

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2012-CP-26-3873

Catalina London Limited f/k/a Alea London Limited..... Respondent

vs.

Elisa Narruhn and R.K.C. Entertainment LLC d/b/a The Red Room..... Appellants

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

This is an appeal from the trial court's order granting Catalina London Limited's Motion for Summary Judgment. The trial court granted the motion on four grounds as follows:

1. The assault and battery exclusion in both the general liability and liquor liability policies purchased by RKC Entertainment, LLC d/b/a The Red Room excludes coverage.
2. The insured's failure to comply with the notice provisions of the policy substantially prejudiced Catalina and thus obviates coverage,
3. The policy was cancelled in accordance with the laws of the State of South Carolina prior to the injury of Narruhn.
4. There was no occurrence to trigger coverage and thus no coverage is available.

STATEMENT OF THE CASE

Elisa Narruhn was a customer at The Red Room (a local nightclub/bar) located in Myrtle Beach, South Carolina. While at The Red Room, and unbeknownst to Narruhn, Ardon Perceval Cato, II, another customer, got into an argument with two men about dancing with a woman. This argument had nothing to do with Narruhn and she did not know Ardon Perceval Cato, II. Cato fired a pistol blindly while under the influence of alcohol into The Red Room. One of those shots ricocheted and struck Narruhn rendering her a paraplegic. Cato was convicted of assault and battery with intent to kill and pled guilty. At his guilty plea he indicated he did not intend to shoot Narruhn.¹

¹ He also denied he knew Narruhn or intended to hurt her at his deposition. (R. ____).

This case has been the subject of extensive litigation in this state. Narruhn filed an action against The Red Room and eventually obtained a Six Million Dollar judgment by the circuit court. (C/A No. 2005-CP-26-4134). (See Order of Judge Baxley dated June 25, 2009, R. _____). Narruhn then filed a lawsuit against Alea London Limited and its insurance agent, Anderson General Insurance Company, after she obtained an assignment of the insurance policy of Alea by Order of a Special Referee. (R. _____). The circuit court allowed the assignment and an appeal was undertaken to the South Carolina Supreme Court. (C/A No. 2010-CP-26-4112). The Supreme Court issued its Opinion finding that the Special Referee could assign any rights against Alea London Limited to Elisa Narruhn and that such procedure was valid under South Carolina law. See *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (S.C. 2013).

Thereafter, Alea London Limited filed a declaratory judgment action in federal court against Narruhn which was dismissed (Case No. 4:11-cv-1661). Alea London Limited then filed this action in state court against Narruhn arguing that there was no liability insurance coverage for The Red Room. The circuit court granted summary judgment and this appeal follows.

STANDARD OF REVIEW

It is well established in South Carolina that summary judgment may not be granted if there is a scintilla of evidence. *Hancock v. Mid-South Management*, 381 S.C. 326, 673 S.E.2d 801 (S.C. 2009)

Appellant asserts that the evidence presented at the summary judgment hearing clearly indicates that there was more than a scintilla of evidence and accordingly the circuit court erred in granting summary judgment.

ARGUMENT

I. The circuit court erred in granting summary judgment under the assault and battery exclusion.

The circuit court in its order granted summary judgment to Alea London based on the assault and battery exclusion which states as follows:

This insurance does not apply to any claim arising out of an assault and/or battery or out of any act or failure to act to prevent or suppress an assault and/or battery whether caused by the insured, an employee, a patron or any other person.

This exclusion applies to all causes of action arising out of an assault and/or battery including but not limited to, allegations of negligent hiring, placement, training or supervision, or to any act, or omission relating to an assault and/or battery.

Appellant asserts that the circuit court's order granting summary judgment on the assault and battery exclusion was error. Respondents cite *Sphere Drake Insurance Co. v. Litchfield*, 313 S.C. 471, 438 S.E.2d 275 (Ct.App. 1993) in support of their argument. In that case, employees of a nightclub intentionally assaulted a patron. The Court held that the assault and battery exclusion prohibited coverage. However, *Sphere* is factually different from the facts and circumstances in this case.

In this case, Cato had no intention of assaulting Narruhn nor did he know her. (Depo. of Cato, p. 6, lines 14-19). Cato had an argument with two other men who were at the club and while under the influence of alcohol fired blindly into the club striking Narruhn with a bullet. (Depo. of Cato, p. 6 lines 14-19; Transcript of guilty plea of Cato, p. 29, lines 5-13).

