

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master in Equity

Case No. 2015-CP-10-06684
Appellate Case No. 2025-001339

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SC Court of Appeals

Palmetto Contract Services, Inc.,
Appellant,

v.

Zurich American Insurance Company of Illinois,
Respondent.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the Master in Equity correctly grant summary judgment to Respondent Zurich American Insurance Company of Illinois ("Zurich") on Appellant Palmetto Contract Services, Inc.'s ("Palmetto") breach of contract counterclaim where Appellant Palmetto failed to either produce any competent evidence that Respondent Zurich breached the insurance policy or that Appellant Palmetto suffered damages as a direct and proximate result of any alleged breach?

II. Did the Master in Equity correctly grant summary judgment to Respondent Zurich on its breach of contract claim where Appellant Palmetto's failure to pay the audited premium balance of \$158,744.00 was undisputed?

STATEMENT OF THE CASE

This case arises from Appellant Palmetto Contract Services, Inc.'s refusal to pay workers' compensation insurance premiums lawfully determined through Respondent Zurich American Insurance Company of Illinois's contractually authorized audit. (R. at p. ____.) After nearly a decade of litigation, Appellant Palmetto has failed to produce any competent evidence supporting its counterclaims or refuting its undisputed obligation to pay the premium balance.

On or about February 20, 2012, Respondent Zurich and Appellant 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. (R. p. ____). Zurich issued a workers' compensation insurance policy (Policy No. WC 9595139-02) (the "Policy") to Palmetto covering the period from February 20, 2012, through February 20, 2013. (R. p. ____).

The Policy expressly authorizes Zurich to conduct audits and adjust premiums based on actual payroll and proper classification codes. Part 4 of the Policy provides that "[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." (R. p. ____). Part 5 of the Policy further provides that "[i]f your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy." (R. p. ____).

Following the policy period, beginning on April 4, 2013, Zurich's auditor, Evelyn Wyatt, conducted a premium audit on behalf of Zurich at 277 Shipyard Lane, Goose Creek, South Carolina, located on the Cooper River, the physical location of Palmetto's business operations. (R. p. ____). Audits are common in the workers' compensation insurance industry; every Zurich workers' compensation policy is audited, either voluntarily via telephone or in person via physical audits. (R. p. ____). Audits are usually performed at the end of each policy period to determine whether the payroll amounts and classification rates provided by the employer at the beginning of the policy period are accurate at the end of the policy period.

The unfinalized Audit preliminarily classified \$626,536.00 of Palmetto's employees' payroll under NCCI Classification Code "3040 Iron Works." (R. p. ____). On April 6, 2013, after further contemplation of Palmetto's overall operations, its waterfront location, the National Council on Compensation Insurance ("NCCI") Manual of Rules and Classifications¹ and consultation with her supervisor, Armando Lantigua, Zurich's Premium Audit Field Director, South Region, 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

¹The National Council on Compensation Insurance (NCCI) is the workers' compensation insurance rating organization in South Carolina. S.C. Dept. Insurance Bulletin No.2016-02.

submitted her finalized worksheets and Audit to Appellant Palmetto. (R. p. ____).

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). (R. p. ____). The finalized Audit was based on the NCCI Rules and Scopes Manual, which provides that the classification procedure is 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." (R. p. ____). According to the Audit, the classification that best describes Appellant Palmetto's business operations is Classification Code "6824(f) Boat Bldg (Federal Act)" rather than Classification Code "3040, Iron Works (State Act)." (R. p. ____).

Based on the completed Audit, it was determined that Appellant Palmetto owed additional premiums of \$158,744.00. (R. p. ____). Respondent Zurich filed this action in December 2015 after Appellant Palmetto refused to pay the additional premiums. (R. p. ____).

Appellant Palmetto asserted counterclaims for breach of contract, fraud, and negligent misrepresentation. On June 9, 2023, the Master granted Respondent Zurich's motion for partial summary judgment, dismissing Appellant Palmetto's fraud and negligent misrepresentation counterclaims. (R. p. ____).

On February 24, 2025, the Master heard Respondent Zurich's motion for summary judgment on the remaining claims. By Order dated June 20, 2025, the Master granted summary judgment in favor of Respondent Zurich on both Appellant Palmetto's breach of contract counterclaim and Respondent Zurich's breach of contract claim, entering judgment for Respondent Zurich in the amount of \$324,702.15 (principal of \$158,744.00, plus prejudgment interest of \$165,958.15). (R.

p. ____).

STANDARD OF REVIEW

When reviewing the granting of summary judgment, this Court applies the same standard as the trial court. *Bovain v. Canal Ins. Co.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC.

