

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-6103
Appellate Case No. 2013-002403

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FEB 04 2015

SC Court of Appeals

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

v.

Chartrease Grier, Palmetto Health Alliance; and Palmetto
Richland Memorial, Defendants,

Chartrease Grier, Third-Party Plaintiff, Appellant,

v.

Nationwide Property & Casualty Insurance Company;
and Tonya D. Parks, Third-Party Defendants, Respondents.

**RETURN TO APPELLANT'S MOTION
TO AMEND THE RECORD ON APPEAL**

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules,
Respondents Nationwide Property & Casualty Insurance Company ("Nationwide") and
Tonya D. Parks file this return to Appellant's motion to amend the record on appeal
filed on January 30, 2015. In her motion, Appellant requests that this Court allow her

leave to amend the record to include a transcription of an audio recording of a telephone call contained on a compact disc filed with the lower court as an exhibit to a memorandum. Respondents object to Appellant's proposed transcription for the reasons set forth below.

First, Appellant never served Respondents with the compact disc that she filed with the lower court as exhibit B to her reply memorandum. (Reply to Third Party Defs.' Mem. in Opp. to Mot. to Am., R. at 216 (which does not include a certificate of service).) Instead, Appellant merely sent Respondents a courtesy copy via email, and the copy did not contain the compact disc referenced as exhibit B in the memorandum or a place holder to indicate that there was an exhibit B actually filed. (See 11/30/12 Email with Attachment (including the reply memorandum and exhibit A only), attached hereto as Ex. A.) Because Respondents never received a copy of the compact disc that Appellant filed with the lower court, Respondents cannot be sure what is on that compact disc or that Appellant's proposed transcript is an accurate transcription of the compact disc's contents.

Additionally, Appellant's proposed transcription is an edited version of the audio recording that Respondents produced during discovery as NW_0132. (See Proposed Transcript, Ex. A to Appellant's Motion to Amend the Record (noting "call edited").) If Appellant filed an edited version with the lower court, Respondents never knew this, because they were not served with it. Respondents would have objected to an edited version of the audio recording, had they known.

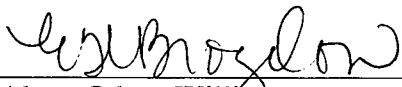
Finally, as specified in the South Carolina Appellant Court Rules, the preferred course of action under these circumstances is for Appellant to move this Court to

request the compact disc exhibit from the lower court. See Rule 210(f), SCACR (“All other exhibits other than paper exhibits must be retained in the trial court and delivered to the appellate court only upon receipt of an order from the clerk of the appellate court.”); see also Jean H. Toal et al., Appellate Practice in South Carolina 137 (2d ed. 2002) (explaining that larger exhibits or those that “do not reasonably lend themselves to accurate reproduction . . . need not be included in the record, but may be filed separately”).

For these reasons, Respondents respectfully request that this Court deny Appellant’s motion to amend the record on appeal to include an edited transcript of the audio recording, and instead, request that this Court obtain the actual exhibit from the lower court.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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(803) 799-2000

Attorneys for Respondents Nationwide Property & Casualty Insurance Company and Tonya D. Park

February 4, 2015

Exhibit A

(11/30/12 Email with Attachment)

From: Sarah Brown [mailto:sarah@moonlawsc.com]
Sent: Friday, November 30, 2012 4:58 PM
To: Jay Thompson; Alana Odom Williams
Cc: Allison Moon; Scott Bradley
Subject: Fwd: Grier v. Nationwide; C.A. No.: 2011-CP-40-6103

Dear Counsel,

Please find attached a courtesy copy of the Reply to the Memo in Opposition to Grier's Motion to Amend that we sent to the Court today for filing.

Thank you,

Sarah

--

Sarah E. Brown
MOON LAW FIRM
1 Augusta Street, Suite 301 (29601)
P.O. Box 3785 (29608)
Greenville, South Carolina
864.271.1595 (Office)
864.551.2085 (Fax)

Confidentiality Statement: The information in this message is intended for the above named individual or entity, and may contain confidential material protected by attorney/client privilege or attorney work product. Any dissemination, retransmission or action taken in reliance upon this information, by anyone other than the intended recipient is prohibited. If you received this communication in error, please notify the sender and delete the material.

