

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case Number 2012-CP-22-00889
(South Carolina Court of Appeals Case Number 2014-001104)

Alexander Mangialardo and Audra Mangialardo.....Appellants,

v.

Blue Ridge Ventures, LLC, Gerald W. Kelly, Elizabeth L. Kelly,
South Carolina Bank & Trust, NA, Century 21 – The Beach Company, LLC,
Caison Engineering Company, Inc., Keith Duncan,
Attorneys’ Title Insurance Fund, Inc., G. Turner Perrow, Jr. and
Tidelands Law, LLC.....Defendants,

Of Whom Blue Ridge Ventures, LLC, Gerald W. Kelly, Elizabeth L. Kelly,
Caison Engineering Company, Inc., Keith Duncan,
Attorneys’ Title Insurance Fund, Inc., G. Turner Perrow, Jr. and
Tidelands Law, LLC, are the Respondents.

**INITIAL BRIEF OF RESPONDENT
ATTORNEYS’ TITLE INSURANCE FUND, INC.**

RECEIVED

NOV 14 2014

SC Court of Appeals

Michael S. Chambers
121 Manly Street, Suite B
Greenville, S.C. 29601
(864) 242-9245
S.C. Bar I.D. No. 001178
ATTORNEY FOR RESPONDENT
ATTORNEYS' TITLE INSURANCE
FUND, INC.

TABLE OF CONTENTS

Table of Authorities.....1

Statement of Issue on Appeal.....3

Statement of the Case.....4

Statement of the Facts.....9

Standard of Review.....14

Argument.....14

 I. The trial court did not abuse its discretion by denying
 Appellants’ Motion to File a Fourth Amended Complaint,
 because allowing such an amendment would have
 prejudiced Respondent.....14

Conclusion.....25

TABLE OF AUTHORITIES

Cases	Page
<u>Berry v McLeod</u> , 328 S.C. 435, 492 S.E.2d 794 (S.C. App. 1997).....	14, 15
<u>City of North Myrtle Beach v Lewis-Davis</u> , 360 S.C. 225, 599 S.E.2d 462 (S.C. App. 2004).....	15
<u>Dunbar v Carlson</u> , 341 S.C. 261, 533 S.E.2d 913 (S.C.App. 2000).....	15
<u>First Federal of Brunswick v Stewart Title Guaranty</u> , 317 S.C. 131, 451 S.E.2d 916 (S.C. App. 1994).....	24
<u>Foggie v CSX Transportation, Inc.</u> , 315 S.C. 17, 431 S.E.2d 587 (S.C. 1993).....	14
<u>Forrester v Smith & Steele Builders, Inc.</u> , 295 S.C. 504, 369 S.E.2d 156 (S.C. App. 1988).....	24
<u>H & H Johnston, LLC v Old Republic National Title Insurance Co.</u> , 405 S.C. 469, 748 S.E.2d 72 (S.C. App. 2013).....	24
<u>Health Promotion Specialists, LLC v Bd. of Dentistry</u> , 403 S.C. 623, 743 S.E.2d 808 (S.C. 2013).....	15, 19
<u>Holland Ex. Rel. Knox v Morbark, Inc.</u> , 407 S.C. 227, 754 S.E.2d 714 (S.C. App. 2014).....	15, 19
<u>Nichols v State Farm Mutual Auto Ins. Co.</u> , 279, S.C. 336, 306 S.E.2d 616 (S.C. 1983).....	19
<u>Reed v SCNB</u> , 293 S.C. 357, 360 S.E.2d 527 (S.C. App. 1987).....	14
<u>Trotter v State Farm</u> , 297 S.C. 465, 377 S.E.2d 343 (S.C. App. 1988).....	24
<u>Wachovia Bank Nat. Ass'n v Beane</u> , 397 S.C. 612, 725 S.E.2d 715 (S.C.App. 2012).....	15
 Statutes	
Section 38-59-40, Code of Laws of South Carolina.....	4, 17

Rules

Rule 15, SCRCP.....14, 15

Rule 40(j), SCRCP.....4, 5

STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion by denying Appellants' Motion to File a Fourth Amended Complaint?