Cato's deposition was taken where he is currently incarcerated at Lee Correctional Institute. In his deposition, Cato stated he did not know Narruhn (Cato Dep. p. 6, lines 14-19); and that he did not intend to shoot or kill anyone (Cato Dep. p. 7, lines 1-4). It is for

this reason that summary judgment should have been denied. South Carolina recognizes that a criminal conviction is not a binding adjudication of a subsequent civil action based on the same or similar facts. See *Samuel v. Mouzon*, 282 S.C. 616, 320 S.E.2d 482 (S.C. App. 1984); see also *Green v. Boney*, 233 S.C. 49, 103 S.E.2d 732 (1958) (S.C.App. 1984) (“criminal conviction not binding adjudication of subsequent civil action”). See also, *Doe v. Doe*, 346 S.C. 145, 551 S.E.2d 259 (S.C. 2001) (criminal conviction is binding only if the Plaintiff has had a full and fair opportunity to litigate the issue). Thus, the court erred in holding Narruhn was precluded from having a jury decide this case because of Cato’s conviction.²

South Carolina has also recognized on many occasions that exclusions in insurance policies are to be construed strictly and that an intentional act which has unintended consequences is not excluded by a policy of liability insurance. In *Miller v. Fidelity Phoenix Ins. Co.*, 268 S.C. 72, 231 S.E.2d 701 (1977), the Supreme Court was faced with a ten year old who had started a fire which eventually burned a house down. The Court noted the negligence claims in the complaint were not excluded by the intentional acts exclusion in the policy. The Court further held that for an act to be an intentional act excluded by an intentional act exclusion in a policy, the following must be proven: (1) the act which produces the loss must be intentional; and (2) the results of the act must be intended.³ The *Fidelity Phoenix Ins. Co.* case has been consistently reaffirmed as the law of South Carolina in regard to exclusions in insurance policies. Specifically, in order to prove an intentional act exclusion one must prove that the consequences were also intended. Intent is a matter

² Narruhn has never litigated this issue.

³ Cato never “intended to injure Narruhn.

for a jury not summary judgment and based on Cato's deposition responses and guilty plea hearing (R. ____), summary judgment was inappropriate as a matter of law.

The Appellant also directs the Court to *Vermont Mutual Ins. Co. v. Singleton*, 316 S.C. 5, 446 S.E.2d 417 (S.C. 1994). In that case, the special referee found a homeowner's insurance policy applied to a fistfight between two high school boys when the defendant acted in self-defense and did not intend the resulting injury. The Supreme Court affirmed the duty of the insurer to defend the insured and cited *Miller supra*. See also, *Auto Owners Ins. Co. v. Personal Touch Med Spa*, 763 F.Supp. 2d 769 (D.S.C. 2011) (holding an intentional act exclusion in South Carolina is to be interpreted narrowly against excluding coverage) and again citing *Miller v. Fidelity-Phoenix Ins. Co.*, 268 S.C. 72, 231 S.E.2d 701 (1977) (holding the better rule is the results of the act must have been intended).⁴ See also *Allstate v. Biggerstaff*, 703 F.Supp. 23 (D.S.C. 1989) (cadets at The Citadel brought suit for assault and the court found Allstate Insurance Company must defend the insured despite the intentional act exclusion in the policy citing the *Miller* case that injury from any act must be intended.)⁵

It is clear from the evidence and testimony offered at the summary judgment hearing that Narruhn did not know the person who had fired the gun, nor had she had any altercation or argument with anyone at The Red Room. (R. ____). She was there simply trying to enjoy herself with her friends. She did not know nor had she ever met Ardon Cato. (See Affidavit of Narruhn dated Sept. 27, 2013 (Ex. 15 to Response to Motion for Summary Judgment).

⁴ Intent is always a jury issue and cannot be decided on summary judgment.

⁵ The trial court Order finds that intent is not an element of assault. In fact, an assault occurs when a person has been placed in reasonable fear of bodily harm. *Gathers v. Harris Teeter*, 282 S.C. 220, 317 S.E.2d 748 (1984). In this case Narruhn was not in reasonable fear of bodily harm since she had never met Cato nor understood what the commotion was about. See *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct.App. 2008). As a result this was an issue for trial not summary judgment.

(R. ___). Thus, no evidence of intent was offered at summary judgment to harm Narruhn by any party and intent is a required element of an assault and battery.

