

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Bank of New York Mellon Trust)
Company, National Association f/k/a The)
Bank of New York Trust Company, N.A.)
As successor to JPMorgan Chase Bank)
N.A s/b/m Bank One National Association)
as Trustee for RAMP 2002RS5,)

Civil Action No.: 2011-CP-40-6103

Plaintiff,)

ORDER

v.)

Chartreuse Grier, Palmetto Health)
Alliance; and Palmetto Richland)
Memorial,)

RICHLAND COUNTY
FILED
2013 APR -4 AM 10:20
JEANETTE W. MCBRIDE
C.C.P. & G.S.

Defendants.)

Chartreuse Grier,)

Third Party Plaintiff,)

v.)

Nationwide Property & Casualty Insurance)
Company; and Tonya D. Parks,)

Third-Party Defendants.)

This matter came before the Court at a hearing on November 28, 2012, on Third-Party Plaintiff Chartreuse Grier's Motion to Amend the Answer/Third-Party Complaint and Motion for Summary Judgment, and the Motion for Summary Judgment of Third-Party Defendants Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Parks"). Present at the hearing were Alana Odom Williams, Esquire, and Jay Thompson, Esquire, counsel for Third-Party Defendants Nationwide and Parks, and M. Allison Moon, Esquire, and Sarah Brown, Esquire, counsel for Third-Party Plaintiff Chartreuse Grier ("Grier"). After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, Grier's Motion to Amend the Answer/Third-Party Complaint and Motion for

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Summary Judgment are **DENIED**. Nationwide and Parks' Motion for Summary Judgment is **GRANTED**.

FACTS

In 2006, Grier purchased a homeowner's insurance policy from Nationwide through her insurance agent, Parks. Nationwide provided homeowner's insurance on Grier's property from March 24, 2006 to March 24, 2011. The Bank of New York Mellon Trust Company ("Bank") was the mortgage holder on the property. GMAC serviced the mortgage on the Bank's behalf. During the time that the Nationwide policy was in effect, Grier made escrow payments to GMAC to cover her insurance premiums. In March or April of each year, GMAC issued a check to Nationwide for the amount of the renewal insurance premium, and Nationwide renewed the policy. Nationwide did not renew the policy after March 24, 2011. When the policy expired, GMAC sent a check to Nationwide for the same amount that GMAC submitted the prior year for renewal of the policy. Nationwide received the check, but because there was no active policy to which the payment could be applied, Nationwide returned the money, issuing a check to Grier on April 1, 2011.

Grier's home was destroyed by a fire on April 6, 2011, making the house inhabitable. Nationwide denied coverage on the property, claiming that there was no policy in place because the policy had not been renewed. Grier subsequently defaulted on her mortgage. The Bank filed this foreclosure action against Grier on September 14, 2011. Grier filed an Answer and a Third-Party Complaint against Nationwide and Parks for breach of contract, bad faith refusal to pay insurance claim, and indemnity and contribution. Nationwide and Parks answered on February 6, 2012. On June 11, 2012, Grier moved to include additional causes of action against Nationwide and Parks. The proposed Amended Answer/Third-Party Complaint includes an additional claim against Nationwide for negligent misrepresentation and an additional claim against Parks for negligence.

DISCUSSION

1. Grier's Motion to Amend Answer/Third-Party Complaint

Pursuant to Rule 15, SCRCP, Grier moves to amend her Answer/Third-Party Complaint to include causes of action for negligence and negligent misrepresentation. Nationwide and Parks oppose this Motion on the grounds that the proposed causes of action would fail as a matter of law and therefore be dismissed pursuant to Rule 12(b)(6), SCRCP. Thus, it would be

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futile to allow the amendments. Furthermore, Nationwide and Parks claim they would be prejudiced if Grier were permitted to amend her Answer/Third-Party Complaint.