STATEMENT OF THE CASE

Appellants commenced this action with the filing of a Complaint on October 22, 2010. (Complaint) The case was given the original Civil Action Number of 2010-CP-22-01672. Prior to service of the Complaint, Appellants filed an Amended Complaint on December 28, 2010. (Amended Complaint)

A Consent Order Allowing Second Amended Complaint was signed by The Honorable Benjamin H. Culbertson on July 29, 2011, and filed on August 5, 2011. (Consent Order, July 29, 2011) Appellants' Second Amended Complaint was filed on August 5, 2011. Among other things, the Second Amended Complaint added Respondent Attorneys' Title Insurance Fund, Inc., (hereinafter "Respondent ATIF") as a Defendant. In their Second Amended Complaint, Appellants' set forth causes of action against Respondent ATIF for breach of contract (Owners' Title Insurance Policy) and for statutory attorneys' fees pursuant to Section 38-59-40, Code of Laws of South Carolina (Liability for attorneys' fees where insurer has refused to pay claim). (Second Amended Complaint)

Respondent ATIF filed an Answer to the Second Amended Complaint on September 12, 2011. (Answer to Second Amended Complaint – Respondent ATIF)

The case was dismissed pursuant to Rule 40(j), SCRPC, by Consent Order signed by The Honorable Edward W. Miller on March 19, 2012, and filed on that same date. (Consent Order, Rule 40(j), SCRPC, March 19, 2012)

By Consent Order to Restore signed by The Honorable Steven H. John on August 10, 2012, and filed on August 22, 2012, the case was restored pursuant to Rule 40(j),

SCRCP. (Consent Order to Restore, Rule 40(j), SCRCP, August 10, 2012) The case was assigned the new Civil Action Number of 2012-CP-22-0089.

A Consent Order to Add Party was signed by The Honorable Steven H. John on June 15, 2012, and filed on August 22, 2012. The Consent Order to Add Party added Respondents G. Turner Perrow, Jr. (hereinafter “Respondent Perrow”), and Tidelands Law, LLC (hereinafter “Respondent Tidelands”), as Defendants and further amended Appellants’ Second Amended Complaint to include an expert affidavit concerning these new Defendants. (Consent Order to Add Party, June 15, 2012)

Pursuant to the aforementioned Consent Order, Appellants filed a Third Amended Complaint on September 11, 2012. In their Third Amended Complaint, Appellants set forth causes of action against Respondents Perrow and Tidelands for breach of contract and negligence, and included the expert Affidavit and Opinion of C. Joseph Roof as to these causes of action. As to Respondent ATIF, Appellants’ Third Amended Complaint did not vary the causes of action or allegations from what were previously set forth in their Second Amended Complaint. (Third Amended Complaint)

Respondents Gerald W. Kelly and Elizabeth L. Kelly (hereinafter “Kelly Respondents”) filed an Answer to the Third Amended Complaint on October 16, 2012. (Answer to Third Amended Complaint – Kelly Respondents)

Respondent ATIF filed an Answer to the Third Amended Complaint on October 23, 2012. (Answer to Third Amended Complaint – Respondent ATIF)

Respondents Perrow and Tidelands filed an Answer to the Third Amended Complaint on October 29, 2012. (Answer to Third Amended Complaint – Respondents Perrow and Tidelands)

The Kelly Respondents filed a Motion for Summary Judgment on July 16, 2013. (Motion for Summary Judgment – Kelly Respondents) A hearing on this Motion was held on August 16, 2013. By letter dated August 19, 2013, The Honorable Benjamin H. Culbertson granted the Kelly Respondents' Motion for Summary Judgment and asked their counsel to draft a proposed Order granting the Motion. (Letter of The Honorable Benjamin H. Culbertson dated August 19, 2013)

Appellants filed a Motion for Continuance, said Motion being dated August 21, 2013, and filed on September 3, 2013. (Motion for Continuance – Appellants) An Order for Continuance was signed by The Honorable Benjamin H. Culbertson on August 28, 2013, and filed on September 3, 2013. The Order for Continuance continued the trial of the case from the Georgetown County Jury Trial Roster for the week of September 9, 2013, until November 1, 2013. (Order for Continuance, August 28, 2013)

On September 9, 2013, The Honorable Benjamin H. Culbertson signed an Order Granting Motion of Gerald W. Kelly and Elizabeth L. Kelly for Summary Judgment. This Order was filed on September 12, 2013. (Order Granting Motion of Gerald W. Kelly and Elizabeth L. Kelly for Summary Judgment, September 9, 2013)

Appellants' filed a Motion to Alter, Amend and/or Reconsider the Order Granting Defendants Kellys Motion for Summary Judgment on September 20, 2013. (Motion to Alter, Amend and/or Reconsider the Order Granting Defendants Kellys Motion for Summary Judgment)

On September 20, 2013, Appellants also filed their Motion to File Fourth Amended Complaint. In their Motion, Appellants asked the Court "to permit the amendment to conform to the evidence and assert or clarify causes of action for agency,

partnership, joint venturer [sic], negligent supervision, negligent misrepresentation as well as other causes of action.” Appellants did not attach a proposed fourth amended complaint to this Motion, or serve such a proposed pleading with the Motion. (Motion to File Fourth Amended Complaint)