Other states have considered circumstances similar to this and have found that summary judgment is not appropriate. In *Talley v. MFA Mutual Ins. Co.*, 273 Ark. 269, 620 S.W.2d 260 (1981) the Supreme Court of Arkansas reversed summary judgment for an insurer which contained language that the policy did not cover bodily injury which is either expected or intended from the standpoint of the insurer. The Court held that a fact issue existed as to whether the insured intended to hit or injure the two victims of a shotgun blast. The Court further stated that the crucial question presented was whether a liability policy such as the one in the instant case provides coverage for the unintended results of an intentional act. If so, said the Court, summary judgment was improper because there was a question of fact as to whether the injuries were intended or were merely the unintended result of an intentional act, i.e., shooting at cars.

In *Talley*, the insured left a party about 11 p.m., procured a shotgun, and returned to the house. Some of the guests were outside and he told them to tell the victims to come outside if they still wanted to argue. Shortly thereafter, those at the party heard shots and discovered that the rear windows of the victims' cars, parked in the driveway had been shot out. The insured circled the block and shot at the car windows a second time. The victims at some point took shotguns from the house and went outside in the area of their cars. The insured returned again and fired a third time in the direction of the cars. The insured then drove away and did not return. In a final round of fire, the victims were hit by shotgun blasts, totally blinding one and partially blinding the other. An individual who lived next door to the incident and who witnessed the incident stated that he saw the victims come out

of the house and hide behind the cars before the second round of shooting, at which time a window and fender of another car was damaged.

In a second case, *Perez v. Otero*, 348 So.2d 564 (1977. Fla. App. District 3), the insured filed summary judgment relying on a provision in his homeowner policy that excluded intentional acts from its coverage. The Court reversed partial summary judgment against the insurer in an action by the administrator holding that an issue of fact existed as to whether the insured's act in shooting the youth was negligent or intentional. The administrator alleging negligence in his complaint (similar to what was done in this case), relied on testimony taken from the insured's criminal trial wherein she stated that the shooting of the youth was not an intentional act, but was rather an accident caused by an inadvertent discharge of a gun, which she had allegedly brandished to frighten the youth (similar to what Cato said in his guilty plea). The incident from which the insured was found guilty of second-degree murder occurred while the youth were frolicking in and about her swimming pool without her permission. Despite the conviction, the Florida District Court of Appeals reversed summary judgment holding the matter to be a jury issue.

In a third case, *Gulf Ins. Co. v. Dooley*, 286 F.Supp. 16 (1968 N.D.Ill.), the Court dismissed a declaratory judgment suit filed by an insurer, holding that it had an obligation to defend its minor insured who was involved in an occurrence which caused serious injury to another minor in a state court action filed by the other minor against the insured. The insured was included under his father's homeowner's insurance policy which excluded liability for bodily injury or property damage caused intentionally by or at the direction of the insured. The incident involved the discharge of a pellet gun. The Court concluded that although it might be true that the second count of the complaint fell within the exclusion, the

third count was, on its face, covered by the insurer's policy. The court noted the third count charged the same injuries were caused by negligence of the same parties which was an acceptable alternative pleading.

In *All-Star Ins. Corp. v. Steel Bar, Inc.*, 324 F.Supp. 160 (N.D. Ind. 1971), an action by an insured seeking a declaration that it had no duty to defend or liability as to the tort action of an injured person, the Court granted summary judgment holding that the insurer had a duty to defend, but refused the insured's motion for summary judgment that the insurer was liable to pay any judgment rendered against the insured in the tort action. The policy issued to the insured, a bar, provided liability insurance to it for any occurrence, which was defined as an accident which results in bodily injury neither expected nor intended from the standpoint of the insured. On the night of the incident, three customers in the bar did not want to leave because they had been unable to start their car. Since it was past legal closing time, the owner-operator of the insured bar was anxious to get the customers out of the bar. The owner-operator put the days' receipts in a bag, took out his gun, turned out the lights in the bar, and started to leave while telling the customers he was closing. While he was trying to persuade the customers to leave, a bullet discharged from his gun, struck one of the customers, and then ricocheted into another person. The Indiana Court held that the question of the insurer's ultimate liability to pay would not be determined on insured's motion for summary judgment. The court added that if the jury in the tort action found that the insured person was wounded by a bullet that ricocheted off a person at whom the gun was pointed, or if the jury finds that the owner-operator negligently, but unintentionally, shot the injured person, it would seem highly unlikely under those

circumstances that the owner-operator could be found to have intended or expected the injured person's injury.

