

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

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err in granting summary judgment because the assault and battery exclusion of the insurance policy excluded coverage?
2. Did the circuit court err in granting summary judgment because the insured failed to comply with the notice requirements of the policy?
3. Did the circuit court err in granting summary judgment because the insurance policy was cancelled on March 29, 2005?
4. Did the circuit court err in granting summary judgment because there was no occurrence, as required for coverage under the policy?

STATEMENT OF THE CASE

Catalina London Limited, f/k/a Alea London Limited (“Catalina”), initiated a declaratory judgment action to determine whether coverage existed for RKC Entertainment LLC d/b/a The Red Room (“RKC” or “The Red Room”) concerning an incident during which Ms. Elisa Narruhn (“Narruhn”) was shot while a patron at The Red Room, a nightclub in Myrtle Beach. R.

3.

In the early morning hours of April 9, 2005, Ardon Percival Cato II (“Cato”) fired several rounds from a 9mm handgun into The Red Room. Narruhn was struck and seriously wounded, suffering a spinal injury rendering her paraplegic. Cato was arrested, charged, and ultimately pled guilty to the crime of assault and battery with intent to kill. R. 278-80.

Through its general agent, Tapco Underwriters, Inc. (“Tapco”), Catalina issued to RKC insurance policy number ALT 47106, covering the period of December 9, 2004 through December 9, 2005. R. 195-98. The Policy contained commercial general liability and commercial liquor liability parts. R. 198. Both parts included the identical exclusion for assault

and battery, as quoted infra, p. 3. RKC never notified Tapco or Catalina of the assault or any related lawsuit.

RKC financed the policy premium through Charleston Premium Finance Company, agreeing to make a down payment and eight monthly payments due on the ninth of each month beginning January 9, 2005. RKC made its January and February payments. Both payments, however, were late and included payment of a late fee. Thereafter, RKC made no other payments. On March 14, 2005, in response to RKC's non-payment, a Ten Day Notice of Intent to Cancel was sent to RKC. RKC made no response, and the policy was cancelled on March 29, 2005. R. 138-39. The policy was cancelled eleven days before Cato assaulted Narruhn.

On April 5, 2013, Catalina moved for summary judgment on its declaratory judgment action. R. 59-60. Catalina's summary judgment motion consisted of several filings: (1) a motion for summary judgment, R. 59-60; (2) a supplemental motion for summary judgment R. 132-143; (3) a memorandum of law in support of its motion for summary judgment R. 144-184; (4) a memorandum of law in support of its supplemental motion for summary judgment R. 185-266; and (5) a supplemental memorandum of law in support of Catalina's first motion for summary judgment R. 267-288.

The four grounds on which Catalina sought summary judgment were: (1) the assault and battery exclusion precluded coverage; (2) the insured's violation of the notice and cooperation requirements of the policy substantially prejudiced Catalina and obviated coverage; (3) the policy was cancelled before the assault on Narruhn; and (4) there was no occurrence under the policy because there was no accident.

On October 3, 2013, the circuit court heard extensive arguments on Catalina's motion. R. 746-795.

On December 17, 2013, the circuit court entered its order granting Catalina's motion on all four grounds. R. 1-13.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE ASSAULT AND BATTERY EXCLUSION EXCLUDES COVERAGE.

A. This Court's Holding in Sphere Drake v. Litchfield governs this case.

The assault and battery exclusion in the Catalina policy purchased by RKC states:

EXCLUSION – ASSAULT AND BATTERY

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, error or omission relating to an assault and/or battery.

R. 84 and 130.

In Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993) this Court addressed the application of an assault and battery exclusion essentially identical to the Catalina exclusion.

Sphere Drake addressed the physical beating of a nightclub patron by another patron and three or four employees of a Summerville nightclub. When the club owners made a claim and demand for a defense, their insurance company declined to defend, relying on the assault and battery exclusion in its policy. That assault and battery exclusion stated:

ASSAULT AND BATTERY EXCLUSION

Notwithstanding anything contained herein to the contrary, it is understood and agreed that this policy excludes claims arising out of Assault and Battery, whether

caused by or at the direction of, the insured, his employees, patrons of [sic] any cause whatsoever.

313 S.C. at 473, 438 S.E.2d at 277.

The trial court in Sphere Drake declined to enforce the assault and battery exclusion, “because it was ambiguous, oppressive, and no reasonable insured would agree to it.” Id. The Court of Appeals reversed, holding the assault and battery exclusion “. . . unambiguously applies to the claim at issue here. In readily understandable language, it excludes claims arising out of assault and battery, no matter what the cause.” Id. at 473-4, 438 S.E.2d at 277.

A side-by-side comparison of the Sphere Drake exclusion with the Catalina exclusion demonstrates the Catalina exclusion is at least as understandable and unambiguous as the Sphere Drake exclusion, and perhaps even more understandable and unambiguous.

Sphere Drake

Notwithstanding anything contained herein to the contrary, it is understood and agreed that this policy excludes claims arising out of Assault and Battery, whether caused by or at the direction of, the insured, his employees, patrons of [sic] any cause whatsoever.

Catalina

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, error or omission relating to an assault and/or battery.