A hearing on Appellants’ Motion to File Fourth Amended Complaint was held on October 10, 2013, before The Honorable Benjamin H. Culbertson. At the hearing, for the first time, Appellants provided Respondents ATIF, Perrow and Tideland with a copy of Appellants’ proposed fourth amended complaint. The proposed fourth amended complaint contains, in addition to the causes of action previously set forth in prior pleadings, an additional cause of action against Respondent ATIF for “Bad Faith/Negligence” and an additional cause of action against Respondents ATIF, Perrow and Tideland designated as “Agency”. Further, the proposed fourth amended complaint included Respondent ATIF in the cause of action for negligence as previously set forth against Respondents Perrow and Tideland in prior pleadings, and included the Kelly Respondents in the in Appellants’ cause of action for negligent construction, as set forth against other Defendants in prior pleadings. (Transcript of Hearing, October 10, 2013) (Proposed Fourth Amended Complaint)

By Order dated October 10, 2013, and filed on October 11, 2013, The Honorable Benjamin H. Culbertson denied Appellants’ Motion to File Fourth Amended Complaint. (Order, October 10, 2013)

Appellants filed a Motion to Alter, Amend and/or Reconsider the Order Denying Plaintiffs’ Motion to File a Fourth Amended Complaint on October 31, 2013. (Motion to

Alter, Amend and/or Reconsider the Order Denying Plaintiffs Motion to File a Fourth Amended Complaint)

By Order dated April 30, 2014, and filed on May 12, 2014, The Honorable Benjamin H. Culbertson denied Appellants' Motion to Alter, Amend and/or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint, and denied Appellants' Motion to Alter, Amend and/or Reconsider the Order Granting Defendants Kellys Motion for Summary Judgment. (Order, April 30, 2014)

Appellants filed a Notice of Appeal on May 23, 2014, and filed an Amended Notice of Appeal on June 13, 2014.

STATEMENT OF THE FACTS

Appellants entered into an Agreement to Buy and Sell Real Estate, Residential, dated September 30, 2007. Paragraph 18 of the aforementioned Agreement (Titled SURVEY, TITLE EXAMINATION AND INSURANCE) stated, among other things, that the real estate brokers and their agents “recommend that Buyer have a survey of the subject property made, have examination as to the title to the property, obtain owner’s title insurance...” (Agreement to Buy and Sell Real Estate, Residential, September 30, 2007) Despite this recommendation, Appellants did not obtain a survey of the property, either prior to or at the time of their purchase of the property (Deposition of Alexander Mangialardo, p. 49, line 9 through line 15; Third Amended Complaint, paragraphs 51, 52 and 65).

Appellants purchased the subject real property through a transaction that was closed on October 22, 2007, with Respondents Perrow and Tideland (Respondent Perrow’s law firm) acting as closing attorney. (Deposition of G. Turner Perrow, Esquire; pp. 28-31) Among other documents signed by the Appellants at the closing, the Appellants signed a “Title Insurance Financial Interest Disclosure Form” identifying Respondent ATIF as the title insurance company and Seaport Title Services, LLC, as its agent. (Title Insurance Financial Interest Disclosure Form; Exhibit E to Respondent ATIF’s Memorandum in Opposition to Plaintiffs’ Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs’ Motion to File a Fourth Amended Complaint).

Although Respondents Perrow and Tideland were the closing attorneys for the transaction, the scope of Mr. Perrow’s agency for Respondent ATIF in relation to the closing transaction was limited to the narrow purpose of binding and issuing Respondent

ATIF's title insurance policies. The scope of Respondent Perrow's agency with Respondent ATIF did not include the broader general closing activities of Mr. Perrow as closing attorney involved with the closing of the entire real estate transaction.

(Deposition of Matthew A. Lewis, Esquire, pp. 39-44, p. 46.; Deposition of G. Turner Perrow, Esquire; pp. 28-31; Exhibits M and K to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint).

In connection with the aforementioned transaction, Respondent ATIF issued Owner's Title Insurance Policy No. OPA-0023821 to Appellants. The Owners' Title Insurance Policy prominently identifies Respondent ATIF as the insurer on the first page, and contains on Schedule A therein the notation "SEAPORT TITLE SERVICES, LLC, 606 Front Street, Georgetown, S.C. 29440," and includes the signature of Respondent Perrow over his name, typed therein as "G. TURNER PERROW, JR." Next to that notation is the identifier "Agent No. 32436." (Owner's Title Insurance Policy; Exhibit C to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint). The Owner's Title Insurance Policy was mailed to Appellants under cover of a letter from Respondent Perrow dated November 30, 2007. (Letter from Turner Perrow dated November 30, 2007; Exhibit D to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint).

