

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
ZURICH AMERICAN INSURANCE)
COMPANY OF ILLINOIS,)
)
Plaintiff,)
)
)
PALMETTO CONTRACT SERVICES,)
INC.,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS

CASE NUMBER 2015-CP-10-06684

RECEIVED

Jul 02 2025

SC Court of Appeals

**ORDER GRANTING PLAINTIFF ZURICH AMERICAN
INSURANCE COMPANY OF ILLINOIS'S MOTION FOR SUMMARY
JUDGMENT ON ALL CLAIMS**

THIS MATTER comes before me pursuant to Rule 56(c), SCRCP, and Plaintiff Zurich American Insurance Company of Illinois's ("Zurich") Motion and Memo in Support of its Motion for Summary Judgment on all remaining causes action against and by Defendant Palmetto Contract Services, Inc. ("Palmetto"). Zurich appeared at the hearing for this matter by and through its attorneys of record, Larry D. Cohen and Carolyn H. Blue. Defendant Palmetto Contract Services, Inc. appeared at the hearing for this matter, by and through its attorneys of record, T. Jefferson Goodwyn, Jr. and Charles G. Blackburn.

In an Order entered on June 9, 2023, this Court granted Zurich's Motion for Partial Summary Judgment on Palmetto's counterclaims for fraud and negligent misrepresentation. Today this Court grants Zurich's Motion for Summary Judgment on Palmetto's sole remaining counterclaim against Zurich for breach of contract. This Court also grants Zurich's Motion for Summary Judgment against Palmetto on Zurich's case in chief against Palmetto for breach of contract.

After reviewing the record and hearing counsels' arguments, this Court finds that Palmetto has failed to produce evidence of Zurich's failure to perform under the terms of the Policy. Palmetto also failed to produce any meaningful factual basis on which this Court could find that Palmetto suffered damages as a "direct and proximate cause" of the alleged breach of contract by Zurich. Finally, after receiving coverage for the Policy term from February 20, 2012 through February 20, 2013, Palmetto breached its contract with Zurich by failing to pay the premium due.

FINDINGS OF FACT

On or about February 20, 2012, Zurich and Palmetto entered into a contract whereby Zurich agreed to provide certain workers' compensation and employers' liability insurance coverage to Palmetto, for which Palmetto agreed to pay the premium.

Zurich issued Policy No. WC 9595139-02 (the "Policy") to Palmetto with coverage for the period from February 20, 2012 through February 20, 2013.

Section A of the General Section of the Policy reads as follows:

A. The Policy

This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

Part 4 of the Policy reads in part, "[t]he premium for the Policy will be determined by our Manuals of Rules, Classifications Rates and Rating Plans. All information required on the following Classification Schedule is subject to verification and change by audit."

Part 5 of the Policy reads in part:

PART FIVE-PREMIUM

A. Our Manuals

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. Classifications

Item 4 of the Information Page [of the Policy] shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

With regard to the Final Premium, the Policy reads in part:

E. Final Premium

The premium shown on the Information Page, schedules and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

Based on Parts 4 and 5 of the Policy, beginning on April 4, 2013, Zurich's auditor, Evelyn Wyatt ("Wyatt"), conducted a premium audit (the "Audit") at the physical location of Palmetto's business, located on the Cooper River at 277 Shipyard Lane, Goose Creek, South Carolina.

Audits are common in the workers' compensation insurance industry. Every Zurich worker's compensation policy is audited, either voluntarily via telephone or in person via physical audits.

The Audit initially classified \$626,536.00 of Palmetto's employees' payroll under NCCI Classification Code "3040 Iron Works."

