THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, Presiding Judge

TONIA D. WILLIAMS, MARION B. SMALLS, TYAWUAN WILLIAMS, By his Guardians ad Litem, TONIA D. WILLIAMS and CHARLES WILLIAMS, And SHAQUILLA SHAW, by her Guardian ad Litem, RITA SHAW, Appellants. v. GEICO CASUALTY COMPANY, GEICO INDEMNITY COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, GEICO GENERAL INSURANCE COMPANY, Respondents.	)	Case Number: 09-CP-27-00639 APPELLATE CASE NUMBER 2013-002645

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On September 29, 2009, the Plaintiffs filed an action against the Defendant Earl Martin, as well as the Respondent, GEICO, alleging negligence by the Defendant Martin, and breach of contract as well as spoliation of evidence against the Defendant GEICO. On or around April 16, 2010, the Respondent GEICO moved for severance of the case which was granted. Thereafter, the Respondent GEICO twice attempted to remove the case to Federal District Court in South Carolina. Both times the case was remanded back to the Court of Common Please in Jasper County. Thereafter, on November 16, 2011, the Respondent GEICO moved for Summary Judgment. Such was initially granted by the Honorable Carmen Mullen on March 19, 2012. Thereafter a Motion to Reconsider was filed and heard and on November 14, 2013 Judge Mullen issued an Order refusing to reconsider the initial Order. The Notice of Appeal was filed on December 12, 2013.

FACTUAL ISSUES RELEVANT TO THE APPEAL

On or around October 2, 2006, the Defendant, Earl Martin, ran a stop sign in Jasper County and struck the vehicle, being a 1998 Ford Explorer in which the Plaintiff was a driver. This resulted in a roll-over by the Ford Explorer vehicle. One passenger was killed and the Plaintiff was evacuated by a helicopter to a hospital in Savannah, Georgia, where she remained for a number of weeks. On or around October 5, 2006, Harry C. Brown, Sr., attorney for the Plaintiffs, contacted Buck Abele, the adjuster for GEICO who had the coverage on the Ford Explorer. Attorney Brown

requested that the evidence be preserved and the following day sent a non-spoliation letter to the adjuster, Buck Abele. Again, this requested preservation of the vehicle. The adjuster agreed both orally on October 5, 2006, and again after the email of October 6, 2006.

Several days after that, the adjuster contacted the insured, Charles Williams, the husband of the Plaintiff, Tonya Williams, and made an offer to settle the collision damage to the vehicle for a total loss. On October 18, 2006, the insured, Charles Williams, agreed to such settlement.

At all times during these negotiations, the adjuster for GEICO knew that the Williams were represented by Attorney Harry Brown and that further as a part of his training as an adjuster, he had been taught that once an attorney appears on the scene, he has to deal with the attorney, not the client. Attorney Brown was not notified that the adjuster thereafter had the vehicle sent to a salvage yard where it was sold for salvage. On or about March 19, 2007, Kelly Stone, a senior GEICO employee in Macon, Georgia, saw the non-spoliation letter and notified Attorney Brown that the vehicle had been sold. TR121 L21 – TR123 L5 The vehicle was thereafter recovered by GEICO from a salvage yard in Charleston. At the time of the recovery, GEICO, assured Attorney Brown that only 3 tires had been sold off the car. In fact, the back rear glass window had also been sold. Attorney Brown visited the salvage to inspect the vehicle and was informed by the salvage yard owner that he had been instructed by GEICO to not have any discussions with Attorney Brown. TR101 (Affidavit)

Attorney Brown's expert, Edward Robinson, opined that given the lack of care, custody and control of the vehicle for some six (6) months after the collision, it would be impossible to reconstruct as of the date of the accident. This is especially true as this was a roll-over and the tires were gone from the vehicle. Thereafter, Attorney Tom Johnson, representing another passenger, filed a products case against Ford Motor Company over the wreck which was settled for an undisclosed amount. As part of that case, counsel for the Defendant Ford noted that there had not been a proper chain of custody of the vehicle and the vehicle was not in the condition that it had been in at the time of the wreck. TR98 At the time of the collision, there was an existing contract of insurance between GEICO and the Plaintiffs Williams. This contract existed throughout until

several weeks after the wreck when GEICO settled the matter without notifying Attorney Brown. By Affidavit, Plaintiff Tonya Williams indicated at the time all this took place she was in the hospital and that her name had been forged on the Bill of the Sale as well as on the Title. TR160 (Affidavit) Tonya further testified through deposition that she had heard that Ford Explorers where easy to flip, that they were potentially unsafe, and that she had turned the matter of the car over to her attorney. Kelly Stone, an adjuster and supervisor from GEICO headquarters in Macon, Georgia, testified that upon realizing that the spoliation letter had been ignored, (TR125 L17 – TR126 L2) she had been advised by senior GEICO people to recover the vehicle which was done. Adjuster Abele further testified that pursuant to GEICO policy, when a non-spoliation request was made, the car would be wrapped, that is, covered with a saran-wrap like material so that it could be kept in its original condition. TR182 l23 – TR184 L9. Such was not done in this case.