On Schedule B of the Owner's Title Insurance Policy, exceptions from coverage are taken (Exceptions 9 and 14) as to the Santee Cooper (South Carolina Public Service

Authority) utility easement that is the subject of Appellants' lawsuit, referenced below. Exception is also taken (Exceptions 3 and 7) to encroachments, overlaps, boundary line disputes and any other matters which would be disclosed by an accurate survey and inspection of the premises. (Owner's Title Insurance Policy; Exhibit C to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint; Deposition of G. Turner Perrow, Esquire, pp. 99-103)

An above ground power line operated by Santee Cooper runs adjacent to the house, located within a fifty (50) foot utility easement previously granted to Santee Cooper. (Third Amended Complaint, paragraph 21) This is the same easement excepted from coverage in Schedule B of the Owner's Title Insurance Policy, as referenced in the above paragraph. In April of 2010, Santee Cooper began inspecting its utility easement in connection with a planned expansion of the power lines within its easement, and conducted a GPS survey of the subject property. At that time, Santee Cooper informed the Plaintiffs that the survey indicated that the house encroached upon the Santee Cooper utility easement by approximately two and one-half (2 ½) feet. (Deposition of Alexander Mangialardo, p. 25, line 18 through p. 27, line 5; p. 39, line 24 through p. 40, line 20; Deposition of Audra Mangialardo, page 28, line 9, through page 32, page 11)

Santee Cooper also tested the house and property for Electronic and Magnetic Fields, and provided the Plaintiffs with the results. (Deposition of Audra Mangialardo, *id.*) Shortly thereafter, on April 14, 2010, Plaintiffs vacated the property. (Deposition of Audra Mangialardo, p. 30, line 5 through line 6; Deposition of Alexander Mangialardo, page 99, line 24 through page 100, line 2) and ceased making their mortgage payments.

(Deposition of Alexander Mangialardo, page 101, line 3 through line 8) The mortgage has since been foreclosed and the property sold at public auction in September of 2011. (Deposition of Audra Mangialardo, page 98, line 3 through line 9; Deed from John P. Grimes, Special Referee for Georgetown County, to Federal National Mortgage Association dated September 27, 2011, and recorded on October 3, 2011, in the ROD for Georgetown County in Book 1758 at page 194) The Plaintiff in the aforementioned foreclosure action waived the right to seek a deficiency judgment against the Plaintiffs. (Order and Judgment of Foreclosure and Sale [Deficiency Waived], dated August 11, 2011, and filed on August 15, 2011, in CA No. 2010-CP-22-1601)

On April 21, 2010, Roger P. Giardino, Esquire (who was at the time the attorney for the Appellants) sent a letter to Respondent ATIF that stated, among other things, that “at the time of purchasing the property, Mr. and Mrs. Mangialardo also obtained title insurance in the amount of the cost of the property from Attorneys’ Title Insurance Fund, Inc., by way of Seaport Title Services, LLC.” (Letter from Roger P. Giardino, Esquire; Exhibit F to Respondent ATIF’s Memorandum in Opposition to Plaintiffs’ Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs’ Motion to File a Fourth Amended Complaint)

Appellants supplemented their discovery responses with a copy of Appellant Alexander Mangialardo’s handwritten notes which reference, among other things, a telephone conversation between Mr. Mangialardo and Matthew Lewis, Esquire, that purportedly took place on September 1, 2010. At that time, Mr. Lewis was Assistant Vice President and South Carolina State Counsel for Respondent ATIF (Deposition of Matthew A. Lewis, Esquire, p. 11; Respondent ATIF’s Answers to Interrogatories;

Exhibit G to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint) In these notes, Mr. Mangialardo states the following concerning that conversation: "Matt [Lewis] then told me that Turner [Perrow] is an agent for them [Title Insurance]..."¹ (Handwritten Notes of Appellant Alexander Mangialardo; Exhibit H to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint)

¹ Respondent ATIF does not concede the truthfulness or accuracy of the handwritten notes by referring to them herein. Reference is made only to illustrate Appellants' prior knowledge of the agency relationship between Respondents ATIF and Perrow prior to Appellants filing their initial Complaint.

STANDARD OF REVIEW

A motion to amend a pleading is a matter within the discretion of the trial judge. The trial judge's discretion is so broad, his decision to grant or deny the motion will rarely be reversed by an appellate court. Reed v SCNB, 293 S.C. 357, 360 S.E.2d 527 (S.C. App. 1987) The decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal. The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred. Berry v McLeod, 328 S.C. 435, 492 S.E.2d 794 (S.C. App. 1997)

ARGUMENT

- I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANTS' MOTION TO FILE A FOURTH AMENDED COMPLAINT, BECAUSE ALLOWING SUCH AN AMENDMENT WOULD HAVE PREJUDICED RESPONDENT