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), SCRPC; *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 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. *Id.* at 322. According to *Celotex*, "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." *Id.* at

322-23. 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. *Id.*

It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine. *Kitchen Planners, LLC, v. Friedman*, 440 S.C. 456, 462, 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. Ravoira*, 339 S.C. 417, 425, 529 S.E.2d 710 (2000).

ARGUMENT

I. Palmetto Improperly Relies on Evidence Excluded by the Master

Appellant Palmetto's appellate brief fundamentally depends on the Affidavit of William R. Deytens, Jr. ("Deytens' Affidavit"), which it cites for the proposition that "most of Appellant's boatyard work is on recreational boats." (Appellant's Br. at 15.) This reliance is improper because Deytens' Affidavit is from a separate, prior lawsuit, styled, *Assurance Company of America v. Palmetto Contract Services, Inc.*, filed under Case No. 2012-CP-10-284, in the Court of Common Pleas for Charleston County, South Carolina, and the Master expressly refused to consider it, because Deytens' Affidavit is from a different lawsuit involving different parties and different time period. Deytens' Affidavit was also improperly filed by Appellant Palmetto for the first time on the day of the hearing on Respondent's Motion for Summary Judgment. Rule 56(c), SCRCPP, specifies that a party opposing a motion for summary judgment may serve affidavits opposing the motion for summary judgment not later than two days before the hearing.

At the February 24, 2025 summary judgment hearing, counsel for Respondent Zurich objected to Appellant Palmetto's attempt to rely on Deytens' Affidavit:

[W]hen Mr. Goodwyn said he had an affidavit from his client, it's my understanding that that affidavit is from the prior case. There were two cases. There was an initial case, an earlier policy period with a different Zurich company against Palmetto Contract Services, and the affidavit was entered in that case. So that affidavit is not concerning this case. (R. p. ____).

The Master agreed, recognizing that Deytens' 2013 Affidavit predated this 2015 case and therefore belonged to the *Assurance* 2012 lawsuit: "Well, this case was presented in 2015. So if it's from 2013, I can assume it must be in the other case." (R. p. ____). Appellant Palmetto's counsel conceded: "Fair enough." (R. p. ____).

Having been told at the summary judgment hearing that it could not rely on Deytens' Affidavit from 2013 because it was from a different case, Appellant Palmetto cannot now resurrect that same affidavit on appeal. Based on Rule 210(h), SCACR, an appellate court will not consider matters outside the record on appeal. "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just. In other words, to obtain the benefit of Rule 56(f), a party must file an affidavit setting forth the reasons that he is unable to "present by affidavit facts essential to justify his opposition." *See Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854 (2001) ("Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery."). Here, Appellant Palmetto failed to file a Rule 56(f) affidavit but instead attempted to submit the inadmissible Deytens' Affidavit from a completely different lawsuit, the 2012 *Assurance*

lawsuit. "Where the [Appellant Palmetto] relies solely upon Zurich's expert and the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented . . . , [plaintiff] was entitled to judgment as a matter of law." *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991). "[T]his court ordinarily will not consider statements of fact presented only in an attorney's argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment." *West v. Gladney*, 341 S.C. 127, 135, 533 S.E.2d 334 (Ct. App. 2000).

Without Deytens' Affidavit, Palmetto has no evidentiary support for its claim that its employees should have been classified under State code 6834 rather than Federal code 6824F. The entire foundation of Appellant Palmetto's 20 C.F.R. § 701.502 argument collapses.

II. The Master Correctly Found No Genuine Issue of Material Fact on Classification

Even setting aside the excluded Deytens' Affidavit, Appellant Palmetto failed to create a genuine issue of material fact regarding the proper classification of its employees.

A. Palmetto's "Inconsistent Audits" Argument Fails

Appellant Palmetto contends that "inconsistencies" between Respondent Zurich's audits from 2009 through 2013 create a fact issue. This argument misunderstands the nature of premium audits. Audits conducted in different years may legitimately produce different results if the insured's operations, payroll allocation, or applicable regulations have changed. The existence of prior audits with different classifications does not, standing alone, create a fact issue as to whether a subsequent audit classification was improper.

Moreover, Appellant Palmetto never separated its payroll between recreational and commercial vessel work. Without such records, any attempt to allocate payroll between classifications is impossible. Palmetto cannot create a fact issue by pointing to prior audits when it failed to maintain the records necessary to support an alternative classification.

The NCCI classification procedure requires assignment of the basic classification that best describes the business of the employer. As the NCCI Basic Manual Rule 1 provides: "It is the business that is classified, not the individual employments, occupations or operations within the business." (R. p. ____). Under NCCI rules, when an employee's work involves exposure to more than one classification, the higher-rated classification applies. Appellant Palmetto's employees performed work both in the shop and at the waterfront location on the Cooper River. Because Palmetto's overall business operations constitute boat building and repair at a waterfront situs, the proper classification is 6824(f) Boat Bldg-US (Federal Act), which encompasses all such operations including any incidental iron works.