In *State Farm Fire & Cas. Co. v. Pildner*, 40 Ohio St. 2d 101, 321 N.E.2d 600 (1974), the court considered a declaratory judgment action brought by a liability insurer to defend a civil action against an insured. In that case, the insured shot a victim and while the criminal charge was pending against the insured, the victim filed a civil suit against him alleging that he was negligently injured by the firing of a rifle shot. In that case, the court reversed an appellate court judgment which declared that the sole fact of a conviction and sentence of the insured for the crime, shooting with intent to wound, was not, in and of itself, finally determinative in law of the separate issue of whether the injury or damage was expected or intended from the standpoint of the insured, and concluded that the trial court was correct in dismissing insurer's complaint for declaratory judgment for failure to state a claim on which relief could be granted.

In *State Farm Fire & Cas. Co. v. Shelton*, 176 Ill. App. 3d 858, 126 Ill. Dec. 286, 531 N.E.2d 913 (1988), the court held that notwithstanding the fact that the insured had been convicted of voluntary manslaughter, where an insured expressly denied intent to harm during a criminal trial, testifying that he fired warning shots into the ground, did not intend to harm the victim, and did not remember firing a fatal shot, harm is not necessarily expected under every set of circumstances and the court in a declaratory judgment action was not compelled to rule that the insured expected bodily injury to be the consequences of his action. Thus, while insurer would be entitled to argue the manslaughter conviction as a defense, the insurer still had a duty to defend the action.

Appellant points this out in her Motion for Reconsideration which was denied by the trial court, a copy of the guilty plea of Ardon P. Cato. In that plea hearing Cato noted:

My intentions were to scare the guys, to kind of let them know, okay, you hit the wrong person, you know. But I was intending to shoot over everyone, maybe hitting the wall or the ceiling. I -- I didn't believe -- I thought -- when I got arrested I thought it would be just a shooting in public charge. I didn't think anyone got hurt.
(Guilty plea Transcript of Record, p. 29, lines 5-13).

Other cases have also held an intentional acts exclusion of an insurance policy is not ripe for summary judgment. See, *Stout v. Underhill*, 734 N.E.2d 717 (Ind.Ct.App. 2000) (holding property owner's shooting of a trespasser was not intentional and that the injuries to trespasser were not expected, such that coverage for trespasser's injuries was not excluded under the policy). See also, *Farmers & Merchants Ins. Co. v. Cologna*, 736 S.W.2d 559 (1987 Mo.App) (jury question presented as to whether insured intended to cause bodily injury within the meaning of the liability policy exclusion for intentional acts, where there was evidence that victim forced his way in and threatened and provoked insured before insured went to get gun); *Agoado Realty Corp. v. United International Ins. Co.*, 95 N.Y.2d 141, 733 N.E.2d 213 (2000) (provision in landlord's liability insurance policy, excluding coverage from bodily injuries expected or intended from the standpoint of the insured, did not apply to murder of tenant by unknown assailant; murder was intentional only from assailant's standpoint); *Merchants Ins. of New Hampshire, Inc. v. Weaver*, 819 N.Y.S.2d 594 (App.Div.3d Dept.2006) (flare gun negligently discharged was within embrace of homeowner's policy despite exclusion for intended acts by insured); *Barry v. Romanosky*, 538 N.Y.S.2d 14 (App.Div.2d Dept. 1989) (patron at discotheque became involved in altercation with bouncers and after being ejected from establishment took 12-gauge shotgun and fired round of buckshot at front door of club, injuring second patron who

was inside, first patron's liability insurer was required to indemnify insured in action brought by second patron, even though policy excluded coverage for bodily injury that was expected or intended).

In summary, case law around the country and in South Carolina holds that a person must intend his act to come within the intentional act exclusion or the assault and battery exclusion and that it is always a jury question. Thus summary judgment was inappropriate in light of the "scintilla standard" for denial of summary judgment.

II. The circuit court erred in holding that the policy of liability insurance in this case was properly cancelled because the insurer was not notified of this lawsuit.