Rule 15, SCRCF, provides that "if more than thirty days have elapsed from the time a responsive pleading is served, a party may amend his pleading only by leave of court or by written consent of the adverse party." "It is well established that a motion to amend is addressed to the discretion of the trial judge." *Stanley v. Kirkpatrick*, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004). Rule 15, SCRCF strongly favors amendments and the court is encouraged to freely grant leave to amend. *See Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987). "[L]eave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCF. "The prejudice that Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Tanner v. Florence County Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999)(quoting *Pool v. Pool*, 329 S.C. 324, 494 S.E.2d 820 (1998)). A court has the authority to deny leave to file an amended complaint, or portions of an amended complaint, if it would be futile because the causes of action in the amended complaint would fail as a matter of law. *See Coral Gables, Inc. v. Palmetto Brick Co.*, 183 S.C. 478, 482, 191 S.E. 337, 338 (1937).

a) Cause of Action for Negligence as to Parks

Grier's Amended Answer/Third-Party Complaint asserts a new cause of action for negligence against Parks, the insurance agent who sold her the Nationwide insurance policy. Grier claims that Parks owed a duty to Grier to advise her on insurance coverage for her home, and Parks breached this duty by failing to advise Grier to obtain alternative insurance. This proposed cause of action would be futile because it is based on an alleged legal duty where, as a matter of law, there is no legal duty.

It is well established that "an insurance agent has no duty to advise an insured at the point of application, absent an express or implied undertaking to do so." *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.C. 7, 12, 620 S.E.2d 326, 329 (2005). "A duty may be imposed, however, 'if the agent, nevertheless, undertakes to advise the insured.'" *Id.* (citing *Carolina Production Maintenance Inc. v. United States Fidelity & Guar. Co.*, 310 S.C. 32, 38, 425 S.E.2d 39, 43 (1992)). In determining whether an implied duty has been created, courts consider several factors, including whether: (1) the agent received consideration beyond a mere payment of the premium, (2) the insured made a clear request for advice, or (3) there is a course of dealing over

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an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on. See *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988).

The proposed negligence claim does not assert that Parks undertook to advise Grier or allege any factors that would create an implied duty. Therefore, the proposed allegations, even if taken as true, are legally untenable and would fail to assert a cause of action, thus requiring dismissal under Rule 12(b)(6), SCRPC. Grier argues that the Court should allow the amendment because “[a]rguments going to the legal merits of the proposed pleadings are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56, SCRPC motion for summary judgment.” *Pruitt v. Bowers*, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct. App. 1998). Motions for Summary Judgment have been filed by both parties. Rather than requiring additional, unnecessary motions on the amended causes of action, this Court has chosen to address the legal merits of the proposed pleadings in this Order.

Additionally, Nationwide and Parks argue that they would be prejudiced by the Amended Answer/Third-Party Complaint because the negligence cause of action is fundamentally different from the existing causes of action. Grier argues that the amendments would not be prejudicial, as Nationwide and Parks have been on notice of the Motion to Amend and the proposed negligence claim would not require any additional evidence. Nationwide has already taken Grier’s deposition and conducted extensive written discovery. This case has been on the jury trial roster. Therefore, Nationwide and Parks would be prejudiced by the negligence cause of action because they lack the opportunity to defend against it by conducting additional discovery.

For these reasons, Grier’s Motion to Amend as to the negligence claim against Parks is **DENIED**.

b) Cause of Action for Negligent Misrepresentation as to Nationwide

Grier’s Amended Answer/Third-Party Complaint also asserts a new cause of action for negligent misrepresentation against Nationwide. Grier claims that Nationwide had a duty to exercise reasonable care in providing information to Grier and her agents because Nationwide had a pecuniary interest in Grier’s insurance policy. Grier alleges that Nationwide breached its duty by representing to GMAC that Grier’s insurance policy would be renewed upon payment of the policy premium.

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To recover in a negligent misrepresentation action, a plaintiff must first allege that the defendant made a false representation of fact to the plaintiff. *See Hurst v. Sandy*, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997). This proposed cause of action would be futile because it would fail as a matter of law. Grier has not alleged that Nationwide made a misrepresentation to her; rather, she alleges that Nationwide made a misrepresentation to GMAC, a third party. GMAC was not acting on Grier's behalf.