B. Appellant Palmetto's Own Evidence Undermines Its Recreational Vessel Argument

Critically, the only damages evidence Palmetto produced, the Job Bids submitted in response to Respondent Zurich's discovery requests, were for commercial vessels, not recreational vessels. As the Master found: "The only evidence produced by Appellant Palmetto in response to Respondent Zurich's Requests for Production are Job Bids that Palmetto submitted to potential third-party customers for proposed repairs to commercial vessels." (R. p. ____).

Specifically, the Job Bids produced by Appellant Palmetto were for proposed repairs and fabrication work on the following U.S. Navy and commercial vessels:

- (1) USS DETROIT (LCS-7) - General Maintenance Card Repairs, Mayport Naval Station, Jacksonville, Florida;
- (2) USS FORT McHENRY (LSD-43) - Main Propulsion Diesel Engine Jacket Water Cooler Repairs, Mayport Naval Station, Jacksonville, Florida;
- (3) USS PHILIPPINE SEA (CG-58) - Peel & Stick Non Skid Repairs, Mayport Naval Station, Jacksonville, Florida;
- (4) USS MILWAUKEE (PC-8) - Battle Dressing Tank Modification Repairs, Mayport Naval Station, Jacksonville, Florida;
- (5) USS ZEPHYR (PC-8) - Handrail Lifeline Repairs, Mayport Naval Station, Jacksonville, Florida;
- (6) USS ZEPHYR (PC-8) - Structural Repairs, Mayport Naval Station, Jacksonville, Florida;
- (7) USS ZEPHYR (PC-8) - Pilothouse Windows Gasket Repairs, Mayport Naval Station, Jacksonville, Florida;
- (8) USS NEW YORK (LPD-21) - Ballast Tank Coatings, Colonna's Shipyard, Inc., Atlantic Beach, Florida;
- (9) NPTU Barge (031-19) - Multiple Line Item Repairs totaling \$1,670,980.00, Epsilon Systems Solutions, Inc., Jacksonville, Florida;
- (10) USS CORONADO - Line Shaft Bearings Maintenance, Pearl Harbor, Honolulu, Hawaii;
- (11) USNS WATERS - Cooler Discharge Piping Repair, Cape Canaveral, Florida;
- (12) USNS WATERS - Engine Room Supply Fan Duct Renewal, Cape Canaveral,

Florida;

(13) USNS LCPL ROY M WHEAT - Hydraulic Actuator Replacement/Vent Fans, U.S. Marine Corps facility, Blount Island, Florida;

(14) USNS MARTIN - Mechanical Cleaning and Painting, Blount Island, Florida;

(15) U.S. Navy Aluminum Brows and Stairways - Fabrication, Testing and Delivery, multiple sizes, Jacksonville, Florida; and

(16) U.S. Navy Aluminum Gangways - Fabrication, Testing and Delivery, Jacksonville, Florida. (R. p. ____).

Every Job Bid provided by Appellant Palmetto post-date the February 2012 through February 2013 policy period by at least 3 years, yet it is the only evidence Palmetto produced to support its damages claim. These Job Bid demonstrate the type of commercial vessel work in which Palmetto was engaged. Every single Job Bid was for work on U.S. Navy vessels or U.S. Navy equipment—not a single recreational vessel under 65 feet. If Palmetto's work during the policy period had truly been focused on recreational vessels as it now claims on appeal, one would expect Palmetto to have produced evidence of recreational vessel work to support its damages. Instead, Palmetto produced only U.S. Navy and commercial vessel job bids. Palmetto's own evidence thus contradicts its central appellate argument that its work was primarily on "recreational vessels under 65 feet" subject to the 20 C.F.R. § 701.502 exclusion.

C. The 20 C.F.R. § 701.502 Argument Fails Without Evidentiary Support

Appellant Palmetto argues that the testimony of Respondent Zurich's expert, Armando Lantigua, did not specifically consider the January 30, 2012 amendment to 20 C.F.R. § 701.502 and that creates a fact issue. But even assuming Mr. Lantigua should have considered this regulation,

Appellant Palmetto bore the burden of producing evidence that its operations actually fell within the recreational vessel exclusion.

Appellant Palmetto had nine years of litigation and extensive discovery to establish what percentage of its work involved recreational vessels under 65 feet. It produced nothing. The Master correctly concluded that Appellant Palmetto "failed to offer evidence of a meaningful factual basis on which this Court can find that Zurich breached the contract." (R. p. ____).