The Court of Appeals in Sphere Drake stated that when a contract is unambiguous and clear it must be understood according to the plain, ordinary language of the agreement without rewriting the agreement to find coverage when the parties have not contracted for it. That Court held:

Parties to a contract of insurance have the right to make their own contract. It is not the function of the courts to rewrite or torture the meaning of the policy to extend coverage. *Gambrell v. Travelers Insurance Cos.*, 280 S.C. 69, 310 S.E.2d 814 (1983). The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract. If the language is clear and unambiguous, the language alone determines the contract's force and effect. *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct.App.1992). When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988). The court is limited to the interpretation of the contract made by the parties, regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their rights carefully. The court is without authority to alter a contract by construction or to make a new contract for the parties. *Id.*

313 S.C. at 473, 438 S.E.2d at 277.

Therefore, in the instant matter, the circuit court followed primary authority and mandatory South Carolina law in holding Catalina's assault and battery exclusion is unambiguous, clear, and enforceable as written.¹

Moreover, courts in other jurisdictions routinely hold assault and battery exclusions to be unambiguous and enforceable in relatively similar situations.²

¹ See also, *USF Ins. Co. v. D&J Enterprises, Inc.* No. 0:09-2510-CMC (U.S. Dist. Ct, Rock Hill, S.C., June 3, 2010)(C. Currie), 2010 WL 2232211 at 5 ("As a matter of state law, Watt's display of the firearm during the course of his robbery was an assault on all present and his shooting of Lord was a battery **It follows that Lord's claims are excluded from coverage under the broad and unambiguous [assault and battery] exclusion in USF's policy**") (emphasis added).

² See, e.g. *Hermitage Ins. Co. v. Sportsmen's Athletic Club*, 578 F.Supp.2d 399, 403 (D. Conn. 2008) (patron of nightclub shot four other patrons. Insurer had no duty to defend or indemnify as, *inter alia*, assault and battery exclusion applied and excluded all coverage for underlying claims); *Levelle, Inc. v. Scottsdale Ins. Co.* 539 F.Supp.2d 373 (D.D.C. 2008) (assault and battery exclusion applied to exclude coverage for fatal stabbing in insured tavern; claim based on tavern owner's failure to train and supervise employees and negligently failing to search incoming patrons for weapons); *Terra Nova Ins. Co. v. Nanticoke Pines, Limited*, 743 F.Supp. 293, 297 (D. Del. 1990) (assault and battery exclusion was effective to preclude coverage where patron was shot by security guard. Despite allegations of negligent hiring, supervision and security, injury was caused by assault); *Eady v. Capital Indem. Corp.*, 502 S.E.2d 514, 515 (Ga. Ct. App. 1998) (assault and battery exclusion in tavern's CGL policy excluded coverage for

injuries to two patrons shot by third patron, even if they were not intended targets); Essex Ins. Co. v. Fieldhouse, Inc., 506 N.W.2d 772, 774 (Iowa 1993) (claims against insured based on one patron's assault on another, triggering assault and battery exclusion; injuries would not have occurred but for assault); L.A. Connection v. Penn-America Ins. Co., 843 N.E. 2d 427, 433 (Ill. Ct. App. 2006) (insurer had no duty to defend bar owner in wrongful death action arising out of fatal gunshot on dance floor); First Financial Ins. Co. v. Bugg, 962 P.2d 515, 524-26 (Kans. 1998) (assault and battery exclusion not ambiguous despite lack of definition; "Courts analyzing this issue have consistently held that the theory of liability is irrelevant when the injuries arise out of an assault and battery. Thus, the negligence claims do not affect the applicability of the assault and battery exclusion" (citation omitted)); Proshee v. Shree, Inc., 832 So.2d 939, 941 (La. Ct. App. 2005) (assault and battery exclusion clear and unambiguous and precluded coverage for patron's negligence claim when injuries caused by assault and battery); First Financial Ins. Co. v. LaRosa, 726 N.E. 2d 978, 979 (Mass. Ct. App. 2000) (assault and battery exclusion unambiguously precluded coverage to insured premises owner in underlying negligence action for an intentional shooting, by independent third persons, of a visitor to the premises); First Financial Ins. Co. v. GLM, Inc., 88 F.Supp.2d 425, 427 (D. Md. 2000) (insurer had no duty to defend or indemnify insured nightclub operator in suit by patron who was stabbed by another patron; assault and battery exclusion precluded claims for negligent hiring and failure to provide security services); Kabanuk Diversified Investments, Inc. v. General Credit Ins. Co., 553 N.W.2d 65, 70 (Minn. App. 1996) (assault and battery exclusion unambiguously relieved insurer of duty to defend suit by victim of assault outside nightclub; claim of infliction of emotional distress precluded by assault and battery exclusion); Train Wreck West, Inc. v. Burlington Ins. Co., 235 S.W. 3d 33, 36 (Mo. Ct. App. 2007) (assault and battery exclusion not ambiguous, effective to preclude coverage and indemnity in suit alleging bouncers pushed patron and her friend out the door); Cullop v. Sphere Drake Ins. Co., 129 F.Supp.2d 981, 982 (S.D.Miss. 2001) (assault and battery exclusion clearly and unambiguously excluded coverage and thereby precluded duty to defend/indemnify in suit alleging off-duty employee assaulted patron); Stafford v. T.H.E. Ins. Co., 706 A.2d 785, 789 (N.J. Super A.D. 1998) (assault and battery exclusion unambiguously precluded coverage for patrons' or employees' firing gun in restaurant); Shanna Golden, Limited v. Tower Ins. Co. of New York, 769 N.Y.S.2d 44, 45 (N.Y. App. Div. 2003) (insurer had no duty to defend/indemnify insured tavern owner against patron's dram shop action after patron was shot by fellow patron because of exclusions – including that for assault and battery – in policy); Carter v. Adams, 877 N.E.2d 1015, 1018 (Ohio Ct. App. 2007) (insurer had no duty to defend/indemnify action by patron who was shot eight times by another patron); Acceptance Ins. Co. v. Seybert, 757 A.2d 380, 382 (Pa. Super. 2000) (insurer had no duty to defend insured against patron's claim that five other patrons beat him in parking lot; notwithstanding allegations of negligence, assault and battery exclusion applied regardless of location); Anglo American Ins. Co., Limited v. Shooters at Indian Point, Inc., 959 F.Supp. 115, 116 (D.R.I. 1997) (assault and battery exclusion clearly and unambiguously precluded coverage for insured tavern owner where patron was fatally assaulted by unknown persons; negligent supervision claim does not preclude application of assault and battery exclusion); Acceptance Ins. Co. v. Walkingstick, 887 F.Supp. 958, 962 (S.D. Tex. 1995) (assault and battery exclusion, *inter alia*, barred coverage for wrongful death and survival action arising from patron's shooting spree in insured country club); McAllister v. Agora Syndicate, Inc., 11 P.3d 859, 860 (Wash. Ct. App. 2000) (assault and battery exclusion was unambiguous in its application to plaintiff who was injured in fight with another