In addition, as previously discussed, Nationwide and Parks have shown that they would suffer prejudice if the amendment were allowed at this stage in the litigation. The negligent misrepresentation cause of action is fundamentally different from the existing causes of action. For the reasons discussed, Grier's Motion to Amend her Answer/Third-Party Complaint to add a cause of action for negligent misrepresentation against Nationwide is **DENIED**.

2. Third-Party Plaintiff Grier's Motion for Summary Judgment:

Third-Party Plaintiff Grier's Motion for Summary Judgment is based on her claim that there is no evidence showing that Third-Party Defendant Nationwide delivered written notice to Parks that the insurance policy at issue was canceled. Grier argues that pursuant to S.C. Code Ann. § 38-75-730 (Supp. 2012), Nationwide's attempt to cancel the homeowner's insurance policy was invalid and therefore, Nationwide could not deny coverage.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56(c), SCRPC; *Pittman v. Grand Strand Entertainment, Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). In determining whether any triable issue of fact exists, the evidence and inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *McNair v. Rainsford*, 330 S.C. 332, 341, 499 S.E.2d 488, 493 (Ct. App. 1998). "[I]n cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Carolina Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Section 38-75-730 addresses cancellation of a policy before the expiration of the policy term. Nationwide did not cancel Grier's policy; rather, the policy was non-renewed and expired on March 24, 2011. In March and April 2010, Nationwide conducted inspections of Grier's property and allegedly discovered numerous hazards and risks on the property. According to the

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affidavit of Franklin L. Jefferies, Nationwide Personal Lines Underwriter, the April 2010 inspection report identified numerous hazards on Grier's property including rotting and severely weathered soffits and eaves, roof damage, cracking greater than ½ inch in the bricks, gutters full of debris, and miscellaneous debris on the property. In his affidavit, Mr. Jefferies stated that in April 2010, Grier's Nationwide policy was to be non-renewed at the next renewal date, March 24, 2011, unless these hazards were corrected. On January 14, 2011, Nationwide sent notice of non-renewal to Grier, explaining that the policy would expire on March 24, 2011. The notice outlined the specific hazards and risks leading to the non-renewal and stated that Grier may become eligible for renewal if she corrected each of the conditions creating a hazard or risk. Parks was copied on the letter sent to Grier and was listed by her agent number, not her name. At the same time, Nationwide sent a separate notice informing GMAC that the policy would not be renewed when it expired on March 24, 2011. Nationwide produced proof of mailing the notice of non-renewal to Grier. At the November 28, 2012 hearing, Grier did not dispute that she received notice of non-renewal.

In order to prevail on her claims against Nationwide and Parks, Grier must produce evidence that she had an insurance policy with Nationwide on April 6, 2011, the date her claim arose. It is undisputed that the term of Grier's insurance policy ended on March 24, 2011. Therefore, to prove that there was an insurance contract on April 6, 2011, Grier would have to prove that the policy was renewed after March 24, 2011 or that Nationwide's non-renewal of the policy did not meet the statutory requirements. According to the Affidavit of Franklin L. Jefferies, Nationwide elected not to renew Grier's policy.

Grier also alleges that Nationwide failed to comply with the requirements of S.C. Code Ann. Section 38-75-740 for non-renewal of insurance policies. However, the applicable statute in this case is S.C. Code Ann. Section 38-75-1160. Section 38-75-740 is a general provision setting forth requirements for non-renewal of property and casualty insurance policies. Section 38-75-740 "applies to all property insurance and casualty insurance, as defined in Section 38-1-20, *except for . . . property or casualty insurance as to which there are specific statutory provisions of law governing cancellation, nonrenewal, or renewal of policies.*" S.C. Code Ann. § 38-75-710 (emphasis added). Further, Section 38-75-740 by its terms only refers to policies "(b) . . . written for a term of one year or less . . . [or] (c) a policy written for a term of more than one year or for an indefinite term." S.C. Code Ann. § 38-75-740(b),(c).