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November 30, 2012

Ms. Jeanette W. McBride
Richland County Clerk of Court
Richland County Judicial Center
1701 Main Street, Room 205
Columbia, South Carolina 29201

Re: The Bank of New York Mellon Trust Company, et al. v. Chartreuse Grier
CA#: 2011-CP-40-6103

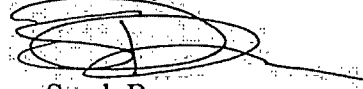
Dear Ms. McBride,

Please find enclosed for filing in the above-captioned matter the original and one copy of the Reply to Third Party Defendants' Memorandum in Opposition to Chartreuse Grier's Motion to Amend as well as a Certificate of Service. By copy of this letter we are serving the same upon all counsel of record.

I would appreciate you filing the original document and returning the copy to me by way of the self-addressed, stamped envelope.

Please feel free to contact me with any questions or concerns. I appreciate your assistance in this matter.

Sincerely,



Sarah Brown

sarah@moonlawsc.com

Enclosures

Cc: Alana Odom Williams, Esq.
Jay T. Thompson, Esq.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

The Bank of New York Mellon Trust)
Company, National Association fka The)
Bank of New York Trust Company, N.A.)
as successor to JPMorgan Chase Bank)
N.A. sbm Bank One National Association)
as Trustee for RAMP 2002RS5,)
)
Plaintiff,)

**REPLY TO THIRD PARTY
DEFENDANTS' MEMORANDUM IN
OPPOSITION TO CHARTREASE
GRIER'S MOTION TO AMEND**

vs.)

Chartrease Grier; Palmetto Health)
Alliance; and Palmetto Richland)
Memorial,)
)
Defendants.)

C.A. No. 2011-CP-40-6103

Chartrease Grier,)
)
Third-Party Plaintiff,)

vs.)

Nationwide Property & Casualty)
Insurance Company; and Tonya D. Parks,)
)
Third-Party Defendants.)

Defendant/Third Party Plaintiff Chartrease Grier (“Grier”), by and through her undersigned counsel, respectfully submits this Reply to Third-Party Defendants’ Memorandum in Opposition to Chartrease Grier’s Motion to Amend. For the reasons set forth below, Grier requests that the Court grant her Motion to Amend in the interest of justice and on the basis that allowing an amendment of the pleadings does not prejudice any other party.

The Third-Party Defendants (collectively, “Nationwide”) contend that they would be prejudiced if Ms. Grier were allowed to amend her pleadings to include of causes of action for

negligence against Parks and negligent misrepresentation against Nationwide. Rule 15 of the South Carolina Rules of Civil Procedure states that leave to amend “shall be freely given when justice so requires and does not prejudice any other party.” Although the Third-Party Defendants have been on notice of Ms. Grier’s Motion to Amend for nearly six months, they still claim that an amendment at this late date would be prejudicial to their case.

Regarding prejudice resulting from late amendments, our courts have stated that

[i]f late amendment of the pleadings would cause prejudice to the opposing party, the court should either deny the amendment or grant a continuance reasonably necessary to allow the opposing party to meet the amendment. Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action.

Ball v. Canadian American Express, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994).

Further, under SCRCF Rule 15(b), it is in the sound discretion of the trial judge to allow an amendment of pleadings to conform to evidence. *Id.* Although this was not the intent of the original motion, the delay in an opportunity for a hearing on the issue has now created further support for amendment.

In this particular case, the introduction of the proposed causes of action for negligence and negligent misrepresentation would in no way be prejudicial to Nationwide or Parks, as these causes of action would not require any additional evidence. First, the original Answer and Third-Party Complaint pled breach of contract against both Nationwide and Parks. The facts pled in support of this and the other original causes of action were generally set forth as follows:

- Tonya Parks was Ms. Grier’s Nationwide insurance agent and issued the policy at issue, which had an effective date of March 24, 2010 through March 24, 2011.
- Communications between GMAC and Nationwide indicated that Nationwide agreed to renew the policy upon receipt of the required \$993.00 premium.
- A payment of the \$993.00 premium was paid to and accepted by Nationwide prior to the policy’s expiration date.

