

 ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

21750

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2011-CP-40-6103

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,

Appellant,

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

Respondents.

RECORD & APPEAL
Volume I of II

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IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-40-6103

RICHLAND COUNTY
FILED
2012 NOV 27 PM 3:27
JEANETTE W. MCBRIDE
C.C.P. & G.S.

**ORDER GRANTING VOLUNTARY
DISMISSAL WITHOUT PREJUDICE**

Defendants.

Third-Party Defendants.

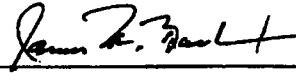
SCANNED

Palmetto Richland Memorial ("PRM") and as to Defendants claims against Plaintiff in the above-styled action.

AND THE COURT, being fully informed and advised;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-styled action is hereby dismissed without prejudice.

IT IS SO ORDERED.



The Honorable James R. Barber, III
Judge Presiding

Richland County, South Carolina
November 27, 2012.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-40-6103

The Bank of New York Mellon Trust Company

Chartrese Grier

Palmetto Health Alliance

Palmetto Richland Memorial

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Attorney for ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

Disposition Type (Check One)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____.
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____.
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____.

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Third-party Defendant Nationwide Property & Casualty Insurance Company and Tonya Parks' Motion to Compel Proper Response to Request for Admission is Denied. Plaintiff Bank of New York Mellon Trust's Motion to Sever is moot. Third-party Plaintiff Grier's Motion for Protective Order as to the deposition of Rule 30(B)(6) designee for Bank of New York Mellon Trust Company is also moot.

Order Information

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

Complete if judgment requires payment of a sum of money or affects title to real or personal property			
JUDGMENT AGAINST PLAINTIFF:		JUDGMENT AGAINST DEFENDANT:	
Judgment Amount	\$ _____	Judgment Amount	\$ _____
Taxable Costs	\$ _____	Taxable Costs	\$ _____
Attorney's Fees	\$ _____	Attorney's Fees	\$ _____
Interest	\$ _____	Interest	\$ _____
Other:	\$ _____	Other:	\$ _____
Total Amount to be Enrolled:	\$ _____	Total Amount to be Enrolled:	\$ _____
If applicable, describe the property, including tax map information and address, referenced in the order:			

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interests or costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

11/29/2012

Janette W. H. Bride

For Clerk of Court Office Use Only

This judgment was entered on _____ and a copy mailed first class or placed in the appropriate attorney's box on this 29 day of Nov, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Michael Casin Griffin

M. Allison Moon
Jay T. Thompson

Alana Odom Williams
Scott James Bradley

ATTORNEY(S) FOR THE PLAINTIFF(S)

Court Reporter

ATTORNEY(S) FOR THE DEFENDANT(S)



Clerk of Court, Jeanette McBride

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Bank of New York Mellon Trust
Company, National Association f/k/a The
Bank of New York Trust Company, N.A.
As successor to JPMorgan 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,

v.

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

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2011-CP-40-6103

ORDER

RICHLAND COUNTY
FILED
2013 APR -4 AM 10:20
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter came before the Court at a hearing on November 28, 2012, on Third-Party Plaintiff Chartrease Grier's Motion to Amend the Answer/Third-Party Complaint and Motion for Summary Judgment, and the Motion for Summary Judgment of Third-Party Defendants Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Parks"). Present at the hearing were Alana Odom Williams, Esquire, and Jay Thompson, Esquire, counsel for Third-Party Defendants Nationwide and Parks, and M. Allison Moon, Esquire, and Sarah Brown, Esquire, counsel for Third-Party Plaintiff Chartrease Grier ("Grier"). After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, Grier's Motion to Amend the Answer/Third-Party Complaint and Motion for

Summary Judgment are **DENIED**. Nationwide and Parks' Motion for Summary Judgment is **GRANTED**.

FACTS

In 2006, Grier purchased a homeowner's insurance policy from Nationwide through her insurance agent, Parks. Nationwide provided homeowner's insurance on Grier's property from March 24, 2006 to March 24, 2011. The Bank of New York Mellon Trust Company ("Bank") was the mortgage holder on the property. GMAC serviced the mortgage on the Bank's behalf. During the time that the Nationwide policy was in effect, Grier made escrow payments to GMAC to cover her insurance premiums. In March or April of each year, GMAC issued a check to Nationwide for the amount of the renewal insurance premium, and Nationwide renewed the policy. Nationwide did not renew the policy after March 24, 2011. When the policy expired, GMAC sent a check to Nationwide for the same amount that GMAC submitted the prior year for renewal of the policy. Nationwide received the check, but because there was no active policy to which the payment could be applied, Nationwide returned the money, issuing a check to Grier on April 1, 2011.

Grier's home was destroyed by a fire on April 6, 2011, making the house inhabitable. Nationwide denied coverage on the property, claiming that there was no policy in place because the policy had not been renewed. Grier subsequently defaulted on her mortgage. The Bank filed this foreclosure action against Grier on September 14, 2011. Grier filed an Answer and a Third-Party Complaint against Nationwide and Parks for breach of contract, bad faith refusal to pay insurance claim, and indemnity and contribution. Nationwide and Parks answered on February 6, 2012. On June 11, 2012, Grier moved to include additional causes of action against Nationwide and Parks. The proposed Amended Answer/Third-Party Complaint includes an additional claim against Nationwide for negligent misrepresentation and an additional claim against Parks for negligence.

DISCUSSION

1. Grier's Motion to Amend Answer/Third-Party Complaint

Pursuant to Rule 15, SCRCF, Grier moves to amend her Answer/Third-Party Complaint to include causes of action for negligence and negligent misrepresentation. Nationwide and Parks oppose this Motion on the grounds that the proposed causes of action would fail as a matter of law and therefore be dismissed pursuant to Rule 12(b)(6), SCRCF. Thus, it would be

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futile to allow the amendments. Furthermore, Nationwide and Parks claim they would be prejudiced if Grier were permitted to amend her Answer/Third-Party Complaint.

Rule 15, SCRCF, provides that "if more than thirty days have elapsed from the time a responsive pleading is served, a party may amend his pleading only by leave of court or by written consent of the adverse party." "It is well established that a motion to amend is addressed to the discretion of the trial judge." *Stanley v. Kirkpatrick*, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2004). Rule 15, SCRCF strongly favors amendments and the court is encouraged to freely grant leave to amend. *See Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987). "[L]eave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCF. "The prejudice that Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Tanner v. Florence County Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999)(quoting *Pool v. Pool*, 329 S.C. 324, 494 S.E.2d 820 (1998)). A court has the authority to deny leave to file an amended complaint, or portions of an amended complaint, if it would be futile because the causes of action in the amended complaint would fail as a matter of law. *See Coral Gables, Inc. v. Palmetto Brick Co.*, 183 S.C. 478, 482, 191 S.E. 337, 338 (1937).

a) Cause of Action for Negligence as to Parks

Grier's Amended Answer/Third-Party Complaint asserts a new cause of action for negligence against Parks, the insurance agent who sold her the Nationwide insurance policy. Grier claims that Parks owed a duty to Grier to advise her on insurance coverage for her home, and Parks breached this duty by failing to advise Grier to obtain alternative insurance. This proposed cause of action would be futile because it is based on an alleged legal duty where, as a matter of law, there is no legal duty.

It is well established that "an insurance agent has no duty to advise an insured at the point of application, absent an express or implied undertaking to do so." *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.C. 7, 12, 620 S.E.2d 326, 329 (2005). "A duty may be imposed, however, 'if the agent, nevertheless, undertakes to advise the insured.'" *Id.* (citing *Carolina Production Maintenance Inc. v. United States Fidelity & Guar. Co.*, 310 S.C. 32, 38, 425 S.E.2d 39, 43 (1992)). 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. *See Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988).

The proposed negligence claim does not assert that Parks undertook to advise Grier or allege any factors that would create an implied duty. Therefore, the proposed allegations, even if taken as true, are legally untenable and would fail to assert a cause of action, thus requiring dismissal under Rule 12(b)(6), SCRPC. Grier argues that the Court should allow the amendment because "[a]rguments going to the legal merits of the proposed pleadings are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56, SCRPC motion for summary judgment." *Pruitt v. Bowers*, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct. App. 1998). Motions for Summary Judgment have been filed by both parties. Rather than requiring additional, unnecessary motions on the amended causes of action, this Court has chosen to address the legal merits of the proposed pleadings in this Order.

Additionally, Nationwide and Parks argue that they would be prejudiced by the Amended Answer/Third-Party Complaint because the negligence cause of action is fundamentally different from the existing causes of action. Grier argues that the amendments would not be prejudicial, as Nationwide and Parks have been on notice of the Motion to Amend and the proposed negligence claim would not require any additional evidence. Nationwide has already taken Grier's deposition and conducted extensive written discovery. This case has been on the jury trial roster. Therefore, Nationwide and Parks would be prejudiced by the negligence cause of action because they lack the opportunity to defend against it by conducting additional discovery.

For these reasons, Grier's Motion to Amend as to the negligence claim against Parks is **DENIED**.

b) Cause of Action for Negligent Misrepresentation as to Nationwide

Grier's Amended Answer/Third-Party Complaint also asserts a new cause of action for negligent misrepresentation against Nationwide. Grier claims that Nationwide had a duty to exercise reasonable care in providing information to Grier and her agents because Nationwide had a pecuniary interest in Grier's insurance policy. Grier alleges that Nationwide breached its duty by representing to GMAC that Grier's insurance policy would be renewed upon payment of the policy premium.

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To recover in a negligent misrepresentation action, a plaintiff must first allege that the defendant made a false representation of fact to the plaintiff. *See Hurst v. Sandy*, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997). This proposed cause of action would be futile because it would fail as a matter of law. Grier has not alleged that Nationwide made a misrepresentation to her; rather, she alleges that Nationwide made a misrepresentation to GMAC, a third party. GMAC was not acting on Grier's behalf.

In addition, as previously discussed, Nationwide and Parks have shown that they would suffer prejudice if the amendment were allowed at this stage in the litigation. The negligent misrepresentation cause of action is fundamentally different from the existing causes of action. For the reasons discussed, Grier's Motion to Amend her Answer/Third-Party Complaint to add a cause of action for negligent misrepresentation against Nationwide is **DENIED**.

2. Third-Party Plaintiff Grier's Motion for Summary Judgment:

Third-Party Plaintiff Grier's Motion for Summary Judgment is based on her claim that there is no evidence showing that Third-Party Defendant Nationwide delivered written notice to Parks that the insurance policy at issue was canceled. Grier argues that pursuant to S.C. Code Ann. § 38-75-730 (Supp. 2012), Nationwide's attempt to cancel the homeowner's insurance policy was invalid and therefore, Nationwide could not deny coverage.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56(c), SCRPC; *Pittman v. Grand Strand Entertainment, Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005). In determining whether any triable issue of fact exists, the evidence and inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *McNair v. Rainsford*, 330 S.C. 332, 341, 499 S.E.2d 488, 493 (Ct. App. 1998). "[I]n cases applying the preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Carolina Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Section 38-75-730 addresses cancellation of a policy before the expiration of the policy term. Nationwide did not cancel Grier's policy; rather, the policy was non-renewed and expired on March 24, 2011. In March and April 2010, Nationwide conducted inspections of Grier's property and allegedly discovered numerous hazards and risks on the property. According to the

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affidavit of Franklin L. Jefferies, Nationwide Personal Lines Underwriter, the April 2010 inspection report identified numerous hazards on Grier's property including rotting and severely weathered soffits and eaves, roof damage, cracking greater than ½ inch in the bricks, gutters full of debris, and miscellaneous debris on the property. In his affidavit, Mr. Jefferies stated that in April 2010, Grier's Nationwide policy was to be non-renewed at the next renewal date, March 24, 2011, unless these hazards were corrected. On January 14, 2011, Nationwide sent notice of non-renewal to Grier, explaining that the policy would expire on March 24, 2011. The notice outlined the specific hazards and risks leading to the non-renewal and stated that Grier may become eligible for renewal if she corrected each of the conditions creating a hazard or risk. Parks was copied on the letter sent to Grier and was listed by her agent number, not her name. At the same time, Nationwide sent a separate notice informing GMAC that the policy would not be renewed when it expired on March 24, 2011. Nationwide produced proof of mailing the notice of non-renewal to Grier. At the November 28, 2012 hearing, Grier did not dispute that she received notice of non-renewal.

In order to prevail on her claims against Nationwide and Parks, Grier must produce evidence that she had an insurance policy with Nationwide on April 6, 2011, the date her claim arose. It is undisputed that the term of Grier's insurance policy ended on March 24, 2011. Therefore, to prove that there was an insurance contract on April 6, 2011, Grier would have to prove that the policy was renewed after March 24, 2011 or that Nationwide's non-renewal of the policy did not meet the statutory requirements. According to the Affidavit of Franklin L. Jefferies, Nationwide elected not to renew Grier's policy.

Grier also alleges that Nationwide failed to comply with the requirements of S.C. Code Ann. Section 38-75-740 for non-renewal of insurance policies. However, the applicable statute in this case is S.C. Code Ann. Section 38-75-1160. Section 38-75-740 is a general provision setting forth requirements for non-renewal of property and casualty insurance policies. Section 38-75-740 "applies to all property insurance and casualty insurance, as defined in Section 38-1-20, *except for . . . property or casualty insurance as to which there are specific statutory provisions of law governing cancellation, nonrenewal, or renewal of policies.*" S.C. Code Ann. § 38-75-710 (emphasis added). Further, Section 38-75-740 by its terms only refers to policies "(b) . . . written for a term of one year or less . . . [or] (c) a policy written for a term of more than one year or for an indefinite term." S.C. Code Ann. § 38-75-740(b),(c).

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Section 38-75-1160 specifically addresses cancellation or refusal to renew policies for property insurance, not motor vehicles. Section 38-75-1160 governs homeowner's insurance, mobile homeowner's insurance, and dwelling fire insurance. Therefore, Section 38-75-1160 applies to non-renewal of the homeowner's policy at issue in this case. Section 38-75-1160 sets forth specific requirements for non-renewal, stating in part:

Except for a cancellation pursuant to Section 38-75-730, a cancellation or refusal to renew by an insurer of a policy of insurance covered in this article is not effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew.

Section 38-75-1160(A)(1). Section 38-75-1160 does not require that notice be sent to an insurance agent in order for a policy non-renewal to be effective. Under Section 38-75-1160(A)(1), a non-renewal of a homeowner's policy is effective as long as the notice to the policy holder satisfies the following requirements. Notice must:

- a) be approved as to form by the director or his designee before use;
- b) state the date not less than sixty days for any cancellation or refusal to renew that is effective between November first and May thirty-first and not less than ninety days for any cancellation or refusal to renew that is effective between June first and October thirty-first after the date of the mailing or delivering on which the cancellation or refusal to renew becomes effective;
- c) state the specific reason of the insurer for cancellation or refusal to renew and provide for the notification required by Section 38-75-1180(B);
- d) inform the insured of his right to request in writing within thirty days of the receipt of notice that the director review the action of the insurer. The notice of cancellation or refusal to renew must contain the following statement in bold print to inform the insured of this right:

"IMPORTANT NOTICE: within thirty days of receiving this notice, you or your attorney may request in writing that the director review this action to determine whether the insurer has complied with South Carolina laws in canceling or nonrenewing your policy. . . ."

- e) inform the insured of the possible availability of other insurance which may be obtained through his agent, or through another insurer; and
- f) state that the Department of Insurance has available a buyer's guide regarding property insurance shopping and availability, and provide applicable mailing addresses and telephone numbers, including a toll-free number, if available, for contacting the Department of Insurance.

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Section 38-75-1160(A)(1).

The notice of non-renewal that Nationwide mailed to Grier satisfies the statutory requirements. The form that Nationwide used to mail notice was approved by the director of the South Carolina Department of Insurance prior to use. Nationwide mailed the notice to the address shown in Grier's policy, 6515 Easter Street, Columbia, South Carolina, 29203-5171, not less than sixty days prior to the expiration of the policy. The notice stated the specific reasons for non-renewal and provided the notification required by Section 38-75-1180(B). The notice informed Grier of her right to request a review and urged her to act promptly to secure other coverage from another carrier. The notice also informed Grier that her representative could provide her with information on a consumer buyer's guide for property insurance and provided contact information for the Department of Insurance. Nationwide provided proof of the mailing notice to Grier. Section 38-75-1160 does not require proof that Grier actually received the notice but Grier does not dispute that she received notice. Rather, Grier disputes whether Parks received notice. However, Section 38-75-1160 does not require that notice be given to Parks.

As a matter of law, Nationwide satisfied the requirements of Section 38-75-1160 for non-renewal of Grier's policy by mailing written notice to Grier of the non-renewal. Therefore, Grier's policy expired on March 24, 2011, and there was no insurance policy on the date of Grier's claim. As a result, Grier is not entitled to summary judgment.

3. Third-Party Defendants' Motion for Summary Judgment

Third-Party Defendants Nationwide and Parks argue that they are entitled to summary judgment pursuant to Rule 56, SCRPC. Parks claims that Grier's breach of contract and insurance bad faith claims against Parks fail, as a matter of law, because there was never any contract between Grier and Parks. Nationwide claims that Grier's breach of contract and insurance bad faith claims against Nationwide fail because Grier's homeowner's insurance policy expired before her claim arose; therefore, Nationwide had a reasonable basis to deny the claim. In addition, both Nationwide and Parks argue that Grier's claim for indemnity and contribution is moot because Plaintiff Bank dismissed its claims against Grier and agreed to satisfy the mortgage.

The indemnity and contribution cause of action alleges that Nationwide and Parks should be liable for any damages Grier sustains in the foreclosure action because the foreclosure would not have occurred but for Nationwide's denial of her insurance claim. Plaintiff Bank has

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voluntarily dismissed the foreclosure action against Grier. Therefore, since there is no foreclosure, there is no right to indemnity for the foreclosure against Nationwide or Parks and the indemnity and contribution cause of action is moot.

a) Breach of Contract against Parks

The breach of contract claim against Parks fails, as a matter of law, because Grier did not have a contract with Parks. In her deposition, Grier testified that she did not have a contract with Tonya Parks. Tonya Parks also testified in her deposition that she did not have a contract with Grier. The only relevant contract in this case is Grier's insurance policy, which was a contract with Nationwide, not Parks. Parks is not an insurer and does not provide insurance coverage. It is well established that the mere fact that Parks was an agent for Nationwide does not create a contractual relationship between Grier and Parks. *See Green v. Industrial Life & Health Ins. Co.*, 199 S.C. 262, 272, 18 S.E.2d 873, 876-77 (1942). Therefore, it is undisputed that Grier did not have a contract with Parks and, as a matter of law, summary judgment is granted in favor of Parks on the breach of contract claim.

b) Breach of Contract against Nationwide

Similarly, Grier's claim for breach of contract as to Nationwide fails as a matter of law. In order to proceed on the breach of contract claim, Grier must produce evidence that she had an insurance policy with Nationwide on April 6, 2011, the date her claim arose. Grier's homeowner's policy expired on March 24, 2011. Therefore, the policy was not in effect at the time the claim arose.

Grier asserts that an insurance contract was in effect on April 6, 2011 because Nationwide's non-renewal was ineffective. Nationwide produced evidence that it complied with the requirements of Section 38-75-1160 with respect to non-renewal of Grier's policy. Nationwide produced proof of mailing the notice of non-renewal to Grier. The notice was mailed not less than sixty days prior to expiration of the policy and contained the content required by Section 38-75-1160(A)(1).

Grier further argues that an insurance policy was in place on April 6, 2011 because Nationwide reached an agreement with her loan servicer, GMAC, that the policy would be renewed if Nationwide received the required premium. However, Grier has not provided evidence of any communication or agreement between GMAC and Nationwide where Nationwide agreed to renew the policy if GMAC paid the premium. and
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Because there is no genuine issue of material fact as to whether there was a contract for insurance between Grier and Nationwide at the time of Grier's claim, Nationwide is entitled to summary judgment on the breach of contract claim.

c) **Bad Faith Failure to Pay Insurance Benefits**

Grier's claim against Nationwide for bad faith failure to pay insurance benefits fails, as a matter of law, because there was no contract for insurance at the time of the claim and therefore, Nationwide's failure to pay insurance benefits was not in bad faith.

To establish a claim for bad faith failure to pay insurance benefits, a party must present evidence of: (1) a mutually binding contract of insurance, (2) refusal by the insurer to pay benefits due under the contract, (3) the refusal resulted from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing, and (4) damages proximately caused by the alleged bad faith refusal to pay benefits. *See Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996). The record in this case lacks evidence to support the elements necessary to maintain this claim. There was no mutually binding contract of insurance at the time of Grier's claim. On its face, the policy expired on March 24, 2011 and was not renewed.

Additionally, there is no evidence of bad faith. There can be no bad faith if the insurer has "a reasonable ground for contesting the claim." *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992). Nationwide denied coverage based on an objective determination that the policy was no longer in effect because it expired without being renewed. Nationwide sent a non-renewal notice on January 14, 2011, more than sixty days before the policy's expiration date, as required by statute. When Nationwide received a payment related to this policy from GMAC, Nationwide returned the payment to Grier because there was no policy in place.

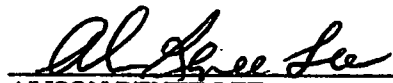
Accordingly, Nationwide had a reasonable basis to deny Grier's claim. Therefore, as a matter of law, the refusal to pay insurance benefits was not in bad faith. Nationwide's Motion for Summary Judgment as to the insurance bad faith claim is **GRANTED**.

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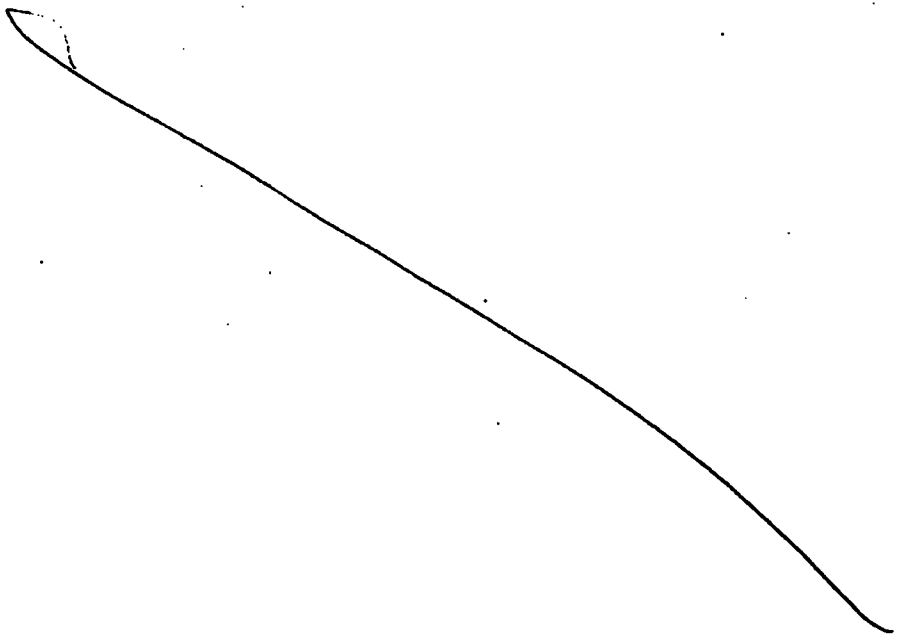
ORDER

For the reasons set forth above, it is **ORDERED**: (1) Chartreuse Grier's Motion to Amend the Answer/Third-Party Complaint and Motion for Summary Judgment are **DENIED**; (2) Third-Party Defendants Nationwide Property & Casualty Insurance Company and Tonya D. Parks' Motion for Summary Judgment is **GRANTED**.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
April 3, 2013


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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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,

Plaintiffs,

vs.

Chartreas Grier; Palmetto Health
Alliance; and Palmetto Richland
Memorial,

Defendants.

Chartrease Grier,

Third-Party
Plaintiff,

vs.

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

Third-Party
Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-40-6103

ORDER

RICHLAND COUNTY
FILED
2013 SEP 23 PM 4:18
JEANETTE W. MCBRIDE
C.C.P. & G.S.

After careful consideration of the record in this case and the submissions of counsel, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Third-Party Plaintiff's Motion to Alter or Amend and/or for Reconsideration submitted on or about

SCANNED

April 25, 2013. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

September 23, 2013
Columbia, South Carolina

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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 2002RSS,

PLAINTIFF,

vs.

Chartreas Grier, Palmetto Health Alliance, and Palmetto Richland Memorial,

DEFENDANT(S).

TO THE ABOVE NAMED DEFENDANT(S):

IN THE COURT OF COMMON PLEAS

C/A NO: 2011-CP-40 -6103

SUMMONS AND NOTICES

(NON-JURY MORTGAGE FORECLOSURE)

FILED
2011 SEP 14 PM 1:03
JEANETTE W. McGRIDE
C.C.P. & C.S.

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, or to otherwise appear and defend, and to serve a copy of your Answer to said Complaint upon the plaintiff's attorneys at their office, 3955 Faber Place, Suite 200, P.O. Box 71727, North Charleston, South Carolina, 29415, or to otherwise appear and defend the action pursuant to applicable court rules, within thirty (30) days after service hereof, exclusive of the day of such service; except that the United States of America, if named, shall have sixty (60) days to answer after the service hereof, exclusive of such service; and if you fail to answer the Complaint or otherwise appear and defend within the time aforesaid, the Plaintiff in this action will apply to the Court for relief demanded therein, and judgment by default will be rendered against you for the relief demanded in the Complaint.

TO MINOR(S) OVER FOURTEEN YEARS OF AGE, AND/OR TO MINOR(S) UNDER FOURTEEN YEARS OF AGE AND THE PERSON WITH WHOM THE MINOR(S) RESIDE(S), AND/OR TO PERSONS UNDER SOME LEGAL DISABILITY:

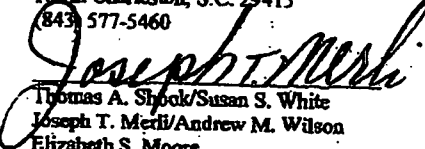
YOU ARE FURTHER SUMMONED AND NOTIFIED to apply for the appointment of a guardian ad litem within thirty (30) days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by the Plaintiff.

YOU WILL ALSO TAKE NOTICE that pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, as amended effective September 1, 2002, the Plaintiff will move for a general Order of Reference to the Master in Equity for Richland County, which Order shall, pursuant to Rule 53(b) of the

SCRCP, specifically provide that the said Master in Equity is authorized and empowered to enter a final judgment in this action.

FINKEL LAW FIRM LLC
P.O. Box 71727
North Charleston, S.C. 29415
(843) 577-5460

By:


Thomas A. Shook/Susan S. White
Joseph T. Merli/Andrew M. Wilson
Elizabeth S. Moore
Attorneys for Plaintiff

September 13, 2011

COUNTY OF RICHLAND

PLAINTIFF.

vs.

Chartreas Grier, et al.,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 2011-CP-40-6103

**CERTIFICATE OF
EXEMPTION/WITHDRAWAL FROM
ARBITRATION AND MEDIATION**

FILED
2011 SEP 14 PM 1:03
JEANETTE W. McBRIDE
C.C.P. & G.S.