The circuit court's order granting Catalina's motion for summary judgment also pointed out a serious deficiency in Appellant's argument in opposition. The Court stated:

In seeking to avoid the application of the assault and battery exclusion, Ms. Narruhn relies on Mr. Cato's deposition testimony that he did not "intend" to shoot Ms. Narruhn, arguing that the issue of intention creates a question of fact for a jury. She cites a number of cases seeking to support her proposition. However, each of the cases relied upon by Narruhn concerns the application of an intentional acts exclusion, and not the application of an assault and battery exclusion. Catalina's argument is grounded in the policy's assault and battery exclusion.

Order, p.4; R. 4 (emphasis added).

In her brief to this Court, Appellant continues to rely on numerous cases involving exclusions for intentional acts rather than an assault and battery. These exclusions are different and cannot be conflated or used interchangeably. On pages 4-10 of her brief, Narruhn cites 15 cases, the majority of which do not reflect South Carolina law and address intentional acts exclusions rather than exclusions for assault and battery.³

nightclub patron; insured's negligence could not be established without first proving the assault); Berg v. Schultz, 526 N.W.2d 781, 782 (Wis. Ct. App. 1994) (insured had no duty to defend patron's claim alleging insured tavern owner was negligent in failing to protect him from assault by another patron; assault and battery exclusion was unambiguous and applied to any damages arising out of assault or battery, including those alleged to result from tavern owner's negligence).

³ See, e.g. Miller v. Fidelity Phoenix Ins. Co., 268 S.C. 72, 231 S.E.2d 701 (1977) (the premier S.C. intentional acts exclusion case); Vermont Mut. Ins. Co. v. Singleton By & Through Singleton, 316 S.C. 5, 7, 446 S.E.2d 417, 419 (1994) (issue on appeal: "whether when construing a homeowners policy's 'intentional act exclusion,' this Court should adopt the intentional analysis as announced by the Court of Appeals"); Auto Owners Ins. Co. v. Pers. Touch Med Spa LLC, 763 F.Supp.2d 769, 780 (D.S.C. 2011) ("One of the exclusions advanced by Auto Owners states that there is no coverage for 'bodily injury...expected or intended from the standpoint of the insured,'" dealing with an intentional acts exclusion); Allstate v. Biggerstaff, 703 F.Supp. 23 (D.S.C. 1989) (intentional act exclusion); Talley v. MFA Mut. Ins. Co., 620 S.W. 260 (Ark. 1981) ("whether a liability policy...provides coverage for the unintended consequences of an intentional act"); Perez v. United States Fidelity & Guaranty Co., 348 So.2d 564 (Fl. Ct. App. 1977) ("...estate of youth who had been...shot...brought suit against insured...on policy excluding coverage of intentional acts.")

The Appellant started her argument by quoting Catalina's assault and battery exclusion, Brief, p. 3, but she ended her argument by conflating the assault and battery exclusion with the intentional acts exclusion, stating, "...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 is always a jury question" (Appellant's Brief, p.11). This is a misstatement of South Carolina law, is not supported by any of the cases she puts forth, and is contrary to Sphere Drake.

Additionally, the circuit court's Order recites several deficiencies with the Appellant's contention that an intentional acts exclusion may be conflated with an assault and battery exclusion. The Court held:

First, the intentional acts exclusion is entirely different than the assault and battery exclusion on which Catalina relies, because the assault and battery exclusion has no inherent requirement for intentionality. Second, the tort of battery has no requirement that the unauthorized contact with another person be intentional. Mellen v. Lane, 377 S.C. 261, 277, 659 S.E.2d 236, 245 (Ct. App. 2008). Third, even if intent was an element of battery, the assailant's guilty plea to assault and battery with intent to kill establishes, as a matter of law, that he had a specific intent to harm.

Order, p. 4; R. 4.

Finally, Appellant in her brief suggests the instant case should be distinguished from Sphere Drake, because in Sphere Drake the assault and battery was committed by employees whereas in the instant matter it was committed by a patron. (Appellant's Brief, p. 3). First, that observation is factually incorrect. In Sphere Drake the assault and battery was committed by a patron and employees. 313 S.C. at 472, 438 S.E.2d at 276. Second, even if the observation were correct, it would be a distinction without a difference, because both the Sphere Drake and Catalina assault and battery exclusions apply to employees, patrons, or any other person. See assault and battery exclusion language, supra, p. 3.