The Respondent obtained summary judgment on a second issue which is the insured's duty to notify under the policy. In this case, The Red Room had a policy of insurance which had liquor and general liability insurance coverage. Once again, this issue was hotly disputed by the parties both at the summary judgment hearing and in the briefs. Narruhn argued and presented to the court the deposition of Robert Hiers who was the agent who sold and serviced the policy to The Red Room. In that deposition Hiers testified that he telefaxed the notice of the lawsuits to agents of the Defendant on October 6, 2008 and that no one ever called him (Hiers Depo. p. 59, lines 17-21); that he didn't get involved with lawsuits (Hiers Depo. p. 59, lines 23-24); and that he did what was required which was to notify them of a claim (Hiers Depo. p. 59, lines 1-25, p. 60, lines 1-2).

Further attached to Hier's deposition was Exhibit 8, a letter from the Law Office of Gerald Huston dated October 6, 2008 to Beth Gaulden, Assistant Vice President of Claims for the Defendants, discussing the issue of notification of this lawsuit. (R. ___)

The Affidavit of Attorney Dwight Hudson (R. ____) was also offered on the issue of notice of the lawsuit to the insurer. Hudson indicated that he was the Plaintiff's original counsel in this case; that Alea London was notified of this loss through its agent, Anderson Insurance Company, who in turn contacted him; that he realized he had a conflict since he had represented Tapco Underwriters; that Tapco Underwriters was aware of the lawsuit and had been advised of the insured's default prior to judgment being entered in this case. (Affidavit of Hudson dated September 25, 2011, R. ____).

The circuit court judge refused to find this was conflicting evidence (and thus an issue of material fact) and deny summary judgment. In fact, Narruhn produced a facsimile from Anderson General Insurance Company to Claims at Tapco (agent of Alea) on October 10, 2008 that stated: "Received this in mail today. Let us know if we need to do anything." (R. ____). Clearly, Tapco as agent of Alea London had actual notice of the lawsuit prior to Judge Baxley's Order granting judgment June 25, 2009 which was well over a year after Hiers sent the fax to Tapco who was the general agent of Alea.

It is disingenuous to argue that The Red Room did not personally advise Alea London when in fact Alea London and its agents already had actual notice of the lawsuit. It is telling that Judge Hyman wrote in his Order on this issue the following:

Catalina does not concede the facsimile was received by Tapco or, if received, that it contained the document alleged. Regardless of whether the fax was received and taking the light most favorable to the non-moving party, there is still no question of fact that the facsimile was not and could never be notice from the insured as required by the clear language of the policy. (See Order of Judge Hyman dated December 11, 2013).⁶

⁶ This argument flies in the face of evidence that the insured's agent sent the lawsuit to the Alea's general agent before judgment. Further, the policy language is ambiguous and does not require only the insured give notice of any pending lawsuit.

Appellant asserts that notice from Hiers, the insurance agent of The Red Room and the person who sold The Red Room the insurance coverage, clearly disputes the notice to the insurer and was an issue of fact and more than a mere “scintilla”. With that in mind, the circuit court erroneously granted summary judgment on disputed facts.

III. The circuit court erred in holding that the insurance policy was cancelled on March 29, 2015.

The third basis for granting summary judgment is that the policy issued to RKC was cancelled effective March 29, 2005 (eleven days before Narruhn was injured). The Appellant believes that this too is a genuine issue of material fact and that cancellation of the policy should not have been granted by summary judgment. S.C. Code § 38-39-90 entitled “Cancellation of Insurance Contract by a Premium Service Company” is applicable in this case. The reason it is applicable is that when The Red Room purchased the insurance it was bought through a premium service company. S.C. Code Ann. § 38-39-90 states as follows:

(a) If a premium service agreement contains a power of attorney enabling the company to cancel an insurance contract listed in the agreement, the insurance contract may not be cancelled by the premium service company unless the cancellation is effectuated in accordance with this section.

(b) The premium service company shall deliver to the insured at least ten days’ written notice of its intent to cancel the insurance contract if there is a default. This notice must be mailed or delivered not more than ten days before the due date.

(c) Not less than five days after the expiration of the notice required pursuant to the provisions of subsection (b), the premium service company may after that time request in the name of the insured cancellation of the insurance contract by delivering to the insurer a notice of cancellation....

During the hearing, Narruhn raised the issue to the circuit court whether the insurance premium service contract which had been entered into by The Red Room was properly cancelled. First, Narruhn pointed out to the court that there was no evidence the

insurance premium service contract was ever signed by Cronic, nor has one been provided or attached to the motion for summary judgment or to the supplementary motion for summary judgment filed on August 15, 2013. (R. ____). If there is no premium service agreement with a properly executed power of attorney signed by the insured then cancellation of the insurance contract would not be legally effective pursuant to the dictates of S.C. Code Ann. § 38-39-90 (2015).