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION BECAUSE:

- ☐ Monetary relief requested in this case exceeds \$25,000;
☐ This is a class action;
☒ There is a substantial claim for injunction or declaratory relief requested in this case;
☐ This case involves (check one or more of the following):
☐ Title to real estate;
☐ Wills, trusts and decedents' estates;
☒ Mortgage foreclosure;
☐ Partition;
☐ This is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
☐ Monetary relief requested in this case is unspecified but exceeds \$25,000;
☐ This case is a companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue;
☐ This action is appellate in nature;
☐ This is a post-conviction relief matter;
☐ This is a forfeiture proceeding brought by the State; or
☐ This is a contempt of Court proceeding.

FINKEL LAW FIRM LLC
P.O. Box 71727
North Charleston, SC 29415
(843) 577-5460

48570.P120221

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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.

Chartreas Grier, Palmetto Health Alliance, and
Palmetto Richland Memorial,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS

C/A NO: 2011-CP-40 -6103

COMPLAINT

(NON-JURY MORTGAGE FORECLOSURE)

JEANETTE W. McBRIDE
C.C.P. & G.S.
2011 SEP 14 PM 1:03
FILED

The Plaintiff alleges as follows:

1. The Plaintiff, a corporation or other legal entity, brings this foreclosure action to collect a debt and/or enforce a mortgage, security interest, or other rights in property securing the debt.
2. The Plaintiff is the servicer and/or mortgagee of the note and mortgage covering real property located in Richland County, which is the subject of the within captioned action, and is entitled to enforce same.
3. The defendant(s) named herein may have an interest in the property that is the subject of this action.
4. Any defendant(s) described herein as Judgment Creditor(s) have by filing judgment(s) designated the attorney(s) entering the judgment(s) as their agent for service of process pursuant to the provisions of §15-35-840 of the South Carolina Code of Laws (1976 as amended).
5. Upon information and belief, the defendant(s) Chartreas Grier is not in the military service of the United States of America pursuant to the provisions of the Servicemembers Civil Relief Act (2003).
6. On or about April 30, 2002, for value received, Chartreas Grier executed and delivered to AEGIS Mortgage Corporation d/b/a UC Lending a certain promissory note in the sum of \$84,500.00, together with interest thereon at an adjustable rate pursuant to the terms of the note.
7. To secure the payment of the said note and debt, secured thereby, and in accordance with the terms and conditions thereof, on April 30, 2002, Chartreas Grier and Larry D. Grier executed and delivered to Mortgage Electronic Registration Systems, Inc., as nominee for AEGIS Mortgage

Corporation d/b/a UC Lending, its successors and assigns, a mortgage covering the following described property:

All that certain piece, parcel or lot of land with improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, being shown and designated as Lot 18, Block 1 on a plat of GREEN VIEW SUBDIVISION, prepared by D. George Ruff, dated August 15, 1963 and recorded in the Office of the RMC for Richland County in Plat Book U at Page 43 and 44; being more particularly shown on a survey prepared for Larry D. Grier and Chartrease Grier by Inman Land Surveying Co., Inc., dated June 3, 1996, to be recorded, having such boundaries and measurements as shown on said latter plat reference to which is hereby craved for a more complete and accurate description.

TMS #: 14302-03-03

Property Address: 6515 Easter Street, Columbia, SC

8. Thereafter the mortgage was recorded in the Office of the Register of Deeds for Richland County in book 660 at page 2316 on May 10, 2002.
9. The mortgage constitutes a first mortgage lien on the subject property.
10. By Assignment of Mortgage dated October 21, 2009, and recorded November 19, 2009, in Book 1570 at Page 1408, in the Office of the Register of Deeds for Richland County, Mortgage Electronic Registration Systems, Inc., as nominee for AEGIS Mortgage Corporation d/b/a UC Lending assigned the subject mortgage to 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, the present lienholder and Plaintiff herein.
11. The property that is the subject of this action is fully and sufficiently described on that more recent plat recorded in Plat Book 56 at Page 3485, and Plaintiff references said plat as providing a complete description of the subject property.
12. The mortgagor Larry D. Grier died February 10, 2007 and his estate was filed in Richland County as Probate no: 2007-ES-40-00698. Pursuant to the Estate, a Deed of Distribution was issued granting all interest in the subject property to Chartrease Grier, thereby making her the sole titleholder of record.
13. Pursuant to the Administrative Order of the Chief Justice, 2009-05-22-01, the loan that is subject of this action is held by a participant in the Home Affordable Modification Program (HMP), however the loan is not subject to modification under the HMP because the property is vacant.
14. Pursuant to the terms of the mortgage, any sums paid by the plaintiff for inspecting and securing the subject property, for fire and other hazard insurance, taxes and assessments for the mortgaged premises, and any costs of collection, including reasonable attorney's fees, are secured by the mortgage.

15. The monthly payments due on said note and mortgage are in default since June 1, 2011, although demand for payment thereof has been made and the plaintiff, as the holder of the said note and mortgage, after providing all required notices, elects to, and does declare the entire balance of said indebtedness due and payable, and that there is due on said note and mortgage as of June 1, 2011, the sum of \$ 70,201.92, together with interest at an adjustable rate pursuant to the terms of the note, from May 1, 2011, and also for the costs and disbursements of this action, including attorney's fees.

16. Pursuant to Sections 37-3-105, South Carolina Code of Laws (1976 as amended), the mortgage lien, which is the subject of this action, is a first lien on real estate and is not a 'consumer loan' for the purposes of the South Carolina Consumer Protection Code. Any notice of right to cure has been given as required.

17. The Plaintiff does not demand a deficiency judgment in the event the sale of the real estate herein does not yield a sum sufficient to satisfy all indebtedness due unto the plaintiff, including costs and attorney's fees.

18. Palmetto Health Alliance and Palmetto Richland Memorial claim(s), or may claim a lien upon or interest in the subject property by virtue of a judgment against Larry Grier, filed January 18, 2007, Case No. 2007-CP-40-00365, in the amount of \$983.89.

The interest or lien of the above Defendant, if any, is junior and subordinate to the plaintiff's first mortgage lien.

WHEREFORE, having fully set forth its Complaint, the Plaintiff prays that this Honorable Court inquire into the matters set forth herein and that:

1. The amount due upon the said note and mortgage held by Plaintiff be ascertained and determined under the direction of this Court, together with attorney's fees and the costs of this action.
2. The said Plaintiff's Mortgage be declared a first mortgage lien and that the said Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with a reasonable sum as attorney's fees and for the costs of this action.
3. The mortgaged premises be sold under the direction of this Court, the equity of redemption be barred, and that the proceeds of sale be applied as follows:
 - First, to the costs and expenses of the within action and sale.
 - Second, to the payment and discharge of the amount due on Plaintiff's note and mortgage, together with the attorney's fees as aforesaid, and
 - Third, the surplus, if any be distributed according to law.

4. An Order be entered directing and empowering the Sheriff of Richland County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property hereinabove described should the same become necessary.
5. An Order be entered for the ejectment of the defendants in possession herein and all persons claiming thereunder and the removal therefrom of all furnishings, fixtures and items not subject to the lien of the plaintiff's mortgage, which personal property if not removed shall be deemed abandoned and shall be removed by the plaintiff or its agents from the subject property by placing said property on the public street or highway or by any other means.
6. An Order be entered granting the appointment of a Receiver to secure and supervise the rental of the property sought to be foreclosed with authority to take possession thereof and collect rents, issues and profits thereon during the pendency of this action and to hold the same as further security for Plaintiff's debt.
7. An Order be entered for reimbursement of all costs for inspecting and securing the property incurred by the plaintiff as a result of the delinquency.
8. An Order be entered for such other and further relief as may be just and proper.

FINKEL LAW FIRM LLC
P.O. Box 71727
N. Charleston, SC 29415
(843) 577-5460

By:

Joseph T. Merli
Thomas A. Syook/Susan S. White
Joseph T. Merli/Andrew M. Wilson
Elizabeth S. Moore
Attorneys for Plaintiff

September 13, 2011

**NOTICE REQUIRED BY THE FAIR DEBT
COLLECTION PRACTICES ACT, (THE 'ACT')
15 U.S.C. SECTION 1601, AS AMENDED**

1. As of October 28, 2011, you owe \$ 95,632.39. Because of interest, late charges, and other charges that may vary from day to day, the amount due on the day you pay may be greater. Hence, if you pay the amount shown above, an adjustment may be necessary after we receive your check, in which event we will inform you before depositing the check for collection. For further information, write or call as directed in Paragraph 6 of this Notice.
2. 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. stam Bank One National Association as Trustee for RAMP 2002RS5 is the Creditor to whom the debt is owed.
3. The debt described in this Notice will be assumed to be valid by the Creditor's law firm unless you, the Debtor, within thirty (30) days after receipt of this notice, dispute the validity of the debt or some portion thereof.
4. If you, the Debtor, notify the Creditor's law firm in writing, within thirty (30) days from receipt of this notice that the debt or any portion thereof is disputed, the Creditor's law firm will cease all collection activities until it obtains and provides to you a verification of the debt, and a copy of the verification will be mailed to you, the debtor, by the Creditor's law firm.
5. If the Creditor named in the attached letter is not the original Creditor, and if you make a written request to the Creditor's law firm within thirty (30) days, the name and address of the original Creditor will be mailed to you by the Creditor's law firm.
6. Written requests should be addressed to Finkel Law Firm LLC, Post Office Box 71727, N. Charleston, SC 29415, or call (843) 577-5460.
7. Please be advised that the time period in which you have to dispute the amount of your debt and request additional information does not alter or affect the time period set forth in the South Carolina Rules of Civil Procedure for the filing of an answer or other responsive pleading to the Complaint.
8. If the Debtor has received a discharge of the debt described in paragraph one pursuant to the United States Bankruptcy Code, then neither Creditor nor its law firm is seeking to collect any portion of the debt and all information contained herein is supplied for informational purposes only. Any pending or ensuing legal action by Creditor's law firm will undertake to foreclose a valid security interest only and neither is intended nor will operate as any effort to collect upon any debt that has been so discharged.

**THIS IS AN ATTEMPT TO COLLECT A DEBT, AND ANY INFORMATION OBTAINED
WILL BE USED FOR THAT PURPOSE**

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

The Bank of New York Mellon Trust Company,
National Association fka The Bank of New
York Trust Company, etc,

PLAINTIFF,

vs.

Chartreas Grier, Palmetto Health Alliance, et
al,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS

C/A NO: 2011-CP-40 -6103

NOTICE OF FORECLOSURE
INTERVENTION

2011 SEP 14 PM 1:03
JEANETTE M. McBRIDE
C.C.P. & G.S.

FILED

TO CHARTREAS GRIER AND LARRY D. GRIER:

PLEASE TAKE NOTICE THAT pursuant to the Supreme Court of South Carolina Administrative Order 2011-05-02-01, you may be eligible for foreclosure intervention programs for the purpose of resolving the above-referenced foreclosure action. If you wish to be considered for a foreclosure intervention program, you must contact Finkel Law Firm LLC, 3955 Faber Place Drive, Suite 200, P.O. Box 71727 (29415), North Charleston, SC 29405, or call (843) 577-5460 within thirty (30) days from the date of this notice. Finkel Law Firm LLC represents the Plaintiff in this action. Our law firm does not represent you and is not authorized to provide you any legal advice.

IF YOU FAIL, REFUSE, OR VOLUNTARILY ELECT NOT TO PARTICIPATE IN THIS FORECLOSURE INTERVENTION PROCESS, THE FORECLOSURE MAY PROCEED.

FINKEL LAW FIRM LLC
P.O. Box 71727
North Charleston, S.C. 29415
(843) 577-5460

By:

Joseph T. Merli
Thomas A. Spook/Susan S. White
Joseph T. Merli/Andrew M. Wilson
Elizabeth S. Moore
Attorneys for Plaintiff

September 13, 2011

NOTICE PURSUANT TO THE FAIR DEBT COLLECTION PRACTICES ACT (15 U.S.C. § 1692 et seq.): This is an attempt to collect a debt and any information you provide will be used for that purpose. However, if you have previously received a discharge from bankruptcy, this message is not and should be construed as an attempt to collect a debt, but only as a requirement pursuant to the administrative order.

Foreclosure Intervention Response Form

This information is requested for the express purpose of foreclosure intervention pursuant to S.C. Supreme Court Administrative Order 2011-05-02-01.

Please check one of the two choices below regarding (6515 Easter Street, Columbia, SC 29203):

- ☐ I am the owner of and occupy the property as my principal residence.
☐ I am the owner but do not occupy the property.
☐ I am already working with my mortgage company.

If you own and occupy (6515 Easter Street, Columbia, SC 29203) as your principal residence and are interested in the following type(s) of loss mitigation, please indicate your interest(s) below (check all that interest you):

☐ Reinstatement	☐ Deed in Lieu
☐ Payoff	☐ Short Sale
☐ Payment Plan	Other: _____
☐ Forbearance Agreement	_____
☐ Loan Modification	_____

PLEASE NOTE THAT YOU MAY NOT QUALIFY FOR ALL THE OPTIONS LISTED ABOVE. NO REPRESENTATION OF ANY KIND IS BEING MADE REGARDING THE AVAILABILITY OF ANY LOSS MITIGATION OPTION OR YOUR QUALIFICATION FOR ANY OPTION.

☐ I do not wish to participate in any Foreclosure Intervention Program.

So that we may offer you the fullest possible assistance, please provide the information requested below.

Contact Information

May we leave a phone message?

At home?	☐ Yes ☐ No	Home #: _____
On your cell?	☐ Yes ☐ No	Cell #: _____
At work?	☐ Yes ☐ No	Work #: _____

May we send you an e-mail message? ☐ Yes ☐ No

Email: _____

_____ (Signature)	_____ (Signature)
_____ (Signature)	_____ (Signature)

6515 Easter Street, Columbia, SC 29203
 Charvren Grier and Larry D. Grier

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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.

Chartreas Grier, Palmetto Health Alliance, and
Palmetto Richland Memorial,

DEFENDANT(S).

IN THE COURT OF COMMON PLEAS
C/A NO: 2011-CP-40

LIS PENDENS

(NON-JURY MORTGAGE FORECLOSURE)

2011 SEP 14 PM 1:03
JEANETTE W. HARRIS
C.G.P. & C.

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in this court upon Complaint of the above-named Plaintiff against the above-named Defendant(s) for foreclosure of a certain mortgage of real estate given by Chartreas Grier and Larry D. Grier to Mortgage Electronic Registration Systems, Inc., as nominee for AEGIS Mortgage Corporation d/b/a UC Lending in the amount of \$84,500.00, dated April 30, 2002, and recorded in the Office of the Register of Deeds for Richland County in Book 660 at Page 2316 on May 10, 2002.

The premises covered and affected by the said mortgage as by the foreclosure thereof, were at the time of the making thereof, and at the time of the filing of this Notice, described as follows:

All that certain piece, parcel or lot of land with improvements thereon, situate, lying and being in the County of Richland, State of South Carolina, being shown and designated as Lot 18, Block 1 of GREEN VIEW SUBDIVISION, being more particularly shown on a survey prepared for Larry D. Grier and Chartreas Grier by Inman Land Surveying Co., Inc., dated June 3, 1996, and recorded in Plat Book 56 at Page 3485, having such boundaries and measurements as shown on said latter plat reference to which is hereby craved for a more complete and accurate description.

TMS#: 14302-03-03

Property Address: 6515 Easter Street, Columbia, SC

FINKEL LAW FIRM LLC
Post Office Box 71727
North Charleston, South Carolina 29415
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By:

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September 13, 2011

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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.)

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

Defendants.)

Chartrease Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS

**ANSWER AND THIRD-PARTY
COMPLAINT**

(JURY TRIAL DEMANDED)

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

RICHLAND COUNTY
FILED
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JENNIFER M. HOBBS
C.C.P. & G.S.

Chartrease Grier ("Defendant"), by and through her undersigned attorneys, answering the
Complaint, would respectfully allege and show unto the court as follows:

FOR A FIRST DEFENSE

(General Denial)

1. Defendant denies all allegations in the Plaintiff's Complaint not specifically
admitted below.

2. Defendant lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint and therefore denies the same and demands strict proof thereof.

3. Defendant lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint and therefore denies the same and demands strict proof thereof.

4. Defendant admits so much of the allegation of paragraph 3 as allege she has and may claim some interest in the real property that is the subject of this action and denies remaining allegations, demanding strict proof thereof.

5. Defendant lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint and therefore denies the same and demands strict proof thereof.

6. Defendant admits the allegations of paragraph 5.

7. Defendant admits so much of the allegations of paragraph 6 as allege that on April 30, 2002, she executed and delivered a promissory note and craves reference to this note for its terms. She denies the remaining allegations of paragraph 6, including any allegations inconsistent with the terms of this instrument.

8. Defendant admits so much of the allegations of paragraph 7 as allege that she executed and delivered a mortgage covering the property located at 6515 Easter Street, Columbia, South Carolina, as security on the aforementioned promissory note. Defendant craves reference to this instrument for its terms and denies the remaining allegations of paragraph 7, including any allegations inconsistent with the terms of this instrument.

9. Defendant admits the allegations of paragraph 8.

10. Defendant admits the allegations of paragraph 9.

11. To the extent the allegations of paragraph 10 refer to recorded documents, Defendant craves reference to those documents, which speak for themselves and are incorporated herein by reference and made a part of this answer. Defendant denies all other allegations of paragraph 10 which are consistent therewith.

12. To the extent the allegations of paragraph 11 refer to recorded documents, Defendant craves reference to those documents, which speak for themselves and are incorporated herein by reference and made a part of this answer. Defendant denies all other allegations of paragraph 11 which are consistent therewith.

13. Defendant admits the allegations of paragraph 12 insofar as they allege that Larry D. Grier died on February 10, 2007. To the extent the allegations of paragraph 12 refer to recorded documents, Defendant craves reference to those documents, which speak for themselves and are incorporated herein by reference and made a part of this answer.

14. Defendant admits the allegations of paragraph 13 insofar as no one is currently living at the subject property due to its destruction by fire on April 6, 2011. Defendant denies the remaining allegations of paragraph 13.

15. In response to the allegations of paragraph 14, Defendant craves reference to the mortgage, which speaks for itself and is incorporated herein by reference and made a part of this answer. Defendant denies all other allegations of paragraph 14 and those that are inconsistent therewith.

16. Defendant denies the allegations of paragraph 15 and demands strict proof thereof.

17. The allegations of paragraph 16 state merely legal conclusions, to which no response on the part of Defendant is required; but to the extent response is required, the allegations are denied.

18. The allegations of paragraph 17 state merely legal conclusions, to which no response on the part of Defendant is required; but to the extent response is required, the allegations are denied.

19. Defendant lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint and therefore denies the same and demands strict proof thereof.

FOR A SECOND DEFENSE

(Failure to State a Claim)

20. Defendant incorporates the allegations of paragraphs 1-19 which are consistent with this defense.

21. Plaintiff fails to state facts sufficient to constitute a cause of action against Defendant for each of the claims and, accordingly, they should be dismissed.

FOR A THIRD DEFENSE

(Unclean Hands)

22. Defendant incorporates the allegations of paragraphs 1-21 which are consistent with this defense.

23. The Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands. Plaintiff, through its alleged assignors, breached its contractual obligations and its wrongful and illegal conduct of engaging in predatory lending preclude Plaintiff from seeking to invoke the court's equitable jurisdiction

FOR A FOURTH DEFENSE

(Accounting)

24. Defendant incorporates the allegations of paragraphs 1-23 which are consistent with this defense.

25. Defendant would show that if any sums are owed to the plaintiff (which is denied), that amount owed is other than is stated in the Complaint; consequently, this Court should make a complete accounting of all sums allegedly due under the instruments referenced in the Complaint.

FOR A FIFTH DEFENSE

(Waiver and Estoppel)

26. Defendant incorporates the allegations of paragraphs 1-25 which are consistent with this defense.

27. Defendant alleges that Plaintiff, by its own conduct, has waived and/or should be estopped from asserting any rights he may have to collect damages against her. Such waiver and estoppel are pled as complete defenses and a bar to Plaintiff's claims.

FOR A SIXTH DEFENSE

(Failure to Mitigate)

28. Defendant incorporates the allegations of paragraphs 1-27 which are consistent with this defense.

29. Defendant alleges that Plaintiff failed to mitigate its damages in the manner provided for by law. Such failure to mitigate is thus pled as a complete defense and bar to Plaintiff's claims. Alternatively, to the extent Plaintiff failed to mitigate any portion of its damages, such failure to mitigate should bar Defendant from recovering damages which could have been avoided.

FOR A SEVENTH DEFENSE

(Illegality)

30. Defendant incorporates the allegations of paragraphs 1-29 which are consistent with this defense.

31. The agreements upon which Plaintiff bases some or all of its causes of action are illegal and/or unenforceable under South Carolina law and public policy.

FOR AN EIGHTH DEFENSE

(Accord and Satisfaction)

32. Defendant incorporates the allegations of paragraphs 1-31 which are consistent with this defense.

33. Defendant would show that in the event the plaintiff has or will receive payment from Defendant's insurance company, the Complaint will be barred by accord and satisfaction.

FOR A NINTH DEFENSE

(Breach of Duty of Good Faith and Fair Dealing)

34. Defendant incorporates the allegations of paragraphs 1-33 which are consistent with this defense.

35. Plaintiff breached its duty of good faith and fair dealing and such breach is the proximate cause of Plaintiff's damages.

FOR A TENTH DEFENSE

(Setoff and Recoupment)

36. Defendant incorporates the allegations of paragraphs 1-35 which are consistent with this defense.

37. Defendant alleges that in the event the plaintiff has or will receive payment from Defendant's insurance company, she will be entitled to set-off and recoupment of any amounts found due and owing under the allegations contained therein.

FOR AN ELEVENTH DEFENSE

38. Defendant incorporates the allegations of paragraphs 1-37 which are consistent with this defense.

39. Plaintiff's claims and remedies are limited, restricted, or excluded by the substance of any communication between the parties and/or between Plaintiff and third parties, including documents and/or oral conversations. Further, Defendant's liability, if any, may be limited, restricted, or excluded by the rights, responsibilities, and liability of Plaintiff and/or third parties, either by contract, statute, or equity.

FOR A TWELFTH DEFENSE AND BY WAY OF THIRD-PARTY COMPLAINT

40. COMES NOW, Defendant, Chartreuse Grier, and by way of Third-party Complaint respectfully allege and show unto the Court as follows:

41. Defendant/Third-party Plaintiff, Chartreuse Grier, is a citizen and resident of Richland County, State of South Carolina.

42. Third-party Defendant, Nationwide Insurance Company ("Nationwide"), is foreign corporation licensed and doing business in the State of South Carolina.

43. Third-party Defendant, Tonya D. Parks ("Parks"), is a resident and citizen of the Richland County, South Carolina and is licensed and doing business in the State of South Carolina.

44. Parks owns and operates an insurance agency in Richland County, South Carolina and, through her agency, solicits business and sells insurance policies in South Carolina.

45. Parks, through her agency, is an authorized agent for Nationwide and is authorized to and does in fact enter into contracts for insurance on behalf of Nationwide.

46. Third-party Plaintiff is the owner of the property located at 6515 Easter Street, Columbia, South Carolina 29203, and the contents thereof.

47. At all times relevant hereto, the mortgage on the property located at 6515 Easter Street, Columbia, South Carolina 29203, was held by GMAC Mortgage, LLC ("GMAC").

48. On or about March 15, 2010, Parks sold to Third-party Plaintiff a policy for homeowners insurance on her home located at 6515 Easter Street, Columbia, South Carolina 29203, and the contents thereof ("The policy"). Policy number 6139-HP-340377 provided insurance limits for \$101,600.00 for the structure of the home and \$71,120.00 for the contents of the home. The policy was underwritten by Nationwide.

49. The policy provided coverage in the event that the insured property was damaged or destroyed by fire.

50. The policy had an effective policy period of March 24, 2010 to March 24, 2011.

51. The policy was executed on behalf of Nationwide by its licensed and legal agent Tonya D. Parks.

52. The policy was executed by Tonya D. Parks and Third-party Plaintiff in Richland County, South Carolina.

53. On or about January 14, 2011, GMAC received notice from Nationwide indicating that the policy issued to Third-party Plaintiff would not be renewed by Nationwide at the conclusion of the policy period.

54. Thereafter, a representative of GMAC contacted Nationwide to inquire about the decision to not renew the policy.

55. During the course of communications between GMAC and Nationwide it was agreed by Nationwide that the policy would be renewed upon receipt of the required premium.

56. On or about March 15, 2011, payment in the amount of \$993.00 was issued by GMAC on behalf of Third-party Plaintiff to Nationwide representing the necessary premium for renewal.

57. The payment in the amount of \$993.00 by GMAC to Nationwide was accepted and deposited by Nationwide.

58. At all times relevant hereto GMAC was acting as the agent for, in the interest of, on behalf of, and for the benefit of Third-party Plaintiff.

59. As a result of the acceptance of the premium payment by GMAC to Nationwide, the policy renewed for the policy period of March 24, 2011 to March 24, 2012.

60. Third-party Plaintiff was an intended beneficiary of the contract for renewal of the policy.

61. On April 6, 2011, Third-party Plaintiff's property located at 6515 Easter Street, Columbia, South Carolina 29203, along with the contents thereof, was destroyed by fire.

62. Notice of the loss was timely made by Third-party Plaintiff to Nationwide and Parks.

63. At all times relevant hereto the policy was in full force and effect and all premiums payments were current.

64. At all times relevant hereto Nationwide and Parks failed to comply with the mandates of Section 38-75-740 of Article 9 for nonrenewal of insurance policies.

65. After the fire on April 6, 2011, Nationwide returned the payment of premium made by GMAC to and accepted by Nationwide to Third-party Plaintiff and Nationwide denied coverage for any losses arising out of the fire.

66. Nationwide's refusal to provide coverage under the policy constitutes a breach of the contract for insurance between Nationwide and Third-party Plaintiff.

67. As a result of the breach, Third-party Plaintiff has suffered damages in the form of the damage and destruction of the property located at 6515 Easter Street, Columbia, South Carolina 29203, and the contents thereof.

68. As a result of the breach, Third-party Plaintiff has suffered damages in the form of anxiety, stress, mental anguish, and depression arising out of her inability to repair the property and replace the contents thereof and having to live with and rely upon family and friends for financial support.

69. As a result of the breach, the County of Richland has instituted the foreclosure proceedings that constitute the main demand of this litigation. Third-party Plaintiff has suffered damages in the form of the costs and expenses incurred to defend the foreclosure action, as well as in the form of anxiety, stress, mental anguish, depression, and embarrassment arising out the possibility of losing her home.

FOR A FIRST CAUSE OF ACTION

(Breach of Contract)

70. Third-party Plaintiff realleges and incorporates by reference the preceding allegations of the Third-party Complaint as if they were repeated herein.

71. Third-party Defendants' refusal to provide coverage under the policy constitutes a breach of the contract for insurance between Third-party Defendants' and Third-party Plaintiff.

72. Third-party Defendants' breach was done with intentionally, without reasonable cause, and in bad faith.

73. Due to Third-party Defendants' breach, Third-party Plaintiff is entitled to recover amounts owed under the policy for property damage and living expenses incurred, interest on the amount owed, and attorneys' fees and costs.

74. Due to Third-party Defendants' breach, Third-party Plaintiff is entitled to recover consequential damages incurred as a result of the breach, including all costs and expenses incurred in defending the foreclosure action which is subject to the main demand, all costs incurred due to Third-party Plaintiff's inability to timely repair and reside in her own home, additional living expenses incurred, and any and all other expenses found to be resulting from the breach.