Rule 15, SCRPC, provides that a pleading may be amended only by leave of court or written consent of the adverse party after expiration of thirty days from service, and that leave to amend shall be freely given when justice requires and does not prejudice any other party. Foggie v CSX Transportation, Inc., 315 S.C. 17, 431 S.E.2d 587 (S.C. 1993) A motion to amend a pleading is a matter within the discretion of the trial judge. The trial judge's discretion is so broad, his decision to grant or deny the motion will rarely be reversed by an appellate court. Reed v SCNB, 293 S.C. 357, 360 S.E.2d 527 (S.C. App. 1987)

Under Rule 15 (a) and (b), SCRPC, the court has the power to amend pleadings beyond the time allowed for an amendment when to do so does not prejudice another party. Courts have wide latitude in amending pleadings. While this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an

amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal. The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred. Berry v McLeod, 328 S.C. 435, 492 S.E.2d 794 (S.C. App. 1997) ("We find the trial judge did not abuse his discretion in refusing to allow the Residents leave to amend their complaint a third time." *Id.*)

A motion to amend is within the sound discretion of the trial judge and the opposing party has the burden of establishing prejudice. Health Promotion Specialists, LLC v Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (S.C. 2013) It is well established that a motion to amend is addressed to the circuit court's sound discretion, and the party opposing the motion has the burden of establishing prejudice. Prejudice occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action. Holland Ex. Rel. Knox v Morbark, Inc., 407 S.C. 227, 754 S.E.2d 714 (S.C. App. 2014)

The prejudice Rule 15 envisions is a lack of notice that a new issue is to be tried and a lack of opportunity to refute it. City of North Myrtle Beach v Lewis-Davis, 360 S.C. 225, 599 S.E.2d 462 (S.C. App. 2004) Amendments to pleadings may properly be denied where there are circumstances such as inexcusable delay, or the taking of the adverse party by surprise, or the like, which might justify a refusal to amend. Dunbar v Carlson, 341 S.C. 261, 533 S.E.2d 913 (S.C.App. 2000) Trial Courts have wide discretion to grant or deny motions to amend, particularly after such a significant delay. Wachovia Bank Nat. Ass'n v Beane, 397 S.C. 612, 725 S.E.2d 715 (S.C.App. 2012)

Allowing Appellants to again amend their complaint, at the "eleventh hour", on the eve of trial, to advance new theories of liability and causes of action based upon

allegations of agency, and to allege a new insurance “bad faith/negligence” cause of action, would prejudice Respondent ATIF. Appellants’ proposed amendment states new claims and theories of liability that would require Respondent ATIF to introduce additional or different evidence to prevail in the amended action, and would create or add issues that have heretofore not been involved in this case. Allowing the amendment would result in inevitable delay and would require additional discovery, significantly increasing litigation costs herein. Because Appellants’ delayed until the eve of trial before seeking to yet again amend their complaint, Respondent ATIF lacked notice that these new issues would be tried, and lacked any opportunity to refute these issues. Further, Appellants were aware of the relationship between Respondent ATIF and Respondents Perrow and Tidelands since well before the filing of their Motion to File Fourth Amended Complaint, and there have been no significant new factual developments that would warrant Appellants’ untimely amendment. All of the foregoing is readily apparent from the record herein.

At the time of the hearing on Appellants’ motion to amend on October 10, 2013, this case was number one (1) for trial on the Georgetown County Jury Trial Roster for the week of November 12, 2013. (Transcript of Hearing, October 10, 2013) In their Motion for Continuance, dated August 21, 2013 (prior to their Motion to File Fourth Amended Complaint on September 20, 2013), Appellants stated that, due to recent discovery responses from Respondents Perrow and Tidelands concerning E & O insurance coverage, additional discovery was needed that should be completed by November 1, 2013. Appellants further requested that the trial of the case be continued until November 1, 2013. (Appellants’ Motion for Continuance dated August 21, 2013) The resulting

Order for Continuance granted the continuance on those grounds, and continued the trial of the case until November 1, 2013. (Order for Continuance, August 28, 2013) Prior to filing their Motion to File Fourth Amended Complaint on September 20, 2013, Appellants were well aware and on notice that the case was subject to being tried on or after November 1, 2013. Appellants did not provide Respondents with a copy of their proposed Fourth Amended Complaint, however, until the hearing on October 10, 2013. (Transcript of Hearing, October 10, 2013; Motion to File Fourth Amended Complaint)

Prior to Appellants' proposed amendments, the only issues involving Respondent ATIF, pursuant to the Second and Third Amended Complaints and Respondent ATIF's defenses thereto, have involved only the terms and interpretation of the Owners' Title Insurance Policy, i.e., whether or not there is coverage under the policy, and, if so, whether Respondent ATIF's refusal to pay the claim would justify an award of attorneys' fees pursuant to Section 38-59-40, Code of Laws of South Carolina. Appellants allege that the damages they have suffered are covered under the policy. (Third Amended Complaint) Respondent ATIF has denied such coverage, based, in part, upon the exceptions in the policy to the Santee Cooper easement itself and exceptions as to matters of survey. (Respondent ATIF's Answer to Third Amended Complaint)