- The premium was subsequently returned by Nationwide via check payable to Chartreuse Grier, this occurred after the non-renewal date of the policy.
- Ms. Grier lost her house by fire on April 6, 2011.
- Nationwide refused to pay Ms. Grier's claim.
- Ms. Grier has suffered great financial and emotional damage as a result.

There is no question that the contract at issue in this case is the homeowner's policy to Ms. Grier issued by Nationwide. Based on the facts pled, Ms. Grier has clearly indicated that a contract was created (and/or renewed) by virtue of communications that took place between GMAC and Nationwide. Although the exact nature of these communications was unknown initially, they were eventually produced by Nationwide in the form of an audio recording. In the deposition of Jeanette Bauerle, an employee of Nationwide, the recording was played, and Ms. Bauerle testified as follows regarding the same:

Q. I'm going to try and play something that will be Exhibit 3. I'll let you know this is actually

Bates-stamped NW_0132. It's a portion of a recording that was produced by Nationwide in response to our request for production. I can also let you know that authenticity has -- authenticity of this recording has been stipulated to by GMAC and Nationwide. Let's see if this works:

(Recording played.)

.....

Q. Does this recording consecrate that the payment would be made, to you?

MS. WILLIAMS: Objection.

BY MS. MOON:

Q. Did the recording mention the 993 payment that we have been discussing that was accepted by Nationwide and returned?

MS. WILLIAMS: Objection.

BY MS. MOON:

Q. You have to answer the question. The call was not very clear.

Q. Did you hear mention of a 993 premium payment?

A. I believe I heard her mention what was the original term premium.

Q. Did you hear the date that she was discussing as the renewal date?

A. I did hear the renewal date.

Q. And what was that?

A. March 24th, 2011.

(Bauerle Depo. 21:5-14; 23:9-24:3 [Ex. A]).¹

It is well established that the formation of a contract involves offer and acceptance. “As in the case of contracts generally, it is essential to the creation of a contract of insurance that there be an offer or proposal by one party and an acceptance by the other. Regardless of which party makes the offer or proposal, its acceptance by the other is necessary to the creation of the contract.” *Hodge v. National Fidelity Ins. Co.*, 221 S.C. 33, 41, 68 S.E.2d 636, 638 (1952); *see also Temptron Inc. v. Dixie Fire and Casualty Co.*, 241 S.C. 55, 61, 127 S.E.2d 4, 6 (1962).

A cause of action for negligent misrepresentation is based upon the existence of a contract or business transaction. *See Evans v. Rite Aid Corporation*, 324 S.C. 269, 478 S.E.2d 846, 848 (1996). The elements of negligent misrepresentation are (1) a false representation made by one party to the other, (2) a pecuniary interest by the party making the statement, (3) a duty of care owed by the defendant to see that truthful information was communicated to the party receiving the information, (4) the defendant breached the duty by failing to exercise due care, (5) the hearing party justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as a direct and proximate result of reliance on the representation. *See Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847, 852 (Ct. App. 1997).

By including facts which support the elements of negligent misrepresentation in the original pleadings, in addition to the inclusion of a breach of contract cause of action in the, Nationwide is and has been on notice of the scope of the issues to be tried and for which evidence would be needed in this case. Thus, a cause of action for negligence and negligent

¹ A CD containing the actual audio recording has been attached for your convenience as Exhibit B. In the interest of time, we did were unable to transcribe it in full.

misrepresentation are in no way prejudicial to Nationwide in maintaining its defense of this action.

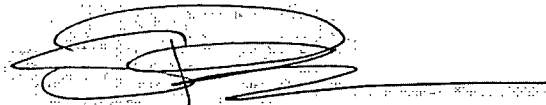
In addition to the arguments in support of amendment above, and those which have previously been filed with the Court and are incorporated herein by reference, Ms. Grier maintains that due to the evidence that has been discovered since the original date of filings, her motion is further supported by SCRCF Rule 15(b), which permits the Court to allow amendment of the pleadings to conform to the evidence at hand. Clearly, the evidence in the record at this point is sufficient to support an amendment of the pleadings to conform accordingly.