Further, in order for the cancellation to the insured to be binding, the notice must first be delivered or mailed not less than ten days before the due date. There is no evidence in the supplementary motion for summary judgment that the premium service notice of cancellation was ever mailed or delivered and thus there was no cancellation of the insurance contract as a matter of law. (R. ____).

S.C. Code Ann. § 38-39-90(b) requires that the premium service company “deliver to the insurer a notice of cancellation.” In fact, the exhibit attached to Alea’s motion for summary judgment was not delivered to Alea London Limited, which had the insurance on The Red Room, but was instead sent to Tapco Underwriters. Tapco Underwriters is not the insurer on this policy. Tapco is apparently an agent of Alea and did not write the coverage in this case. (See Exhibit 8 to Defendant’s Response to Motion for Summary Judgment entitled Notice of Cancellation and Exhibit 9 showing Alea London Limited as the insurer.)

It is without question that The Red Room entered into a policy of insurance by financing through a premium service company. (R. ____). It is further without question that the owner of The Red Room (Cronic) never filed or signed a power of attorney. (R. ____). Because the requirements of S.C. Code Ann. § 38-39-90(a)(b)(c) were not complied with,

the circuit court should not have granted summary judgment and the policy in question was in full force and effect on April 9, 2005 when the injury occurred to Narruhn.

Further Appellant brings to the Court's attention a case on point entitled *South Carolina Insurance Co. v. Brown*, 280 S.C. 574, 313 S.E.2d 348 (S.C.App. 1984). In that case, the question was whether or not a premium finance company effectively cancelled a liability insurance policy under the predecessor statute to S.C. Code Ann. § 38-39-90. The prior statute, S.C. Code Ann. § 38-27-100, is identical to S.C. Code § 38-39-90 and the appellate court found that "the clear intent of this statute is as applied to this case that the premium service company was required to mail a notice to Brown of the arrearage and that if not paid the premium service company would cancel the policy." The court further noted "the record shows the notice to effectuate cancellation was not addressed to insurance company and insurance company offered no evidence that the notice to affect cancellation was mailed to insurance company as required by statute. (280 S.C. 574).

Accordingly, the *South Carolina Insurance Co.* case holds that if a statute is "clear and unambiguous the courts must apply its literal meaning." Because the premium service company in this case did not follow the statute, the policy was not appropriately and properly cancelled and accordingly, the circuit court should not have granted summary judgment in this case. See *South Carolina Insurance Co. v. Brown*, 280 S.C. 574, 313 S.E.2d 348 (S.C.App. 1984).

IV. The circuit court erred in holding that no occurrence had arisen under the policy.

The final reason the court granted summary judgment was that there was no "occurrence" under the policy and that this was not an accident. Alea London's insurance policy provides the definition for occurrence as follows: "Occurrence means an accident

including continuous or repeated exposure to substantially the same general harmful conditions.” (R. ____).

The circuit court’s decision holds that there is no occurrence under the policy because Cato pled guilty to assault and battery with intent to kill. However, the Court’s opinion impermissibly makes a ruling on factual matters. Cato has repeatedly indicated he did not intend to shoot Narruhn (R. ____) and Narruhn has repeatedly indicated that she did not know Cato. (R. ____). Thus, from the point of the victim (Narruhn) this was an occurrence since it was not an intentional act by Cato to shoot Narruhn. His testimony being that he only intended to shoot over the heads of the individuals he was fighting with in the bar. Further, it was without a doubt that Narruhn qualifies for” bodily injury” under the policy which means “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.”

The circuit court’s decision in this case is contra to *Samuel v. Mouzon*, 282 S.C. 616, 320 S.E.2d 482 (S.C. App. 1984) which holds that a criminal adjudication is not binding on a subsequent civil action. Further in *Doe v. Doe*, 346 S.C. 145, 551 S.E.2d 257 (S.C. 2001), the Supreme Court had the opportunity to discuss whether a criminal conviction was binding on a Plaintiff who was not a party. In the *Doe* case, the Plaintiff had been convicted of a crime and was bringing a civil action for damages. The Court took the opportunity to note that in order for a criminal conviction to be binding in a civil action the Plaintiff must have had a full and fair opportunity to contest the prior determination. (*Doe*, 551 S.E.2d at 258.) Here, Narruhn, of course, has had no such opportunity as she was not a party to the criminal litigation regarding Cato. Further, at Cato’s guilty plea and in his deposition he repeatedly denied an intent to shoot Narruhn. (R. ____).