FOR A SECOND CAUSE OF ACTION

(Bad Faith Refusal to Pay Insurance Claim)

75. Third-party Plaintiff realleges and incorporates by reference the preceding allegations of the Third-party Complaint as if they were repeated herein.

76. Third-party Defendants owed Third-party Plaintiff a duty of good faith and fair dealing in evaluating and processing her claim for benefits under the policy.

77. Third-party Defendants', through their agents, representatives, and/or their employees wrongly and in violation of their duty of good faith and fair dealing refused to pay to Third-party Plaintiff the benefits to which she is entitled under the policy.

78. As a direct result of the conduct of Third-party Defendants, Third-party Plaintiff is entitled to recover amounts owed under the policy for property damage and living expenses incurred, all costs and expenses incurred in defending the foreclosure action which is subject to

the main demand, all costs incurred due to Third-party Plaintiff's inability to timely repair and reside in her own home, additional living expenses incurred, interest on the amount owed, attorneys' fees and costs, and any and all other expenses found to be resulting from Third-party Defendants' conduct.

79. Third-party Defendants' actions in refusing to pay benefits to Third-party Plaintiff were willful, wanton, and in reckless disregard for the rights of Third-party Plaintiff.

80. As a result of Third-party Defendants' willful, wanton, and reckless actions, Third-party Plaintiff is entitled to an award of punitive damages against Third-party Defendants.

FOR A THIRD CAUSE OF ACTION

(Indemnity and Contribution)

81. Third-party Plaintiff realleges and incorporates by reference the preceding allegations of the Third-party Complaint as if they were repeated herein.

82. It is alleged in the main demand that Third-party Plaintiff is liable to Plaintiff in the main demand for damages related to or arising out of the foreclosure on the property located at 6515 Easter Street, Columbia, South Carolina 29203.

83. Should Third-party Plaintiff be found liable to Plaintiff in the main demand, said liability will be based solely on the actions or inactions of Nationwide and Parks.

84. Due to the actions or inactions of Nationwide and Parks, Nationwide and Parks are liable to Third-party Plaintiff under the theories of indemnification and contribution for all amounts Third-party Plaintiff is found to owe now or in the future to Plaintiff in the main demand.

85. Third-party Plaintiff demands a trial by jury on all issues.

WHEREFORE, having fully answered the Complaint and having set forth defenses and counterclaims, Defendant, Chartreuse Grier, respectfully requests the following:

1. That the Complaint be dismissed with prejudice;
2. For an accounting
3. For other equitable relief;
4. For actual, compensatory and consequential damages as permitted by law;
5. For reasonable attorney's fees and costs related to this action;
6. For such other and further relief as this Court deems just and proper.

WHEREFORE, Third-party Plaintiff, Chartreuse Grier, prays for a judgment against Third-party Defendants, Nationwide Insurance Company and Tonya D. Parks, finding Third-party Defendants to be in breach of contract and in bad faith and awarding actual, consequential, and punitive damages, plus interest and attorney's fees and costs incurred in prosecuting this claim, and for such other and further relief as this Court shall deem just and proper.

[SIGNATURES ON THE FOLLOWING PAGE]

Greenville, South Carolina
November 17, 2011



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Plaintiff, Chartreuse Grier

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,

Plaintiffs,

vs.

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

Defendants.

Chartrease Grier,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

Civil Action No. 2011-CP-40-6103

ANSWER TO THIRD-PARTY
COMPLAINT

Jury Trial Requested

JEANETTE W. McBRIDE
Clerk of Court
C.P. & G.S.

2012 FEB -6 PM 3:17

RICHLAND COUNTY
CLERK OF COURT

NOW COME Third-Party Defendants Nationwide Property & Casualty Insurance Company and Tonya D. Parks (hereinafter "Third-Party Defendants"), by and through their undersigned counsel, and answer the Third-Party Complaint by denying each and every allegation not specifically admitted herein, and answering as follows. Third-Party Defendants make no statement regarding the truth or validity of Defendant/Third-Party Plaintiff's assertions in Paragraphs 1 - 39 of the Answer and Third-Party Complaint.

1. In response to Paragraph 40 of the Third-Party Complaint, Third-Party Defendants incorporate by reference all preceding paragraphs as if set forth fully herein

2. Upon information and belief, Third-Party Defendants admit the allegations of Paragraph 41 of the Third-Party Complaint.

3. Third-Party Defendants deny the allegations of Paragraph 42 of the Third-Party Complaint. No entity by the name "Nationwide Insurance Company" has been named as a party to this action.

4. Third-Party Defendants admit the allegations of Paragraph 43 of the Third-Party Complaint.

5. Third-Party Defendants admit the allegations of Paragraph 44 of the Third-Party Complaint.

6. Responding to Paragraph 45, Third-Party Defendants admit that Tonya D. Parks is an authorized agent for Nationwide Property & Casualty Insurance Company. Any remaining allegations in Paragraph 45 are denied.

7. Third-Party Defendants are without information sufficient to form a belief as to the allegations in Paragraph 46 of the Third-Party Complaint and therefore deny all allegations contained therein.

8. Third-Party Defendants are without information sufficient to form a belief as to the allegations in Paragraph 47 of the Third-Party Complaint and therefore deny all allegations contained therein.

9. Responding to Paragraph 48, Third-Party Defendants state that Nationwide Property & Casualty Insurance Company entered into a policy for homeowners insurance with Defendant/Third-Party Plaintiff with a policy effective date of March 24, 2010, for the

property located at 6515 Easter Street, Columbia, South Carolina 29203, Policy No. 6139-HP-340377 (collectively with any riders, endorsements, declarations or amendments hereinafter referred to as "the Policy"). Third-Party Defendants incorporates herein the terms, provisions, declarations, riders, exclusions and amendments of the Policy and denies any allegations in Paragraph 48 inconsistent therewith.

10. In response to the allegations of Paragraph 49 of the Third-Party Complaint, Third-Party Defendants admit the Policy provided coverage for the dwelling, other structures, and personal property, as set forth in the terms of the policy, in the event such dwelling, other structures, or personal property were damaged or destroyed by fire during the policy period, subject to Property Exclusions as set forth in the terms of the Policy. Third-Party Defendants deny any and all remaining allegations of Paragraph 49 of the Third-Party Complaint.

11. Third-Party Defendants admit the allegations of Paragraph 50 of the Third-Party Complaint.

12. Third-Party Defendants deny the allegations of Paragraph 51 of the Third-Party Complaint.

13. Third-Party Defendants deny the allegations of Paragraph 52 of the Third-Party Complaint.

14. In response to the allegations of Paragraph 53 of the Third-Party Complaint, Third-Party Defendants state that Nationwide Property & Casualty Insurance Company issued notice to both GMAC and the named insured on January 14, 2011 that the Policy would not be renewed at the conclusion of the policy period. Third-Party Defendants crave reference to the January 14, 2011 notice and deny any and all remaining allegations of Paragraph 53 inconsistent therewith.

15. Responding to Paragraph 54, Third-Party Defendants states that GMAC communicated with Nationwide regarding the subject policy. Third-Party Defendants deny any allegations in Paragraph 54 inconsistent with the above.

16. Third-Party Defendants deny the allegations of Paragraph 55 of the Third-Party Complaint.

17. Responding to Paragraph 56, Third-Party Defendants state that Nationwide received a check in the amount of \$993.00 on March 22, 2011. Third-Party Defendants deny any allegations in Paragraph 56 inconsistent with the above.

18. In response to the allegations of Paragraph 57 of the Third-Party Complaint, Third-Party Defendants state that Nationwide Property & Casualty Insurance Company temporarily deposited the \$993.00 sent by GMAC until it could be administratively determined what the funds were for. Third-Party Defendants deny any allegations in Paragraph 57 inconsistent with the above.

19. Third-Party Defendants are without information sufficient to form a belief as to the allegations in Paragraph 58 of the Third-Party Complaint and therefore deny all allegations contained therein.

20. Third-Party Defendants deny the allegations of Paragraph 59 of the Third-Party Complaint.

21. In response to the allegations of Paragraph 60 of the Third-Party Complaint, Third-Party Defendants deny the existence of a "contract for renewal of the policy." Third-Party Defendants further deny any and all remaining allegations of Paragraph 60 of the Third-Party Complaint.

22. Upon information and belief, Third-Party Defendants admit the allegations in Paragraph 61 of the Third-Party Complaint.

23. Responding to Paragraph 62 Third-Party Defendants state that Nationwide received notice of loss for the subject property but there was no policy in effect at the time of the loss. Third-Party Defendants deny any allegations of Paragraph 62 inconsistent with the above.

24. Third-Party Defendants deny the allegations of Paragraph 63 of the Third-Party Complaint.

25. Third-Party Defendants deny the allegations of Paragraph 64 of the Third-Party Complaint.

26. Responding to Paragraph 65 of the Third-Party Complaint, Third-Party Defendants state that Nationwide Property & Casualty Insurance Company returned the funds in the amount of \$993.00 with a check issued on March 24, 2011, and denied coverage for the loss that occurred on April 6, 2011 because there was no policy in effect at the time of the loss. Third-Party Defendants deny any and all remaining allegations of Paragraph 65 of the Third-Party Complaint.

27. Third-Party Defendants deny the allegations of Paragraph 66 of the Third-Party Complaint.

28. Third-Party Defendants deny the allegations of Paragraph 67 of the Third-Party Complaint.

29. Third-Party Defendants deny the allegations of Paragraph 68 of the Third-Party Complaint.

30. Third-Party Defendants deny the allegations of Paragraph 69, including all subparagraphs, of the Third-Party Complaint.

**FOR A FIRST DEFENSE TO DEFENDANT/THIRD-PARTY PLAINTIFF'S
FIRST CAUSE OF ACTION
(Breach of Contract)**

31. In response to Paragraph 70 of the Third-Party Complaint, Third-Party Defendants incorporate by reference all preceding paragraphs as if set forth fully herein.

32. Third-Party Defendants deny the allegations of Paragraph 71 of the Third-Party Complaint.

33. Third-Party Defendants deny the allegations of Paragraph 72 of the Third-Party Complaint.

34. Third-Party Defendants deny the allegations of Paragraph 73 of the Third-Party Complaint.

35. Third-Party Defendants deny the allegations of Paragraph 74 of the Third-Party Complaint.

**FOR A FIRST DEFENSE TO DEFENDANT/THIRD-PARTY PLAINTIFF'S
SECOND CAUSE OF ACTION
(Bad Faith Refusal to Pay Insurance Claim)**

36. In response to Paragraph 75 of the Third-Party Complaint, Third-Party Defendants incorporate by reference all preceding paragraphs as if set forth fully herein.

37. Paragraph 76 calls for a legal conclusion to which no response is necessary.

38. Third-Party Defendants deny the allegations of Paragraph 77 of the Third-Party Complaint.

39. Third-Party Defendants deny the allegations of Paragraph 78 of the Third-Party Complaint.

40. Third-Party Defendants deny the allegations of Paragraph 79 of the Third-Party Complaint.

41. Third-Party Defendants deny the allegations of Paragraph 80 of the Third-Party Complaint.

**FOR A FIRST DEFENSE TO DEFENDANT/THIRD-PARTY PLAINTIFF'S
THIRD CAUSE OF ACTION
(Indemnity and Contribution)**

42. In response to Paragraph 81 of the Third-Party Complaint, Third-Party Defendants incorporate by reference all preceding paragraphs as if set forth fully herein.

43. Third-Party Defendants deny the allegations of Paragraph 82 of the Third-Party Complaint.

44. Third-Party Defendants deny the allegations of Paragraph 83 of the Third-Party Complaint.

45. Third-Party Defendants deny the allegations of Paragraph 84 of the Third-Party Complaint.

46. The allegations in Paragraph 85 of the Third-Party Complaint require no response from Third-Party Defendants.

**FOR A FIRST DEFENSE TO
THE PRAYER FOR RELIEF**

47. Third-Party Defendants deny that Defendant/Third-Party Plaintiff is entitled to the relief requested in the unnumbered paragraphs beginning "WHEREFORE" on page 13 of the Third-Party Complaint, including all subparagraphs and subparts.

FOR A SECOND DEFENSE

48. The Third-Party Complaint fails to state a cause of action upon which relief can

be granted and, therefore, must be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

49. Third-Party Defendant Tonya D. Parks did not enter into any contract of insurance with Defendant/Third-Party Plaintiff.

50. Third-Party Defendant Tonya D. Parks had no involvement with the Defendant/Third-Party Plaintiff's claim for coverage under the policy.

51. Accordingly, Third-Party Defendant Tonya D. Parks owed no duty of care to Defendant/Third-Party Plaintiff regarding the causes of action set forth in the Third-Party Complaint.

52. Therefore, all causes of action must be dismissed as to Third-Party Defendant Tonya D. Parks.

FOR A FOURTH DEFENSE

53. Nationwide would show that certain conditions precedent to its obligations under the Policy did not occur.

FOR A FIFTH DEFENSE

54. Third-Party Defendants would show that Defendant/Third-Party Plaintiff has failed to take all reasonable measures to mitigate her alleged damages.

FOR A SIXTH DEFENSE

55. Nationwide would show that it had a reasonable and valid basis for the denial of the claim for insurance benefits.

FOR A SEVENTH DEFENSE

56. Liability of Third-Party Defendants in this matter, if any, is dependent upon a

policy of insurance, which, as a written document, is the best evidence of its terms, conditions, provisions and exclusions. Third-Party Defendants deny any liability at variance with such terms, conditions, provisions and exclusions and pleads them as if copied herein, and claim any other exclusions that may apply.

FOR AN EIGHTH DEFENSE

57. Some or all of Defendant/Third-Party Plaintiff's claims may be barred by the doctrines of waiver and/or estoppel.

FOR A NINTH DEFENSE

58. Nationwide would show that the Plaintiff's claims are barred because there was no policy in effect at the time of the loss.

FOR A TENTH DEFENSE

59. Defendant/Third-Party Plaintiff is not entitled to punitive damages because Third-Party Defendants' alleged wrongful acts or omissions, which are expressly denied, were not done with malice.

FOR AN ELEVENTH DEFENSE

60. An award of punitive damages violates the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that:

- a. the judiciary's ability to correct a punitive damages award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;
- b. any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- c. any award of punitive damages based upon the wealth of the Third-Party Defendants violates due process guarantees;

- d. the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- e. an excessive award of punitive damages violates the due process guarantees of the Third-Party Defendants;
- f. an award of punitive damages that is neither reasonable nor proportionate to the alleged wrong committed is irrational, arbitrary, furthers no legitimate purpose, and is an unconstitutional deprivation of the property of the Third-Party Defendants;
- g. an award of punitive damages that is grossly disproportionate to any compensatory damages awarded violates the Third-Party Defendants' due process guarantees;
- h. an award of punitive damages based solely on vicarious liability or the doctrine of respondeat superior is violative of due process guarantees;
- i. due to the lack of standards for determining punitive damages, the Third-Party Defendants lack fair notice of the punishment to which they could be subjected;
- j. even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;
- k. an award of punitive damages that does not comport with the three guideposts articulated in *State Farm Mutual Automobile Insurance Company v. Campbell* fails to satisfy constitutional due process guarantees; and
- l. the Plaintiff's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Third-Party Defendants.

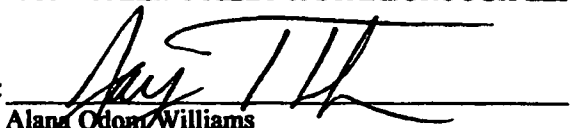
FOR A TWELFTH DEFENSE

61. Third-Party Defendants reserve the right to assert any additional defense that may be disclosed during the course of additional investigation and discovery.

WHEREFORE, having fully answered the Third-Party Complaint, Third-Party Defendants pray that judgment be entered against Defendant/Third-Party Plaintiff, that the relief requested by

Defendant/Third-Party Plaintiff be denied, that the Third-Party Complaint be dismissed with prejudice, and for such other and further relief as the Court deems just and proper.

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*Attorneys for Third-Party Defendants Nationwide Property &
Casualty Insurance Company and Tonya D. Parks*

Columbia, South Carolina

February 6, 2012

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 2002RSS,

Plaintiffs,

vs.

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

Defendants.

Chartrease Grier,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

Civil Action No. 2011-CP-40-6103

**MOTION FOR PROTECTIVE
ORDER BY THIRD-PARTY
DEFENDANT NATIONWIDE
PROPERTY & CASUALTY
INSURANCE COMPANY**

RICHLAND COUNTY
FILED
2012 MAY 10 AM 9:41
J. C. P. & G. S.
J. C. P. & G. S.

Pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, Third-Party Defendant Nationwide Property & Casualty Insurance Company ("Nationwide"), by and through its undersigned counsel, hereby respectfully requests that this Court enter a Protective Order protecting the confidentiality of information that Nationwide has been requested to produce in discovery from discovery in this action.

The basis of this motion is as follows:

1. Defendant/Third-Party Plaintiff Chartreuse Grier ("Grier") served Interrogatories and Requests for Production on Nationwide on March 7, 2012. Pursuant to an extension granted in writing by Grier's counsel, Nationwide's deadline to respond to this discovery is May 11, 2012.

2. Request # 25 of the Requests for Production calls for the following documentation:

Copies of the criteria or standards utilized by Nationwide when making a decision as to whether to renew and/or cancel a homeowners policy of insurance based on the identification of hazards on or part of the property through the Home Care review process or otherwise.

3. Nationwide objects to this request on the basis that it calls for information that is confidential, proprietary, and a trade secret to Nationwide's business concerns. The documents responsive to this request are sensitive, internal company policies and procedures that are not disclosed to anyone other than Nationwide employees in the regular course of business.

4. Nationwide is willing to produce the requested information upon entry of a protective order by the Court.

5. Among the safeguards to protect confidentiality, Nationwide requests that the protective order provide that no individual other than a named party to this case or counsel for a named party to this case (including persons acting as agents of counsel for a named party, such as retained experts) should be in possession of any documents or information designated to be confidential under the Order. Further, all originals and copies of said documents, information, or data, whether in electronic or hard copy form, should be physically and

conspicuously marked "Confidential—Produced Pursuant to Protective Order," or other similar demarcation.

6. Nationwide requests additional appropriate safeguards such that any agent of counsel for a named party, such as a retained experts, should sign an acknowledgement that he/she is aware that the documents or information are confidential and under protective order. Copying of the documents, information, and data should be restricted to working copies for use by a named party or counsel for a named party in connection with the instant litigation. The protected information should not be otherwise disseminated and should be destroyed or returned to Nationwide immediately upon termination of this civil action.

7. Nationwide is attaching a proposed protective order as Exhibit A to this motion.

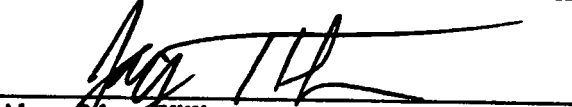
8. Nationwide's counsel has twice attempted via written communications to obtain consent from counsel for all represented parties to this request for a protective order. However, Nationwide's counsel has received no response from any other party or counsel regarding this request.

For the reasons stated above, Nationwide respectfully requests that the Court issue the requested Protective Order.

< < *Signature block on next page* > >

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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*Attorneys for Third-Party Defendants Nationwide Property &
Casualty Insurance Company and Tonya D. Parks*

Columbia, South Carolina

May 10, 2012

Exhibit A

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,

Plaintiffs,

vs.

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

Defendants.

Civil Action No. 2011-CP-40-6103

PROTECTIVE ORDER

Chartreuse Grier,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

Whereas, Third-Party Defendant Nationwide Property & Casualty Insurance Company has requested that the Court issue a protective order regarding certain confidential, proprietary documents that have been requested in discovery, and whereas the Court has determined that the terms set forth herein are appropriate to protect the respective interests of the parties, the public, and the Court; accordingly, it is hereby ORDERED:

1. **Scope.** All documents produced in the course of discovery, all responses to discovery requests, and all deposition testimony and deposition exhibits and any other materials

which may be subject to discovery (hereinafter collectively "documents") shall be subject to this Order concerning confidential information as set forth below.

2. **Form and Timing of Designation.** Confidential documents shall be so designated by placing or affixing the word "CONFIDENTIAL" on the document in a manner which will not interfere with the legibility of the document and which will permit complete removal of the Confidential designation. Documents shall be designated CONFIDENTIAL prior to, or contemporaneously with, the production or disclosure of the documents. Inadvertent or unintentional production of documents without prior designation as confidential shall not be deemed a waiver, in whole or in part, of the right to designate documents as confidential as otherwise allowed by this Order.

3. **Documents Which May be Designated Confidential.** Any party may designate documents as confidential but only after review of the documents by an attorney¹ who has, in good faith, determined that the documents contain information protected from disclosure by statute, sensitive personal information, trade secrets, or confidential research, development, or commercial information. Information or documents which are available in the public sector may not be designated as confidential.

4. **Depositions.** Portions of depositions shall be deemed confidential only if designated as such when the deposition is taken or within seven business days after receipt of the transcript. Such designation shall be specific as to the portions to be protected.

¹ The attorney who reviews the documents and certifies them to be CONFIDENTIAL must be admitted to the Bar of at least one state but need not be admitted to practice in the State of South Carolina and need not apply for *pro hac vice* admission. By signing the certification, counsel submits to the jurisdiction of this court in regard to the certification.

5. Protection of Confidential Material.

a. General Protections. Documents designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties or counsel for the parties or any other persons identified below (§ 5.b.) for any purposes whatsoever other than preparing for and conducting the litigation in which the documents were disclosed (including any appeal of that litigation).

b. Limited Third Party Disclosures. The parties and counsel for the parties shall not disclose or permit the disclosure of any documents designated CONFIDENTIAL under the terms of this Order to any other person or entity except as set forth in subparagraphs (1)-(5) below, and then only after the person to whom disclosure is to be made has executed an acknowledgment (in the form set forth at Attachment A² hereto), that he or she has read and understands the terms of this Order and is bound by it. Subject to these requirements, the following categories of persons may be allowed to review documents which have been designated CONFIDENTIAL pursuant to this Order:

(1) counsel and employees of counsel for the parties who have responsibility for the preparation and trial of the lawsuit;

(2) parties and employees of a party to this Order but only to the extent counsel shall certify that the specifically named individual party or employee's assistance is necessary to the conduct of the litigation in which the information is disclosed;

(3) court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents;

(4) consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of the

² Counsel shall retain a copy of the Attachment A form signed by the party or employee.

lawsuit; and

(5) other persons only upon consent of the producing party or upon order of the court and on such conditions as are agreed to or ordered.

c. Control of Documents. Counsel for the parties shall take reasonable efforts to prevent unauthorized disclosure of documents designated as Confidential pursuant to the terms of this Order. Counsel shall maintain a record of those persons, including employees of counsel, who have reviewed or been given access to the documents along with the originals of the forms signed by those persons acknowledging their obligations under this Order.

d. Copies. All copies, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as "copies"), of documents designated as Confidential under this Order or any portion of such a document, shall be immediately affixed with the designation "CONFIDENTIAL" if the word does not already appear on the copy. All such copies shall be afforded the full protection of this Order.

6. Filing of Confidential Materials. In the event a party seeks to file any material that is subject to protection under this Order with the Court, that party shall take appropriate action to ensure that the documents receive proper protection from public disclosure including: (1) filing a redacted document with the consent of the party who designated the document as confidential; (2) where appropriate (*e.g.* in relation to discovery and evidentiary motions), submitting the documents solely for *in camera* review; or (3) where the preceding measures are not adequate, seeking permission to file the document under seal. Absent extraordinary circumstances making prior consultation impractical or inappropriate, the party seeking to submit the document to the Court shall first consult with counsel for the party who designated the document as confidential to determine if some measure less restrictive than filing the document

under seal may serve to provide adequate protection. This duty exists irrespective of the duty to consult on the underlying motion.

7. Greater Protection of Specific Documents. No party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an Order providing such special protection.

8. Challenges to Designation as Confidential. Any CONFIDENTIAL designation is subject to challenge. The following procedures shall apply to any such challenge.

a. The burden of proving the necessity of a CONFIDENTIAL designation remains with the party asserting confidentiality.

b. A party who contends that documents designated CONFIDENTIAL are not entitled to confidential treatment shall give written notice to the party who affixed the designation of the specific basis for the challenge. The party who so designated the documents shall have fifteen (15) days from service of the written notice to determine if the dispute can be resolved without judicial intervention and, if not, to move for an Order confirming the CONFIDENTIAL designation.

c. Notwithstanding any challenge to the designation of documents as confidential, all material previously designated CONFIDENTIAL shall continue to be treated as subject to the full protections of this Order until one of the following occurs:

(1) the party who claims that the documents are confidential withdraws such designation in writing;

(2) the party who claims that the documents are confidential fails to move timely for an Order designating the documents as confidential as set forth in paragraph 8.b. above; or

(3) the Court rules that the documents should no longer be designated as confidential information.

d. Challenges to the confidentiality of documents may be made at any time and are not waived by the failure to raise the challenge at the time of initial disclosure or designation.

9. Treatment on Conclusion of Litigation.

a. **Order Remains in Effect.** All provisions of this Order restricting the use of documents designated CONFIDENTIAL shall continue to be binding after the conclusion of the litigation unless otherwise agreed or ordered.

b. **Return of CONFIDENTIAL Documents.** Within thirty (30) days after the conclusion of the litigation, including conclusion of any appeal, all documents treated as confidential under this Order, including copies as defined above (§5.d.) shall be returned to the producing party unless: (1) the document has been entered as evidence or filed (unless introduced or filed under seal); (2) the parties stipulate to destruction in lieu of return; (3) as to documents containing the notations, summations, or other mental impressions of the receiving party, that party elects destruction; or (4) the parties consent to the retention of certain or all of such documents. Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product including an index which refers or relates to information designated CONFIDENTIAL so long as that work product does not duplicate verbatim substantial portions of the text of confidential documents. This work product continues to be Confidential under the terms of this Order. An attorney may use his or her work product in a subsequent litigation provided that its use does not disclose the Confidential documents.

10. Order Subject to Modification. This Order shall be subject to modification on motion of any party or any other person who may show an adequate interest in the matter to

intervene for purposes of addressing the scope and terms of this Order. The Order shall not, however, be modified until the parties shall have been given notice and an opportunity to be heard on the proposed modification.

11. **No Judicial Determination.** This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any specific document or item of information designated as CONFIDENTIAL by counsel is subject to protection under Rule 26(c) of the South Carolina Rules of Civil Procedure or otherwise until such time as a document-specific ruling shall have been made.

12. **Persons Bound.** This Order shall take effect when entered and shall be binding upon: (1) counsel who signed below and their respective law firms; and (2) their respective clients.

IT IS SO ORDERED.

Presiding Judge

_____, 2012

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Plaintiffs.

vs.

**Chartrease Grier; Palmetto Health Alliance;
and Palmetto Richland Memorial.**

Defendants.

Chartrease Grier,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

**Acknowledgment of Understanding
and Agreement to be Bound**

65

The undersigned acknowledges that violation of the Stipulated Confidentiality Order may result in penalties for contempt of court.

Name: _____

Job Title: _____

Employer: _____

Business Address: _____

Date: _____

Signature

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
The Bank of New York Mellon Trust
Company, National Association f/k/a The
Bank of New York Trust Company, N.A. as
successor to JPMorgan Chase Bank N.A.
s/b/m Bank One National Association as
Trustee for RAMP 2002RS5,

Plaintiff,

vs.

