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November 25, 2013

G. HAMLIN O'KELLEY, III
ATTORNEY AT LAW
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Ms. V. Claire Allen,
Deputy Clerk of the Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, South Carolina 29211

Re: Sharon Sutton v. Melissa Helms Estes, Estes Law Firm, LLC, Carteret Title, LLC, and Chicago Title Insurance Company
Case No. 2012-CP-07-02389
Appellate Case No. 2013-002420

Dear Ms. Allen:

Please allow this letter to serve as a reply to your correspondence of November 21, 2013. The Motion to Reconsider by Ms. Sutton was ruled upon by Judge Dukes by email on October 24, 2013, in which he advised he would not be changing his prior order. I have attached that email. There was no formal order provided.

It is our position that the Order appealed is now final.

By copy of this letter, I am serving same upon all counsel of record. Should you have any questions, please feel free to contact me. With kind regards, I am

Sincerely,

G. Hamlin O'Kelley, III

Enclosures
cc. (w/enc.): J. Ashley Twombley, Esq.
David W. Overstreet, Esq.

Hamlin O'Kelley

From: Dukes, Marvin <mdukes@bcgov.net>
Sent: Thursday, October 24, 2013 8:02 AM
To: Ashley Twombley; McLeod, Heather
Cc: Hamlin O'Kelley; mmccall@carlockcopeland.com; Andrea Smith
Subject: RE: Sutton

Sorry for the delay. I am not changing the prior Order.
Best to all,

Marvin H. Dukes, III
Master-in-Equity for Beaufort County
Beaufort County Courthouse
102 Ribaut Road, Room 212
Post Office Drawer 1228
Beaufort, SC 29901
Office: 843.255.5710
Fax: 843.255.9505

From: Ashley Twombley [mailto:twombley@twlawfirm.com]
Sent: Tuesday, October 22, 2013 9:37 PM
To: Dukes, Marvin; McLeod, Heather
Cc: hamlin.okelley@buistbyars.com; mmccall@carlockcopeland.com; Andrea Smith
Subject: FW: Sutton
Importance: High

Judge Dukes:

The 30(b)(6) depo of Chicago Title is scheduled to go forward on Thursday (day after tomorrow). We respectfully need a decision from your honor on Sutton's Motion to Reconsider (see below). Can you please let us know the decision, or in the alternative, clarify that I will be allowed to re-depose the deponent on the documents at issue in the Motion to Reconsider before trial should you ultimately decide to grant the motion? I am just trying to save everyone time and effort here. Thank you in advance for any direction you can provide.

Ashley

RECEIVED
NOV 27 2013
SC Court of Appeals

From: Ashley Twombley [mailto:twombley@twlawfirm.com]
Sent: Thursday, October 17, 2013 8:55 AM
To: mdukes@bcgov.net
Cc: Hamlin O'Kelley; mmccall@carlockcopeland.com; Jennifer Campbell
Subject: Sutton

Judge Dukes:

Please allow this email to serve as a reminder that you took Plaintiff's Motion to Reconsider in Sutton under advisement and we are still awaiting a ruling on the same. The 30(b)(6) deposition of Chicago Title is taking place next week and we need this motion resolved before hand. The issue is whether or not Plaintiff can discovery why Chicago Title changed its coverage position in this case. As you may recall, in August of 2011 Chicago Title took the legal and factual position that Plaintiff's claim was not covered. However, in April of 2012, Chicago Title changed its legal and factual position and asserted the claim was covered. The question is, why did they change their coverage position, and can they use the attorney client privilege to hide their rational.

This precise situation was addressed in City of Myrtle Beach v. United National Insurance Company. The City of Myrtle Beach filed a complaint alleging breach of contract and
bad faith causes of actions against United National Insurance Company. In discovery, the City of Myrtle Beach requested production of documents, including a copy of United National Insurance Company claims file. United National Insurance Company ultimately responded with a 53 page privilege log, and Myrtle Beach filed a motion to compel production of the requested documents. In ruling on the motion to compel, the Court stated:

"The approach first espoused in Hearn v. Rhay sets forth a frame work that provides a balance between the two competing policies of attorney-client privilege and the administration of justice and is consistent with established South Carolina law. Additionally, the Hearn approach is the most widely accepted approach. The privilege is intended as a shield, not a sword. The undersigned finds there is no per se waiver of the attorney client privilege simply by a plaintiff making allegations of

bad faith. However, if **a defendant voluntarily injects an issue in the case, whether legal or factual, the insurer voluntary waives, explicitly or impliedly, the attorney-client privilege**. Thus, voluntarily injecting the issue is not limited to asserting the advice of counsel as an affirmative defense. A party's assertion of a new position of law or fact may be the basis of waiver. As expounded by the Arizona Supreme Court in State Farm Mut. Auto. Ins. Co. v. Lee, if State Farm were merely asking its expert witness to evaluate the reasonableness of its conduct under the statutes, the case law, and the policy language, State Farm would not have put counsel's advice to the claims managers at issue; nor would Plaintiffs need to know what the claims managers actually believed to prove that State Farm's position was not objectively reasonable. **But when a litigant seeks to establish its mental state by asserting that it acted after investigating the law and reaching a well-founded belief that the law permitted the action it took, then the extent of its investigation and the basis for its subjective evaluation are called into question**.

A review of the Answer to the Complaint filed by United reveals a number of defenses asserted in addition to the denial of the various factual allegations contained in the City's Complaint. Defenses asserted include, but are *not* limited to, that United National and its representatives have acted reasonably and in good faith at all times herein and therefore Plaintiffs are barred from any recovery in this action; preclusion of coverage for loss and expenses incurred in connection with claims for declaratory and injunctive relief; preclusion of coverage to the extent that the City failed to allocate loss payments and/or associated defense expenses between uncovered and covered claims; preclusion of coverage for lack of an occurrence or
intended and expected injury; preclusion of coverage for reimbursement of defense expenses that are unnecessary or unreasonable; preclusion of coverage to the extent that the City failed to cooperate with United; and others.

By asserting the defenses in its Answer, [United] has injected into this case the issues of law and fact contained in the documents for which it seeks protection. While this ruling amounts to a virtual per se waiver of the privilege in this case, this result is based on the facts and issues presented by United in its Answer and its failure to meet its burden as to the

applicability of the privilege with this in mind. Therefore, the court grants the City's motion to compel . . . . City of Myrtle Beach v. United National Insurance Company, 2010 WL 3420044 (D.S.C. 2010) (attached hereto as Exhibit A) (internal citations and quotations omitted and emphasis added)."

In the instant case, Chicago Title injected into the case new issues of law and fact when they changed their coverage position. The documents are issue contain evidence of the same. Plaintiff is therefore entitled to all documents listed in the privilege log and to an unredacted response to Request for Production 30.

J. Ashley Twombley
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