Lastly, Nationwide contends that a negligence claim against Tonya Parks would be futile, as an agent owes no duty to an insured. In support of this assertion, Nationwide relies upon and misstates *Houck v. State Farm Fire and Insurance Casualty Co.*, 366 S.C. 7, 620 S.E.2d 326 (2005). However, Nationwide failed to include a very important part of the statement regarding an agent's duties by omitting the part of the quote which states that the agent has no duty to advise the insured **at the point of application**. *Id.* at 12, 329. The law is clear that a duty very well may be imposed "if the agent, nevertheless, *undertakes to advise the insured.*" *Carolina Prod. Maint., Inc. v. United States Fid. & Guar. Co.*, 310 S.C. 32, 425 S.E.2d 39, 43 (1992) (*citing Trotter v. State Farm*, 297 S.C. 465, 377 S.E.2d 343 (Ct.App.1988)) (Emphasis added). Absent an express undertaking to assume such a duty, a duty can be impliedly created. *Id.* In determining whether an implied duty has been created, courts consider several factors, including whether: (1) the agent received consideration beyond a mere payment of the premium, (2) the insured made a clear request for advice, or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on. *Id.*

There is ample evidence that indicates that Parks and Ms. Grier had a working relationship that existed for many years. Ms. Grier does not claim that the negligent breach of duty occurred at the point of application. Rather, the evidence reveals that the parties' professional relationship extended far beyond just the policy at issue. To maintain that a cause of action for negligence against Parks would be futile based on the fact that "an agent owes no duty" to an insured is a misstatement of the relevant law. The law on this topic states that such a duty can be impliedly created, and the record contains ample evidence to support this notion. Thus, Ms. Grier's Motion to Amend to add a cause of action for negligence should be granted.

For the foregoing reasons, Chartreuse Grier respectfully requests that the Court grant her Motion to Amend Defendant/Third Party Plaintiff's Answer and Third Party Complaint.

Respectfully submitted this 30th day of November, 2012.



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SBradley@ScottBradleyLaw.com

Attorneys for Defendant/Third-Party
Plaintiff, Chartreuse Grier

EXHIBIT A

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF RICHLAND

Civil Action No. 2011-CP-40-6103

The Bank of New York Mellon Trust)
Company, National Association fka The)
Bank of New York Trust Company, N.A. as)
successor to JPMorgan Chase Bank N.A.)
sbm Bank One National Association as)
Trustee for RAMP 2002RS5,)

Plaintiff,)

vs.)

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

Defendants.)

Chartreuse Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

TELEPHONIC 30(b)(6) DEPOSITION OF JEANETTE BAUERLE

(Taken by Plaintiff)

Raleigh, North Carolina

Tuesday, November 13th, 2012

Reported in Stenotype by

Sophie Brock, RPR, CRR

Transcript produced by computer-aided transcription

1 be renewed?

2 A. If the national money processing system
3 doesn't receive charges, it is the norm that it would
4 re-issue the money back out.

5 Q. I'm going to try and play something that will
6 be Exhibit 3. I'll let you know this is actually
7 Bates-stamped NW_0132. It's a portion of a recording
8 that was produced by Nationwide in response to our
9 request for production.

10 I can also let you know that authenticity
11 has -- authenticity of this recording has been
12 stipulated to by GMAC and Nationwide. Let's see if
13 this works.

14 (Recording played.)

15 Q. Can you hear it?

16 A. Not very well.

17 Q. Let me try again. Let me see if this works.
18 I'm having technical difficulties.

19 (Recording played.)

20 BY MS. MOON:

21 Q. Were you able to get most of that?

22 A. Yes, most of it.

23 Q. It's kind of hard because she had kind of
24 a thick accent, but she -- what's your understanding
25 of what that was?

1 questions about it. Objection noted.

2 MS. WILLIAMS: Well, depending on the
3 questions, we may say that's outside of the scope. So
4 we'll see where it's going, but I may say it's outside
5 the scope and instruct her not to answer the question.