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Section 38-75-1160 specifically addresses cancellation or refusal to renew policies for property insurance, not motor vehicles. Section 38-75-1160 governs homeowner's insurance, mobile homeowner's insurance, and dwelling fire insurance. Therefore, Section 38-75-1160 applies to non-renewal of the homeowner's policy at issue in this case. Section 38-75-1160 sets forth specific requirements for non-renewal, stating in part:

Except for a cancellation pursuant to Section 38-75-730, a cancellation or refusal to renew by an insurer of a policy of insurance covered in this article is not effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew.

Section 38-75-1160(A)(1). Section 38-75-1160 does not require that notice be sent to an insurance agent in order for a policy non-renewal to be effective. Under Section 38-75-1160(A)(1), a non-renewal of a homeowner's policy is effective as long as the notice to the policy holder satisfies the following requirements. Notice must:

- a) be approved as to form by the director or his designee before use;
- b) state the date not less than sixty days for any cancellation or refusal to renew that is effective between November first and May thirty-first and not less than ninety days for any cancellation or refusal to renew that is effective between June first and October thirty-first after the date of the mailing or delivering on which the cancellation or refusal to renew becomes effective;
- c) state the specific reason of the insurer for cancellation or refusal to renew and provide for the notification required by Section 38-75-1180(B);
- d) inform the insured of his right to request in writing within thirty days of the receipt of notice that the director review the action of the insurer. The notice of cancellation or refusal to renew must contain the following statement in bold print to inform the insured of this right:

"IMPORTANT NOTICE: within thirty days of receiving this notice, you or your attorney may request in writing that the director review this action to determine whether the insurer has complied with South Carolina laws in canceling or nonrenewing your policy. . . ."

- e) inform the insured of the possible availability of other insurance which may be obtained through his agent, or through another insurer; and
- f) state that the Department of Insurance has available a buyer's guide regarding property insurance shopping and availability, and provide applicable mailing addresses and telephone numbers, including a toll-free number, if available, for contacting the Department of Insurance.

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Section 38-75-1160 specifically addresses cancellation or refusal to renew policies for property insurance, not motor vehicles. Section 38-75-1160 governs homeowner's insurance, mobile homeowner's insurance, and dwelling fire insurance. Therefore, Section 38-75-1160 applies to non-renewal of the homeowner's policy at issue in this case. Section 38-75-1160 sets forth specific requirements for non-renewal, stating in part:

Except for a cancellation pursuant to Section 38-75-730, a cancellation or refusal to renew by an insurer of a policy of insurance covered in this article is not effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew.

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- c) state the specific reason of the insurer for cancellation or refusal to renew and provide for the notification required by Section 38-75-1180(B);
- d) inform the insured of his right to request in writing within thirty days of the receipt of notice that the director review the action of the insurer. The notice of cancellation or refusal to renew must contain the following statement in bold print to inform the insured of this right:

"IMPORTANT NOTICE: within thirty days of receiving this notice, you or your attorney may request in writing that the director review this action to determine whether the insurer has complied with South Carolina laws in canceling or nonrenewing your policy. . . ."

- e) inform the insured of the possible availability of other insurance which may be obtained through his agent, or through another insurer; and
- f) state that the Department of Insurance has available a buyer's guide regarding property insurance shopping and availability, and provide applicable mailing addresses and telephone numbers, including a toll-free number, if available, for contacting the Department of Insurance.

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voluntarily dismissed the foreclosure action against Grier. Therefore, since there is no foreclosure, there is no right to indemnity for the foreclosure against Nationwide or Parks and the indemnity and contribution cause of action is moot.

a) Breach of Contract against Parks

The breach of contract claim against Parks fails, as a matter of law, because Grier did not have a contract with Parks. In her deposition, Grier testified that she did not have a contract with Tonya Parks. Tonya Parks also testified in her deposition that she did not have a contract with Grier. The only relevant contract in this case is Grier's insurance policy, which was a contract with Nationwide, not Parks. Parks is not an insurer and does not provide insurance coverage. It is well established that the mere fact that Parks was an agent for Nationwide does not create a contractual relationship between Grier and Parks. *See Green v. Industrial Life & Health Ins. Co.*, 199 S.C. 262, 272, 18 S.E.2d 873, 876-77 (1942). Therefore, it is undisputed that Grier did not have a contract with Parks and, as a matter of law, summary judgment is granted in favor of Parks on the breach of contract claim.