Therefore, the circuit court's holding that the assault and battery exclusion is not ambiguous and is enforceable as written should be affirmed.

B. The Facts of this Case are Directly within the Purview of the Assault and Battery Exclusion.

Catalina's assault and battery exclusion states the policy provides no insurance for any claim arising out of an assault **and/or** battery, regardless of who commits the offense.

Here, both the person who fired the shot and the person who was hit by the bullet admit there was an assault.

1. Cato's Guilty Plea to Assault and Battery with Intent to Kill is Dispositive as to the assault and as to intent, if necessary, which is not conceded.

The man who fired the weapon, Cato, admitted he assaulted Narruhn by pleading guilty to assault and battery with intent to kill. R. 280.

Cato's conviction for assault and battery with intent to kill via a guilty plea estops any later testimony to the effect that he did not intend to harm Narruhn. Doe v. Doe, 346 S.C. 145, 148-49, 551 S.E.2d 257, 258-59 (2001) ("We now adopt the rule that once a person has been criminally convicted he is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction.").⁴ That his conviction came by a guilty plea rather than a jury determination in a contested trial makes no legal difference. Zurcher v. Bilton, 379 S.C. 132, 136, 666 S.E.2d 224, 226 (2008) ("We find no legal or practical justification for excluding guilty pleas from the ambit of the doctrine of collateral estoppel.").

⁴ It should be noted that Doe v. Doe abrogated Samuel v. Mouzon, 282 S.C. 616, 320 S.E.2d 482 (Ct. App. 1984), which Appellant cites for the contrary proposition of law in her Brief, pp. 4, 16.

Ms. Narruhn argues estoppel is not applicable under the facts of this case, but cites no South Carolina case law to contradict the rules expressed in Doe and Zurcher. Therefore, Cato's later, self-serving statements about his lack of intent are of no legal effect.

2. Narruhn's pleadings and answers to requests to admit judicially and collaterally estop her from now being able to assert that she was not the victim of an assault.

Narruhn admitted or pled numerous times that she was assaulted at the Red Room by Cato. In her Amended Complaint in her tort action against RKC Entertainment and Cato, filed August 26, 2005, Case No. 2005-CP-26-4134, Narruhn asserted:

¶ 6 "While in The Red Room on said date, Plaintiff was assaulted by Defendant Cato (emphasis added)."

¶ 7 "Defendant Red Room did or should have foreseen the assault against Plaintiff... (emphasis added)."

¶ 8 "Defendant Red Room was negligent, grossly negligent, reckless...

c. In failing to employ sufficient...guards who could have...prevented the assault (emphasis added).

d. In failing to intervene to stop the assault...before Plaintiff was assaulted (emphasis added)."

R. 163-164.

Responding to Requests to Admit, Ms. Narruhn answered as follows:

1. Admit that the document attached hereto as Exhibit A is a true and accurate copy of the Amended Complaint filed by Elisa Narruhn in Case No. 2005-CP-26-4134.

ANSWER: Admitted.

2. Admit that in Paragraph 6 of Exhibit A, Elisa Narruhn alleges that Ardon Perceival Cato, II assaulted her (emphasis added).

ANSWER: Admitted.

3. Admit that, in accordance with Paragraph 9 of Exhibit A, the assault perpetrated on Ms. Narruhn by Mr. Cato involved Mr. Cato shooting Ms. Narruhn with a firearm (emphasis added).

ANSWER: Admitted.

5. Admit, but for the alleged assault perpetrated upon Ms. Narruhn by Mr. Cato, Ms. Narruhn would not have sustained the injuries she complains of in the Complaint attached hereto as Exhibit A (emphasis added).

ANSWER: Admitted.

R. 182-83.

Ms. Narruhn should be estopped from now contradicting these pleading statements and admissions, either by judicial estoppel or collateral estoppel.

Black's Law Dictionary defines "judicial estoppel" as:

Judicial estoppel. Under the doctrine of "judicial estoppel," a party is bound by his judicial declarations and may not contradict them in a subsequent proceeding involving same issues and parties. *Sailes v. Jones*, 17 Ariz. App. 593, 499 P.2d 721, 726. Under this doctrine, a party who by his pleadings, statements or contentions, under oath, has assumed a particular position in a judicial proceeding is estopped to assume an inconsistent position in a subsequent action. *Yarber v. Pennell*, Tex. Civ. App., 443 S.W.2d 382, 384.

Black's Law Dictionary (5th ed. 1979).

South Carolina has specifically chosen to apply this doctrine in situations like that at hand. Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 251-52 489 S.E.2d 472, 477 (2003) ("We now explicitly adopt the doctrine of judicial estoppel as it relates to matters of fact (not law). In order for the judicial process to function properly, litigants must approach it in a truthful manner.") In the instant action Narruhn seeks to change her position as to the central fact of whether she was the victim of an assault. This Court should judicially estop her from doing so.

Alternatively, she should be collaterally estopped from asserting that she was not assaulted. In her original Complaint in C.A. No. 05-CP-26-4134 ("case 4134"), filed August 4,

2005, against RKC and Cato, she alleged that Cato assaulted her and that RKC failed “to employ security guards or ‘bouncers’ who could have controlled Defendant Cato and thereby [prevented] the *assault*” and failed to “intervene to stop the *assault* or call the police when Plaintiff was *assaulted*” (emphasis added). R. 164.