Appellants provided the court and the Respondents herein with copies of their proposed Fourth Amended Complaint for the first time at the hearing on Appellants' motion to amend, held on October 10, 2013. (Transcript of Hearing, October 10, 2013; Proposed Fourth Amended Complaint) In addition to the previously pled causes of action against Respondent ATIF for breach of contract (Owner's Title Insurance Policy) and Statutory Attorney's Fees and Costs (Section 38-59-40, Code of Laws of South Carolina),

Appellant' proposed Fourth Amended Complaint included a new cause of action against Respondent ATIF for "Bad Faith/Negligence." The "Bad Faith/Negligence" cause of action purports to allege tort liability against Respondent ATIF for the handling of Appellants' claim, and also for matters concerning the closing of the real estate purchase and the issuance of the Owner's Policy, based upon an agency theory of liability.

(Proposed Fourth Amended Complaint)

Appellants also include Respondent ATIF in their negligence cause of action against Respondents Perrow and Tidelands in their proposed Fourth Amended Complaint. Further, inserted immediately after their causes of action against Respondents Perrow and Tidelands for breach of contract and negligence, Appellants purport to set forth a cause of action titled simply "Agency." In this cause of action, Appellants allege that Respondents Perrow and Tidelands were acting as agents of Respondent ATIF in the closing of the Appellant's purchase of the property, and again attempt to allege this as a basis for liability. (Proposed Fourth Amended Complaint)

Appellants also attempted, in their proposed Fourth Amended Complaint, to re-allege causes of action against the Kelly Respondents, and to include, for the first time, the Kelly Respondents in Appellants' First Cause of action for negligent construction, despite the fact that an Order granting the Kelly Respondents' Motion for Summary Judgment had previously been filed on September 12, 2013. (Proposed Fourth Amended Complaint)

If Appellants' proposed amendments are allowed, Respondent ATIF would be forced to defend against new theories of liability, and new issues would be interjected herein such as agency liability, scope of agency, apparent authority, negligence, tort

liability for bad faith in handling the claim pursuant to Nichols v State Farm Mutual Auto Ins. Co., 279, S.C. 336, 306 S.E.2d 616 (S.C. 1983), insurer's duty, or lack of duty, to advise insured, standard of care, etc.,² that heretofore have not been involved.

Respondent ATIF's actions in investigating, evaluating and denying the claim would become an additional issue. Additional discovery on these issues would be required, and depositions of various parties would have to be retaken, all at a significant cost to Respondent ATIF. Respondent ATIF would be required to retain and identify expert witnesses as to certain title insurance and standard of care issues, and possibly other issues. Respondent ATIF would also need to depose Appellants' legal standard of care expert, C. Joseph Roof, Esquire, (Third Amended Complaint) and incur the expense associated with that expert witness deposition. (Prior to Appellants' proposed amendment, Mr. Roof was only involved with the causes of action concerning Respondents Perrow and Tidelands) This would be unduly prejudicial to Respondent ATIF at this stage of the case, on the eve of trial, after so much time has elapsed already. See Health Promotion Specialists, LLC v Bd. of Dentistry, *supra*, and Holland Ex. Rel. Knox v Morbark, Inc., *supra*.

Appellants claim that they sought to amend to add new allegations concerning Respondent ATIF based upon Matthew Lewis' deposition testimony taken on August 1, 2013. (Transcript of Hearing, October 10, 2013) Actually, Appellants were aware of the facts and evidence giving rise to these new allegations well before the deposition of Mr. Lewis on August 1, 2013, and even before they filed their initial Complaint herein.

² Respondent ATIF does not intend for the foregoing to represent a complete or exhaustive list of the additional issues that would be injected into this case by Appellants' proposed amendment. The list is intended to be illustrative of the myriad of issues and complexities that would be added by the amendment.

As set forth in Respondent ATIF's Statement of Facts herein, Respondents signed the Title Insurance Financial Interest Form at the closing on October 22, 2007. (Title Insurance Financial Interest Disclosure Form; Exhibit E to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint). This form sets out the agency relationship involving Respondent ATIF and Seaport Title Services, LLC. The Owner's Title Insurance Policy itself (Owner's Title Insurance Policy; Exhibit C to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint), mailed to Appellants on November 30, 2007, (Letter of Respondent Perrow; Exhibit D to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint). clearly references the agency relationship involving Respondent Perrow, Respondent ATIF and Seaport Title Services, LLC. Appellants' attorneys' letter of April 21, 2010, to Respondent ATIF also references the relationship between the Owner's Title Insurance Policy, Respondent ATIF and Seaport Title Services, LLC. (Letter of April 21, 2010, Roger P. Giardino, Esquire; Exhibit F to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint). Appellant Alexander Mangialardo's notes of a telephone conversation that purportedly took place on September 1, 2010, references that Matthew Lewis, with Respondent ATIF, told Mr. Mangialardo that Respondent Perrow was an agent for Respondent ATIF. (Handwritten Notes, Appellants' Supplement to Discovery Responses; Exhibit H to Respondent ATIF's Memorandum in Opposition to

Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint).