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

Defendants,

Chartrease Grier,

Third Party Plaintiff,

vs.

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

Third Party Defendants.

IN THE COURT OF COMMON PLEAS

**NOTICE OF MOTION AND MOTION
TO AMEND ANSWER AND THIRD
PARTY COMPLAINT**

Case No. 2011-CP-40-6103

YOU WILL PLEASE TAKE NOTICE that defendant and third-party plaintiff, **Chartrease Grier** ("Grier"), will move before the Court of Common Pleas, County of Richland, for an order, pursuant to S.C. R. Civ. P. 15, giving Grier leave of court to amend her answer and third-party complaint in the matter captioned above. This motion is made on the basis of newly discovered evidence and legal precedent that amendments will be freely given when justice so requires and when there is no prejudice to plaintiffs. This motion is also based on the applicable law, the affidavits that may be filed with the Court, and testimony that may be taken by the court in the interests of justice.

Grier specifically requests that she be allowed to amend its answer and third-party complaint as so indicated in the attached second amended answer and second amended third-party complaint (**Exhibit A**).

Respectfully submitted,



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Luke A. Burke (SC Bar No. 100033)

MOON LAW

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Attorneys for Defendant and Third Party Plaintiff, Chartrease Grier

June 8, 2012

Greenville, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
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.)
Chartrease Grier; Palmetto Health)
Alliance; and Palmetto Richland)
Memorial,)
Defendants.)

IN THE COURT OF COMMON PLEAS

**AMENDED ANSWER AND THIRD-
PARTY COMPLAINT**

(JURY TRIAL DEMANDED)

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.)

Chartrease Grier ("Defendant"), by and through her undersigned attorneys, answering the Complaint, would respectfully allege and show unto the court as follows:

FOR A FIRST DEFENSE

(General Denial)

1. Defendant denies all allegations in the Plaintiff's Complaint not specifically admitted below.

2. Defendant lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint and therefore denies the same and demands strict proof thereof.

3. Defendant lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint and therefore denies the same and demands strict proof thereof.

4. Defendant admits so much of the allegation of paragraph 3 as allege she has and may claim some interest in the real property that is the subject of this action and denies remaining allegations, demanding strict proof thereof.

5. Defendant lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint and therefore denies the same and demands strict proof thereof.

6. Defendant admits the allegations of paragraph 5.

7. Defendant admits so much of the allegations of paragraph 6 as allege that on April 30, 2002, she executed and delivered a promissory note and craves reference to this note for its terms. She denies the remaining allegations of paragraph 6, including any allegations inconsistent with the terms of this instrument.

8. Defendant admits so much of the allegations of paragraph 7 as allege that she executed and delivered a mortgage covering the property located at 6515 Easter Street, Columbia, South Carolina, as security on the aforementioned promissory note. Defendant craves reference to this instrument for its terms and denies the remaining allegations of paragraph 7, including any allegations inconsistent with the terms of this instrument.

9. Defendant admits the allegations of paragraph 8.

10. Defendant admits the allegations of paragraph 9.

11. To the extent the allegations of paragraph 10 refer to recorded documents, Defendant craves reference to those documents, which speak for themselves and are incorporated herein by reference and made a part of this answer. Defendant denies all other allegations of paragraph 10 which are consistent therewith.

12. To the extent the allegations of paragraph 11 refer to recorded documents, Defendant craves reference to those documents, which speak for themselves and are incorporated herein by reference and made a part of this answer. Defendant denies all other allegations of paragraph 11 which are consistent therewith.

13. Defendant admits the allegations of paragraph 12 insofar as they allege that Larry D. Grier died on February 10, 2007. To the extent the allegations of paragraph 12 refer to recorded documents, Defendant craves reference to those documents, which speak for themselves and are incorporated herein by reference and made a part of this answer.

14. Defendant admits the allegations of paragraph 13 insofar as no one is currently living at the subject property due to its destruction by fire on April 6, 2011. Defendant denies the remaining allegations of paragraph 13.

15. In response to the allegations of paragraph 14, Defendant craves reference to the mortgage, which speaks for itself and is incorporated herein by reference and made a part of this answer. Defendant denies all other allegations of paragraph 14 and those that are inconsistent therewith.

16. Defendant denies the allegations of paragraph 15 and demands strict proof thereof.

17. The allegations of paragraph 16 state merely legal conclusions, to which no response on the part of Defendant is required; but to the extent response is required, the allegations are denied.

18. The allegations of paragraph 17 state merely legal conclusions, to which no response on the part of Defendant is required; but to the extent response is required, the allegations are denied.

19. Defendant lacks sufficient information to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint and therefore denies the same and demands strict proof thereof.

FOR A SECOND DEFENSE

(Failure to State a Claim)

20. Defendant incorporates the allegations of paragraphs 1-19 which are consistent with this defense.

21. Plaintiff fails to state facts sufficient to constitute a cause of action against Defendant for each of the claims and, accordingly, they should be dismissed.

FOR A THIRD DEFENSE

(Unclean Hands)

22. Defendant incorporates the allegations of paragraphs 1-21 which are consistent with this defense.

23. The Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands. Plaintiff, through its alleged assignors, breached its contractual obligations and its wrongful and illegal conduct of engaging in predatory lending preclude Plaintiff from seeking to invoke the court's equitable jurisdiction

FOR A FOURTH DEFENSE

(Accounting)

24. Defendant incorporates the allegations of paragraphs 1-23 which are consistent with this defense.

25. Defendant would show that if any sums are owed to the plaintiff (which is denied), that amount owed is other than is stated in the Complaint; consequently, this Court should make a complete accounting of all sums allegedly due under the instruments referenced in the Complaint.

FOR A FIFTH DEFENSE

(Waiver and Estoppel)

26. Defendant incorporates the allegations of paragraphs 1-25 which are consistent with this defense.

27. Defendant alleges that Plaintiff, by its own conduct, has waived and/or should be estopped from asserting any rights he may have to collect damages against her. Such waiver and estoppel are pled as complete defenses and a bar to Plaintiff's claims.

FOR A SIXTH DEFENSE

(Failure to Mitigate)

28. Defendant incorporates the allegations of paragraphs 1-27 which are consistent with this defense.

29. Defendant alleges that Plaintiff failed to mitigate its damages in the manner provided for by law. Such failure to mitigate is thus pled as a complete defense and bar to Plaintiff's claims. Alternatively, to the extent Plaintiff failed to mitigate any portion of its damages, such failure to mitigate should bar Defendant from recovering damages which could have been avoided.

FOR A SEVENTH DEFENSE

(Illegality)

30. Defendant incorporates the allegations of paragraphs 1-29 which are consistent with this defense.

31. The agreements upon which Plaintiff bases some or all of its causes of action are illegal and/or unenforceable under South Carolina law and public policy.

FOR AN EIGHTH DEFENSE

(Accord and Satisfaction)

32. Defendant incorporates the allegations of paragraphs 1-31 which are consistent with this defense.

33. Defendant would show that in the event the plaintiff has or will receive payment from Defendant's insurance company, the Complaint will be barred by accord and satisfaction.

FOR A NINTH DEFENSE

(Breach of Duty of Good Faith and Fair Dealing)

34. Defendant incorporates the allegations of paragraphs 1-33 which are consistent with this defense.

35. Plaintiff breached its duty of good faith and fair dealing and such breach is the proximate cause of Plaintiff's damages.

FOR A TENTH DEFENSE

(Setoff and Recoupment)

36. Defendant incorporates the allegations of paragraphs 1-35 which are consistent with this defense.

37. Defendant alleges that in the event the plaintiff has or will receive payment from Defendant's insurance company, she will be entitled to set-off and recoupment of any amounts found due and owing under the allegations contained therein.

FOR AN ELEVENTH DEFENSE

38. Defendant incorporates the allegations of paragraphs 1-37 which are consistent with this defense.

39. Plaintiff's claims and remedies are limited, restricted, or excluded by the substance of any communication between the parties and/or between Plaintiff and third parties, including documents and/or oral conversations. Further, Defendant's liability, if any, may be limited, restricted, or excluded by the rights, responsibilities, and liability of Plaintiff and/or third parties, either by contract, statute, or equity.

FOR A TWELFTH DEFENSE AND BY WAY OF THIRD-PARTY COMPLAINT

40. COMES NOW, Defendant, Chartrease Grier, and by way of Third-party Complaint respectfully allege and show unto the Court as follows:

41. Defendant/Third-party Plaintiff, Chartrease Grier, is a citizen and resident of Richland County, State of South Carolina.

42. Third-party Defendant, Nationwide Insurance Company ("Nationwide"), is foreign corporation licensed and doing business in the State of South Carolina.

43. Third-party Defendant, Tonya D. Parks ("Parks"), is a resident and citizen of the Richland County, South Carolina and is licensed and doing business in the State of South Carolina.

44. Parks owns and operates an insurance agency in Richland County, South Carolina and, through her agency, solicits business and sells insurance policies in South Carolina.

45. Parks, through her agency, is an authorized agent for Nationwide and is authorized to and does in fact enter into contracts for insurance on behalf of Nationwide.

46. Third-party Plaintiff is the owner of the property located at 6515 Easter Street, Columbia, South Carolina 29203, and the contents thereof.

47. At all times relevant hereto, the mortgage on the property located at 6515 Easter Street, Columbia, South Carolina 29203, was held by GMAC Mortgage, LLC ("GMAC").

48. On or about March 15, 2010, Parks sold to Third-party Plaintiff a policy for homeowners insurance on her home located at 6515 Easter Street, Columbia, South Carolina 29203, and the contents thereof ("The policy"). Policy number 6139-HP-340377 provided insurance limits for \$101,600.00 for the structure of the home and \$71,120.00 for the contents of the home. The policy was underwritten by Nationwide.

49. The policy provided coverage in the event that the insured property was damaged or destroyed by fire.

50. The policy had an effective policy period of March 24, 2010 to March 24, 2011.

51. The policy was executed on behalf of Nationwide by its licensed and legal agent Tonya D. Parks.

52. The policy was executed by Tonya D. Parks and Third-party Plaintiff in Richland County, South Carolina

53. On or about January 14, 2011, GMAC received notice from Nationwide indicating that the policy issued to Third-party Plaintiff would not be renewed by Nationwide at the conclusion of the policy period.

54. Thereafter, a representative of GMAC contacted Nationwide to inquire about the decision to not renew the policy.

55. During the course of communications between GMAC and Nationwide it was agreed by Nationwide that the policy would be renewed upon receipt of the required premium.

56. On or about March 15, 2011, payment in the amount of \$993.00 was issued by GMAC on behalf of Third-party Plaintiff to Nationwide representing the necessary premium for renewal.

57. The payment in the amount of \$993.00 by GMAC to Nationwide was accepted and deposited by Nationwide.

58. At all times relevant hereto GMAC was acting as the agent for, in the interest of, on behalf of, and for the benefit of Third-party Plaintiff.

59. As a result of the acceptance of the premium payment by GMAC to Nationwide, the policy renewed for the policy period of March 24, 2011 to March 24, 2012.

60. Third-party Plaintiff was an intended beneficiary of the contract for renewal of the policy.

61. On April 6, 2011, Third-party Plaintiff's property located at 6515 Easter Street, Columbia, South Carolina 29203, along with the contents thereof, was destroyed by fire.

62. Notice of the loss was timely made by Third-party Plaintiff to Nationwide and Parks.

63. At all times relevant hereto the policy was in full force and effect and all premiums payments were current.

64. At all times relevant hereto Nationwide and Parks failed to comply with the mandates of Section 38-75-740 of Article 9 for nonrenewal of insurance policies.

65. After the fire on April 6, 2011, Nationwide returned the payment of premium made by GMAC to and accepted by Nationwide to Third-party Plaintiff and Nationwide denied coverage for any losses arising out of the fire.

66. Nationwide's refusal to provide coverage under the policy constitutes a breach of the contract for insurance between Nationwide and Third-party Plaintiff.

67. As a result of the breach, Third-party Plaintiff has suffered damages in the form of the damage and destruction of the property located at 6515 Easter Street, Columbia, South Carolina 29203, and the contents thereof.

68. As a result of the breach, Third-party Plaintiff has suffered damages in the form of anxiety, stress, mental anguish, and depression arising out of her inability to repair the property and replace the contents thereof and having to live with and rely upon family and friends for financial support.

69. As a result of the breach, the County of Richland has instituted the foreclosure proceedings that constitute the main demand of this litigation. Third-party Plaintiff has suffered damages in the form of the costs and expenses incurred to defend the foreclosure action, as well as in the form of anxiety, stress, mental anguish, depression, and embarrassment arising out the possibility of losing her home.

FOR A FIRST CAUSE OF ACTION

(Breach of Contract)

70. Third-party Plaintiff realleges and incorporates by reference the preceding allegations of the Third-party Complaint as if they were repeated herein.

71. Third-party Defendants' refusal to provide coverage under the policy constitutes a breach of the contract for insurance between Third-party Defendants' and Third-party Plaintiff.

72. Third-party Defendants' breach was done with intentionally, without reasonable cause, and in bad faith.

73. Due to Third-party Defendants' breach, Third-party Plaintiff is entitled to recover amounts owed under the policy for property damage and living expenses incurred, interest on the amount owed, and attorneys' fees and costs.

74. Due to Third-party Defendants' breach, Third-party Plaintiff is entitled to recover consequential damages incurred as a result of the breach, including all costs and expenses incurred in defending the foreclosure action which is subject to the main demand, all costs incurred due to Third-party Plaintiff's inability to timely repair and reside in her own home, additional living expenses incurred, and any and all other expenses found to be resulting from the breach.

FOR A SECOND CAUSE OF ACTION

(Bad Faith Refusal to Pay Insurance Claim)

75. Third-party Plaintiff realleges and incorporates by reference the preceding allegations of the Third-party Complaint as if they were repeated herein.

76. Third-party Defendants owed Third-party Plaintiff a duty of good faith and fair dealing in evaluating and processing her claim for benefits under the policy.

77. Third-party Defendants', through their agents, representatives, and/or their employees wrongly and in violation of their duty of good faith and fair dealing refused to pay to Third-party Plaintiff the benefits to which she is entitled under the policy.

78. As a direct result of the conduct of Third-party Defendants, Third-party Plaintiff is entitled to recover amounts owed under the policy for property damage and living expenses incurred, all costs and expenses incurred in defending the foreclosure action which is subject to

the main demand, all costs incurred due to Third-party Plaintiff's inability to timely repair and reside in her own home, additional living expenses incurred, interest on the amount owed, attorneys' fees and costs, and any and all other expenses found to be resulting from Third-party Defendants' conduct.

79. Third-party Defendants' actions in refusing to pay benefits to Third-party Plaintiff were willful, wanton, and in reckless disregard for the rights of Third-party Plaintiff.

80. As a result of Third-party Defendants' willful, wanton, and reckless actions, Third-party Plaintiff is entitled to an award of punitive damages against Third-party Defendants.

FOR A THIRD CAUSE OF ACTION

(Negligent Misrepresentation)

81. Third-party Plaintiff realleges and incorporates by reference allegations 1-69 of the Third-party Complaint as if they were repeated herein.

82. Nationwide had a duty to exercise reasonable care in giving information to Third-party Plaintiff and her agents because Nationwide had a pecuniary interest in Third-party Plaintiff's insurance policy.

83. Nationwide breached this duty by representing to GMAC that Third-party Plaintiff's insurance policy would be renewed upon payment of the policy premium.

84. Third-party Plaintiff relied upon this information in deciding not to obtain alternative insurance coverage.

85. Third-party Plaintiff is entitled to recover consequential damages incurred as a result of this misrepresentation, including all costs and expenses incurred in defending the foreclosure action which is subject to the main demand, all costs incurred due to Third-party

Plaintiff's inability to timely repair and reside in her own home, additional living expenses incurred, and any and all other expenses found to be resulting from the misrepresentation.

FOR A FOURTH CAUSE OF ACTION

(Negligence)

86. Third-party Plaintiff realleges and incorporates by reference allegations 1-69 of the Third-party Complaint as if they were repeated herein.

87. Parks had a pecuniary interest in her relationship with Third-party Plaintiff.

88. Parks owed a duty to Third-party Plaintiff to advise her on insurance coverage for her home.

89. Parks breached this duty by failing to advise Third-party Plaintiff to obtain alternative insurance.

90. Third-party Plaintiff is entitled to recover consequential damages incurred as a result of the breach, including all costs and expenses incurred in defending the foreclosure action which is subject to the main demand, all costs incurred due to Third-party Plaintiff's inability to timely repair and reside in her own home, additional living expenses incurred, and any and all other expenses found to be resulting from the breach.

FOR A FIFTH CAUSE OF ACTION

(Indemnity and Contribution)

91. Third-party Plaintiff realleges and incorporates by reference the preceding allegations of the Third-party Complaint as if they were repeated herein.

92. It is alleged in the main demand that Third-party Plaintiff is liable to Plaintiff in the main demand for damages related to or arising out of the foreclosure on the property located at 6515 Easter Street, Columbia, South Carolina 29203.

93. Should Third-party Plaintiff be found liable to Plaintiff in the main demand, said liability will be based solely on the actions or inactions of Nationwide and Parks.

94. Due to the actions or inactions of Nationwide and Parks, Nationwide and Parks are liable to Third-party Plaintiff under the theories of indemnification and contribution for all amounts Third-party Plaintiff is found to owe now or in the future to Plaintiff in the main demand.

95. Third-party Plaintiff demands a trial by jury on all issues.

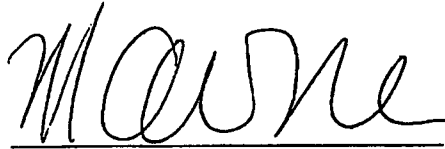
WHEREFORE, having fully answered the Complaint and having set forth defenses and counterclaims, Defendant, Chartreuse Grier, respectfully requests the following:

1. That the Complaint be dismissed with prejudice;
2. For an accounting
3. For other equitable relief;
4. For actual, compensatory and consequential damages as permitted by law;
5. For reasonable attorney's fees and costs related to this action;
6. For such other and further relief as this Court deems just and proper.

WHEREFORE, Third-party Plaintiff, Chartreuse Grier, prays for a judgment against Third-party Defendants, Nationwide Insurance Company and Tonya D. Parks, finding Third-party Defendants to be in breach of contract and in bad faith and awarding actual, consequential, and punitive damages, plus interest and attorney's fees and costs incurred in prosecuting this claim, and for such other and further relief as this Court shall deem just and proper.

[SIGNATURE ON THE FOLLOWING PAGE]

Greenville, South Carolina
June 9, 2017



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SBradley@ScottBradleyLaw.com

Attorneys for Defendant/Third-Party
Plaintiff, Chartreuse Grier

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,

Civil Action No. 2011-CP-40-6103

Plaintiffs,)

vs.)

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

Defendants.)

**THIRD-PARTY DEFENDANTS'
MOTION TO COMPEL PROPER
RESPONSE TO REQUEST FOR
ADMISSION**

Chartrease Grier,

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

Third-Party Defendants Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Parks"), by and through their undersigned counsel, respectfully submit this Motion to Compel a Proper Response to a Request for Admission that Third-Party Plaintiff Grier ("Grier") has improperly denied. For the reasons set forth below, Nationwide and Parks further request that the Court issue an award of costs and attorneys fees they have incurred because of Grier's improper discovery conduct in denying a Request to

Admit under Rule 36, SCRPC, which has forced Nationwide and Parks to incur undue expenses to prove facts that are undisputed and should have been admitted under the Rules.

FACTUAL BACKGROUND

Grier's Third-Party Complaint asserted causes of action against Nationwide and Parks based on the existence of a contract between the parties. However, it is indisputable that Grier had no contract with Parks. Her only contract relevant to her claims against Nationwide and Parks was her insurance policy, which was a contract with Nationwide, not with Parks.

Nationwide and Parks served a Request to Admit on Grier under Rule 36, SCRPC, seeking the following admission from Grier:

Admit that Third-Party Defendant Tonya D. Parks is not and was never a party to any contract with Third-Party Plaintiff Chartreuse Grier.

See Exhibit A. Grier denied this Request to Admit.

Thereafter, Nationwide and Parks served interrogatories and requests for production on Grier, requesting the basis for her denial of the Request to Admit. Grier responded merely by identifying several facts and documents showing that Parks was an agent of Nationwide, which is not in dispute. However, Grier failed to identify any information indicating that she ever had a contractual relationship with Parks or any valid basis for denying the Request to Admit. Grier continued to deny the Request to Admit, thereby claiming that she did have some alleged contract with Parks.

Nationwide and Parks then sent a letter to Grier, requesting that she dismiss Parks as a Third-Party Defendant because all of the causes of action against Parks were based on the existence of a contract, but there was no contract between Grier and Parks. *See Exhibit B.* In response, Grier filed a motion to amend the Third-Party Complaint. The proposed amended

Third-Party Complaint would assert additional causes of action against Nationwide and Parks, and it would continue to assert the contract-based claims against Parks. Therefore, Grier is still seeking to assert claims against Parks that require the existence of a contract, even though it is undisputed that Grier never had any contract with Parks.

LEGAL ARGUMENT

1. Request to Admit Should be Admitted

The Court should either order that the Request to Admit that Parks is not and was never a party to any contract with Grier is admitted or require Grier to serve an amended answer admitting this Request to Admit. Rule 36(a) provides as follows:

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. . . . If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. . . . The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Grier's written discovery responses confirm that Parks never had any contract with Grier. Grier has acknowledged that the only contract was the policy of insurance between Grier and Nationwide, which expired before the date of loss in this case. It is well established that the mere fact that Parks was an agent for Nationwide does not somehow create a contractual relationship between Grier and Ms. Parks. *See, e.g., Green v. Industrial Life & Health Ins. Co.*, 199 S.C. 262, 272, 18 S.E.2d 873, 876-77 (1942) ("The liability, if any, for a breach of such contract is that of the principal alone.") (citing *Goodale v. Page*, 92 S. C. 413, 75 S.E. 700 (1912)); *First Citizens Bank & Trust Co. v. Strable*, 292 S.C. 146, 355 S. E. 2d 278 (Ct. App. 1987); *Holder v. Haskett*, 283 S.C. 247, 321 S.E.2d 192 (Ct. App. 1984);

Southern R. Co. v. Strachan Shipping, 624 F. Supp. 218 (D.S.C. 1985); 23 S.C. Jurisprudence Agency § 50 (“[T]he agent cannot be sued on a contract made on behalf of the principal if the name of the principal is disclosed at the time the contract is made and it is clear that the agent did not intend to bind himself.”); *id.* § 67 (“If the agent makes a contract as an agent and names his principal during the execution of the contract, the agent will not be held personally liable for the contract if the terms of the contract explicitly show he is an agent.”); *id.* § 68 (“The court will not hold an agent personally liable for a breach of contract if he acted within his authority when he entered the contract for a known principal.”)

It is indisputable that Parks is not and was never a party to any contract with Grier. There is no evidence to the contrary. Grier has improperly denied the Request to Admit, and the Court should either order that the Request to Admit that Parks is not and was never a party to any contract with Grier is admitted or require Grier to serve an amended answer admitting this Request to Admit.

2. Costs and Attorneys Fees

Nationwide and Parks request that the Court require Grier to pay their costs and attorneys’ fees incurred because Grier improperly denied the Request to Admit that Parks is not and was never a party to any contract with Grier. By refusing to admit this indisputable fact, Grier has forced Nationwide and Parks to incur undue expenses to prove facts that are undisputed and should have been admitted under the Rules.

Rule 37(a)(4) provides:

If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney’s fees, unless

the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

In addition, Rule 37(c) provides as follows:

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

Nationwide and Parks have proven that Parks is not and was never a party to any contract with Grier. Nationwide and Parks were forced to incur costs and attorneys to prove this fact, including the cost of filing this motion and attorneys fees for legal research to prepare the correspondence to Grier's counsel regarding their improper denial of the Request to Admit, preparing and serving written discovery regarding Grier's claim that she had a contract with Parks, preparing the opposition to Grier's Motion to Amend her Answer and Third-Party Complaint, and preparing this Motion to Compel. The Court should award Nationwide and Parks their costs and attorneys fees, which would not have been incurred if Grier had not improperly denied the Request to Admit.

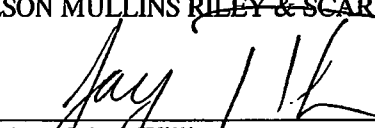
CONCLUSION

For the reasons set forth above, Nationwide respectfully requests that the Court either order that the Request to Admit that Parks is not and was never a party to any contract with Grier is admitted or require Grier to serve an amended answer admitting this Request to Admit. Nationwide also requests that the Court require Grier to pay Nationwide and Parks'

costs and attorneys' fees incurred because Grier improperly denied the Request to Admit that Parks is not and was never a party to any contract with Grier.

The undersigned counsel hereby certifies, in accordance with Rule 11 of the South Carolina Rules of Civil Procedure, that he has communicated with Third-Party Plaintiff's counsel and has attempted in good faith to resolve the matter contained in this motion, but has been unsuccessful.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Alana Odom Williams

SC Bar No. 70518

E-Mail: alana.williams@nelsonmullins.com

Jay T. Thompson

SC Bar No. 75030

E-Mail: jay.thompson@nelsonmullins.com

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Post Office Box 11070 (29211-1070)

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(803) 799-2000

*Attorneys for Third-Party Defendants Nationwide Property &
Casualty Insurance Company and Tonya D. Parks*

Columbia, South Carolina

July 3, 2012

EXHIBIT A

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,)

Civil Action No. 2011-CP-40-6103

Plaintiffs,)

vs.)

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

Defendants.)

**THIRD-PARTY DEFENDANTS'
FIRST REQUESTS TO ADMIT TO
THIRD-PARTY PLAINTIFF**

Chartrease Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

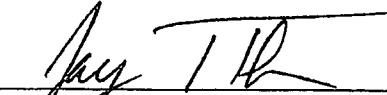
**TO: M. ALLISON MOON, ESQ. AND SCOTT J. BRADLEY, ESQ., ATTORNEYS
FOR DEFENDANT/THIRD PARTY PLAINTIFF CHARTREASE GRIER.**

Pursuant to Rules 26 and 36, SCRCF, Third-Party Defendants Nationwide Property & Casualty Insurance Company and Tonya D. Parks (hereinafter "Third-Party Defendants") hereby propound and serve upon Defendant/Third-Party Plaintiff Chartrease Grier their First Requests to Admit to Third-Party Plaintiff and requests they be answered fully in writing within thirty (30) days from the date of service hereof.

