the full amount of its coverage. **(R. pp. 765-768)** Of the total settlement amount, One Hundred Sixteen Thousand Nine Hundred Thirty Three and 05/100 ($116,933.05) Dollars was paid on behalf of McKenzie to his present and former attorneys. **(R. pp. 765-768; R. pp. 30-35)** That left a balance of the settlement sum of One Hundred Fifteen Thousand One Hundred Forty And 40/100 ($115,140.40) Dollars, and the Court allowed Travelers to deposit this sum as interpleaded funds, and it granted Travelers a dismissal with prejudice. **(R. pp. 765-768; R. pp. 30-35; R. pp. 45-46)**

Travelers did not deposit into Court the amount claimed, as required by the Rule. The amount claimed was Travelers coverage, and Travelers deposited significantly less than its

coverage of Two Hundred Eighty-Seven Thousand and No/100 ($287,000) Dollars. The Court erred in dismissing Travelers in this situation, and particularly erred in doing so without requiring payment of the full amount claimed, the coverage. The Court further erred in accepting Travelers settlement figures with McKenzie for an amount that was Fifty-Four Thousand Nine Hundred Twenty Six and 55/100 ($54,926.55) less than the full amount of its coverage.

The amount paid out from the settlement was for attorney's fees. The Court erred in allowing Interpleader after this payment because attorney's fees are not recoverable unless authorized by contract or statute. *Tharp v. SC Dept. of Soc. Servs., 312 SC 243, 439 SE2d 854 (1993).* The settlement agreement authorizing the payment of attorney fees was not a contract within the meaning of *Tharp,* and it was not authorized by a statute. Further, allowing Interpleader and dismissing Travelers from liability under these facts contradicts the basis for Interpleader. The primary purpose of Interpleader is allowing a neutral stakeholder to shield itself from liability for "paying over the stake to the wrong party." *First Union Nat'l Bank of SC v. FCVS Commc'ns, 321 SC 496, 499, 469 SE2d 613, 616, rev'd in part, 328 SC 290, 494 SE2d 429 (1997).*

Travelers was well aware of this action before it settled with McKenzie. Travelers made a claim for Interpleader, to relieve it from the risks of competing claims, and then it turned around and settled with McKenzie. The Court erred in allowing Interpleader for less than the claimed amount, as the Rule requires, and in granting dismissal or discharge of Travelers in exchange for its deposit of a portion of the claimed amount and because the attorney fees paid were not set by contract or case law within the meaning of *Tharp.*

4. Are There Genuine Issues Of Material Fact Such That Summary Judgment And Interpleader To Travelers Should Have Been Denied?

Summary Judgment is limited to cases where there is no genuine issue of material fact. *SCRCP, Rule 56(c).* To determine whether triable issues of fact exist, all evidence and inferences must be view most favorably to the non-moving party. *Koester v. Carolina Rental Center, 313 SC 490, 493, 443 SE2d 392, 394 (1994).* To survive a motion for Summary Judgment under the state preponderance of the evidence standard, a party must produce only a scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., 381 SC 326, 673 SE2d 801 (2009).*

There is much more than a mere scintilla of evidence of genuine issues of material fact in this case. As to Travelers, these include, but are not limited to the following: the ownership issues between Driggers/Floyd and McKenzie, the ownership percentages between Driggers/Floyd and McKenzie, the contracts between Gamble/McKenzie and the Driggers/Floyd defendants, prior Court Orders between Driggers and McKenzie and the interpretation and application of those Orders, McKenzie's claim to Travelers, Driggers claim to Travelers, the history of the contacts between Driggers and Travelers, the content of communications between Driggers and Travelers and what was said about Farm Bureau, and Travelers payment to McKenzie during the pendency of this action after the request for Interpleader was filed.

Additionally, the evaluations required by the Pro Rata statute, alone, should prevent Summary Judgment where the carriers have not agreed as to elements required by the statute, which include valuation and the ownership percentage as they relate to the percentage of coverage. Relative to the ownership percentage, there is not even agreement as to the payment history of the McKenzie account, and without a determination of that history, the ownership

percentage cannot be determined. Without that, the proportion of coverage cannot be fixed.

Genuine, material factual issues and disputes do not just exist in this case – they abound. Therefore, the grant of Summary Judgment to Travelers was in error.

CONCLUSION

This case is the poster child for the Pro Rata statute. The complex facts here show why carriers have obligations to each other in order to comply with the statute and must have a special relationship to achieve the goals of the statute. Beneath the layers of facts that need to be found to determine valuation, ownership and percentages of coverage, lurk other issues that are contentious and complex, involving the individual parties claims against each other, their bad faith claims against the carriers, and those that need to be resolved so that the Court can declare what coverage exists, if any.

The novel legal issue of whether the Pro Rata statute creates a special relationship between the involved carriers – alone- should have mandated the denial of Summary Judgment. Travelers decision to pay out part of its coverage for McKenzie's attorney fees, to settle with McKenzie for less than its full coverage, and to seek and gain Interpleader of much less than the claimed amount should mean that Interpleader and/or dismissal or discharge should have been denied. If none of that prevented Summary Judgment, then the abundance of contested issues of genuine material facts should have done so. Those contested issues have not been fully explored because the Court granted Travelers Summary Judgment before its scheduled deposition could be held.

Summary Judgment and dismissal were erroneously granted. At the motions hearing, Farm Bureau's Motion For Summary Judgment was found to be premature because discovery had not been completed, but the Judge then granted Travelers Motion for Summary Judgment and

dismissed Travelers from the case despite discovery being incomplete. **See: (R. pp. 511-513; R. pp. 536-545; R. pp. 623-624; R. pp. 30-35; R. pp. 17-21; R. pp. 45-46)**

No matter how much easier it would be to deposit coverage and walk away, Farm Bureau chose the harder and more honorable path of filing this action to seek declarations from the Court. The Court's answer should not and cannot be taking the easy path of Summary Judgment and dismissal. These complex and contested facts, once fully developed through depositions, should be fully considered and determined. The Circuit Court's grant of Summary Judgment and Interpleader with dismissal to Travelers should be reversed, and this case should be remanded for the completion of discovery, mediation and a trial on the merits.

Respectfully Submitted,

/s/ J. Dwight Hudson

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