Narruhn secured a default judgment in case 4134. She was awarded a \$6,000,000 default judgment against RKC. R. 325-327. Having obtained an award based upon a complaint that pled she was assaulted by Mr. Cato, Narruhn now should be collaterally estopped from asserting as a fact something that contradicts the allegations that led to Court’s award in Case 4134.

In summary, the central fact in this case – previously established by the actions and words of Cato and Narruhn – is that Cato assaulted Narruhn. That fact brings the situation directly and completely within the purview of the assault and battery exclusion in Catalina’s policy.⁵ The circuit court was correct in holding the policy’s assault and battery exclusion causes Catalina “to have no duty to defend or indemnify RKC for Ms. Narruhn’s injury” and in granting summary judgment. Order, p. 5; R. 5.

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE INSURED FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF THE POLICY.

Catalina’s insurance policy imposed notice duties on RKC, as follows:

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

⁵ See also, USF Ins. Co. v. D & J Enterprises, Inc. No. 0:09-2510-CMC (U.S. Dist. Ct, Rock Hill, S.C., June 3, 2010)(C. Currie), 2010 WL 2232211 at 5 (“Even if Watt’s intent was relevant, it would be enough that he intended to commit an assault or battery on someone, not that Lord was the specifically intended target. ... **As a matter of state law, Watt’s display of the firearm during the course of his robbery was an assault on all present and his shooting of Lord was a battery** It follows that Lord’s claims are excluded from coverage under the broad and unambiguous [assault and battery] exclusion in USF’s policy”) (emphasis added).

a. You [**the insured**] must see to it that we are notified as soon as practicable of an “occurrence” or an offense which may result in a claim. To the extent possible, notice should include:

- (1) How, when and where the “occurrence” or offense took place;
- (2) The names and addresses of any injured persons and witnesses; and
- (3) The nature and location of any injury or damage arising out of the “occurrence” or offense.

b. If a claim is made or “suit” is brought against any insured, you [**the insured**] must:

- (1) Immediately record the specifics of the claim or “suit” and the date received; and
- (2) Notify us as soon as practicable.

You [**the insured**] must see to it that we receive written notice of the claim or “suit” as soon as practicable.

c. You [**the insured**] and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or “suit”;
- (2) Authorize us to obtain records and other information;
- (3) Cooperate with us in the investigation or settlement of the claim or defense against the “suit”; and
- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

R. 99.

Where the insured fails in its duty to notify the insurer of a claim or suit, South Carolina law recognizes the possibility of prejudice to the insurer substantial enough to deny coverage.

The purpose of a notification requirement is to allow for investigation of the facts and to assist the insurer in preparing a defense. *Washington v. National Service Fire Ins. Co.*, 252 S.C. 635, 168 S.E.2d 90 (1969). Where the rights of innocent parties are jeopardized by a failure of the insured to comply with the notice requirements of an insurance policy, the insurer must show substantial prejudice to the insurer's rights. *Factory Mut. Ins. Co. v. Kennedy*, 256 S.C. 376, 182 S.E.2d 727 (1971)

Vermont Mut. Ins. Co. v. Singleton, 316 S.C. 5, 12, 446 S.E.2d 417, 421-22 (1994). The burden is on the insurer to show substantial prejudice by a preponderance of the evidence. Id.

Cato shot Narruhn in the Red Room in the early morning hours of April 9, 2005. Narruhn filed suit against RKC and Cato on August 4, 2005. R. 283. RKC, owned and operated by Mr. Richard C. Cronic ("Cronic"), never notified Catalina or its general agent, Tapco, of the incident or of the suit. When RKC did not file an answer, the court found it to be in default.

Narruhn obtained a \$6,000,000 default judgment against RKC and Cato. R. 166-168. The matter was then assigned to special referee for supplemental proceedings. The special referee held a hearing on February 9, 2010. R. 329. Catalina received no notice of it and was, therefore, unrepresented before the special referee. On March 8, 2010, the special referee entered an order that, among other things, assigned to Narruhn any rights of RKC to pursue claims against Catalina. R. 330. Based on this authority, on May 11, 2010, Narruhn filed a bad faith action against Catalina seeking to collect the \$6,000,000 default judgment and alleging bad faith, failure to defend, negligence, and unfair trade practices. R. 588-593.

It was only after service of the summons and complaint for the May 2010 lawsuit that Catalina learned of the April 2005 incident, the August 2005 lawsuit, the \$6,000,000 default judgment, and the March 2010 supplemental proceedings.

Catalina provided two affidavits as evidence in support of its contention that it had received no notice from RKC of the incident or the subsequent suit.

Mr. W. P. Pinson, Executive Vice President and Chief Underwriting Officer of Tapco, which is the surviving entity created as a result of the merger of Tapco Premium Underwriters, Inc. and Charleston Premium Finance Company, on behalf of both Tapco and the former Charleston Premium Finance, stated in his affidavit:

13. R.K.C. never notified Tapco of Elisa Narruhn's 2005 suit against R.K.C., the entry of a default judgment against R.K.C., or any supplemental proceedings against R.K.C.

R. 258.

Mr. Andrew Hayward, a London-based representative of Catalina, stated in his affidavit:

6. RKC did not conform to the notification or cooperation provisions of the policy so Alea London was not aware of the incident until an action was filed in 2008 against the lessor of the property.⁶ RKC Entertainment and its registered agent, Cronic, have not cooperated with Alea London regarding this shooting at any time.