On April 6, 2013, after further contemplation of Palmetto's overall operations, its waterfront location, the NCCI Manual of Rules and Classifications and consultation with her supervisor, Armando Lantigua (the "Expert Witness"), Zurich and Palmetto's expert witness, Wyatt corrected the Audit and classified \$626,536.00 of Palmetto's employee payroll under NCCI Classification "6824(f) Boat Bldg-US," rather than NCCI Classification "3040 Iron Works" and submitted her final worksheets to Palmetto. NCCI Classification Code "6824(f) Boat Bldg-US," is for "employer operations" that meet NCCI Rules for status, overall business operations, i.e., boat building, and situs, i.e., on or near the water.

Based on the terms of the Policy, Palmetto is required to pay all premiums when due, including audit and retrospective premiums.

Part 5 D of the Policy reads as follows:

D. Premium Payments

You will pay all premium when due. You will pay the premium even if part or all of a workers compensation law is not valid.

Zurich made demand on Palmetto for payment, but Palmetto failed and refused to pay.

Zurich filed this lawsuit against Palmetto for breach of contract. Zurich seeks liquidated damages against Palmetto for unpaid premiums in the amount of \$158,744.00.

On or about January 14, 2016, Zurich served Palmetto with its Summons, Complaint, First Set of Interrogatories and First Requests for Production Documents and Things, among other discovery.

Palmetto served its initial Answer to Zurich's Summons and Complaint on February 12, 2016, denying all of Zurich's allegations in the Complaint and alleging affirmative defenses, including fraud and fraud in the inducement.

On February 12, 2016, prior to Palmetto filing its counterclaims against Zurich, Palmetto served its Responses to Zurich's First Requests for Production of Documents. Five months later, on July 12, 2016, Palmetto moved to amend its initial Answer and assert counterclaims against Zurich for negligent misrepresentation, fraud and breach of contract.

On September 27, 2017, Palmetto served its Amended Answer and Counterclaim on Zurich. Palmetto's Amended Answer and Counterclaim is identical to Palmetto's proposed Amended Answer and Counterclaim that Palmetto filed with its "Notice of Motion and Motion to Amend Answer and Assert Counterclaim" on July 12, 2016, except for the addition of a demand for a jury trial.

On or about April 23, 2018, pursuant to Rule 30(b)(6), SCRPC, Zurich deposed Palmetto's corporate designees, William R. Dentyns Jr. ("Dentyns") and Serena Miller ("Miller"), concerning Palmetto's breach of contract and its alleged counterclaims against Zurich. During Dentyns' deposition Dentyns testified that the false representation alleged by Palmetto is, "[b]ecause in the contract Zurich agreed to split classification codes. According to Dentyns, Palmetto relied upon the un-finalized Audit that was provided to it by Wyatt on April 4, 2013, before it was finalized on April 6, 2013 and submitted to Palmetto.

Dentyns contends that the evidence and facts that support Palmetto's allegations of breach of contract by Zurich are the reallocation of the payroll during the Audit begun by Wyatt on April 4, 2013 and finalized on April 6, 2013. Dentyns' contention is contrary to the terms of the Policy. The Policy specifically authorizes Zurich to change and correct the estimated classification codes after the policy period and an audit. According to Dentyns, the breach of contract occurred when the finalized Audit did not split the classification codes between NCCI Classification Codes "3040 Iron Works ("State Act)" and "6824(f) Boat Bldg-US (Federal Act)," as occurred under the

estimate at the beginning of the policy period. Instead, the final Audit classified all of Palmetto's payroll previously under the estimated Classification Code "3040 Iron Works (State Act)" to Classification Code "6824(f) Boat Bldg-US (Federal Act)."

The finalized Audit submitted on April 6, 2013 is based on NCCI Rules and Scopes Manual. Zurich and Palmetto's Expert Witness testified at his deposition that the classification procedure under the NCCI Rules says to assign the basic classification that best describes the business of the employer. "It is the business that is classified, not the individual employments, occupations or operations within the business." According to the Audit and Zurich and Palmetto's Expert Witness, the classification that best describes Palmetto business operations is Classification Code "6824(f) Boat Bldg (Federal Act)," rather than Classification Code "3040, Iron Works (State Act)." The phraseology for Classification Code 6824(f), "Boat Bldg (Federal Act)," ". . . includes shop and yard work and are applicable to the construction or repair of wood, metal fiberglass or plastic yachts, motorboats, sailboats or rowboats not exceeding 150 feet in length." Classification Code 3040, "Iron Works (State Act)" is eliminated because the scope of Classification Code "6824(f) Boat Bldg (Federal Act)" includes iron works.