REQUESTS TO ADMIT

1. Admit that Third-Party Defendant Tonya D. Parks is not and was never a party to any contract with Third-Party Plaintiff Chartreuse Grier.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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(803) 799-2000

*Attorneys for Third-Party Defendants Nationwide Property &
Casualty Insurance Company and Tonya D. Parks*

Columbia, South Carolina

February 14, 2012

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, Nationwide Property & Casualty Insurance Company and Tonya D. Parks, do hereby certify that I have served all known counsel in this action with a copy of the pleading(s) herein below specified by United States Postal Service, to the following address:

Pleadings Served:

**Third-Party Defendants' First Requests For Production To
Third-Party Plaintiff**

**Third-Party Defendants' First Set Of Interrogatories To Third-
Party Plaintiff**

**Third-Party Defendants' First Requests To Admit To Third-
Party Plaintiff**

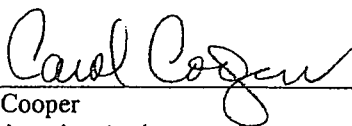
Counsel Served:

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Greenville, SC 29608

Thomas A. Shook, Esq.
FINKEL LAW FIRM LLC
Post Office Box 71727
N. Charleston, SC 29415

Scott J. Bradley, Esq.
Scott Bradley Law Firm, LLC
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Michael C. Griffin, Esq.
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Charlotte, NC 28202



Carol Cooper
Administrative Assistant

February 14, 2012.
Columbia, South Carolina

EXHIBIT B

18813/1510
/0111

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP
Attorneys and Counselors at Law
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jay.thompson@nelsonmullins.com

May 23, 2012

M. Allison Moon, Esquire
Moon Law, LLC
P. O. Box 3785
Greenville, SC 29608

Scott J. Bradley, Esquire
Scott Bradley Law Firm, LLC
P. O. Box 716
Greenville, SC 29602

RE: Chartreuse Grier v. Nationwide Property & Casualty Insurance Company; and Tonya
D. Parks
Civil Action No. 2011-CP-40-6103
Our File No. 18813/01510

Dear Counsel:

We are in receipt of Third-Party Plaintiff Grier's responses to Third-Party Defendants' second sets of interrogatories and requests for production. One of the primary purposes of these written discovery requests was to determine whether Third-Party Plaintiff had any valid basis for: (1) including Tonya D. Parks as a party to this lawsuit, and (2) denying our request to admit that Ms. Parks never had any contract with Ms. Grier.

In light of your discovery responses, it is clear that Tonya D. Parks is not a proper party to this lawsuit and should be dismissed. The claims being asserted against Ms. Parks all arise out of the premise that there was an alleged contract between the parties. However, your written discovery responses confirm that Ms. Parks never had any contract with Ms. Grier. You have acknowledged that the only contract was the policy of insurance between Ms. Grier and Nationwide.¹ It is well established that the mere fact that Ms. Parks was an agent for Nationwide does not somehow create a contractual relationship between Ms. Grier and Ms. Parks. See, e.g., *Green v. Industrial Life & Health Ins. Co.*, 199 S.C. 262, 272, 18 S. E. 2d 873, 876-77 (1942) ("The liability, if any, for a breach of such contract is that of the principal

¹ The policy expired before the date of loss in this case.

M. Allison Moon, Esq.
May 23, 2012
Page 2

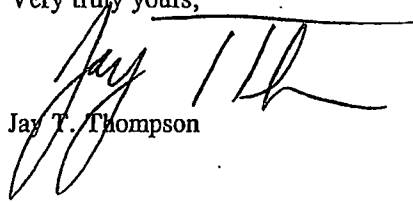
alone.") (citing *Goodale v. Page*, 92 S. C. 413, 75 S.E. 700 (1912)); *First Citizens Bank & Trust Co. v. Strable*, 292 S.C. 146, 355 S. E. 2d 278 (Ct. App. 1987); *Holder v. Haskett*, 283 S.C. 247, 321 S.E.2d 192 (Ct. App. 1984); *Southern R. Co. v. Strachan Shipping*, 624 F. Supp. 218 (D.S.C. 1985); 23 S.C. Jurisprudence Agency § 50 ("[T]he agent cannot be sued on a contract made on behalf of the principal if the name of the principal is disclosed at the time the contract is made and it is clear that the agent did not intend to bind himself."); *id.* § 67 ("If the agent makes a contract as an agent and names his principal during the execution of the contract, the agent will not be held personally liable for the contract if the terms of the contract explicitly show he is an agent."); *id.* § 68 ("The court will not hold an agent personally liable for a breach of contract if he acted within his authority when he entered the contract for a known principal.")

Considering these facts, we respectfully request that you voluntarily dismiss Ms. Parks from this lawsuit. If Ms. Parks is not voluntarily dismissed, we will move for judgment on the pleadings and/or summary judgment as to Ms. Parks and to have all claims against her stricken from the Third-Party Complaint. Pursuant to Rule 37(c), SCRCP, we will also seek an award of all reasonable expenses and attorneys fees incurred in proving that Ms. Parks never had any contract with Ms. Grier, a fact which has been improperly denied by Third-Party Plaintiff in response to Third-Party Defendants' Request to Admit.

We respectfully request that you respond to this correspondence by **June 8, 2012**, to confirm whether you will voluntarily dismiss Ms. Parks or whether we must seek court intervention to have her dismissed and to seek a sanction of costs and fees under Rule 37(c).

With highest regards, I remain

Very truly yours,


Jay T. Thompson

cc: Alana Odom Williams, Esq.

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendants, Nationwide Property & Casualty Insurance Company and Tonya D. Parks, do hereby certify that I have served all known counsel in this action with a copy of the pleading(s) herein below specified by United States Postal Service, to the following address:

Pleadings and Documents Served:

**Third -Party Defendants' Motion To Compel Proper Response
To Request For Admission**

Counsel Served:

M. Allison Moon, Esq.
Moon Law, LLC
P. O. Box 3785
Greenville, SC 29608

Scott J. Bradley, Esq.
Scott Bradley Law Firm, LLC
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Michael C. Griffin, Esq.
Bradley Arant Boult Cummings, LLP
Bank of America Corporate Center
100 N. Tryon Street, Ste. 2690
Charlotte, NC 28202



Carol Cooper
Administrative Assistant

July 3, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF RICHLAND)

The Bank of New York Mellon Trust) Civil Action No. 2011-CP-40-6103
 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,)

Plaintiffs,)

vs.)

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

Defendants.)

**THIRD-PARTY DEFENDANTS'
 MEMORANDUM IN OPPOSITION
 TO DEFENDANT/THIRD-PARTY
 PLAINTIFF CHARTREASE GRIER'S
 MOTION TO AMEND ANSWER AND
 THIRD PARTY COMPLAINT**

Chartrease Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

Third-Party Defendants Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Parks"), by and through their undersigned counsel, respectfully submit this Memorandum in Opposition to Defendant/Third-Party Plaintiff Chartrease Grier's ("Grier") Motion to Amend Answer and Third Party Complaint.

For the reasons set forth below, Nationwide and Parks request that the Court DENY the motion to amend the Third-Party Complaint, on the basis that it would be futile to allow

Grier to introduce a new pleading that continues to assert untenable contract claims against Parks, which would only be dismissed pursuant to Rule 12(b)(6), SCRCR, because there was no contract between Grier and Parks.

FACTUAL BACKGROUND

Grier's Third-Party Complaint asserted causes of action against Nationwide and Parks for: (1) breach of contract, (2) bad faith refusal to pay insurance claim, and (3) indemnity and contribution. The claims against Nationwide and Parks were based on the existence of a contract of insurance between the parties. However, it is indisputable that Grier had no contract with Parks. Her only contract relevant to her claims in this case was her insurance policy, which was a contract with Nationwide, not with Parks.

Nationwide and Parks served interrogatories and requests for production on Grier, requesting the basis for her claim that she had a contract with Parks. Grier responded merely by identifying several facts and documents showing that Parks was an agent of Nationwide, which is not in dispute. However, Grier failed to identify any information indicating that she ever had a contractual relationship with Parks.

Nationwide and Parks then sent a letter to Grier, requesting that they dismiss Parks as a Third-Party Defendant because all of the causes of action against Parks were based on the existence of a contract, but there was no contract between Grier and Parks.

In response, Grier filed the instant motion to amend the Third-Party Complaint, seeking to assert two additional causes of action: (1) a claim against Nationwide for negligent misrepresentation, and (2) a claim against Parks for negligence.

However, the proposed Amended Third-Party Complaint would continue to assert the contract-based claims against Parks. Therefore, Grier is still seeking to assert claims against

Parks that require the existence of a contract, even though Grier never had any contract with Parks.

LEGAL ARGUMENT

Nationwide and Parks oppose the motion to amend the Third-Party Complaint on the basis that it would be futile to allow Grier to introduce a new pleading that continues to assert untenable contract claims against Parks, which would only be dismissed pursuant to Rule 12(b)(6), SCRCF.

The Court has authority to deny leave to file an amended complaint, or portions of an amended complaint, if it would be futile because the causes of action in the amended complaint would fail as a matter of law. *See, e.g., Coral Gables, Inc. v. Palmetto Brick Co.*, 183 S.C. 478, 482, 191 S.E. 337, 338 (1937) (affirming denial of leave to amend complaint because claims in proposed amended complaint would be barred by statute of limitations).

Courts around the country, including the U.S. Supreme Court and Fourth Circuit, have consistently held that a plaintiff (or third-party plaintiff) should not be allowed to file an amended complaint that would assert futile causes of action which would simply be dismissed for failure to state a claim. *See, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962) (explaining that denying leave to amend is proper where amendment would be futile or a waste of judicial resources); *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995) (holding that amendment is futile when it could not withstand a motion to dismiss or is legally insufficient); *Dilmar Oil Co. v. Federated Mut. Ins. Co.*, 986 F. Supp. 959, 980 (D.S.C. 1997) (holding that “[l]eave to amend under Rule 15(a) is not granted automatically” and “may be granted *only* ‘when justice so requires’” (emphasis in original)) (citing *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987)).

In a third-party bad faith insurance claim, the United States District Court for the District of South Carolina held that “an amendment which would be futile should not be allowed; and . . . a party seeking to amend should make at least a prima facie showing that there is some merit to the proposed amended claim.” *Riegel Textile Corp. v. Employers Ins. Co.*, 1981 U.S. Dist. LEXIS 15888, at *5 (D.S.C. Oct. 5, 1981) (citations omitted) (denying motion to amend answer to complaint because there was no factual basis to support the proposed new affirmative defenses that would have been asserted in the amended answer).

An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss. *HealthSouth Rehab. Hosp. v. Am. Nat’l Red Cross*, 101 F.3d 1005, 1011-12 (4th Cir. 1996) (noting that proposed amendment was futile because allowing it would have “at most, delayed the inevitable dismissal” of plaintiff’s claims). *See also, e.g., In re PEC Solutions, Inc. Securities Litig.*, 418 F.3d 379, 391 (4th Cir. 2005) (affirming denial of leave to amend complaint because amendment would have been futile); *Lucente v. Int’l Bus. Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) (“One appropriate basis for denying leave to amend is that the proposed amendment is futile. . . . An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to [Rule] 12(b)(6).”); *Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001) (affirming denial of leave to amend complaint because plaintiff would be unable to prevail on claims in proposed amended complaint); *Bradley v. Val-Mejias*, 379 F.3d 892, 901 (10th Cir. 2004) (affirming denial of leave to amend complaint because claims in proposed amended complaint would be barred by statute of limitations); *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007) (affirming denial of leave to amend complaint because defendant would immediately be entitled to summary judgment on the claims in the proposed amended complaint); *see also Addington v.*

Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 667 (5th Cir. 1981) (denying motion to amend because the proposed claim was futile and would not survive a motion for summary judgment).

In this case, it would be futile to allow Grier to amend her Third-Party Complaint, because the proposed amended Third-Party Complaint would still assert causes of action against Parks that require the existence of a contract, which would only be dismissed for failure to state a claim. Specifically, the proposed amended Third-Party Complaint would assert causes of action against Parks for breach of contract and for bad faith refusal to pay an insurance claim. An essential element of both of these causes of action is the existence of a contract. However, it is indisputable that there was no contract between Grier and Parks.

If the Court were to allow Grier to amend her Third-Party Complaint, the result would simply be that Parks would file a Rule 12(b)(6) motion to dismiss the contract-based claims on the basis that there was no contract between Grier and Parks. Rather than requiring additional, unnecessary motion practice in this case, the Court should deny Grier's motion to amend the Third-Party Complaint.

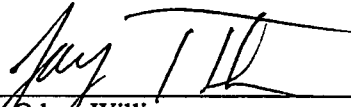
CONCLUSION

Grier has not made a prima facie showing that her claims against Parks for breach of contract and bad faith refusal to pay an insurance claim could have any merit. Therefore, since Grier's proposed amended complaint would assert causes of action against Parks that would be futile because they would only be dismissed pursuant to Rule 12(b)(6), SCRCP, the Motion to Amend should be denied.

< < *Signature block on next page* > >

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:  _____

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Jay T. Thompson
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*Attorneys for Third-Party Defendants Nationwide Property &
Casualty Insurance Company and Tonya D. Parks*

Columbia, South Carolina

July 3, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CASE 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,

v.

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

Defendants,

PLAINTIFF'S MOTION TO SEVER

Chartrease Grier,

Third Party Plaintiff,

v.

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

Third Party Defendants,

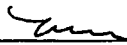
COMES NOW Plaintiff The Bank of New York Mellon Trust Company, National Association f/k/a The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank N.A. s/b/m Bank One National Association as Trustee for RAMP 2002RS5 ("Plaintiff") pursuant to Rule 42(b) of the South Carolina Rules of Civil Procedure, and moves this Court for an order to sever the claims between Third Party Plaintiff Chartrease Grier ("Ms. Grier") and

Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Ms. Parks"), an agent of Nationwide. Plaintiff states the following in support thereof:

1. Plaintiff's action against Ms. Grier is a mortgage lien foreclosure action.
2. Ms. Grier's claims against Nationwide and Ms. Parks involve breach of a contract for insurance; bad faith refusal to pay an insurance claim; and indemnity and contribution.
3. Plaintiff is not a necessary party to the resolution of the dispute between Ms. Grier and Nationwide and Ms. Parks. Ms. Park's mortgage obligations to Plaintiff are independent of the insurance obligations of Nationwide and Ms. Parks to Ms. Parks.
4. The two actions should be severed because the claims of the respective parties involve substantially different questions of law and fact.
5. Moreover, to allow a mortgagor to assert a claim against any party it believes caused or contributed to the mortgagor's failure to fulfill her contractual obligations to the mortgagee would essentially bring foreclosure proceedings to a halt and have untold consequences on lenders and borrowers throughout this State.
6. Further, the resolution of claims asserted in the Third-Party Complaint is unnecessary in resolving Plaintiff's foreclosure action inasmuch as surplus funds, if any, may be held by the Court to distribute at a future date in accordance with the separate resolution of the insurance claims.
7. Severance of the claims will remove the possibility of prejudice, confusion, and delay in the resolution of these matters.
8. After consultation, counsel for the defendants do not consent to this motion.

WHEREFORE, Plaintiff moves this Court for an order severing the claims between the parties.

Respectfully submitted this the 20th day of September 2012.



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Michael C. Griffin (SC Bar No. 72868)
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ATTORNEY FOR PLAINTIFF

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

The Bank of New York Mellon Trust) Civil Action No. 2011-CP-40-6103
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.)

CONSENT
SCHEDULING ORDER

Chartreuse Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

With the consent of all parties, the Court establishes the following schedule for this case.

1. **Mediation:** Mediation shall be conducted by **December 14, 2012**.
2. **Discovery:** All discovery shall be completed by **January 16, 2013**. The parties shall serve all discovery requests in time for the responses thereto to be made by this deadline.
3. **Dispositive Motions:** The parties shall file any dispositive motions by **January 25, 2013**.

4. Trial: This case shall not be placed on the jury trial roster until on or after February 4, 2013.

IT IS SO ORDERED.

The Honorable James R. Barber, III
South Carolina Circuit Judge

_____, South Carolina

_____, 2012

WE SO CONSENT:

BRADLEY ARANT BOULT CUMMINGS, LLP

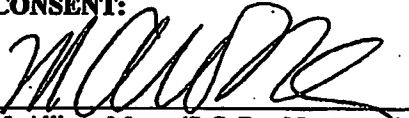
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National Association fka The Bank of New York Trust Company, N.A.
as successor to JPMorgan Chase Bank N.A. sbm Bank One National
Association as Trustee for RAMP 2002RS5*

Charlotte, North Carolina

October 23, 2012

WE CONSENT:

By: 

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Attorneys for Defendant/Third-Party Plaintiff Chartreuse Grier

Greenville, South Carolina

October 23, 2012

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*Attorneys for Third-Party Defendants Nationwide Property & Casualty Insurance Company and
Tonya D. Parks*

Columbia, South Carolina

October 23, 2012

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	
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,	)	
	)	
Plaintiffs,	)	NOTICE OF 30(B)(6) DEPOSITION
	)	TO NATIONWIDE PROPERTY &
vs.	)	CASUALTY INSURANCE CO.
	)	
Chartreas 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.	)	

**TO: JAY T. THOMPSON, ESQ. AND ALANA ODOM WILLIAMS, ESQ., ATTORNEYS
FOR THE THIRD-PARTY DEFENDANTS NATIONWIDE PROPERTY & CASUALTY
INSURANCE COMPANY AND TONYA D. PARKS**

WILL YOU PLEASE TAKE NOTICE that the undersigned in the above-captioned
matter will take, pursuant to South Carolina Rules of Civil Procedure 30(b)(6), the deposition of
Nationwide Property & Casualty Insurance Co., upon oral examination, for the purposes of

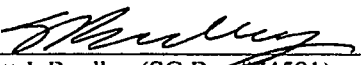
discovery and/or use of as evidence in the above-captioned action, before a Notary Public or some other official authorized by law to take depositions. Nationwide will designate one or more officers, directors, managing agents, or such other persons who consent to testify on their behalf and who are most knowledgeable regarding the subject matter listed in Exhibit A, attached hereto.

The 30(b)(6) Designee(s) of Nationwide are to appear at MOON LAW FIRM, 1 Augusta Street, Suite 301, Greenville, South Carolina 29601, on Monday, November 12, 2012, at 9:00 a.m., to testify at the taking of a deposition in the above-captioned case, provided said Designee(s) are within the State of South Carolina or within a 100-mile distance from Moon Law Firm. If the 30(b)(6) Designee(s) of Nationwide are beyond the above-stated limits for travel, the deposition shall take place via telephone on or before 9:00 a.m. on Monday, November 12, 2012.

November 2, 2012

Greenville, SC

SCOTT BRADLEY LAW FIRM, LLC


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Attorneys for the Defendant/Third-Party Plaintiff,
Chartcase Grier

EXHIBIT A

1. The receipt and processing of the \$993.00 check from GMAC Mortgage, LLC, to Nationwide, which was subsequently reissued to Chartreuse Grier on April 1, 2011.
2. The authenticity of the call-center recordings of conversations between GMAC representatives and Nationwide Customer Service Representatives produced by Nationwide and labeled NW-0131 and NW-0132, respectively.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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

Plaintiff,)

vs.)

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

Defendants,)

Chartrease Grier,)

Third Party Plaintiff,)

vs.)

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

Third Party Defendants.)

IN THE COURT OF COMMON PLEAS

RICHLAND COUNTY
FILED
2012 NOV -5 PM 1:21
JEANETTE W. MCBRIDE
C.C.P. & G.S.

**NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT**

Case No. 2011-CP-40-6103

**TO: THIRD-PARTY DEFENDANTS NATIONWIDE PROPERTY &
CASUALTY INSURANCE COMPANY and TONYA D. PARKS**

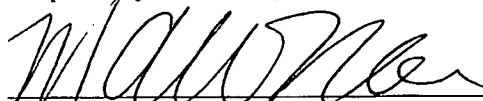
PLEASE TAKE NOTICE that the defendant/third-party plaintiff, Chartrease Grier, by and through her undersigned attorney, will move this Honorable Court ten (10) days after the service of this Notice, or at such time that counsel is scheduled to be heard, for an Order, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, granting summary judgment to Defendant/Third-Party Plaintiff Grier and finding coverage under the homeowner's insurance policy at issue.

As will be set forth in detail in the memorandum in support to be filed with the Court, Defendant/Third-Party Plaintiff Grier's motion is based on the fact that there is no evidence showing that Third-Party Defendant Nationwide delivered written notice to their agent of record that the insurance policy at issue was cancelled. Pursuant to the applicable statutory and caselaw, specifically South Carolina Code Ann. § 38-75-730 (1976, as amended), the attempt by Third-Party Defendant Nationwide to cancel the policy was invalid and coverage under the policy at the time of loss cannot be denied.

This motion is based on the pleadings filed in this case, the written discovery exchanged to date, the supporting memorandum to be filed, the rules of court, and the applicable statutory and caselaw.

Greenville, SC
November 2, 2012

Respectfully Submitted,



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Attorneys for Defendant/Third-Party Plaintiff,
Chartreuse Grier

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,)

Plaintiffs,)

vs.)

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

Defendants.)

Chartrease Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

Civil Action No. 2011-CP-40-6103

THIRD-PARTY DEFENDANTS
MOTION FOR SUMMARY
JUDGMENT

JEANETTE
C.C.P.

2012 NOV -6 PM 12:54

RICHLAND COUNTY
FILED

Third-Party Defendants Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Parks"), by and through their undersigned counsel, respectfully submit this Motion for Summary Judgment as to all third-party claims asserted by Defendant/Third-Party Plaintiff Chartrease Grier ("Grier") against Nationwide and Parks. Grier has set forth claims for breach of contract, bad faith failure to pay an insurance claim,

and indemnity and contribution. The grounds for this motion are that the undisputed facts show each of the following:

- 1) There was never any contract between Grier and Parks, who was merely an insurance agent. Accordingly, Grier's claims against Parks for both breach of contract and insurance bad faith fail as a matter of law;
- 2) Grier's breach of contract and bad faith claims against Nationwide fail because the subject insurance policy expired before her claim arose, so there was no contract of insurance at the time the claim arose;
- 3) Because Grier's policy expired before the claim arose, Nationwide had a reasonable basis to deny Grier's insurance claim and, therefore, the bad faith denial of benefits claim fails as a matter of law; and
- 4) The claim for indemnity and contribution fails as a matter of law because the record evidence clearly demonstrates that Nationwide's denial of Grier's insurance claim did not cause the foreclosure, Grier was not without fault, and the Bank is not seeking damages against Grier.

STATEMENT OF UNDISPUTED FACTS

Grier had a homeowner's insurance policy with Nationwide that expired on March 24, 2011. Grier's home was damaged by fire on April 6, 2011, *after* her Nationwide policy expired. She submitted an insurance claim to Nationwide regarding the fire, and Nationwide denied the claim because Grier's policy had expired. Grier then sued Nationwide and its agent, Tonya Parks.

All parties, claims, and defenses in this case are related to a single parcel of real property. Plaintiff ("the Bank") is the mortgage holder on the property, and Grier is the property owner. The Bank contracted with GMAC, who serviced the mortgage on the Bank's behalf. Nationwide provided homeowners insurance on the property from March 24, 2006 to March 24, 2011. *See* Policy showing expiration date of March 24, 2011 [Exhibit A]. Parks was the Nationwide insurance agent who sold the insurance policy to Grier in 2006.

For the entire time that the Nationwide insurance policy was in effect, Grier made escrow payments to GMAC to cover her insurance premiums. (Grier dep., 28:20 – 29:11) [Exhibit B]. Each year, Nationwide renewed the policy for another year, and in March or April of each year, GMAC regularly issued a check to Nationwide for the amount of the renewal insurance premium. (*Id.* at 31:5 – 32:7).

However, the policy year running from March 25, 2010 to March 24, 2011 was different. In March and April 2010, Nationwide conducted inspections of the subject property revealing that Grier had allowed numerous hazards and risks to develop on the property. [See Exhibit C]. Nationwide determined that it could not renew Grier's policy upon its expiration in March 2011 unless these deficiencies were corrected. (See Affidavit of Franklin L. Jefferies ¶¶ 4-5) [Exhibit D]. Nationwide set the policy for non-renewal and sent notice to the Nationwide agent, Tonya Parks. (*Id.* ¶ 7). Nationwide sent the notice of non-renewal to Grier on January 14, 2011, explaining that the policy would expire on March 24, 2011. (*Id.* ¶ 8); *see also* [Exhibit E]. The notice outlined the specific hazards and risks leading to the non-renewal and stated that Grier may become eligible for renewal if she corrected each of the conditions creating a hazard or risk. (Jefferies Aff. ¶ 6) [Exhibit D]; *see also* [Exhibit E]. Parks was listed by her agent number as a "CC" recipient on the notice that was sent to Grier. *Id.*; (*see also* Parks dep., 102:5-23) [Exhibit F]. At the same time, Nationwide sent a separate notice informing GMAC that the policy would not be renewed when it expired on March 24, 2011. [Exhibit G]. Nationwide has produced proof of mailing the notice of non-renewal to Grier. [Exhibit H].

Grier did not correct the hazards and risks, and her Nationwide policy expired on March 24, 2011.

When the policy expired, GMAC sent a check to Nationwide in the same amount that GMAC had submitted the prior year for renewal of the policy. *See* Payment records [Exhibit I]. Nationwide received the check, but because there was no active policy to which the payment should be applied, Nationwide promptly returned this money, issuing a check to Grier on April 1, 2011. [Exhibit J]; *see also* Grier dep., 80:14-21; 85:13-16 [Exhibit B] (admitting that Nationwide's check to Grier was issued April 1, 2011, before the fire).

On April 6, 2011, Grier's property was damaged by fire. *See* (Answer/Third Party Compl. ¶ 61). Grier attempted to submit a claim to Nationwide for property damage. However, Nationwide denied Grier's claim because there was no insurance policy or coverage in effect. (*See* Affidavit of Bruce Irick ¶ 8) [Exhibit K]; (Jefferies Aff. ¶¶ 8-10) [Exhibit D].

The Bank commenced this action, its second foreclosure action against Grier, on September 14, 2011. *See* (Pl's Compl.). The Bank waived its claim to a deficiency judgment against Grier. (*Id.* ¶ 17). Grier filed an Answer and Third-Party Complaint on November 22, 2011, bringing Nationwide and Parks into the case as Third-Party Defendants. (*See* Answer/Third Party Compl.). Grier asserted causes of action against Nationwide and Parks for breach of contract, bad faith failure to pay an insurance claim, and indemnity and contribution. (*Id.*) As set forth below, there is no genuine issue of material fact regarding these causes of action, and the Court should grant summary judgment as to all claims against Nationwide and Parks.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law.” Rule 56(c), SCRPC. When the party moving for summary judgment satisfies the burden of showing that there is no genuine issue of material fact, the burden shifts to the opposing party to, “come forward with specific facts showing there is a genuine issue for trial.” *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). The non-moving party may only refute a motion for summary judgment with materials that would be admissible in evidence. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) (citing cases). If the evidence taken as a whole is susceptible to only one reasonable inference, there is no jury issue and the motion for summary judgment should be granted. *Hopson v. Clarey*, 321 S.C. 312, 468 S.E.2d 305 (1995).

For indemnity claims, there is a unique standard for summary judgment. “A party opposing a summary judgment motion on an indemnification claim . . . has the two-fold burden of demonstrating a genuine issue of material fact regarding the opposing party’s lack of liability and a genuine issue of material fact regarding the moving party’s liability. The failure to meet this two-fold burden is fatal to the indemnification claim.” *Toomer v. Norfolk Southern Ry. Co.*, 344 S.C. 486, 490, 544 S.E.2d 634, 635-36 (Ct. App. 2001); *Vermeer Carolina’s, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 64-65, 518 S.E.2d 301, 307 (Ct. App. 1999).