7. Alea London, not having been given notice, or informed, of the hearing before the special referee for supplementary proceedings, or of the intention of Plaintiff's counsel to seek an assignment against Alea, had no one at that hearing to protect its interests.

R. 141.

Because RKC failed to comply with the policy notice provisions, Catalina suffered substantial prejudice. First, Catalina was not able to investigate the facts or prepare a defense to Narruhn's claims during the days, months, or even years following the 2005 suit and was not on notice to begin any investigation until Narruhn's 2010 suit. Second, Catalina became subject to a \$6,000,000 default judgment plus interest compounded at the legal rate since July 9, 2009, R. 168, which is far in excess of the applicable policy limits, for a matter in proceedings about which they had no notice, R. 141, 258, and, therefore, no representation. Third, through assignment of RKC's rights to Narruhn, R. 170, Catalina became subject to a bad faith claim by Narruhn, R. 588-593, a third party to the insurance agreement, exposing Catalina to the possibility of additional substantial financial liability in excess of the \$6,000,000 default judgment. R. 168.

To further support its position that lack of notice for a period of five years amounts to substantial prejudice, Catalina argues by analogy to the purpose of statutes of limitation. Five

⁶ The 2008 action (CA No. 08-CP-26-2609) (discussed below at p. 16ff.) was a suit by Narruhn against Jacob Garron a/k/a Joseph Barron, the building landlord. This suit did not name RKC, The Red Room, or Cronic.

years is substantially longer than the three-year statute of limitations for intentional torts. As the United States Supreme Court has held, “the purpose of statutes of limitation is to prevent surprises ‘through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.’” American Pipe & Const. Co. v. Utah, 414 U.S. 538, 561, 94 S.Ct. 756, 770 (1974) (citations omitted).

The purpose of limitations statutes is to prevent the deterioration of evidence and to avoid prejudice to the defendant. In this matter, the applicable three-year statute had expired before Catalina was served with the 2010 suit concerning a 2005 incident and 2005 suit. Because of lack of any notice from its insured, Catalina was precluded for over five years from investigating the claim or participating in the litigation of the 2005 suit. If commencing an action over three years after an incident has happened is too late – as indicated by the statute of limitations – a delay of five years is far too late and is evidence of substantial prejudice.

The five year delay in notice between the 2005 incident and the 2010 suit also diminished the time available to Catalina to find and question RKC’s principal and registered agent, Richard Cronic. Catalina sought to locate Cronic at addresses in South Carolina and New Jersey, but he was not able to be located at either address. Finally, Catalina learned Cronic died on June 5, 2011 in Frisco, Texas. Death Certificate, R. 266. Catalina never had an opportunity to interview Cronic about what he knew about the incident; why notice of the 2005 suit had not been given to Catalina; whether he had actually received notice of the hearings regarding the default judgment and before the special referee; or about his knowledge that the insurance policy had been cancelled. This is further evidence of substantial prejudice to Catalina.

Appellant argues a question of fact exists as to Catalina having notice in October 2008 of Narruhn’s 2005 suit, relying upon deposition testimony of insurance agent Robert Hiers (the

agent who sold the Catalina policy to RKC), a letter from the Law Office of Gerald Huston, an affidavit of attorney Dwight Hudson, and a facsimile from Anderson General to Tapco. Each will be considered in turn to demonstrate that none of these items create a question of fact as to notice to Catalina of the 2005 lawsuit.

Hiers' deposition testimony concerns notice of a totally different action filed by Narruhn in 2008 against the landlord of The Red Room, Joseph Barron. (Elisa Narruhn v. Jacob Garron a/k/a Joseph Barron, CA No. 08-CP-26-2609.) That the 2008 suit is the subject of Hiers' facsimile is established by reading together Hiers' deposition exhibits 8 (a facsimile) and 9 (a letter) and noting both the facsimile and the letter are dated October 6, 2008. R. 473-476. The 2008 suit did not name—and was not served—on RKC, The Red Room, or Cronce. Furthermore the complaint in the 2008 suit against Barron does not reference Narruhn's 2005 suit against RKC and Cato. There is, therefore, nothing in Hiers' facsimile or the attached letter that would put Tapco or Catalina on notice of Narruhn's 2005 suit or any of its hearings. Narruhn eventually dismissed the 2008 suit by stipulation entered June 24, 2009 in consideration of a \$60,000 payment by Barron. Neither RKC, The Red Room, or Cronce were ever added to the 2008 suit. Therefore, Hiers' deposition testimony does not and cannot raise a question of fact as to whether Catalina was on notice of Narruhn's 2005 suit.

The letter from the Law Office of Gerald Huston (exhibit 9 to Hiers' deposition, R. 474-476) also deals only with Narruhn's 2008 suit against Barron. This letter does not and cannot raise a question of fact as to whether Catalina was on notice of Narruhn's 2005 suit for the same reasons noted concerning Hiers' deposition testimony.

The affidavit of Dwight Hudson cannot be used to establish a question of fact concerning when, if at all, Tapco received what is alleged to be notice of the 2005 suit, because in his

affidavit Hudson does not refer to any dates on which the purported notice was given; no documents or exhibits were attached to his affidavit; and Hudson did not give a deposition in this matter.

Finally, there is absolutely no question of fact nor is it disputed anywhere in the record that the insured, RKC or Cronic, failed to give notice to Catalina, as required under the policy, See supra. As a result Catalina has suffered and continues to suffer severe prejudice.