In August 2022, more than six years after Palmetto filed its proposed Amended Answer and Counterclaim alleging damages, Palmetto served its First Supplemental Responses to Zurich's Request for Production of Documents and Things ("Supplemental Response"). Palmetto's "Supplemental Response" supplements Zurich's Request for Production No. 19, which reads:

19. If you are claiming damages, produce all documents and tangible things that you relied on or used to support each element of your claim, including the source of your figures for arriving at that amount and how you arrived at that amount. [emphasis added]

In response to Zurich's Request for Production No. 19, Palmetto produced 20 quotes or job bids (collectively, the "Job Bids") that Palmetto submitted to potential third-party customers for

repairs to commercial vessels located in Florida and Hawaii; however, the Job Bids are all dated after July 12, 2016, the date Palmetto filed its Amended Answer and Counterclaim, alleging it incurred damages and more than three years after the final Audit on April 6, 2013. Based on the dates of the Job Bids and the date of Palmetto's Amended Answer and Counterclaim alleging damages, Palmetto's alleged damages did not exist at the time Palmetto first filed its Amended Answer and Counterclaim. At the hearing on February 24, 2025, on Zurich's Motion for Summary Judgment, Palmetto admitted that other than the Job Bids, it had no other proof of its alleged damages to offer.

THE SUMMARY JUDGMENT STANDARD

Rule 56(c) of the South Carolina Rules of Civil Procedure requires that summary judgment be granted “. . . if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.”

In determining whether a genuine issue of fact exists, the evidence and all factual inferences drawn from it must be viewed in a light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of South Carolina*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

It is insufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine. *The Kitchen Planners v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023); *Durkin v. Hansen*, 313 S.C. 343, 346, 437 S.E.2d 550, 552 (Ct. App.1993).

Although summary judgment is a drastic remedy which should be cautiously invoked, where a verdict is not reasonably possible under the facts presented, summary judgment is proper. *Bloom v. Ravoir*, 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000). *Evans v. Stewart*, 636 S.E.2d 632, 370 S.C. 522 (S.C. App. 2006).

Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(c), SCRCPP; *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 438 (S.C. App. 2003). When the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, it may discharge its burden by demonstrating to the court that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548 (1986). The non-movant must then "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. According to *Celotex* at 322-323, . . . the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

**ZURICH'S MOTION FOR SUMMARY
JUDGMENT ON PALMETTO'S COUNTERCLAIM
FOR BREACH OF CONTRACT**

To recover on a breach of contract claim a party must allege and prove:

- (1) a binding contract entered into by the parties;
- (2) breach or unjustifiable failure to perform the contract; and
- (3) damage suffered by plaintiff as a direct and proximate result of the alleged breach.

Fuller v. Eastern Fire and Casualty Insurance Co., 240 S.C. 75, 124 S.E.2d 602 (1958).

Palmetto has failed to offer evidence of a meaningful factual basis on which this Court can find that Zurich breached the contract, and that Palmetto suffered damages as a direct and proximate result of the alleged breach of contract.

Palmetto's counterclaim for breach of contract ignores the express terms of the Policy. Zurich has a contractual right to conduct audits of Palmetto's initial estimated classifications, rates and premium and if warranted make changes to the estimated classifications, rates and premium. Palmetto contends that even though the Policy authorizes Zurich to audit Palmetto's employees' payroll records and company operations based on Zurich's manuals of rules, rates, rating plans and classifications, Zurich's audit premium and classification adjustments constitute a breach of contract. Palmetto wrongfully alleges that Zurich represented to Palmetto that the estimated premium and classification codes that applied at beginning of the Policy's term would not change.