LEGAL ARGUMENT

I. The Claim For Breach of Contract Fails Because Grier Had No Contract With Nationwide or Parks.

A. Grier Had No Contract with Tonya Parks.

It is undisputed that Grier never had any contract with Parks. Both Grier and Parks testified that they did not have a contract with each other. Grier testified as follows:

Q. Do you have a contract with Tonya Parks as opposed to Nationwide Insurance?

A. I'm going to say no. I'm going to say no.

(Grier dep., 94:22-25, attached as Exhibit B).

Similarly, Parks testified as follows:

Q. Do you have a contract with Chartreuse Grier?

A. No.

Q. Have you ever had any kind of contract with Chartreuse Grier?

A. No.

(Parks dep., 101:1-6, attached as Exhibit F).

The only contract Grier has ever identified in this case is her homeowner's insurance policy with Nationwide. In written discovery, Nationwide and Parks issued an Interrogatory to Grier requesting that she "[i]dentify each and every contract in which Third-Party Defendant Tonya D. Parks is or was a party to a contract with Third-Party Plaintiff Chartreuse Grier." Grier's only response was to identify her expired insurance policy with Nationwide. *See* (Grier's Resp. to 2nd Interrogs.) [Exhibit L]. Similarly, Nationwide and Parks also issued a request for Grier to produce "[a]ll contracts in which Third-Party Defendant Tonya D. Parks is or was a party to a contract with Third-Party Plaintiff Chartreuse Grier." Again, Grier's only response was to identify her expired insurance policy with Nationwide. *See* (Grier's Resp. to 2nd Req. for Prod.) [Exhibit M]. Grier never identified any contract with Parks, because she never had any contract with Parks.

As a matter of law, Grier's insurance policy with Nationwide was not a contract between Grier and Parks — it was merely a contract between Grier and Nationwide. Parks is not an insurer and does not provide insurance coverage. (Parks dep., 104:19-24) [Exhibit F].

She was merely an agent of Nationwide and never entered into a contract with Grier herself. It is well established that the mere fact that Parks was an agent for Nationwide does not somehow create a contractual relationship between Grier and Parks. *See, e.g., Green v. Industrial Life & Health Ins. Co.*, 199 S.C. 262, 272, 18 S.E.2d 873, 876-77 (1942) (“The liability, if any, for a breach of such contract is that of the principal alone.”) (citing *Goodale v. Page*, 92 S. C. 413, 75 S.E. 700 (1912)); *First Citizens Bank & Trust Co. v. Strable*, 292 S.C. 146, 355 S.E.2d 278 (Ct. App. 1987); *Holder v. Haskett*, 283 S.C. 247, 321 S.E.2d 192 (Ct. App. 1984); *Southern R. Co. v. Strachan Shipping*, 624 F. Supp. 218 (D.S.C. 1985); 23 S.C. Jurisprudence Agency § 50 (“[T]he agent cannot be sued on a contract made on behalf of the principal if the name of the principal is disclosed at the time the contract is made and it is clear that the agent did not intend to bind himself.”); *id.* § 67 (“If the agent makes a contract as an agent and names his principal during the execution of the contract, the agent will not be held personally liable for the contract if the terms of the contract explicitly show he is an agent.”); *id.* § 68 (“The court will not hold an agent personally liable for a breach of contract if he acted within his authority when he entered the contract for a known principal.”)

Therefore, it is undisputed that Grier had no contract with Parks and, as a matter of law, summary judgment should be granted in favor of Parks on the breach of contract claim.

B. Grier’s Contract with Nationwide Expired Before Her Claim Arose.

To survive summary judgment on the breach of contract claim, Grier would have to produce admissible evidence showing that she had an insurance policy with Nationwide on the date of the fire — April 6, 2011. The South Carolina Court of Appeals has held that where an insurance policy is properly canceled before the claim arises, then no valid insurance contract existed at the time the claim arose. *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 102-03, 518

S.E.2d 608, 615 (Ct. App. 1999). Here, Grier's homeowner's policy expired on March 24, 2011, and her claim arose when a fire occurred on April 6, 2011. Therefore, the policy was no longer in effect on April 6, 2011, and there was no valid insurance contract at the time the claim arose.

Grier asserts there was an insurance contract on April 6, 2011 because Nationwide's non-renewal notice was ineffective under the South Carolina statute governing non-renewal of a homeowner's insurance policy. However, this argument is merely an attempt to manufacture an issue of fact when none exists.

The statute governing non-renewal provides, in pertinent part:

(b) A policy written for a term of one year or less may be nonrenewed by the insurer at its expiration date by giving or mailing written notice of nonrenewal to the insured and the agent of record, if any, not less than sixty days prior to the expiration date of the policy for any nonrenewal that would be effective between November first and May thirty-first. . . .

. . .

(d) The notice required by this section must be given or mailed to the insured and the agent at their addresses shown in the policy or, if not reflected therein, at their last known addresses. Proof of mailing is sufficient proof of notice.

S.C. Code Ann. § 38-75-740.

Nationwide complied with the statutory requirements for non-renewal of Grier's policy, so the non-renewal was effective. Nationwide mailed notice of non-renewal to Grier on January 14, 2011. [See Exhibit E]. The statute specifically provides that proof of mailing is sufficient proof of notice, and Nationwide has produced proof of mailing the notice. [See Exhibit H]. In addition, when Nationwide set the policy for non-renewal, it sent notice to the Nationwide agent, Tonya Parks. (Jefferies Aff. ¶ 7) [Exhibit D]. Parks was listed by her

Nationwide agent number as a "CC" recipient on the same non-renewal notice that Nationwide sent to Grier. [See Exhibit E]. In her deposition, Parks confirmed that the non-renewal notice indicated that a "CC" copy was sent to her:

A. This is the letter that Nationwide sent to Ms. Grier dated January the 14th that, if she did not remedy the hazards on her property, that it would be non-renewing effective March 24th.

...

Q. Down toward the end, see where it says cc?

A. Yes.

Q. And it has some numbers beside it?

A. Uh-huh.

Q. What are those numbers?

A. That's me.

Q. So this has a cc to you?

A. Correct.

Q. Does that indicate to you that this letter was sent to you?

A. Yes. According to this, they cc-ed me on the letter.

(Parks dep., 102:5-23, attached as Exhibit F).

As a matter of law, Nationwide met its obligations for non-renewal of Grier's policy by mailing a copy of the letter to Grier and to the agent, Tonya Parks, not less than sixty days prior to the expiration date of the policy.

It is irrelevant that Grier claims she never received notice of the policy's non renewal because the statute only requires proof that the notice was sent. Moreover, Grier's deposition testimony reflects that she was not aware of whether or not the non-renewal notice was delivered to her mailbox. In response to a series of questions about whether she was aware of receiving mail during the exact time period at issue (January 2011), Grier testified that there have been "plenty" of times when she did not receive her mail:

Q. You were sent a notice of default on January 11th of 2011. And then on January 27th of 2011, you're telling GMAC that you were not aware that you'd been owing for two months; right?

A. Uh-huh.

...

Q. ... You would agree though that there have been times where you didn't receive your mail?

A. Yeah. Yeah. It's been plenty time I haven't received my mails.

(Grier dep., 113:20 – 114:22, attached as Exhibit B).

Grier further alleges that Nationwide reached an agreement with her loan servicer, GMAC, that the policy would be renewed if Nationwide received the "required premium." See (Answer/Third Party Compl. ¶ 55). However, no such agreement occurred and the record lacks evidence of proof to the contrary. In fact, Grier testified that she could not identify any such agreement:

Q. Ms. Grier, can you identify any communication between GMAC and Nationwide where you claim that Nationwide agreed that that policy would be renewed if GMAC sent in a payment?

...

THE WITNESS: I don't know.

BY MR. THOMPSON:

Q. You don't know? Okay.

A. I don't. I really don't know.

(Grier dep., 102:22 – 103:14, attached as Exhibit B). Furthermore, the Plaintiff has expressly stated in written discovery responses that GMAC did not even handle the payment made to Nationwide. See (Pl.'s Resp. to Interrogs. # 14, 16, 17) [Exhibit N]. In addition, there is no

admissible evidence that GMAC ever even communicated with Nationwide regarding the non-renewal or payment of a premium on the policy.

Because there is no genuine issue of material fact that the Nationwide insurance policy expired prior to when Grier's claim arose, there was no contract of insurance with Nationwide at the time of the claim and, therefore, Nationwide is entitled to summary judgment on the breach of contract claim.

II. Grier's Claim For Bad Faith Failure to Pay Insurance Benefits Fails Because There is No Contract and No Evidence of Bad Faith.

To establish a claim for insurance bad faith, a party must present evidence of: (1) a mutually binding contract of insurance, (2) refusal by the insurer to pay benefits due under the contract, (3) the refusal resulted from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing, and (4) damages proximately caused by the alleged bad faith refusal to pay benefits. *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727, 730 (1996); *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 450 S.E.2d 582, 586 (1994); *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393, 396 (1992); *Hansen v. United Servs. Auto. Ass'n*, 350 S.C. 62, 565 S.E.2d 114 (Ct. App. 2002).

In this case, the Court should grant summary judgment on the insurance bad faith claim because the record lacks evidence supporting the elements necessary to maintain this claim. First, there was no mutually binding contract of insurance at the time of Grier's claim. Second, there is no evidence that Nationwide refused to pay benefits due under a contract of insurance. Third, there is no evidence that Nationwide's denial of Grier's claim was in bad faith.

A. No mutually binding contract of insurance

For the reasons set forth above regarding the breach of contract cause of action, there was no mutually binding contract of insurance at the time of Grier's claim. Grier's claim arose *after* her policy expired. On its face, the policy expired on March 24, 2011, and it was not renewed. Grier's claim did not arise until April 6, 2011 — after the policy expired. Because there was no insurance policy on April 6, 2011, Grier's claim for bad faith refusal to pay benefits fails as a matter of law.

B. Nationwide Did Not Refuse to Pay Benefits Due Under a Contract of Insurance.

There is no evidence that Nationwide refused to pay benefits due under a contract of insurance. Nationwide declined Grier's claim because it did not arise until after her policy expired, so no benefits were due to Grier under the policy. (See Affidavit of Bruce Irick ¶ 8) [Exhibit K]; (Jefferies Aff. ¶¶ 8-10) [Exhibit D]. The South Carolina Court of Appeals has held that where the insurer's refusal to pay benefits is justified as a matter of law, this element of the cause of action is not met. See *Walters v. Canal Ins. Co.*, 294 S.C. 150, 363 S.E.2d 120 (Ct. App. 1987). Nationwide was justified in declining Grier's claim because there was no insurance policy at the time the claim arose. Therefore, as a matter of law, there was no refusal to pay benefits due under a contract of insurance.

C. No evidence of Bad Faith.

Summary Judgment should be granted in favor of Nationwide and Parks on the insurance bad faith claim because there is no evidence that Nationwide's denial of Grier's claim was in bad faith. It is well settled that there can be no bad faith if the insurer has "a reasonable ground for contesting the claim." *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307

S.C. 354, 360, 415 S.E.2d 393, 397 (1992) (finding no bad faith where insurer relied on published procedures to evaluate whether coverage should be denied); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004) (upholding summary judgment on bad faith claim because insurer had a reasonable basis for denial of claim); *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1986); *Hansen v. United Servs. Auto. Ass'n*, 350 S.C. 62, 72-73, 565 S.E.2d 114, 119 (Ct. App. 2002) ("Generally, if there is a reasonable ground for contesting a claim, the denial of the claim does not constitute bad faith.").

Here, there is ample evidence that Nationwide had a reasonable basis for denying Grier's claim, which precludes a finding of bad faith as a matter of law. Nationwide denied coverage based upon an objective determination that the policy was no longer in effect because it had expired without being renewed. (See Irick Aff. ¶ 8) [Exhibit K]. Nationwide reasonably denied Grier's claim because there was no existing insurance policy.

At the time Grier's claim arose on April 6, 2011, Nationwide's claim representative found that the insurance policy had expired without being renewed. See *id.* ¶¶ 6-8. Nationwide sent the non-renewal notice on January 14, 2011, more than sixty days before the policy's expiration date, as required by statute. [See Exhibits E & H]. Nationwide's records, which have been produced in this case, reflect that the non-renewal notice was sent to Grier and that Grier failed to correct the hazardous conditions identified in the non-renewal notice in order to become eligible for policy renewal. (Jefferies Aff. ¶ 5-7) [Exhibit D]. Furthermore, when Nationwide received a payment related to this policy, Nationwide returned the payment to Grier, because there was no policy in place. [Exhibit J]; (Grier dep., 80:14-21; 85:13-16) [Exhibit B] (admitting that Nationwide's check to Grier was issued April 1, 2011, before the

fire). Therefore, when Nationwide denied the claim, it had already returned the alleged premium payment to Grier.

Accordingly, Nationwide had a reasonable basis for denying Grier's claim. Therefore, as a matter of law, there can be no finding of bad faith, and the Court should grant summary judgment as to the insurance bad faith claim.

III. Grier's Claim for Contribution and Indemnity Fails as a Matter of Law.

A. The Law of "Contribution" Does Not Apply.

In her Third-Party Complaint, Grier asserts that Nationwide and Parks are liable to her "under the theories of indemnification and contribution." (Answer/Third Party Compl. ¶ 84). This cause of action fails in part because the law of contribution does not apply in this setting. Contribution applies only among joint tortfeasors, "when multiple tortfeasors are responsible for a single injury and one of the tortfeasors pays more than his proper share in discharge of the common liability." S.C. Juris. Contribution § 3. "Indemnity, on the other hand, is applicable when one person discharges a liability which, as between himself and the other, should have been discharged by the other." *Id.* In addition, a cause of action for contribution arises only when a judgment has already been obtained against one party, who seeks to offset a portion of that judgment against another. See *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 68, 518 S.E.2d 301, 309 (Ct. App. 1999) (quoting section 15-48-40(D)(2) of the South Carolina Uniform Contribution Among Tortfeasors Act). Contribution does not apply when the party seeking recovery has not already obtained a judgment.

In her Complaint, Grier does not allege that she was a joint tortfeasor with Nationwide and Parks. Rather, Grier alleges that Nationwide and Parks are exclusively liable for the

entire amount of any damages she may sustain. (Answer/Third Party Compl. ¶ 83 (“Should [Grier] be found liable to [the Bank] in the main demand, said liability will be based solely on the actions or inactions of Nationwide and Parks.”)). Accordingly, contribution does not apply to the facts of the Complaint and, therefore, Grier’s claim must be dismissed.

B. There is No Right to Indemnification For Grier’s Mortgage Foreclosure.

A party may be entitled to equitable indemnification only when she “is compelled to pay damages because of negligence imputed to him as the result of a tort committed by another.” *Vermeer Carolina’s*, 336 S.C. at 60, 518 S.E.2d at 305. As a matter of law, there is no right of indemnity if the party seeking indemnification was personally at fault to any degree. *Id.*; S.C. Juris. Contrib. § 3. The right of indemnity arises only when one person is exposed to liability, but she would not have been exposed to liability but for the wrongful act of another.

As a matter of law, Grier has no right of indemnity against Nationwide or Parks. The crux of Grier’s indemnity claim is that Nationwide and Parks should be liable for any damages Grier sustains in the Bank’s foreclosure action because Grier claims the foreclosure would not have occurred but for Nationwide’s denial of her insurance claim. (See Answer/Third Party Compl. ¶¶ 81-84). However, the undisputed facts show that Grier was personally at fault for the foreclosure well before she submitted an insurance claim to Nationwide, and she was exposed to liability of foreclosure regardless of any alleged wrongful acts by Nationwide and Parks.

The events leading to the Bank’s foreclosure action began well before the fire that led to Grier’s insurance claim. In fact, this is not the first time the Bank has commenced foreclosure proceedings on the same mortgage loan. Grier has repeatedly been in default on

her mortgage obligations since at least 2004. (Grier dep., 70:11 – 72:4) [Exhibit B]. GMAC sent at least thirteen notices of default to Grier since 2004. (*Id.*) In October 2009, the Bank filed a foreclosure action against Grier regarding the same mortgage at issue in the current foreclosure proceedings. *See* Civil Action No. 2009-CP-40-07312 [Exhibit O]. Grier was able to retain the property, but even after that first foreclosure, she continued to miss payment deadlines and struggled to meet her mortgage obligations. GMAC continued to send notices of default and to work with her to avoid foreclosure. [See Exhibit P].

In addition, the mortgage servicer's records show that more than a month and a half after the fire occurred and Nationwide denied Grier's insurance claim, Grier attributed her inability to make her mortgage payments on time to being out of work and not receiving her disability benefits. [See Exhibit Q]. Grier did not attribute her inability to make her mortgage payments to any alleged wrongdoing by Nationwide or Parks.

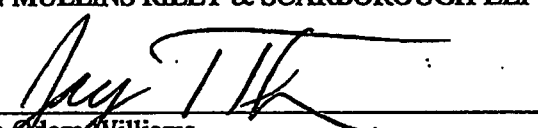
Finally, the Bank is not seeking damages against Grier, so there could be no damages for Nationwide and Parks to indemnify. The Bank has expressly waived its claim to a deficiency judgment against Grier. (*See* Compl. ¶ 17). The Bank's claim against Grier is an equitable foreclosure action, not a claim for damages. Therefore, Grier is not entitled to indemnification.

For these reasons, Nationwide and Parks are entitled to summary judgment on the indemnity claim.

CONCLUSION

Based on the foregoing reasons, Nationwide and Parks respectfully request that the Court grant summary judgment as to Grier's claims against Nationwide and Parks.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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*Attorneys for Third-Party Defendants Nationwide Property &
Casualty Insurance Company and Tonya D. Parks*

Columbia, South Carolina

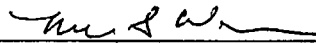
November 6, 2012

STATE OF SOUTH CAROLINA	)	IN THE 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,	)	
	)	
v.	)	
	)	
Chartreuse Grier; Palmetto Health Alliance;	)	
and Palmetto Richland Memorial,	)	
	)	PLAINTIFF'S MOTION FOR ENTRY
Defendants.	)	OF DEFAULT BY CLERK AGAINST
	)	DEFENDANTS PALMETTO
	)	HEALTH ALLIANCE AND
	)	PALMETTO RICHLAND
	)	MEMORIAL
	)	
Chartreuse Grier,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Nationwide Property & Casualty Insurance	)	
Company; and Tonya D. Parks,	)	
	)	
Third-Party Defendants.	)	
	)	

NOW COMES the Plaintiff, 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") and moves the Clerk of Court pursuant to Rule 55(a) of the South Carolina Rules of Civil Procedure for entry of default against the Defendants Palmetto Health Alliance and Palmetto Richland Memorial on the Complaint filed in this action.

In support of this Motion, Plaintiff respectfully shows the Clerk of Court that Defendants Palmetto Health Alliance and Palmetto Richland Memorial have failed to move, plead, or otherwise respond and are subject to default judgment as provided by the Rules of Civil Procedure pursuant to the Affidavit attached hereto. Plaintiff further reserves the right to seek award of attorney's fees at which time an Affidavit will be submitted.

Respectfully submitted this 2nd day of November, 2012.



Mark S. Wierman (SC Bar No. 78537)
Michael C. Griffin (SC Bar No. 72868)
BRADLEY ARANT BOULT CUMMINGS LLP
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Charlotte, North Carolina 28202
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mwierman@babco.com
mgriffin@babco.com

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE 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,	)	
	)	
v.	)	
	)	
Chartrease Grier; Palmetto Health Alliance;	)	
and Palmetto Richland Memorial,	)	
	)	
Defendants.	)	
	)	
Chartrease Grier,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Nationwide Property & Casualty Insurance	)	
Company; and Tonya D. Parks,	)	
	)	
Third-Party Defendants.	)	
	)	

**AFFIDAVIT OF MARK S.
WIERMAN IN SUPPORT OF
MOTION FOR ENTRY OF DEFAULT
BY CLERK AGAINST DEFENDANTS
PALMETTO HEALTH ALLIANCE
AND PALMETTO RICHLAND
MEMORIAL**

MARK S. WIERMAN, ATTORNEY FOR Plaintiff, being first duly sworn, deposes and says:

1. I am the attorney representing the Plaintiff in this matter.
2. On or about September 14, 2011, a copy of the Summons and Complaint was personally served by Wendy Lanier, upon Defendants Palmetto Health Alliance and Palmetto Richland Memorial, at address 1301 Taylor Street, Columbia, South Carolina as evidenced by the Affidavit of Service attached hereto as Exhibit A.

3. Defendants Palmetto Health Alliance and Palmetto Richland Memorial have failed to file a responsive pleading.

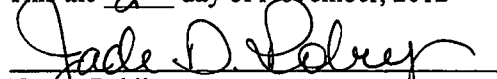
This the 2nd day of November, 2012.

BRADLEY ARANT BOULT CUMMINGS LLP



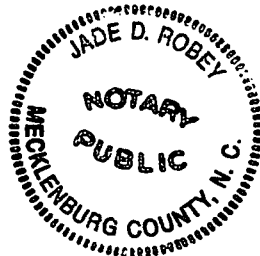
Mark S. Wierman (S.C. Bar # 78537)
Bank of America Corporate Center
100 N. Tryon Street, Suite 2690
Charlotte, NC 28202
Tel.: (704) 338-6000
Fax: (704) 332-8858

SWORN TO AND SUBSCRIBED before me
This the 2nd day of November, 2012



Notary Public

My Commission Expires: 3-31-14



Affidavit of Service

DOCKET NUMBER: 2011-CP-40-6103
COURT OF COMMON PLEAS FOR RICHLAND COUNTY, SC
CASE STYLE:

FILE NUMBER: FJ2052R



PLAINTIFF 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 2002RSS; et seq.

vs.

DEFENDANT CHARTREAS GRIER; et al.SERVICE OF PROCESS ON: PALMETTO HEALTH ALLIANCE

METHOD OF SERVICE: A true and correct copy of the above-described papers were served on the below-named party in the following manner:

☒ (CORPORATION/PARTNERSHIP) By leaving a copy with an officer, a managing or general agent, or with any other agent authorized by appointment or by law to receive service of process.

PLACE OF SERVICE: Registered Agent: Charles D. Beaman Jr. Attn: Maggie Mobley, Process Clerk 1301 Taylor Street Columbia, SC 29201

Is the place of service the dwelling house or usual place of abode for the party being served? () Yes (x) No

DATE OF SERVICE: 09/14/2011 TIME OF SERVICE: 12:00 PM

TYPE OF DOCUMENTS: (x) SUMMONS & COMPLAINT (x) LIS PENDENS
(x) OTHER: NOTICE OF FORECLOSURE INTERVENTION

DESCRIPTION OF PARTY RECEIVING DOCUMENTS: The person receiving the documents is described as follows:

Name DELORIS STEELE; Relationship/Title PROCESS CLERK
Sex FEMALE; Race BLACK; Facial Hair none;
Age(prox.) 61-65; Height(prox.) 5ft 2; Weight(prox.) 140

COMMENTS:

Signature of Process Server: The undersigned declares, under penalty of perjury, that the foregoing is true and correct and that the deponent is over the age of 18 and is not a party to nor interested in this action.

NAME: WENDY LANIER

Signature of Process Server

Date

STATE OF SCCOUNTY OF RichlandSworn and subscribed before me this 15th day of September in the year of 2011

Personally known to me of _____ identified by the following document:

Type: _____ Number/Reference: _____

[Signature] Notary Public for South Carolina
Notary Public (Legal Signature)
Commission Expiration FEBRUARY 23, 2019

EXHIBIT A

Affidavit of Service

DOCKET NUMBER: 2011-CP-40-6103
 COURT OF COMMON PLEAS FOR RICHLAND COUNTY, SC
 CASE STYLE:

FILE NUMBER: F32052R



PLAINTIFF 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 2002RSS; et seq.
 vs.
 DEFENDANT CHARTREAS GRIER ; et al.
 SERVICE OF PROCESS ON: PALMETTO RICHLAND MEMORIAL

METHOD OF SERVICE: A true and correct copy of the above-described papers were served on the below-named party in the following manner:

(x) (CORPORATION/PARTNERSHIP) By leaving a copy with an officer, a managing or general agent, or with any other agent authorized by appointment or by law to receive service of process.

PLACE OF SERVICE: 1301 TAYLOR ST.
COLUMBIA, SC 29201

Is the place of service the dwelling house or usual place of abode for the party being served? () Yes (x) No

DATE OF SERVICE: 09/14/2011 TIME OF SERVICE: 1:15 PM

TYPE OF DOCUMENTS: (x) SUMMONS & COMPLAINT (x) LIS PENDENS
 (x) OTHER: NOTICE OF FORECLOSURE INTERVENTION

DESCRIPTION OF PARTY RECEIVING DOCUMENTS: The person receiving the documents is described as follows:
 Name DELORIS STEELE ; Relationship/Title PROCESS CLERK
 Sex FEMALE ; Race BLACK ; Facial Hair none ;
 Age(prox.) 61-65 ; Height(prox.) 5ft 2 ; Weight(prox.) 140

COMMENTS:

Signature of Process Server: The undersigned declares, under penalty of perjury, that the foregoing is true and correct and that the deponent is over the age of 18 and is not a party to nor interested in this action.

NAME: WENDY LANIER

Signature of Process Server

Date

STATE OF SC

COUNTY OF Richland

Sworn and subscribed before me this 15th day of September, in the year of 2011

Personally known to me or identified by the following document:

Type: _____ Number/Reference: _____

[Signature] Notary Public for South Carolina
 Notary Public (Legal Signature)
 Commission Expiration FEBRUARY 23, 2019

FILED
 2011 SEP 15 PM 12:48
 JEANETTE W. McBRIDE
 C.C.P. & G.S.

STATE OF SOUTH CAROLINA	)	IN THE 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,	)	
	)	
v.	)	
	)	
Chartrease Grier; Palmetto Health Alliance;	)	
and Palmetto Richland Memorial,	)	
	)	[PROPOSED] ORDER ON CLERK'S
Defendants.	)	ENTRY OF DEFAULT AGAINST
	)	DEFENDANTS PALMETTO HEALTH
	)	ALLIANCE AND PALMETTO
	)	RICHLAND MEMORIAL
	)	
Chartrease Grier,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Nationwide Property & Casualty Insurance	)	
Company; and Tonya D. Parks,	)	
	)	
Third-Party Defendants.	)	
	)	

THIS MATTER is before the Clerk upon Plaintiff, 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's ("Plaintiff") Motion for Entry of Default against Defendants Palmetto Health Alliance and Palmetto Richland Memorial, pursuant to Rule 55(a) of the South Carolina Rules of Procedure.

IT APPEARS to the Clerk, having read and considered the moving papers filed by the parties, to GRANT Plaintiff's Motion for Entry of Default against Defendants Palmetto Health Alliance and Palmetto Richland Memorial.

IT IS HEREBY ORDERED that default is entered against Defendants Palmetto Health Alliance and Palmetto Richland Memorial.

Clerk of Court for Richland County, South Carolina

November _____, 2012
Richland County, South Carolina

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,)

vs.)

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

Defendants.)

Chartrease Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

Civil Action No. 2011-CP-40-6103

**THIRD-PARTY DEFENDANTS'
MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S
MOTION TO SEVER**

FILED
C.C.P. & G.S.
BRIDGE

2012 NOV - 8 PM 12:44

RICHLAND COUNTY
FILED

Third-Party Defendants Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Parks"), by and through their undersigned counsel, respectfully submit this Memorandum in Opposition to Plaintiff's Motion to Sever. Plaintiff has not merely asked the Court to hold separate trials, but to completely sever the claims into two separate civil actions. However, the facts of Plaintiff's claim against Defendant/Third-Party Plaintiff Chartrease Grier ("Grier") are inextricably linked to Grier's claims against

Nationwide and Parks and will require findings of fact and conclusions of law on issues that are common to both sets of claims.