In granting summary judgment, the circuit court correctly concluded that entry of default, a substantial default judgment, significant legal expenses, consumption of time and energy, and threat of substantial additional financial judgments could all have been avoided if RKC had fulfilled its contractual notice obligations. In its order the circuit court noted it was RKC's "total failure to comply with the notice terms of the policy, which failure resulted in substantial prejudice to Catalina." R. 9.

III. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE INSURANCE POLICY WAS CANCELLED PRIOR TO THE ASSAULT.

The circuit court held that Catalina's policy was properly cancelled on March 29, 2005, which was 11 days prior to the assault on Narruhn and it, therefore, granted summary judgment to Catalina on that basis.

The cancellation was made because the insured, RKC Entertainment, failed to make the requisite premium payments. It made a down payment and two of eight scheduled payments. It made no payments after making the second scheduled payment, leading to a default. R. 257-258. Appellant has provided no evidence that the insured was not in default in its payments.

The premium finance company, Charleston Premium Finance Company, through which RKC had financed the insurance policy, issued the statutorily-required 10-day notice of intent to

cancel on the day RKC was in default, March 14, 2005. The notice stated that RKC had to make a payment of \$244.84 before March 24, 2005. R. 258. The sole evidence before the circuit court was that RKC did not make the required payment so it did not extricate itself from default under the premium finance agreement. R. 9-11. Appellant has provided no evidence to the contrary.

When RKC failed to rectify its default, Charleston Premium Service Company, on March 24, 2005 sent a Notice of Cancellation to RKC at its last known address. R. 138. That notice stated that cancellation would be effective at 12:01 a.m. on March 29, 2005. When RKC did not respond, the policy was cancelled in accordance with the Notice of Cancellation. R. 139.

Catalina has presented evidence as to all of the above via an Affidavit of Charleston Premium Finance Company and Tapco Underwriters by Mr. W.P. Pinson. R. 134-139. The Pinson affidavit exhaustively outlines the entire application, payment, and cancellation history related to RKC's policy. Paragraphs 9 through 11 of the Pinson Affidavit outline the specific steps Charleston Premium Finance Company took in cancelling the policy, subsequent to RKC's default on payments.

9. As of March 14, 2005 R.K.C. was in default under the terms of its premium finance agreement. Therefore, on March 14, 2005 Charleston Premium Finance sent to R.K.C. by U.S. Mail to the last address set forth in its records a ten day notice of intent to cancel the policy. This notice required that in order to avoid cancellation of the insurance policy a payment in the amount of \$244.84 must be received before 24 March 2005 (see Exhibit B).

10. Subsequent to the ten day notice, Charleston Premium Finance did not receive any payments from R.K.C. Therefore, on March 24, 2005 Charleston Premium Finance sent a notice of cancellation to R.K.C. by U.S. Mail to the last address set forth in its records for R.K.C. The notice stated that the insurance policy would cancel effective March 29, 2005 at 12:01 A.M. (see Exhibit C).

11. Charleston Premium Finance also notified Tapco to cancel R.K.C.'s insurance policy, as allowed under the premium finance service agreement. On April 14, 2005, Tapco sent notice via U.S. Mail to the last known address of R.K.C. This notice confirmed that the subject insurance policy had already been cancelled effective March 29, 2005 (see Exhibit D).

12. Therefore, R.K.C.'s policy of insurance was cancelled as of March 29, 2005 at 12:01 A.M.

R. 135.

Appellant has presented no contrary evidence, but has only raised questions about a power of attorney and about the timing of delivery of the notice of cancellation. Appellant Narruhn does not address the circuit court's recitation of facts that undermine her conclusory assertions or speculations.

Ms. Narruhn argues that the policy was not properly cancelled because the principal of R.K.C., Mr. Richard Cronic, did not actually sign the application with the premium finance company and thus did not grant power of attorney to the premium finance company to cancel the agreement. Furthermore Ms. Narruhn argues that R.K.C. did not know what dates the premium finance payments were due because the due date was crossed out on the application form. **There is no dispute that the signature on the premium finance application, which contains power of attorney language authorizing cancellation, was signed by the producing insurance agent and not Mr. Cronic. However, there is also no dispute that the premium finance application expressly allows the producing agent or the applicant to sign.** [R. 10.] Moreover, there is no dispute that R.K.C. made a substantial down payment and two premium payments based on the finance agreement, which as a matter of law constitutes ratification of the agreement, its obligations, and the power of attorney language. Catalina also produced uncontradicted deposition testimony of the producing agent stating that at the time the agreement was consummated, the producing agent clearly and specifically communicated the due dates of the finance payments to Mr. Cronic, despite the crossed out due date on the premium finance application. [R. 449-50.] The producing agent's testimony also indicated that Mr. Cronic would also have received a payment booklet stating the payment due dates and amounts. Furthermore, Ms. Narruhn has produced no evidence that R.K.C. or Mr. Cronic ever actually misunderstood the due date of the finance payments. **Finally, Ms. Narruhn argues that the premium finance company failed to comply with the South Carolina premium finance company cancellation statute by failing to notify the insurance company of the cancellation. However, the Cancellation Notice states on its face that notice was provided to Tapco as the insurance company.** [R. 10.] The evidence shows that Tapco is the managing general agent for Catalina and is, therefore, authorized to receive such notice as the insurance company. See S.C. CODE ANN. §38-44-20 (3)(a).