Thus, at the time of the Summary Judgment Motion, there was credible evidence in the record that there was an existing policy of insurance between GEICO and the Williams. It was further established that the adjuster had been put on notice verbally and in writing to preserve the vehicle and agreed to do so. He thereafter settled the matter behind the attorney's back without any notice in regard to the vehicle itself and had it disposed of. The net result is the inability for the Plaintiffs to bring any products action on the vehicle itself leaving the Plaintiff substantially uncompensated for severe permanent injuries.

ARGUMENT

1. WAS THERE AN EXISTING CONTRACT OF INSURANCE BETWEEN THE PARTIES OF THE NON-SPOLIATION REQUEST – AND IF SO, DID THE ACTIONS OF GEICO BREACH THAT?

1. Page 14, Line 16: "Then we (GEICO) would contact the attorney."
2. Page 17, Line 16-20:

   "A. I got in touch with the auto damage adjuster to check the status of the vehicle, and he had indicated that the salvage had already been sold and then mentioned to me that he received a letter from you requesting that the vehicle be shrink wrapped."

They got the request for the non spoliation of the vehicle and agreed to it.

Page 22, Line 4-Line 15:

"Q. Okay, that's fine. What steps did you take to recover the vehicle?

A. I contacted Mr. Abele, the auto damage adjuster, and requested that he find out where the vehicle was sold to and recover the vehicle back.

Q. And in the recovery of the vehicle do you know what specifically did he do?

A. No sir, I have no idea.

Q. Did you – upon getting the vehicle back did you report back to Mr. Ross Miller?

A. That we had recovered the vehicle?

A. Yes."

Page 23, Line 3-Line 7:

"Q Let me be more specific then. What procedure does GEICO follow when they receive a notice of non-spoliation of evidence?

A. I would have contacted the auto damage adjuster and asked them to secure the vehicle."

There was no mention by GEICO to attorney Brown of any request for any funds to reimburse GEICO for any cost in preserving the vehicle. Further GEICO had screwed up by selling the vehicle after having given him assurance that they, in fact, would not do that.

3. Page 26 Line 19 – Page 27, Line 7.

"A. Again Mr. Brown, I don't remember the specifics of the conversation. We discussed that the vehicle had been sold, I was instructed to get the vehicle back and recover the vehicle, and that's what we did.

Q. Okay, you told him that Mr. Martin had instructed you to get the vehicle back, that's what you told him?

A. Mr. Miller.

Q. Mr. Miller, okay, and what did he say? Did he say don't do it, do it, what did he say?

A. What did who say?

Q. Attorney Heitin.

A. Again, Mr. Brown, I don't remember the particulars of the conversation. My recollection is that we were all in agreement to try and get the vehicle recovered. "

Page 40, Line 15-20.

"Q. Then efforts were made to get the vehicle back?

A. Because you had requested the vehicle, so we were trying to recover the vehicle for you."

The gist of this is that GEICO realized they had an affirmative duty to secure the car and they had screwed up by letting it go and had to get it back. This was a decision made at the highest level of GEICO headquarters in Macon Georgia with no mention of any funds

for reimbursement costs or anything else, just that their insured's attorney had been mislead by them and had not been treated fairly or correctly.

4. Page 43, Line 11- Page 44, Line 14

"Q. Did Mr. Ross Miller or Attorney Barry Heitin ever review that letter?

A. Mr. Miller helped review that letter to draft it in response to your correspondence.

Q. Do you know what kind of degrees Mr. Miller has?

A. I have no idea.

Q. But he helped you draft that letter there?

A. Yes, sir.

Q. And you were advised to retrieve the vehicle by Mr. Miller after you discussed it with him?

A. Yes, sir.

Q. Do you recognize hat there was an error made?

A. Do I recognize that there was an error made?

Q. Yes.

A. What kind of error?

Q. In the sale of the vehicle?

A. I don't – I'm not sure if there was an error made, or who – if there was an error made. Once we discovered that the vehicle has been sold we did our – all we could to get that vehicle returned to us.

Q. And, of course, when you found the vehicle the vehicle was - you said the vehicle had been sold, correct?

A. Yes, sir.

Q. And you don't know who it was sold to?

A. No, sir.

Q. I'm assuming that since you sold the – the vehicle was sold you had – somebody had to pay to get the vehicle back, correct?

A. Yes, sir.

It was <u>error</u> (to sell the car) and they were now doing their best to find it back. They further agreed (Page 49 Line 9-18) *that they were supposed to always deal directly with the attorney and not with the insured*

"Q. Let's go back to the claims processing once again. What is the process at GEICO for handling a claim when a lawyer is involved, an attorney is involved?