INTRODUCTION

This case arose because Defendant/Third-Party Plaintiff Chartreuse Grier failed to meet her mortgage obligations, and Plaintiff ("the Bank") foreclosed on the mortgage. Grier's Third-Party Complaint alleges that the reason the Bank foreclosed on the mortgage is because Nationwide declined to pay insurance benefits for property damage that occurred after Grier's Nationwide policy expired. (*See* Third Party Compl. ¶ 69). Furthermore, Grier seeks to recover from Nationwide and Parks any amounts she is found to owe in the foreclosure matter as well as expenses incurred in defending the foreclosure matter. (*See id.* ¶¶ 74, 78, 82, 84). Therefore, the facts and legal issues of Grier's claims against Nationwide and Parks cannot be litigated or tried without simultaneous consideration and findings of fact regarding the Bank's claims against Grier.

Plaintiff's motion requests relief under Rule 42(b), SCRCp. However, Rule 42(b) provides only for a bifurcated trial; it does not allow for complete severance of claims into separate civil actions. Accordingly, the Court should not sever the Bank's claims against Grier from Grier's claims against Nationwide and Parks. If the Court finds the claims should be heard and decided separately, then the Court should order a separate trial of the Bank's claims against Grier and should require that a jury must hear and decide the issues common to the foreclosure claim and third-party legal claims before the Court, or Master-in-Equity, may determine the equitable issues raised in the foreclosure action.

FACTUAL BACKGROUND

All parties, claims, and defenses in this case, including third party claims and defenses, involve the same set of facts related to a single parcel of real property. The Bank is the mortgage holder on the property, and Grier is the property owner. The Bank contracted with GMAC, who serviced the mortgage on the Bank's behalf. All relevant actions by the Bank related to this case were conducted by GMAC as the Bank's agent. Nationwide provided homeowners insurance on the property from March 24, 2006 to March 24, 2011. Parks was the Nationwide insurance agent who sold the insurance policy to Grier in 2006.

For the entire time that the Nationwide insurance policy was in effect, Grier made escrow payments to GMAC to cover her insurance premiums. (Grier dep., 28:20 – 29:11, attached as **Exhibit A**). Each year, in March or April, GMAC regularly issued a check to Nationwide for the amount of the renewal premium, and the policy renewed for another year. (*Id.* at 31:5 – 32:7).

However, the policy year running from March 25, 2010 to March 24, 2011 was different. In March and April 2010, Nationwide conducted inspections of the subject property revealing that Grier had allowed numerous hazards and risks to develop on the property. [*See Exhibit B*]. Nationwide determined that it could not renew Grier's policy upon its expiration in March 2011 unless these deficiencies were corrected. (*See* Affidavit of Franklin L. Jefferies ¶¶ 4-5) [*Exhibit C*]. Nationwide set the policy for non-renewal and sent notice to the Nationwide agent, Tonya Parks. (*Id.* ¶ 7). Nationwide sent the notice of non-renewal to Grier on January 14, 2011, explaining that the policy would expire on March 24, 2011. (*Id.* ¶ 8); *see also* [*Exhibit D*]. At the same time, Nationwide sent a notice to GMAC that the policy would not be renewed when it expired on March 24, 2011. [*Exhibit E*].

Despite the notice of non-renewal, GMAC sent its regular yearly check to Nationwide in the amount that would have been due from Grier if the policy had renewed. Nationwide received the check, but it was unable to locate an active policy to which the payment should be applied. Because the policy had expired without being renewed, Nationwide promptly issued a check to Grier on April 1, 2011, in the same amount as the check that was received from GMAC. On April 6, 2011, Grier's property was damaged by fire. Grier submitted a claim to Nationwide for property damage; however, Nationwide denied Grier's claim because there was no insurance policy or coverage in effect.

The Bank commenced this action, its second foreclosure action against Grier, on September 14, 2011. Grier filed an Answer and Third-Party Complaint on November 22, 2011, thus bringing Nationwide and Parks into the case as Third-Party Defendants. Grier's Third-Party Complaint alleges that the foreclosure action brought by the Bank would not have occurred but for alleged wrongful conduct by Nationwide and Parks. (*See Answer/Third Party Compl.* ¶¶ 69, 83). Grier also alleges that GMAC, as the Bank's mortgage servicer, was her agent acting on her behalf and that Nationwide made certain representations to GMAC while GMAC was servicing the mortgage and was allegedly acting on her behalf. (*See id.* ¶¶ 56, 58). Grier alleges that, if she is found liable to the Bank in the foreclosure, then such liability would be based solely on the actions or inactions of Nationwide and Parks. Grier has also claimed as damages against Nationwide and Parks her costs and expenses in defending the foreclosure action by the Bank. (*See id.* ¶¶ 74, 78, 82, 84).

LEGAL ARGUMENT

A. The First Party and Third-Party Claims Should Not Be Severed.

Under Rule 14(a), SCRPC, a defendant has the right to assert a third-party claim against a party who may be liable to the defendant for all or part of the plaintiff's claim against the defendant. The defendant has the right for her claim to be heard and decided as part of the pending action brought by the plaintiff as long as the substantive law permits the defendant to shift some or all of her liability to the third party. *Gathings v. Robertson Brokerage Co., Inc.*, 295 S.C. 112, 117, 367 S.E.2d 423, 426 (Ct. App. 1988) (quoting H. Lightsey & J. Flanagan, *South Carolina Civil Procedure* at 257 (1985)); *First Gen'l Svcs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994). For actions based in law (as opposed to equitable actions), the third-party defendant has the constitutional right to have the facts heard and decided by a jury. U.S. Const. Amend. VII; S.C. Const. Art. I, § 14; Rule 38(a), SCRPC.

The allegations in Grier's Third-Party Complaint unambiguously intertwine the facts and issues of the Bank's claim against Grier with the facts and issues of Grier's claim against Nationwide and Parks. Two of the defenses Grier has set forth to the Bank's foreclosure claim specifically make the outcome of the foreclosure claim dependent on the outcome of Grier's claim against Nationwide. (*See Answer/Third Party Compl.* ¶¶ 33, 37). Moreover, Grier alleges that the foreclosure action brought by the Bank would not have occurred but for purported wrongful conduct by Nationwide and Parks. (*See id.* ¶¶ 69, 83).

Grier also alleges that GMAC, as the Bank's mortgage servicer, acted as her agent and that Nationwide made certain representations to GMAC while GMAC was acting in this capacity. (*See id.* ¶¶ 56, 58). Therefore, Grier has placed the Bank's dealings (through

GMAC as the Bank's mortgage servicer) with both Grier and Nationwide directly at issue in her third-party claims against Nationwide and Parks. In addition, Grier alleges that, if she is found liable to the Bank in the foreclosure, then such liability would be based solely on the actions or inactions of Nationwide and Parks. (*See id.* ¶ 83). Therefore, Grier's claims against Nationwide and Parks cannot be heard or decided without full consideration of the issues involving the mortgage lender.

In addition, Grier has claimed as damages against Nationwide and Parks her costs and expenses in defending the foreclosure action by the Bank. (*See id.* ¶¶ 74, 78, 82, 84). Grier's allegation is that the Bank's claims are completely and inextricably linked to the facts and the outcome of her claims against Nationwide and Parks. Therefore, the Court should require that all claims must be tried together and should deny the Bank's motion to sever.

B. The South Carolina Rules of Civil Procedure Allow For The Trial of Third-Party Claims To Be Separated, But The Case Should Not Be Severed.

Rule 42(b), SCRCP, allows the Court to order a separate trial of a third-party claim, "always preserving inviolate the right to trial by jury as declared by the Constitution or as given by a statute of the State." *Id.* However, there is no obligation to sever a matter into separate civil actions, and the Court may order the issues in the case to be tried jointly or separately as appropriate, "in furtherance of convenience or to avoid prejudice." *Id.* The South Carolina Supreme Court held in *Johnson v. S.C. Nat'l Bank*, 292 S.C. 51, 54-55 354 S.E.2d 895, 896-97 (1987), that "legal and equitable claims may be tried side by side in the same action with the jury rendering a verdict on the legal issues and the court rendering a decision on equitable issues."

Importantly, Rule 42(b) does not provide a mechanism for complete severance of claims, as requested by the Bank in its motion to sever. Rather, the Rule provides only for

separate trials of distinct claims or issues within one civil action, and only when the facts and legal issues do not implicate one another or require that findings of fact be conducted jointly. All other aspects of the case, including discovery, must still be conducted among all parties. *See, e.g., Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1519 n.8 (10th Cir. 1991)¹ (“Separate trials ordered pursuant to Fed.R.Civ.P. 42(b) must be distinguished from a severance under Rule 21. . . . Separate trials under Rule 42(b) result in a single judgment while claims severed under Rule 21 become independent actions with separate judgments entered in each.”); 9A Wright & Miller, *Federal Practice and Procedure*, Civil 3d § 2387 (citing numerous cases from a variety of jurisdictions); 4 *Moore’s Federal Practice*, § 21.06[1] (Matthew Bender 3d ed.) (“[A]n order of separate trials does not result in the filing of separate cases. Instead, it simply leads to two or more separate factual inquiries in the context of a single, properly joined case. No matter how many separate trials the court may order, they remain part of a single case.”) (citing numerous cases from a variety of jurisdictions).

When separate trials are held, the order in which the claims are tried matters. In *Gardner v. Travis*, 316 S.C. 315, 318, 450 S.E.2d 54, 56 (Ct. App. 1994), the plaintiff brought a foreclosure action, and the defendant asserted legal counterclaims regarding the validity of the notes and mortgages. “The circuit court ordered the foreclosure action referred to the master-in-equity for trial and the counterclaims placed on the jury roster for trial.” *Id.* at 316, 450 S.E.2d at 55. Before the legal issues raised in the counterclaims regarding the validity of the notes and mortgages could be decided by a jury, the master-in-equity “made detailed findings of fact on the validity of the notes and mortgages even though he had

¹ The official notes to Rule 42, SCRCF provide that “[t]his Rule 42 is substantially identical with the Federal Rule.”

expressly recognized the circuit court had ordered the counterclaims 'placed on the jury calendar to be heard.'" *Id.* at 317, 450 S.E.2d at 56.

On appeal, the Court of Appeals vacated the Master's order, holding that a separate trial on the foreclosure claim in which the Master heard and made findings of fact on issues common to all claims, deprived the defendant of his right to have the facts and legal issues heard and decided by a jury. *Id.* at 318, 450 S.E.2d at 57. The court required that a jury must hear and decide the issues common to the foreclosure claim and legal counterclaims before the master could determine the equitable issues raised in the foreclosure action. *Id.* at 318-19, 450 S.E.2d at 57-58. Citing *Johnson v. S.C. Nat'l Bank*, the court further held that caution should be taken when a court is considering whether to order separate trials, so as not to deprive any party "of the right to have a jury determine the legal issues." *Id.* at 318, 450 S.E.2d at 56.

In this case, allowing the Bank's claims against Grier to be severed from Grier's claims against Nationwide and Parks would deprive Nationwide and Parks of their right to have a jury determine the factual and legal issues that are common to all claims, which would create prejudice, confusion, and delay in the resolution of these matters. As in *Gardner*, if the Court, or Master-in-Equity, were to make findings of fact in the foreclosure claim regarding Grier's failure to pay her obligations under the mortgage and the reasons for Grier's failure to pay, then Nationwide and Parks would be deprived of their right to have a jury determine these same issues.

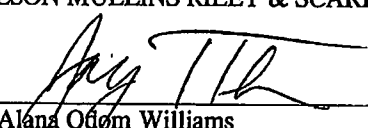
CONCLUSION

For the reasons set forth above, Nationwide and Parks respectfully request that the Court deny the Bank's motion to sever. If the Court finds the claims should be heard and

decided separately, then the Court should order a separate trial of the Bank's claims against Grier and should require that a jury must hear and decide the issues common to the foreclosure claim and third-party legal claims before the Court or Master-in-Equity may determine the equitable issues raised in the foreclosure action.

Respectfully submitted,

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Columbia, South Carolina

November 8, 2012

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,

Plaintiffs,

vs.

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

Defendants.

Civil Action No. 2011-CP-40-6103

**THIRD-PARTY DEFENDANTS'
OPPOSITION TO GRIER'S
MOTION FOR
SUMMARY JUDGMENT**

Chartrease Grier,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

RICHLAND COUNTY
FILED
2012 NOV - 8 PM 12:44
JEANETTE W. McBRIDE
C.C.P. & G.S.

Third-Party Defendants Nationwide Property & Casualty Insurance Company
("Nationwide") and Tonya D. Parks ("Parks") respectfully submit this Opposition to
Defendant/Third-Party Plaintiff Chartrease Grier's Motion for Summary Judgment.

INTRODUCTION

This case is about a homeowner who sued her former insurance carrier for denying a
claim that did not arise until *after* the insurance policy expired. Despite not offering any

factual evidence whatsoever in support of her claims, Defendant/Third-Party Plaintiff Chartreuse Grier (“Grier”) now claims that she should be entitled to prevail on her claims as a matter of law, without proving anything. However, the record evidence shows that there is evidence contradicting Grier’s claims. Therefore, the Court should deny Grier’s motion for summary judgment.

LEGAL ARGUMENT

To prevail on her claims against Nationwide and Parks, Grier must produce admissible evidence showing that she had an insurance policy with Nationwide on the date her claim arose — April 6, 2011. It is undisputed that the term of her insurance policy ended on March 24, 2011. [See **Exhibit A**]. Therefore, to prove that there was an insurance contract on April 6, 2011, Grier would have to prove that the policy was renewed after March 24, 2011 and was still in effect on April 6, 2011. However, the evidence shows that Nationwide elected not to renew Grier’s policy after its March 24, 2011 expiration. (See, e.g., Affidavit of Franklin L. Jefferies ¶¶ 4-6) [**Exhibit B**].

Grier’s motion for summary judgment must fail for three reasons:

1. Grier’s Motion Cites Only Inapplicable Law and Issues.

Grier’s motion for summary judgment asserts that she should be entitled to summary judgment under S.C. Code Ann. § 38-75-730, which governs requirements for cancellation of an insurance policy. The motion asserts that Nationwide did not provide notice to the agent of record “that the insurance policy at issue was cancelled.” However, there is no allegation of a cancellation in this case. It is undisputed that Grier’s policy was never canceled. This case involves a non-renewal of an insurance policy, not a cancellation. Non-renewal is a separate

and distinct action with distinct requirements,¹ governed by a separate statute. *See* S.C. Code Ann. § 38-75-740 (“Requirements for renewal of policies”). Neither the law nor the issue that Grier asserts as her basis for summary judgment have anything to do with the allegations or facts of this case. Therefore, the Court should deny Grier’s motion for summary judgment.

2. There is Evidence that Nationwide Provided Notice to Its Agent of Non-Renewal.

In an artful attempt to create an active insurance policy when there was none, Grier implies that her insurance policy automatically renewed despite Nationwide’s action not to renew it. Grier’s claim turns on her unsupported assertion that the policy automatically renewed for another term beginning March 24, 2011 because, she claims, there is no evidence that Nationwide sent notice of the non-renewal to the Nationwide agent.² However, Grier has set forth no support whatsoever for this assertion.

The South Carolina statute governing non-renewal of a homeowner’s insurance policy requires that an insurer seeking to non-renew a policy must provide written notice of the non-renewal to the insured and the agent at least sixty days prior to the policy expiration date, or the non-renewal is ineffective. *See* S.C. Code Ann. § 38-75-740. Here, there is evidence in the record that Nationwide complied with the statute and sent notice of the non-renewal letter to the agent, Tonya Parks. First, the Nationwide underwriting representative who made the determination that the policy should not be renewed, Franklin Jefferies, sent notice of the non-renewal to agent Parks. Mr. Jefferies has provided an affidavit stating that it is his normal

¹ A cancellation is the act of ending an insurance policy prior to the end of its term, whereas a non-renewal is simply the act of allowing a policy term to end and not commencing a new term after the end of the term.

² Interestingly, Grier does not claim in her motion for summary judgment that Nationwide failed to notify her (Grier) of the non-renewal. Instead, the entire basis of her motion is her claim that Nationwide failed to notify someone else of the non-renewal.

business practice in approximate 240 non-renewal notices per year to send notice to the agent, and he has no reason to believe he did not send it in this instance. (See Jefferies Aff. ¶ 7) [Exhibit B].

Second, the notice itself that Nationwide sent to Grier identified Parks by her Nationwide agent number as a “CC” recipient on the face of the document itself. [See Exhibit C].

Third, in her deposition, Parks confirmed that the non-renewal notice indicated that a “CC” copy was sent to her:

A. This is the letter that Nationwide sent to Ms. Grier dated January the 14th that, if she did not remedy the hazards on her property, that it would be non-renewing effective March 24th.

...

Q. Down toward the end, see where it says cc?

A. Yes.

Q. And it has some numbers beside it?

A. Uh-huh.

Q. What are those numbers?

A. That's me.

Q. So this has a cc to you?

A. Correct.

Q. Does that indicate to you that this letter was sent to you?

A. Yes. According to this, they cc-ed me on the letter.

(Parks dep., 102:5-23, attached as **Exhibit D**).

Therefore, there is evidence that Nationwide provided notice to its agent of non-renewal. Accordingly, Grier has failed to meet the required showing under Rule 56, and the Court should deny her motion for summary judgment.

3. Grier's Motion is Merely a Conclusory Assertion That Fails to Meet the Requirements of Rule 56, SCRCP.

Grier's motion for summary judgment is a mere conclusory assertion. Grier has made no attempt to produce any evidence in support of her motion. This lack of evidence fails to meet the requirements of Rule 56, SCRCP.

Rule 56 requires that when the party seeking summary judgment has the burden of proof on the claim at issue, she cannot achieve summary judgment simply by making the bald assertion that the party without the burden of proof has not presented evidence to rebut the claim. The Rule provides, in pertinent part:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

. . .

(c) Motions and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Rule 56, SCRCP. *See also, e.g., Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 115-16, 410 S.E.2d 537, 545-46 (1991) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)) (explaining that no-evidence summary judgment applies when the moving party does not have the burden of proof); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 471, 570 S.E.2d 197, 203 (Ct. App. 2002) (citing *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545) (explaining that a party moving for summary judgment is not required to present evidence supporting its motion when the moving party does not have the burden of proof on the claims at issue).

This Rule is intended to facilitate resolution of claims when there is no genuine issue of material fact to be submitted to a jury, not to allow the plaintiff (or Third-Party Plaintiff, in this case) to circumvent her burden of proof. The claimant is required to show that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.”

Even though she has the burden of proof on her claims against Nationwide and Parks, Grier has not attempted to set forth any evidence in support of her claims. She has not cited any pleading, depositions, answers to interrogatories, admissions on file, or affidavits, as required by Rule 56. By seeking summary judgment without setting forth any evidence in support of her claims, Grier is attempting to shift the burden of proof for her claims to Nationwide and Parks. Essentially, Grier is claiming that she should be entitled to judgment as a matter of law without setting forth any evidence whatsoever.

Therefore, Grier has failed to meet the required showing under Rule 56, and the Court should deny her motion for summary judgment.

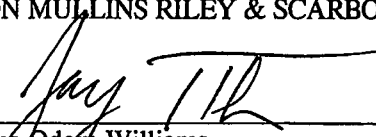
CONCLUSION

For the reasons set forth above, the Court should deny Grier’s motion for summary judgment.

[SIGNATURE ON NEXT PAGE]

Respectfully submitted,

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Columbia, South Carolina

November 8, 2012

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,)

Plaintiffs,)

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.)

Civil Action No. 2011-CP-40-6103

RICHLAND COUNTY
FILED
2012 NOV 13 AM 9:06
JEANETTE W. McBRIDE
C.C.P. & G.S.

**THIRD-PARTY DEFENDANTS
SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Third-Party Defendants Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Parks"), by and through their undersigned counsel, respectfully submit this Supplemental Memorandum in Support of their Motion for Summary Judgment as to all third-party claims asserted by Defendant/Third-Party Plaintiff Chartreuse Grier ("Grier") against Nationwide and Parks.

INTRODUCTION

This Supplemental Memorandum is to inform the Court that the statute previously cited by all parties regarding non-renewal of an insurance policy is NOT the applicable statute in this case. The process for non-renewal of the property insurance policy in this case is governed by a different statute that the parties have not previously cited. The applicable statute has a completely different set of requirements for providing notice of non-renewal, and it is indisputable that the non-renewal procedures in this case meet all requirements of the applicable statute. Therefore, because the insurance claim at issue arose after the property insurance policy expired following a statutorily prescribed non-renewal, there was no contract at the time of the claim, and Nationwide and Parks are entitled to summary judgment on Grier's breach of contract and insurance bad faith claims.

In addition, the Bank has voluntarily dismissed its entire foreclosure action against Grier, so Grier has no remaining claim for indemnity of damages she may sustain in the foreclosure action. Therefore, Nationwide and Parks are entitled to summary judgment on Grier's indemnity claim.

LEGAL ARGUMENT

- I. S.C. Code Ann. § 38-75-1160, not § 38-75-740, governs non-renewal of the homeowner's insurance policy in this case.

This case turns on Grier's allegation that Nationwide failed to comply with the statutory requirements for non-renewal of her insurance policy. It is undisputed that the term of Grier's insurance policy ran from March 24, 2010 to March 24, 2011 and Grier's claim arose on April 6, 2011. The only basis for Grier's claim that there was a contract on the date of her insurance claim is

her assertion that Nationwide's non-renewal of the policy did not meet the statutory requirements for non-renewal.

Grier's claims fails as a matter of law because she relies on the incorrect statute. Grier's Third-Party Complaint alleged that "Nationwide and Parks failed to comply with the mandates of Section 38-75-740 of Article 9 for nonrenewal of insurance policies." (Answer/Third Party Compl. ¶ 64.) However, the applicable statute setting forth requirements for non-renewal of a homeowner's insurance policy is S.C. Code Ann. § 38-75-1160, *not* § 38-75-740. The General Assembly enacted § 38-75-1160 to provide specific provisions that replaced § 38-75-740 for policies of property insurance.

Section 38-75-740 is a general provision setting forth requirements for non-renewal of property and casualty insurance policies. Property insurance is defined as "insurance against direct or indirect loss of or damage to a property," specifically including loss resulting from fire or smoke. S.C. Code Ann. § 38-1-20(50). Section 38-75-740 is codified in Title 38, Chapter 75, Article 9 of the South Carolina Code. The Code specifically defines the scope of Article 9, including section 38-75-740, providing that it "applies to all property insurance and casualty insurance, as defined in Section 38-1-20, *except for . . . property or casualty insurance as to which there are specific statutory provisions of law governing cancellation, nonrenewal, or renewal of policies.*" *Id.* § 38-75-710 (emphasis added).

Section 38-75-740 does not apply to the homeowner's insurance policy at issue in this case because, as contemplated by the scope restrictions on Article 9, South Carolina has enacted a specific statutory provision of law governing cancellation and nonrenewal of property insurance policies. On March 1, 2005, the Property and Casualty Insurance Personal Lines Modernization Act went into effect. The General Assembly codified this Act with 2004 Act No. 290, which specifically provided

that one purpose of the Act was to add a new article to the South Carolina insurance code, “SO AS TO PROVIDE REGULATION OF PROPERTY INSURANCE, CANCELLATION AND NONRENEWALS.” [See Exhibit A.]

The Act added new Article 13 to Chapter 75, Title 38 of the Code, which governs the nonrenewal at issue in this case. Article 13 is entitled Property Insurance Cancellation and Nonrenewal. The scope of the Article specifically provides that it “applies only to property insurance on risks located in this State.” S.C. Code Ann. § 38-75-1130 (2011). Article 13 includes a new, specific provision narrowly tailored to govern “Notice requirement prior to cancellation or refusal to renew.” S.C. Code Ann. § 38-75-1160. Since the enactment of § 38-75-1160, the prior requirements of the “old” statute, § 38-75-740, do not apply to non-renewal of property insurance policies for property located in the State of South Carolina.

The South Carolina Department of Insurance (“SCDOI”) issued several official Bulletins regarding the Property and Casualty Insurance Personal Lines Modernization Act. The first was Bulletin 2004-09, dated August 18, 2004. [Exhibit B.] In this Bulletin, the SCDOI officially confirmed that the Act implemented “requirements for insurers to change cancellation and non-renewal forms with an effective date of March 1, 2005.” Nationwide complied with this requirement and created the form of notice at issue in this case, which was specifically structured to comply with § 38-75-1160 and was specifically approved by the SCDOI. [Exhibit C.] The second Bulletin regarding the Act was Bulletin 2004-11, dated October 25, 2004. [Exhibit D.] In this Bulletin, the SCDOI officially confirmed that the new requirements of § 38-75-1160 “apply to homeowners, mobile homeowners and dwelling fire” insurance.

Section 38-75-1160 governs non-renewal of the homeowner’s insurance policy at issue in this case. It sets forth specific requirements for nonrenewal, stating that:

except for a cancellation pursuant to Section 38-75-730, a cancellation or refusal to renew by an insurer of a policy of insurance covered in this article is not effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew.

Id. § 38-75-1160(A)(1). Unlike § 38-75-740, which ceased to apply in 2005, § 38-75-1160 does not require any notice to be sent to an insurance agent in order for a policy non-renewal to be effective. Rather, the Act replaced this requirement with specific content that must be included in a non-renewal notice sent to the policy holder. Under the new provision, a non-renewal of a homeowner's insurance policy is effective as long as the notice to the policy holder satisfies the following requirements. It must:

- (a) be approved as to form by the director or his designee before use;
- (b) state the date not less than sixty days for any cancellation or refusal to renew that is effective between November first and May thirty-first and not less than ninety days for any cancellation or refusal to renew that is effective between June first and October thirty-first after the date of the mailing or delivering on which the cancellation or refusal to renew becomes effective;
- (c) state the specific reason of the insurer for cancellation or refusal to renew and provide for the notification required by Section 38-75-1180(B);
- (d) inform the insured of his right to request in writing within thirty days of the receipt of notice that the director review the action of the insurer. The notice of cancellation or refusal to renew must contain the following statement in bold print to inform the insured of this right:

"IMPORTANT NOTICE: Within thirty days of receiving this notice, you or your attorney may request in writing that the director review this action to determine whether the insurer has complied with South Carolina laws in canceling or nonrenewing your policy. If this insurer has failed to comply with the cancellation or nonrenewal laws, the director may require that your policy be reinstated. However, the director is prohibited from making underwriting judgments. If this insurer has complied with the cancellation or nonrenewal laws, the director does not have the authority to overturn this action."

- (e) inform the insured of the possible availability of other insurance which may be obtained through his agent, or through another insurer; and

(f) state that the Department of Insurance has available a buyer's guide regarding property insurance shopping and availability, and provide applicable mailing addresses and telephone numbers, including a toll-free number, if available, for contacting the Department of Insurance.

Id. § 38-75-1160(A)(1).

II. Since the enactment of S.C. Code Ann. § 38-75-1160, no court has applied the “old” statutes for cancellation or non-renewal to property insurance policies.