Appellant also points out *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (S.C. 2008). In *Zurcher*, a civil action was brought for damages regarding a physical altercation between the parties. The trial court granted Defendant's motion for summary judgment as to each claim on the grounds that Zurcher's Alford plea in a prior criminal proceeding collaterally estopped him from litigating a civil case based on the same facts.

The Supreme Court held: "Accordingly, we hold that a defendant who enters a guilty plea may be collaterally estopped from litigating this same issue in a subsequent civil suit."

The Court further noted that Zurcher had a full and fair opportunity to litigate the criminal assault and battery charge and thus precluded him from bringing a civil suit. Appellant suggests that because Narruhn did not have an opportunity to litigate the criminal matter and because Cato specifically denied an intent to injure Narruhn that the order of the circuit court was not binding on Narruhn and that a genuine issue of material fact was present.

This reasoning is found in the Court of Appeals opinion entitled *Carrigg v. Cannon*, 347 S.C. 75, 552 S.E.2d 767 (S.C.App. 2001). In that case, a deputy sheriff pled guilty to reckless driving and the circuit court granted plaintiff's motion for summary judgment arguing that the sheriff (Cannon) was collaterally and judicially estopped from disputing liability. The Court noted:

Since Cannon was not a party to the guilty plea proceeding, either personally or in his official capacity, the question arises whether judicial estoppel may be evoked against him if he is indeed in privity with Heider [the deputy]. South Carolina law does not specifically address this question, although some authority exists for extending the concept of judicial estoppel to parties in privity.

The court then went on to hold that Cannon and his deputy were not in privity for the purpose of applying judicial estoppel and as a result the grant of summary judgment was reversed.

Thus, Appellant believes the Court improperly weighed the evidence at summary judgment instead of finding whether or not there was an absence of a genuine issue of material fact. South Carolina's courts have specifically defined "occurrence" as an accident or unintended result. Here, the record shows Cato did not know Narruhn (R. _____), did not have an altercation with Narruhn (R. _____) and did not intend to shoot her (R. ____). Thus, as to Narruhn, this was unintended result. The bodily injury to Narruhn was neither expected nor intended and thus qualified as an occurrence. Accordingly, the circuit court's decision should be reversed on this ground.

CONCLUSION

For the reasons listed above, this Court should reverse the grant of summary judgment by the circuit court because of the numerous issues of material fact. Narruhn was not in privity with Cato. Narruhn has not had a chance to litigate the issue of the unintended result of the shooting and Narruhn has direct evidence from Cato at the guilty plea and in his deposition that he did not intend to shoot Narruhn. It is for these reasons that the Court should reverse summary judgment and bind this matter over for trial.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.A.

A handwritten signature in black ink, appearing to read "Gene M. Connell, Jr.", written over a horizontal line.

Gene M. Connell, Jr. (S.C. Bar No. 1358)

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Attorney for Appellant

March 20, 2015
Surfside Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2012-CP-26-3873

Catalina London Limited f/k/a Alea London Limited..... Respondent

vs.

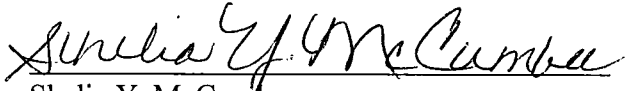
Elisa Narruhn and R.K.C. Entertainment LLC d/b/a The Red Room..... Appellants

PROOF OF SERVICE

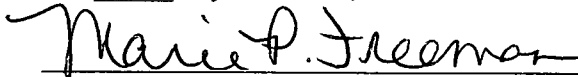
PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Initial Brief of Appellants** on Respondent, through attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Mark V. Gende, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 12129
Columbia, SC 29211

DATE OF MAILING: March 20, 2015


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 20th day of March, 2015.


Notary Public for South Carolina
My Commission Expires: 6/11/24

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served Appellants' **Designation of Matter to be Included in Record on Appeal** on Respondent, through attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Mark V. Gende, Esquire
Sweeny Wingate & Barrow, P.A.
P.O. Box 12129
Columbia, SC 29211

DATE OF MAILING: March 20, 2015

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 20th day of March, 2015.

Marie P. Freeman
Notary Public for South Carolina
My Commission Expires: 6/11/24