The deposition of Appellant Alexander Mangialardo was taken on August 31, 2011. Mr. Mangialardo was obviously aware at that time of the agency relationship between Respondent ATIF and Respondent Perrow, as shown by the following exchange:

Q. So sitting here today in this deposition, you can't tell me what loss you've suffered that is covered by this policy; is that correct?

A. That's correct. And you can't show me a policy that your company wrote.

Q. What's Exhibit D-7 right there?

A. That's our part. You didn't even bring what they did, and you should have the HUD settlement from your guy that works for you. He's the one who did it all.

(Deposition of Alexander Mangialardo, page 205, line 19, through page 206, line 3; Exhibit J to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint).

On October 28, 2011, Respondent ATIF served its Answers to (former) Co-Defendants South Carolina Bank & Trust, NA's, Interrogatories on all parties herein, including Appellants.³ In its identification of potential witnesses, Respondent ATIF included the following information:

- c. Matthew A. Lewis, Esquire
Assistant Vice President
South Carolina State Counsel
Attorneys' Title Insurance Fund, Inc.
810 Dutch Square Boulevard, Suite 117
Columbia, S.C. 29210

No written or recorded statement at this time.

³ Appellants did not serve Respondent ATIF with initial discovery requests until January 18, 2013.

This individual has knowledge of his investigation of Plaintiffs' claim for title insurance coverage herein, his telephone conversation(s) with Alexander Mangialardo concerning same, and the Owner's Title Insurance Policy issued to Plaintiffs herein.

- d. G. Turner Perrow, Jr., Esquire
Seaport Title Services, LLC
Tidelands Law, LLC
606 Front St.
Georgetown, S.C. 29440

No written or recorded statement at this time.

This individual is expected to have knowledge of the closing of Plaintiffs' purchase of the real property that is the subject of this action and the issuance of the Owners' Title Insurance Policy to Plaintiffs.

(Answers to Interrogatories; Exhibit G to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint).

In the Affidavit and Opinion of C. Joseph Roof, dated March 5, 2012, and attached to Appellant' Third Amended Complaint (Third Amended Complaint), Mr. Roof opines that Respondent Perrow failed... "to recognize and explain to Plaintiffs Perrow's duties in the transaction to Attorneys' Title Insurance Fund, Inc., and Seaport Title Services, LLC, and the possible conflict of interest that exists when a closing attorney is serving as an underwriting agent for a title insurance company (insurer) and also serving as attorney for the buyer (insured)." (Affidavit and Opinion of C. Joseph Roof; Exhibit I to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint).

Appellants took Respondent Perrow's deposition on March 11, 2013. The title insurance agency issue was fully explored and examined in that deposition. (Deposition of G. Turner Perrow, Jr., Esquire; page 20, line 25, through page 21, line 15; page 28, line 16, through page 29, line 6; page 30, line 10, through page 31, line 3; page 102, line 2 through line 25; Exhibit K to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint).

It is obvious from the foregoing that Appellants were aware of the title insurance agency relationship between Respondent Perrow and Respondent ATIF prior to their filing their initial Complaint in this matter, or at least well before the deposition of Matthew Lewis taken on August 1, 2013. No new evidence was gleaned from that deposition that would justify Appellants waiting until this late stage of the litigation to seek an amendment setting forth new theories of liability and new causes of action.

Mr. Lewis testified that Respondent Perrow was an agent for Respondent ATIF for the limited purpose of binding and writing title insurance policies for the company, and that the scope of this agency would not include general settlement and closing activities. Mr. Lewis further testified that any discussions concerning the option or advantages of obtaining a survey would be outside the scope of the title insurance agency, but rather instead would be part of the general closing and settlement activities of a closing attorney. (Deposition of Matthew A. Lewis, Esquire; page 39, line 4, through page 44, line 17; page 46, line 1 through line 13; Exhibit M to Respondent ATIF's Memorandum in Opposition to Plaintiffs' Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs' Motion to File a Fourth Amended Complaint) This testimony is