b) Breach of Contract against Nationwide

Similarly, Grier's claim for breach of contract as to Nationwide fails as a matter of law. In order to proceed on the breach of contract claim, Grier must produce evidence that she had an insurance policy with Nationwide on April 6, 2011, the date her claim arose. Grier's homeowner's policy expired on March 24, 2011. Therefore, the policy was not in effect at the time the claim arose.

Grier asserts that an insurance contract was in effect on April 6, 2011 because Nationwide's non-renewal was ineffective. Nationwide produced evidence that it complied with the requirements of Section 38-75-1160 with respect to non-renewal of Grier's policy. Nationwide produced proof of mailing the notice of non-renewal to Grier. The notice was mailed not less than sixty days prior to expiration of the policy and contained the content required by Section 38-75-1160(A)(1).

Grier further argues that an insurance policy was in place on April 6, 2011 because Nationwide reached an agreement with her loan servicer, GMAC, that the policy would be renewed if Nationwide received the required premium. However, Grier has not provided evidence of any communication or agreement between GMAC and Nationwide where Nationwide agreed to renew the policy if GMAC paid the premium.

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Because there is no genuine issue of material fact as to whether there was a contract for insurance between Grier and Nationwide at the time of Grier's claim, Nationwide is entitled to summary judgment on the breach of contract claim.

c) **Bad Faith Failure to Pay Insurance Benefits**

Grier's claim against Nationwide for bad faith failure to pay insurance benefits fails, as a matter of law, because there was no contract for insurance at the time of the claim and therefore, Nationwide's failure to pay insurance benefits was not in bad faith.

To establish a claim for bad faith failure to pay insurance benefits, a party must present evidence of: (1) a mutually binding contract of insurance, (2) refusal by the insurer to pay benefits due under the contract, (3) the refusal resulted from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing, and (4) damages proximately caused by the alleged bad faith refusal to pay benefits. *See Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996). The record in this case lacks evidence to support the elements necessary to maintain this claim. There was no mutually binding contract of insurance at the time of Grier's claim. On its face, the policy expired on March 24, 2011 and was not renewed.

Additionally, there is no evidence of bad faith. There can be no bad faith if the insurer has "a reasonable ground for contesting the claim." *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992). Nationwide denied coverage based on an objective determination that the policy was no longer in effect because it expired without being renewed. Nationwide sent a non-renewal notice on January 14, 2011, more than sixty days before the policy's expiration date, as required by statute. When Nationwide received a payment related to this policy from GMAC, Nationwide returned the payment to Grier because there was no policy in place.


Accordingly, Nationwide had a reasonable basis to deny Grier's claim. Therefore, as a matter of law, the refusal to pay insurance benefits was not in bad faith. Nationwide's Motion for Summary Judgment as to the insurance bad faith claim is **GRANTED**.

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ORDER

For the reasons set forth above, it is **ORDERED**: (1) Chartreuse Grier's Motion to Amend the Answer/Third-Party Complaint and Motion for Summary Judgment are **DENIED**; (2) Third-Party Defendants Nationwide Property & Casualty Insurance Company and Tonya D. Parks' Motion for Summary Judgment is **GRANTED**.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
April 3, 2013

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

JUDGM. T IN A CIVIL CASE

CASE NUMBER:

Chartrease Grier

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Pl. No Suit);
 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 _____
- 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 PUBLIC 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
		\$
		\$
		\$

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.

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 4 April 2013 to attorneys of record or to parties (when appearing pro se) as follows:

M. Allison Moon
Jay T. Thompson

Alana Odom Williams
Scott James Bradley

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

2013 APR -14 AM 10:56
RICHLAND COUNTY
FILED
JEANETTE W. MCBRIDE
CLERK OF COURT