A. You deal directly with the attorney.

Q. You deal directly with the attorney?

A. Yes sir."

So at the time of the sale of the automobile, the Respondent GEICO admits there was an insurance contract between the parties and that as part and parcel of that contract they agreed to preserve the vehicle. They further, in violation of their own policies, went behind the attorney's back and settled the case with the insured, somehow got Ms. Williams' signature on the various documents to do with the sale of the automobile, (which she submits without contradiction that it was forged) and sold the vehicle thereby breaking the chain of custody which is crucial in any kind of products case.

The Appellants respectfully submit that as for the standards of summary judgment the Appellants Williams have clearly shown sufficient elements of a breach of contract to satisfy the scintilla of evidence with all disputed facts and all the ambiguities construed in favor of the Plaintiffs, the Appellants respectfully submit that it was incorrect summary judgment.

II. DID THE SUPREME COURT'S DECISION IN COLE VISION v. HOBBS, 714 S.E.2d 537 S.C. 2011 PRECLUDE A THIRD PARTY ACTION FOR DELIBERATE AND INTENTIONAL SPOLIATION OF EVIDENCE?

The Supreme Court's decision in Cole Vision v. Hobbs, 714 S.E.2d 537 (S.C. 2011) (hereafter Cole Vision) addressed an issue where the parties involved were an optometrist, a vision service and the landlord, Sears, who were all sued for malpractice. The vision service, Cole Vision, lost part of the patient's records which led to the payment of costs, fees, etc. The Supreme Court determined that the tort of negligent spoliation does not exist under South Carolina Law. In that case, the Court also carefully distinguished Austin v. Beaufort County Sheriff's Department, 737 S.E.2d 830, 401 S.C. 522 (S.C. 2012) noting that Austin was purely a third party spoliation case. In both Cole Vision and Austin, the spoliation was done through negligence and not through any intentional act or with any bad motive. In this case, we have almost the opposite. The Respondent GEICO's actions in not honoring the non-spoliation agreement, settling the case behind the

attorney's back in violation of their own policies, and almost immediately shipping the vehicle off to a salvage yard (with a title and other documents inferentially forged by GEICO and its agents) with the resulted benefit going to GEICO of stopping storage charges, payment of further adjustment fees and commissions and all other costs attended to the examination and settlement of an automobile collision claim. So while Cole and Austin dealt with negligent destruction of evidence, the instant case involves the intentional and deliberate destruction of the evidence. This is especially egregious when having agreed to preserve the evidence, they never offered attorney for the Appellants the opportunity to pay for storage, immediately buy the salvage, thus preserving the evidence, and let them detrimentally rely on GEICO's assurances that they would honor the agreement to preserve the evidence. It's especially galling as this agreement was entered into at the time when there was a binding contract of insurance between the Respondent GEICO and the Appellants. The recognition of what a mistake had been made is amply demonstrated by the lengths GEICO went through to locate the vehicle, have it re-secured and made available to counsel of the Appellate. TR103 TR128 L4 – L10. The flip side of this is that this was after a period of six months in which it had not been secured, it could not be reliably reconstructed and was missing items more than what GEICO had told the Appellants had been sold. TR282 – TR284 (expert affidavit) The act of GEICO employees calling the salvage yard and admonishing the owner not to talk to Attorney Brown (which is undisputed) makes this even more egregious. TR101 (Park's affidavit) The complaint against the Defendant GEICO not only includes general negligence, but also includes gross negligence, willfulness and wanton conduct, which these deliberate acts would certainly satisfy.

CONCLUSION

The Appellants respectfully submit that the decision in Cole Vision does not address issues raised in this case and does not disallow a cause of action against a third party for deliberately and

intentionally destroying evidence.

Respectfully submitted,

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	)	APPELLATE CASE NUMBER 2013-002645
Appellants.	)	
v.	)	
GEICO CASUALTY COMPANY, GEICO INDEMNITY COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, GEICO GENERAL INSURANCE COMPANY,	)	
Respondents.	)	

CERTIFICATE OF COUNSEL

This is to certify that the Appellant's Final Brief complies with Rule 21(b), SCACR.

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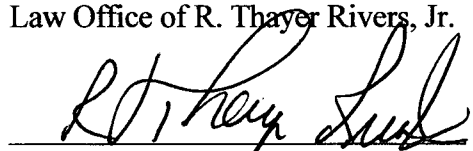
PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant by depositing a copy of same in the United States Mail, postage prepaid, on Feb. 2, 2015, addressed to their attorney of record, E. Mitchell Griffith, Esquire, Griffith, Sadler & Sharp, Post Office Box 570, Beaufort, South Carolina 29901-1570.

Feb. 2, 2015.

Law Office of R. Thayer Rivers, Jr.



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