Furthermore, under NCCI rules governing the division of payroll, when employees perform duties that fall within more than one classification, and the employer has not maintained adequate records to support an allocation of payroll between classifications, the entire payroll must be assigned to the highest-rated classification. Appellant Palmetto admittedly never separated its payroll between recreational and commercial vessel work, and never maintained records that would support any allocation. (R. p. ____). Accordingly, even if some of Palmetto's work involved recreational vessels, its failure to maintain proper records required classification of all payroll under the higher-rated 6824(f) code.²

III. Palmetto Failed to Establish Damages

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.*

²The Zurich Policy includes a Longshore and Harbor Workers' Compensation Act Coverage Endorsement (WC 00 01 06 A) that adds USL&H Act coverage (33 U.S.C. §§ 901-950) to the Policy for work in South Carolina and other states where the Policy provides coverage. (R. p. ____). Under NCCI rules, classification codes ending in "F"—such as 6824F—apply to work covered by the USL&H Act. Because the Policy included multi-state Longshore coverage and Palmetto's boat repair operations were subject to the USL&H Act, Zurich properly classified Palmetto's payroll under code 6824F.

Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1958). Appellant Palmetto failed to meet its burden on the third element.

The Job Bids Appellant Palmetto produced as damages evidence were all dated after July 12, 2016—more than three years after the April 6, 2013 Audit and after the policy period expired. As the Master found:

[A]t 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. (R. p. ____).

The procedural history underscores Palmetto's failure of proof. On or about January 14, 2016, Zurich served Palmetto with its First Set of Interrogatories and First Requests for Production of Documents, including requests for all documents supporting Palmetto's alleged damages. (R. p. ____). Over at least a two-year period, Zurich's attorneys made multiple attempts to obtain documents and electronically stored information supporting Palmetto's alleged damages. (R. p. ____).

On August 23, 2022, more than six years after Palmetto filed its proposed Amended Answer and Counterclaim, Zurich finally received Palmetto's Supplemental Responses to Requests for Production, which produced 20 Job Bids that Palmetto submitted to potential third-party customers for repairs to commercial vessels located in Florida and Hawaii. (R. p. ____). All Job Bids are dated after July 12, 2016, the date Palmetto filed its Amended Answer and Counterclaim, and more than three years after the completed final Audit on April 6, 2013. Based on the Job Bid dates and the date of Palmetto's Amended Answer and Counterclaim, the damages alleged in Palmetto's counterclaims did not even exist when the counterclaim was filed.

Even viewing the evidence in the light most favorable to Appellant Palmetto, there is simply

not any competent proof connecting any alleged misclassification to any actual damages. Appellant Palmetto's speculation that it was "blackballed" is unsupported by any documentary evidence or affidavit explaining why any particular job bid was rejected or how such rejection related to Respondent Zurich's audit.

IV. The Insurance Policy Authorized Zurich's Audit and Premium Adjustment

Appellant Palmetto's breach of contract counterclaim ignores the express terms of the insurance policy. The Policy specifically authorized Zurich to conduct audits and, if warranted, make changes to the estimated classifications, rates, and premium.

Part 4 of the Policy provides: "[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." (R. p. ____).

Part 5 of the Policy provides:

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. (R. p. ____).

The policy's "Final Premium" provision states:

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. (R. p. ____).

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, LLC, v. Friedman*, 440 S.C. 456, 464, 892 S.E.2d 297 (2023). Zurich did exactly what the contract authorized: it conducted an audit, determined the proper classifications based on Palmetto's actual operations, and calculated the final premium. Neither can Appellant 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. Id.

V. The Master Correctly Granted Summary Judgment on Zurich's Breach of Contract Claim

Zurich sustained its burden of producing evidence on each element of its breach of contract action against Palmetto. The circuit court found that Zurich established: (1) a contract existed between the parties; (2) Palmetto failed to pay the audited premium balance as required by the policy; and (3) Zurich suffered damages in the amount of the unpaid premium. (R. p. ____).

Zurich's Motion for Summary Judgment on its breach of contract claim was supported by the uncontroverted Affidavit of Sheryl Totzke, Legal Collection Specialist for Zurich. (R. p. ____). According to the Totzke Affidavit, after every payment and credit has been applied, as of June 18, 2013, Palmetto is indebted to Zurich for the principal amount of \$158,744.00. (R. p. ____). Demand was made by Zurich on Palmetto, but Palmetto failed and refused to pay as agreed. (R. p. ____).

Appellant Palmetto does not dispute that it refused to pay the \$158,744.00 premium balance. Its only defense is that the classification was improper, a defense, which it failed to support with competent evidence. The Master correctly entered judgment for Zurich in the amount of \$324,702.15.

CONCLUSION

For the foregoing reasons, Respondent Zurich American Insurance Company of Illinois respectfully requests that this Court affirm the Master in Equity's Order granting summary judgment in favor of Respondent.