With regard to the Final Premium, the Policy reads in part:

E. Final Premium

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the

balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

Zurich cannot be held liable for a breach of contract when the actions complained of by Palmetto are authorized by the Policy. Neither can Palmetto recover on a breach of contract claim against Zurich when Palmetto has failed to present evidence that “provide[s] a meaningful factual basis on which a factfinder could” find for Palmetto. *The Kitchen Planners v. Friedman*, 440 S.C. 456, 464, 892 S.E.2d 297, 302 (2023). The only evidence produced by Palmetto in response to Zurich’s Requests for Production are Job Bids that Palmetto submitted to potential third-party customers for proposed repairs to commercial vessels. The Job Bids are dated after July 12, 2016, the date that Palmetto filed its counterclaim for damages against Zurich, and more than 3 years after the final Audit on April 6, 2013. Meaning that at the time Palmetto filed its counterclaim claiming damages, Palmetto by its own account, had not incurred any damages. Additionally, Palmetto offered no evidence of a causal relation between Zurich’s alleged breach of contract and Palmetto’s failure to secure work through its Job Bids.

Palmetto has failed to sustain its burden of producing evidence on each element of its counterclaim against Zurich for breach of contract.

IT IS THEREFORE ORDERED that Zurich’s Motion for Summary Judgment is granted in favor of Zurich and against Palmetto on Palmetto’s counterclaim against Zurich for breach of contract.

**ZURICH’S MOTION FOR SUMMARY
JUDGMENT ON ITS CASE IN CHIEF
FOR BREACH OF CONTRACT**

Zurich has sustained its burden of producing evidence on each element of its breach of contract action against Palmetto. Zurich has offered a meaningful factual basis on which this Court

can find for Zurich on (1) the contract entered into between Zurich and Palmetto, (2) Palmetto’s failure to pay Zurich as agreed and (3) the damages suffered by Zurich.

Zurich’s Motion for Summary Judgment against Palmetto for breach of contract is supported by the uncontroverted Affidavit of Sheryl Totzke, Legal Collection Specialist for Zurich (the “Totzke Affidavit”).

According to the Totzke Affidavit, “[a]fter every payment and credit has been applied, as of June 18, 2013, Palmetto is indebted to Zurich for the principal amount of One Hundred Fifty-Eight Thousand Seven Hundred Forty-Four and 00/100 (\$158,744.00) Dollars.”

Demand has been made by Zurich on Palmetto, but Palmetto has failed and refused to pay as agreed.

This Court finds that Zurich is entitled to recover liquidated damages against Palmetto in the amount of \$158,744.00.

IT IS THEREFORE ORDERED that Zurich’s Motion for Summary Judgment against Palmetto Contract on Palmetto’s breach of contract action is granted.

IT IS FURTHER ORDERED that Zurich shall have judgment against Palmetto as follows:

Principal:	\$158,744.00
Interest at the rate of 8.75% per annum from June 19, 2013 to May 31, 2025:	<u>\$165,958.15</u>
Total:	\$324,702.15

AND IT IS SO ORDERED!

_____, 2025

Mikell R. Scarborough
Master in Equity, Charleston County

RECEIVED

Jul 02 2025

SC Court of Appeals

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-06684

ZURICH AMERICAN INSURANCE
COMPANY OF ILLINOIS,

PALMETTO CONTRACT SERVICES,
INC.,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Larry D. Cohen

Attorney for: Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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ZURICH AMERICAN INSURANCE COMPANY OF ILLINOIS	PALMETTO CONTRACT SERVICES, INC.	\$324,702.15
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	3062	
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Charleston Common Pleas

Case Caption: Zurich American Insurance Company Of Illinois VS Palmetto
Contract Services Inc
Case Number: 2015CP1006684
Type: Master/Order/Form 4

So Ordered

s/Mikell R. Scarborough 3062