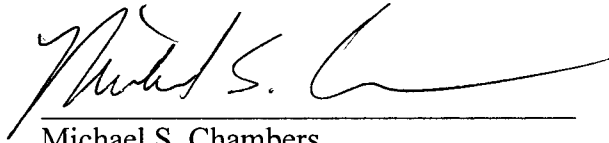
consistent with existing law and authorities concerning these issues. *See H & H Johnston, LLC v Old Republic National Title Insurance Co.*, 405 S.C. 469, 748 S.E.2d 72 (S.C. App. 2013); (“We find Bufkin was acting as an attorney at the closing... We find any advice Bufkin gave H & H regarding potential adverse claims constituted the practice of law.”; Distinguishing between the roles of real estate closing attorney and title insurance agent). A title policy indemnifies rather than guarantees the state of an insured title. *First Federal of Brunswick v Stewart Title Guaranty*, 317 S.C. 131, 451 S.E.2d 916 (S.C. App. 1994) Generally, an insurer and its agents owe no duty to advise an insured... An insurance agent normally has no duty to advise a customer or to warn him of provisions contained in the insurance policy. *Trotter v State Farm*, 297 S.C. 465, 377 S.E.2d 343 (S.C. App. 1988) There is nothing in Mr. Lewis’ deposition that would justify or warrant Appellants amending their pleadings at this late stage in the litigation.

Based upon the foregoing, it is readily apparent from the record that granting Appellants’ Motion to File a Fourth Amended Complaint would prejudice Respondents and result in undue delay of the case. (*See Forrester v Smith & Steele Builders, Inc.*, 295 S.C. 504, 369 S.E.2d 156 (S.C. App. 1988); “Absence of explanation of denial need not always result in reversal, but reasons would have to be readily apparent.”) (Transcript of Hearing, October 10, 2013; Proposed Fourth Amended Complaint; Respondent ATIF’s Memorandum in Opposition to Plaintiffs’ Motion to Alter, Amend or Reconsider the Order Denying Plaintiffs’ Motion to File a Fourth Amended Complaint) It was not an abuse of discretion for the trial court to deny Appellants’ Motion to File a Fourth Amended Complaint.

CONCLUSION

For the foregoing reasons, Respondent ATIF respectfully requests that the Order Denying Appellants' Motion to File a Fourth Amended Complaint be affirmed.

Respectfully submitted,



Michael S. Chambers
121 Manly Street, Suite B
Greenville, S.C. 29601
(864) 242-9245
S.C. Bar I.D. No. 001178
Attorney for Respondent Attorneys' Title
Insurance Fund, Inc.

Date: November 12, 2014

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case Number 2012-CP-22-00889
(South Carolina Court of Appeals Case Number 2014-001104)

Alexander Mangialardo and Audra Mangialardo.....Appellants,

v.

Blue Ridge Ventures, LLC, Gerald W. Kelly, Elizabeth L. Kelly,
South Carolina Bank & Trust, NA, Century 21 – The Beach Company, LLC,
Caison Engineering Company, Inc., Keith Duncan,
Attorneys’ Title Insurance Fund, Inc., G. Turner Perrow, Jr. and
Tidelands Law, LLC.....Defendants,

Of Whom Blue Ridge Ventures, LLC, Gerald W. Kelly, Elizabeth L. Kelly,
Caison Engineering Company, Inc., Keith Duncan,
Attorneys’ Title Insurance Fund, Inc., G. Turner Perrow, Jr. and
Tidelands Law, LLC, are the Respondents.

RECEIVED

NOV 14 2014

SC Court of Appeals

PROOF OF SERVICE

I certify that I have served Respondent Attorneys’ Title Insurance Fund, Inc.’s
Initial Brief and Designation of Matter to be Included in the Record on Appeal on
Appellants and Respondents by depositing copies of it in the United States Mail, postage
prepaid, on November 10, 2014, addressed as follows:

Jeffrey E. Johnson, Esquire
Attorney for Appellants
P.O. Box 1829
Conway, S.C. 29528

Karen A. Sauls, Esquire
Attorney for Appellants
P.O. Box 2598
Myrtle Beach, S.C. 29578

Jack M. Scoville, Jr., Esquire
Attorney for Respondent
Gerald W. Kelly and Elizabeth L. Kelly
P.O. Drawer 1228
Georgetown, S.C. 29422

G. Turner Perrow, Esquire
Individually and as Attorney for Respondent
Tidelands Law, LLC
606 Front St.
Georgetown, S.C. 29440

Keith Duncan
Registered Agent for
Respondent Blue Ridge Ventures, LLC
647 Little Tony Ave.
Murrells Inlet, S.C. 29576

Keith Duncan
635 Little Tony Ave.
Murrells Inlet, S.C. 29576

Albert A. Caison
Registered Agent for Respondent
Caison Engineering Company, Inc.
4034 Bayfield Loop
Murrells Inlet, S.C. 29576



Michael S. Chambers
121 Manly Street, Suite B
Greenville, S.C. 29601
(864) 242-9245
S.C. Bar I.D. No. 001178
Attorney for Respondent Attorneys' Title
Insurance Fund, Inc.

November 10, 2014

Greenville, South Carolina