6 MS. MOON: I'm not sure you can do that
7 under the Rules, but we'll see.

8 BY MS. MOON:

9 Q. Does this recording consecrate that the
10 payment would be made, to you?

11 MS. WILLIAMS: Objection.

12 BY MS. MOON:

13 Q. Did the recording mention the 993 payment
14 that we have been discussing that was accepted by
15 Nationwide and returned?

16 MS. WILLIAMS: Objection.

17 BY MS. MOON:

18 Q. You have to answer the question.

19 A. The call was not very clear.

20 Q. Did you hear mention of a 993 premium
21 payment?

22 A. I believe I heard her mention what was the
23 original term premium.

24 Q. Did you hear the date that she was discussing
25 as the renewal date?

1 A. I did hear the renewal date.

2 Q. And what was that?

3 A. March 24th, 2011.

4 Q. And did you hear that the policy period for
5 the renewal was 2011 through 2012?

6 MS. WILLIAMS: Objection again. She
7 was -- Ms. Bauerle was not a party to this
8 conversation, but you're asking her to speculate and
9 talk about things that she is not aware of because she
10 was not a party to this particular conversation.

11 MS. MOON: But she --

12 MS. WILLIAMS: The 30(b)(6) did not ask
13 for someone who was familiar with the recording, or
14 someone who --

15 MS. MOON: But familiar with the
16 payment. And the payment --

17 MS. WILLIAMS: And she already explained
18 that the payment came in from the P.O. Box to the
19 Lockbox system. And then, from there, it went on to
20 locate an account. And she explained that as part
21 of -- for purposes of this deposition.

22 And if you wanted someone else, we could get
23 someone else, but for the purposes of this deposition,
24 that's where --

25 MS. MOON: Your objection is noted.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-6103
Appellate Case No. 2013002403

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COURT OF APPEALS

Bank of New York Mellon Trust Company, National
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Company, N.A. as successor to JP Morgan Chase Bank
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Chartrese Grier, Third-Party Plaintiff, Appellant,

v.

Nationwide Property & Casualty Insurance Company;
and Tonya D. Parks, Third-Party Defendants, Respondents.

PROOF OF SERVICE

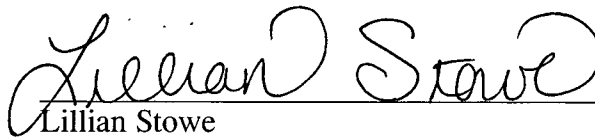
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **RETURN TO APPELLANT'S MOTION TO AMEND THE
RECORD ON APPEAL**

Counsel Served:

M. Alison Moon, Esquire
Sarah E. Brown, Esquire
Moon Law Firm
P.O. Box 3785
Greenville, SC 29608

Michael Geoffrey Wimer, Esquire
Wimer & Associates, P.C. d/b/a Asheville Law Group
349 Haywood Road
Asheville, NC 28806

A handwritten signature in cursive script that reads "Lillian Stowe". The signature is written in black ink and is positioned above a horizontal line.

Lillian Stowe
Administrative Assistant

February 4, 2015

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law
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February 4, 2015

RECEIVED

FEB 04 2015

SC Court of Appeals

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Chartrease Grier, Appellant v. Nationwide Property & Casualty Insurance Company;
and Tonya D. Parks, Respondents
Appellate Case No. 2013-002403
Our File No. 18813/01510

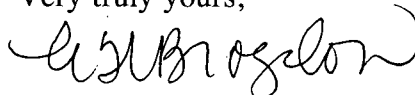
Dear Ms. Kitchings:

Enclosed please find an original and seven copies of Respondents' Return to Appellant's Motion to Amend the Record on Appeal in the above-referenced matter. Please file the original and six copies and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of same, we are hereby serving all counsel of record.

With kindest regards, I remain

Very truly yours,



Elizabeth H. Brogdon

EHC:dh8

cc: M. Allison Moon, Esquire
Sarah E. Brown, Esquire
Michael Geoffrey Wimer, Esquire