Order, p. 9-10; R. 9-10 (emphasis and references to the record added).

Appellant, therefore, does not meet the requirements of our law regarding what a party must do to avoid summary judgment. Our Supreme Court has held that:

One may not, however, avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. This argument, if accepted, would render summary judgment obsolete, and it is in any event at odds with Rule 56, SCRPC, and our summary judgment jurisprudence:

[R]ule 56(e), SCRPC, requires that when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings. The adverse party's response, including affidavits or as otherwise provided by the rule, must set forth specific facts showing there is a genuine issue for trial.

SI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); *see also Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 856 (2001) (explaining that “a party opposing summary judgment [must] come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial”).

Hoard v. Roper Hospital, Inc., 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010). The circuit court was consequently correct in holding that:

Therefore, there is no genuine issue of material fact that the policy of insurance was cancelled, in accordance with the applicable South Carolina statute governing cancellation of insurance by a premium finance company, on March 29, 2005, eleven days before the incident that resulted in Ms. Narruhn being shot at the Red Room. Because the policy of insurance was cancelled and of no effect prior to Ms. Narruhn's incident, Catalina could not have coverage or any duty to defend or indemnify. Therefore, Catalina is entitled to summary judgment based on this issue as well.

Order, pp. 10-11; R. 10-11.

IV. THE CIRCUIT COURT CORRECTLY GRANTED SUMMARY JUDGMENT BECAUSE THERE WAS NO OCCURRENCE, AS REQUIRED FOR COVERAGE UNDER THE POLICY.

The Insuring Agreement in Catalina's policy states that, “[t]his insurance applies to ‘bodily injury’ ... only if: (1) The ‘bodily injury’... is caused by an ‘occurrence.’” Policy, Form CG 00 01 10 01 at p.1; R. 214. “‘Occurrence’ is defined in the policy as, “...an accident...” *Id.* at p. 15; R. 228.

Cato's pleading guilty to "assault and battery with *intent to kill*" and his actual commission of a tort of this nature preclude the incident at the Red Room from being considered an accident, so there was no occurrence that is necessary to trigger coverage under the policy.

As this Court has held, citing our Supreme Court, "[t]he intent to act, coupled with the intent to produce the consequences is not an 'accident' as defined by the Supreme Court of South Carolina." Manufacturers and Merchants Mut. Ins. Co. v. Harvey, 330 S.C. 152, 161, 498 S.E.2d 222, 227 (Ct. App. 1998) citing Goethe v. New York Life Ins. Co., 183 S.C. 199, 190 S.E. 451 (1937).

The intent to act and the intent to achieve a specific result are both implicit in the title of the crime to which Mr. Cato pled. In State Farm Fire and Cas. Co. v. Barrett, 340 S.C.1, 530 S.E.2d 132 (Ct. App. 2000) the Court held that allegations in the complaint of intentional torts "do not allege an accidental occurrence." Barrett, 340 S.C. at 10, 530 S.E.2d at 137 citing Gattison v. South Carolina State College, 318 S.C. 148, 151, 456 S.E.2d 414, 416 (Ct. App. 1995); Prior v. South Carolina Med. Malpractice Liab. Ins., 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991); and Snakenberg v. Hartford Cas. Ins. Co., 299 S.C. 164, 171-2, 383 S.E.2d 2, 5-6 (Ct. App. 1989).

Appellant argues the circuit court made an impermissible ruling on a factual matter concerning Cato's actions. Catalina disagrees and relies on its argument in section one above that Cato's guilty plea is dispositive as to an assault and as to his intent and can be used to establish an intentional assault in this case.

Appellant cites Doe v. Doe for the proposition that for a criminal conviction to be binding in a civil matter the "Plaintiff must have had a full and fair opportunity to contest the prior determination (Appellant's Initial Brief, p. 16)." However, she incorrectly applies the principle.

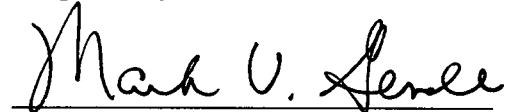
Appellant concludes because she is the plaintiff she should have the opportunity to contest the prior determination as to Cato's criminal conviction. This is backwards. Doe makes it clear that it is the criminal who must have had the opportunity to contest the prior determination, not the victim. Cato had a full and fair opportunity to contest the charges against him in his criminal case, and he chose to plead guilty to assault and battery with intent to kill.

Therefore, it is well established in our law that allegations of intentional torts do not allege an "occurrence" under a liability insurance policy and based on Cato's plea and criminal conviction to assault and battery with intent to kill there was not an occurrence under the policy language.

CONCLUSION

The circuit court's order granting summary judgment to Catalina should be affirmed. All four grounds on which the court held Catalina to be entitled to summary judgment were based on South Carolina law, which was properly applied to the facts of the case.

Respectfully submitted,



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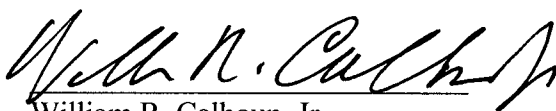
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

June 19, 2015



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Larry B. Hyman, Jr., Circuit Court Judge

CASE NO. 2012-CP-26-3873

RECEIVED
JUN 25 2015
SC Court of Appeals

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

I certify that I have served the Respondent's Final Brief on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on June 25, 2015, addressed to their attorney of record, Gene M. Connell, Jr. at Post Office Drawer 14547, Surfside Beach, SC 29587.

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