Prior to the enactment of the Property and Casualty Insurance Personal Lines Modernization Act, several published opinions applied § 38-75-730 to cancellation of property insurance policies and § 38-75-740 to non-renewal of property insurance policies. However, since the Act took effect, no published opinion of any court, South Carolina or otherwise, has applied § 38-75-730 or § 38-75-740 to any cancellation or non-renewal of a property insurance policy. Sections 38-75-740 and 38-75-740 no longer apply to cancellation or non-renewal of property insurance policies for property located in the State of South Carolina.

III. It is indisputable that Nationwide non-renewed Grier's policy in compliance with S.C. Code Ann. § 38-75-1160.

To survive summary judgment on the breach of contract and insurance bad faith claims, Grier would have to produce admissible evidence showing that she had an insurance policy with Nationwide on the date of the fire — April 6, 2011. The South Carolina Court of Appeals has held that where an insurance policy is properly canceled before the claim arises, then no valid insurance contract existed at the time the claim arose. *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 102-03, 518 S.E.2d 608, 615 (Ct. App. 1999). Here, Grier's homeowner's policy expired on March 24, 2011, and her claim arose when a fire occurred on April 6, 2011. Therefore, the policy was no longer in effect on April 6, 2011, and there was no valid insurance contract at the time the claim arose.

Grier asserts there was an insurance contract on April 6, 2011 because she claims that Nationwide's non-renewal notice was ineffective under § 38-75-740. However, Nationwide complied with the statutory requirements of S.C. Code Ann. § 38-75-1160 for non-renewal of Grier's policy, so the non-renewal was effective. Nationwide mailed notice of non-renewal to Grier on January 14, 2011. [See Exhibit E]. Nationwide has produced proof of mailing the notice. [See Exhibit F]. The notice satisfied all the requirements of § 38-75-1160, as follows:

(a) the form of the notice was approved by the director of the South Carolina Department of Insurance prior to use. [See Exhibit C];

(b) the notice was sent on January 14, 2011, which was more than sixty days before the non-renewal date of March 24, 2011. [See Exhibit E];

(c) the notice stated five specific reasons for the non-renewal, and it specifically provided for the notification required by Section 38-75-1180(B). *See id.*;

(d) the notice specifically quoted the language of the statute to inform the insured of his right to request in writing within thirty days of the receipt of notice that the director review the action of the insurer. *See id.*;

(e) the notice informed Grier of the possible availability of other insurance which may be obtained through her agent, or through another insurer. Specifically, it stated: "Because of the importance of this protection, we urge you to act promptly. This advance notice should provide sufficient time to secure other coverage from another carrier." *See id.*; and

(f) the notice informed Grier that "[y]our representative can provide you with information on a consumer buyer's guide for property insurance that has been developed by the South Carolina Department of Insurance. You may also want to obtain this information directly from the

Department of Insurance by contacting them at Capitol Center, 1201 Main St., Suite 1000, Columbia, SC 29201 or phone (803) 737-6180 or the toll-free number 1-800-768-3467.” *See id.*

As a matter of law, Nationwide satisfied the requirements of § 38-75-1160 for non-renewal of Grier’s policy by mailing written notice to Grier of the non-renewal. Therefore, Grier’s policy expired on March 24, 2011, and there was no insurance policy on the date of Grier’s claim. As a result, Nationwide and Parks are entitled to summary judgment on Grier’s breach of contract and insurance bad faith claims.

IV. Grier’s Claim for Contribution and Indemnity Fails as a Matter of Law.

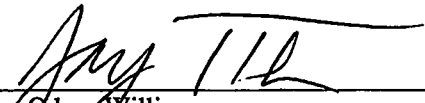
As a matter of law, Grier has no right of indemnity against Nationwide or Parks. The crux of Grier’s indemnity claim is that Nationwide and Parks should be liable for any damages Grier sustains in the Bank’s foreclosure action because Grier claims the foreclosure would not have occurred but for Nationwide’s denial of her insurance claim. (*See Answer/Third Party Compl.* ¶¶ 81-84). However, the Bank has voluntarily dismissed its entire foreclosure action against Grier and will be satisfying the mortgage maintained on the subject property. Therefore, since there is no foreclosure, there is no right to indemnity for the foreclosure, and Nationwide and Parks are entitled to summary judgment on Grier’s indemnity claim.

CONCLUSION

Based on the foregoing reasons, in addition to the reasons set forth in Nationwide and Parks’ motion for summary judgment, Nationwide and Parks respectfully request that the Court grant summary judgment as to all of Grier’s claims.

[SIGNATURE ON NEXT PAGE]

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Columbia, South Carolina

November 12, 2012

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,)

Plaintiffs,)

vs.)

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

Defendants.)

Chartrease Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

Civil Action No. 2011-CP-40-6103

RICHLAND COUNTY
FILED
2012 NOV 13 AM 9:05
JEANETTE W. McBRIDE
C.C.P. & G.S.

**THIRD-PARTY DEFENDANTS'
SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO GRIER'S
MOTION FOR
SUMMARY JUDGMENT**

Third-Party Defendants Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Parks") respectfully submit this Supplemental Memorandum in Opposition to Defendant/Third-Party Plaintiff Chartrease Grier's Motion for Summary Judgment.

INTRODUCTION

This Supplemental Memorandum is to inform the Court that the statute previously cited by all parties regarding non-renewal of an insurance policy is NOT the applicable statute in this case. The process for non-renewal of the property insurance policy in this case is governed by a different statute that the parties have not previously cited. The applicable statute has a completely different set of requirements for providing notice of non-renewal, and it is indisputable that the non-renewal procedures in this case meet all requirements of the applicable statute. Therefore, because the insurance claim at issue arose after the property insurance policy expired following a statutorily prescribed non-renewal, there was no contract at the time of the claim, and the Third Party Plaintiff is not entitled to summary judgment.

LEGAL ARGUMENT

- I. S.C. Code Ann. § 38-75-1160, not § 38-75-740, governs non-renewal of the homeowner's insurance policy in this case.

This case turns on Grier's allegation that Nationwide failed to comply with the statutory requirements for non-renewal of her insurance policy. It is undisputed that the term of Grier's insurance policy ran from March 24, 2010 to March 24, 2011 and Grier's claim arose on April 6, 2011. The only basis for Grier's claim that there was a contract on the date of her insurance claim is her assertion that Nationwide's non-renewal of the policy did not meet the statutory requirements for non-renewal.

Grier is not entitled to summary judgment because her claims are based on the incorrect statute. Grier's Third-Party Complaint alleged that "Nationwide and Parks failed to comply with the mandates of Section 38-75-740 of Article 9 for nonrenewal of insurance policies." (Answer/Third Party Compl. ¶ 64.) Grier's memorandum in support of summary judgment confirmed that her

motion is based on the provisions of § 38-75-740. However, the applicable statute setting forth requirements for non-renewal of a homeowner's insurance policy is S.C. Code Ann. § 38-75-1160, not § 38-75-740. The General Assembly enacted § 38-75-1160 to provide specific provisions that replaced § 38-75-740 for policies of property insurance.

Section 38-75-740 is a general provision setting forth requirements for non-renewal of property and casualty insurance policies. Property insurance is defined as "insurance against direct or indirect loss of or damage to a property," specifically including loss resulting from fire or smoke. S.C. Code Ann. § 38-1-20(50). Section 38-75-740 is codified in Title 38, Chapter 75, Article 9 of the South Carolina Code. The Code specifically defines the scope of Article 9, including section 38-75-740, providing that it "applies to all property insurance and casualty insurance, as defined in Section 38-1-20, *except for . . . property or casualty insurance as to which there are specific statutory provisions of law governing cancellation, nonrenewal, or renewal of policies.*" *Id.* § 38-75-710 (emphasis added).

Section 38-75-740 does not apply to the homeowner's insurance policy at issue in this case because, as contemplated by the scope restrictions on Article 9, South Carolina has enacted a specific statutory provision of law governing cancellation and nonrenewal of property insurance policies. On March 1, 2005, the Property and Casualty Insurance Personal Lines Modernization Act went into effect. The General Assembly codified this Act with 2004 Act No. 290, which specifically provided that one purpose of the Act was to add a new article to the South Carolina insurance code, "SO AS TO PROVIDE REGULATION OF PROPERTY INSURANCE, CANCELLATION AND NONRENEWALS." [See Exhibit A.]

The Act added new Article 13 to Chapter 75, Title 38 of the Code, which governs the nonrenewal at issue in this case. Article 13 is entitled Property Insurance Cancellation and

Nonrenewal. The scope of the Article specifically provides that it “applies only to property insurance on risks located in this State.” S.C. Code Ann. § 38-75-1130 (2011). Article 13 includes a new, specific provision narrowly tailored to govern “Notice requirement prior to cancellation or refusal to renew.” S.C. Code Ann. § 38-75-1160. Since the enactment of § 38-75-1160, the prior requirements of the “old” statute, § 38-75-740, do not apply to non-renewal of property insurance policies for property located in the State of South Carolina.

The South Carolina Department of Insurance (“SCDOI”) issued several official Bulletins regarding the Property and Casualty Insurance Personal Lines Modernization Act. The first was Bulletin 2004-09, dated August 18, 2004. [Exhibit B.] In this Bulletin, the SCDOI officially confirmed that the Act implemented “requirements for insurers to change cancellation and non-renewal forms with an effective date of March 1, 2005.” Nationwide complied with this requirement and created the form of notice at issue in this case, which was specifically structured to comply with § 38-75-1160 and was specifically approved by the SCDOI. [Exhibit C.] The second Bulletin regarding the Act was Bulletin 2004-11, dated October 25, 2004. [Exhibit D.] In this Bulletin, the SCDOI officially confirmed that the new requirements of § 38-75-1160 “apply to homeowners, mobile homeowners and dwelling fire” insurance.

Section 38-75-1160 governs non-renewal of the homeowner’s insurance policy at issue in this case. It sets forth specific requirements for nonrenewal, stating that:

except for a cancellation pursuant to Section 38-75-730, a cancellation or refusal to renew by an insurer of a policy of insurance covered in this article is not effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew.

Id. § 38-75-1160(A)(1). Unlike § 38-75-740, which ceased to apply in 2005, § 38-75-1160 does not require any notice to be sent to an insurance agent in order for a policy non-renewal to be effective.

Rather, the Act replaced this requirement with specific content that must be included in a non-renewal notice sent to the policy holder. Under the new provision, a non-renewal of a homeowner's insurance policy is effective as long as the notice to the policy holder satisfies the following requirements. It must:

- (a) be approved as to form by the director or his designee before use;
- (b) state the date not less than sixty days for any cancellation or refusal to renew that is effective between November first and May thirty-first and not less than ninety days for any cancellation or refusal to renew that is effective between June first and October thirty-first after the date of the mailing or delivering on which the cancellation or refusal to renew becomes effective;
- (c) state the specific reason of the insurer for cancellation or refusal to renew and provide for the notification required by Section 38-75-1180(B);
- (d) inform the insured of his right to request in writing within thirty days of the receipt of notice that the director review the action of the insurer. The notice of cancellation or refusal to renew must contain the following statement in bold print to inform the insured of this right:

"IMPORTANT NOTICE: Within thirty days of receiving this notice, you or your attorney may request in writing that the director review this action to determine whether the insurer has complied with South Carolina laws in canceling or nonrenewing your policy. If this insurer has failed to comply with the cancellation or nonrenewal laws, the director may require that your policy be reinstated. However, the director is prohibited from making underwriting judgments. If this insurer has complied with the cancellation or nonrenewal laws, the director does not have the authority to overturn this action."

- (e) inform the insured of the possible availability of other insurance which may be obtained through his agent, or through another insurer; and
- (f) state that the Department of Insurance has available a buyer's guide regarding property insurance shopping and availability, and provide applicable mailing addresses and telephone numbers, including a toll-free number, if available, for contacting the Department of Insurance.

Id. § 38-75-1160(A)(1).

II. Since the enactment of S.C. Code Ann. § 38-75-1160, no court has applied the “old” statutes for cancellation or non-renewal to property insurance policies.

Prior to the enactment of the Property and Casualty Insurance Personal Lines Modernization Act, several published opinions applied § 38-75-730 to cancellation of property insurance policies and § 38-75-740 to non-renewal of property insurance policies. However, since the Act took effect, no published opinion of any court, South Carolina or otherwise, has applied § 38-75-730 or § 38-75-740 to any cancellation or non-renewal of a property insurance policy. Sections 38-75-740 and 38-75-740 no longer apply to cancellation or non-renewal of property insurance policies for property located in the State of South Carolina.

III. It is indisputable that Nationwide non-renewed Grier’s policy in compliance with S.C. Code Ann. § 38-75-1160.

To prevail on her claims, Grier would have to produce admissible evidence showing that she had an insurance policy with Nationwide on the date of the fire — April 6, 2011. The South Carolina Court of Appeals has held that where an insurance policy is properly canceled before the claim arises, then no valid insurance contract existed at the time the claim arose. *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 102-03, 518 S.E.2d 608, 615 (Ct. App. 1999). Here, Grier’s homeowner’s policy expired on March 24, 2011, and her claim arose when a fire occurred on April 6, 2011. Therefore, the policy was no longer in effect on April 6, 2011, and there was no valid insurance contract at the time the claim arose.

Grier asserts there was an insurance contract on April 6, 2011 because Nationwide’s non-renewal notice was ineffective under the South Carolina statute governing non-renewal of a homeowner’s insurance policy. Nationwide complied with the statutory requirements of S.C. Code Ann. § 38-75-1160 for non-renewal of Grier’s policy, so the non-renewal was effective. Nationwide mailed notice of non-renewal to Grier on January 14, 2011. [See Exhibit E].

Nationwide has produced proof of mailing the notice. [See Exhibit F]. The notice satisfied all the requirements of § 38-75-1160, as follows:

(a) the form of the notice was approved by the director of the South Carolina Department of Insurance prior to use. [See Exhibit C];

(b) the notice was sent on January 14, 2011, which was more than sixty days before the non-renewal date of March 24, 2011. [See Exhibit E];

(c) the notice stated five specific reasons for the non-renewal, and it specifically provided for the notification required by Section 38-75-1180(B). *See id.*;

(d) the notice specifically quoted the language of the statute to inform the insured of his right to request in writing within thirty days of the receipt of notice that the director review the action of the insurer. *See id.*;

(e) the notice informed Grier of the possible availability of other insurance which may be obtained through her agent, or through another insurer. Specifically, it stated: "Because of the importance of this protection, we urge you to act promptly. This advance notice should provide sufficient time to secure other coverage from another carrier." *See id.*; and

(f) the notice informed Grier that "[y]our representative can provide you with information on a consumer buyer's guide for property insurance that has been developed by the South Carolina Department of Insurance. You may also want to obtain this information directly from the Department of Insurance by contacting them at Capitol Center, 1201 Main St., Suite 1000, Columbia, SC 29201 or phone (803) 737-6180 or the toll-free number 1-800-768-3467." *See id.*

As a matter of law, Nationwide satisfied the requirements of § 38-75-1160 for non-renewal of Grier's policy by mailing written notice to Grier of the non-renewal. Therefore,

Grier's policy expired on March 24, 2011, and there was no insurance policy on the date of Grier's claim, April 6, 2011. As a result, Grier is not entitled to summary judgment.

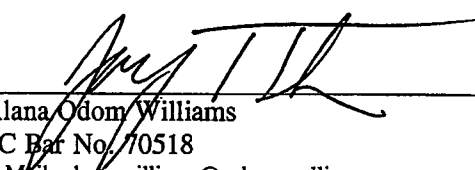
CONCLUSION

For the reasons set forth above, in addition to the reasons set forth in Nationwide and Parks' Opposition to Grier's motion for summary judgment, the Court should deny Grier's motion for summary judgment.

Respectfully submitted,

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By: _____


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November 12, 2012

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,

Plaintiffs,

vs.

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

Defendants.

Chartrease Grier,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

Civil Action No. 2011-CP-40-6103

JEANETTE W. McBRIDE
C.C.P. & G.S.

2012 NOV 16 PM 2:24

RICHLAND COUNTY
FILED

**MOTION FOR PROTECTIVE
ORDER TO PRECLUDE SECOND
DEPOSITION OF NATIONWIDE
PROPERTY & CASUALTY
INSURANCE COMPANY**

Pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, Third-Party Defendant Nationwide Property & Casualty Insurance Company ("Nationwide") respectfully requests that this Court enter a Protective Order to prevent Defendant/Third-Party Plaintiff Chartrease Grier ("Grier") from conducting a second Rule 30(b)(6) deposition of Nationwide.

The basis for this motion is that: (1) it is improper to attempt to issue multiple deposition notices of the same witness, including Rule 30(b)(6) notices of a corporate party,

and (2) Grier has unilaterally attempted to schedule the improper second deposition during the roster meeting and juror qualifications for the upcoming term of court for jury trials, and this case is on the jury trial roster for that term of court.

On Monday, November 12, 2012, Grier's counsel conducted a Rule 30(b)(6) deposition of Nationwide. On Thursday, November 15, 2012, Grier's counsel sent a second deposition notice attempting to set up another Rule 30(b)(6) deposition of Nationwide. Grier's counsel did not consult with Nationwide before sending the second notice. The notice unilaterally attempted to schedule the deposition for Monday, November 26, 2012, at 10:00 a.m., which will be during the roster meeting and juror qualifications for the November 26 term of court. This case is currently on the jury trial roster for the November 26, 2012 term of court.

Rule 30(a)(2), SCRCP, provides that "the deposition of any party or witness may only be taken one time in any case except by agreement of the parties through their counsel or by order of the court for good cause shown." Courts have specifically held that the federal counterpart to this rule, Fed. R. Civ. P. 30(a)(2)(A)(ii), applies to Rule 30(b)(6) depositions of a corporate witness, meaning that a party must obtain leave of court before it can issue multiple 30(b)(6) deposition notices to the same party. *See, e.g., Ameristar Jet Charter, Inc. v. Signal Composites, Inc.*, 244 F.3d 189, 192 (1st Cir. 2001); *Burdick v. Union Sec. Ins. Co.*, No. CV 07-4028 ABC(JCx), 2008 WL 5102851, *2 (C.D. Cal. Dec. 3, 2008); *Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 239 (S.D.N.Y. 2002).

Grier made no effort to consult with Nationwide, obtain Nationwide's consent, or obtain leave of court to issue a second deposition notice of the same party, after already taking one deposition of that party. Grier has offered no justification or basis on which such a

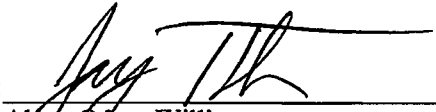
deposition should be allowed. This attempt to issue a second deposition notice and re-depose a party that has already been deposed directly violates Rule 30(a)(2).

Further, Grier has offered no rationale for unilaterally attempting to schedule the deposition during the roster meeting and juror qualifications for the term of court when this case is on the jury trial roster. The Court should not allow Grier to conduct a deposition in this manner.

For the reasons stated above, Nationwide respectfully requests that the Court issue a Protective Order to prevent Grier from conducting a second Rule 30(b)(6) deposition of Nationwide.

Respectfully submitted,

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Columbia, South Carolina

November 16, 2012

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 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,)

Plaintiffs,)

vs.)

Chartreas Grier; Palmetto Health Alliance;)
 and Palmetto Richland Memorial,)

Defendants.)

 Chartrease Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS

**BRIEF IN SUPPORT OF THIRD-PARTY
 PLAINTIFF'S MOTION FOR
 SUMMARY JUDGMENT**

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

RICHLAND COUNTY
 FILED
 2012 NOV 19 AM 10:39
 JEANETTE M. MCBRIDE
 C.C.P. 2.5.

This matter is before the court on the motion of Third-Party Plaintiff, Chartrease Grier ("Ms. Grier"), for summary judgment as to her complaint against Third-Party Defendant, Nationwide Property & Casualty Insurance Co. ("Nationwide"), pursuant to the provisions of Rule 56 of the South Carolina Rules of Civil Procedure. Ms. Grier's motion is based upon

Nationwide's failure to comply with the notice requirements for an effective non-renewal found in S.C. Code Ann. § 38-75-740¹. This brief is submitted in support of Ms. Grier's motion.

STATEMENT OF FACTS

This matter deals with a homeowner's insurance policy, issued by Nationwide to Ms. Grier for her primary residence, located at 6515 Easter Street, Columbia, South Carolina, identified specifically as Nationwide Policy No. 6139-HP-34037 ("Policy"). Ms. Grier purchased the policy from Third-Party Defendant Tonya Parks ("Parks"), or one of the associate agents in her employment. Parks is owner of an authorized Nationwide agency located in Columbia, South Carolina, where she solicits and sells insurance policies exclusively for, and underwritten by, Nationwide. (See Deposition of Tonya Parks, 10:24-25, 15:7-12, 16:19-23, 37:16-25, 40:13-23, 100:8-25 [Ex. A]).

In January 2010, Nationwide attempted to send a letter to Grier and her mortgage company, GMAC Mortgage, LLC ("GMAC"), stating their intention not to renew Ms. Grier's homeowners policy for the policy period beginning after March 24, 2010. (See Exhibit 2 to Parks Dep. [Ex. B]). This 2010 attempt at non-renewal apparently failed and it is undisputed that the policy was, in fact, renewed for the policy period effective March 24, 2010 to March 24, 2011. Subsequently, on or about January 14, 2011, Nationwide claims to have sent GMAC and Ms. Grier letters indicating that the policy would not be renewed by Nationwide at the conclusion of the policy period for unspecified reasons. (See Ex. 4 to Parks Dep., 00001-0005 [Ex. C]).² There

¹ As Third-Party Defendants' Opposition to Grier's Motion for Summary Judgment correctly points out, Third-Party Plaintiff's Notice of Motion and Motion for Summary Judgment mistakenly references the S.C. Code Ann. § 38-75-730, which deals with notice required for cancellation. However, the Motion also references South Carolina law generally and the parties are all on notice that the code section that applies deals with non-renewal, not cancellation; therefore, none of the parties have been prejudiced. In fact, since Nationwide has filed an Opposition to the motion arguing the correct statute section there is no showing that they are prejudiced by the error.

² Not at issue in this motion is the fact that GMAC took steps to ensure the policy would be renewed, resulting in assurances from Nationwide that renewal would occur upon payment of the required premium, which was subsequently paid to Nationwide on or about March 15, 2011.

is no evidence that any other party was sent a copy of this letter, other than Parks' agency number appearing in the "Cc:" line at the bottom of the letter. (See Parks Dep 50:9-20, 51:13-25, 67:7-21, 71:8-19, 102:5-22, [Ex. A]).

On April 6, 2011, Ms. Grier's house and its contents were completely destroyed by fire, and Ms. Grier submitted a claim to Nationwide for the property damage. Nationwide denied coverage for any losses arising out of the fire, stating that the policy had expired on March 24, 2011, and no coverage was in place on the date of loss. Ms. Grier testified that the first time she was notified that the policy was not being renewed was on the date of the fire. (See Deposition of Chartreuse Grier, 62:8-24 [Ex. D]).

Nationwide claims it sent Ms. Grier notice of the non-renewal by letter dated January 15, 2011, citing a mail log as evidence of the notice to Ms. Grier. The mail log purports to show Nationwide mailed the letter to Ms. Grier at the same time it mailed the letter to GMAC. (See Ex. 10 to Parks Dep. [Ex. E]).

Of importance to this motion is the fact that there is no mail log showing anything was ever sent to Parks prior to the nonrenewal of the Policy. In fact, Parks does not recall ever receiving copies of the notices of non-renewal sent in January 2011 to GMAC and Grier, despite her agent number being included as a party to be carbon copied on the correspondences. (See Parks Dep. 67:7-21, 71:8-19, 102:5-22 [Ex. A]). In fact, even though Parks testified that she would have filed all correspondence received on the policy, her file contains nothing mentioning the nonrenewal until after the loss at issue. (See Parks Production in its entirety [Ex. C]). Specifically, the only nonrenewal related documents in her possession are from faxes that were sent to her from Nationwide on April 7, 2011. (See Parks 0001-0005 [Ex. C]). Therefore, there is no evidence of any kind that Nationwide provided notice of the policy's non-renewal to Parks,

the agent of record, as required by S.C. Code Ann. § 38-75-740 (1976, as amended). Thus, the only reasonable conclusion that can be made based on the evidence is that Nationwide's attempt at non-renewal was ineffective as a matter of law and coverage was in place on the date of loss.

STANDARD OF REVIEW

Summary judgment must be entered in favor of a party who shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002); Bishop v. South Carolina Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998).

Under Rule 56(c), SCRPC, the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. AT&T, 306 S.C. 101, 410 S.E.2d 537, 545 (1991). However, with respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility "may be discharged by 'showing' -- that is, pointing out to the [trial] court -- that there is an absence of evidence to support the nonmoving party's case." Id (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). Once the moving party carries its initial burden, the non-moving party must, under Rule 56(e), come forward with specific facts showing that there is a genuine issue for trial. Id, see also Rule 56(e), SCRPC, see also Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E.2d 433, 439 (2003).

In considering a motion for summary judgment, the court "must view the facts in the light most favorable to the non-moving party. Nonetheless, a court 'cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.'" Bloom v. Ravoir, 339 S.C. 417, 529 S.E.2d 710, 713

(2000).

LEGAL ARGUMENT

I. Nationwide Has the Burden of Proving Strict Compliance with § 38-75-740

a. Non-Renewal Notice Requirements and Burden of Proof

Section 38-75-740 of the South Carolina Code governs the manner in which an insurance policy may be non-renewed by the insurer. As set forth in subsection (a) of that statute, “[n]o insurance policy may be nonrenewed by an insurer except in accordance with the provisions of this section ... and any nonrenewal attempted which is not in compliance with this section ... is ineffective.” Thus, the statute makes it clear that it provides the only method by which an insurer may effectuate non-renewal of an insurance policy.

Subsections (b) and (d) of § 38-75-740 set forth the specific procedure an insurer must follow for non-renewal:

(b) A policy written for a term of one year or less may be nonrenewed by the insurer at its expiration date by giving or mailing written notice of nonrenewal to the insured and the agent of record, if any, not less than sixty days prior to the expiration date of the policy for any nonrenewal that would be effective between November first and May thirty-first and not less than ninety days for any nonrenewal that would be effective between June first and October thirty-first.

....

(d) The notice required by this section must be given or mailed to the insured and the agent at their addresses shown in the policy or, if not reflected therein, at their last known addresses. Proof of mailing is sufficient proof of notice.

The statute clearly states that the required notice be provided to both the insured and the agent of record at their addresses shown in the policy or at their last known addresses, and makes no distinction between the notice requirements for the insured and those for the agent.

Subsection (d) suggests that the proof of notice is to be established by the insurer, the party responsible for mailing notice, not the intended recipients. Both the South Carolina

Supreme Court and the Fourth Circuit have addressed this notion, and have maintained that the party asserting cancellation of an insurance policy bears the burden of proving strict compliance with the established procedure for cancellation. *Moore v. Palmetto Bank*, 120 S.E.2d 231 (S.C. 1961); *South Carolina Nat'l Bank v. Lumberman's Mut. Cas. Co.*, 526 F.Supp. 94 (D.S.C. 1981) (applying South Carolina law and holding that the insurer failed to carry its burden of proving that notice was actually placed in the mail and thus, even if mere proof of mailing of notice of cancellation were sufficient to relieve insurer of liability under the policy, loss payee was entitled to judgment against insurer); *see also* 45 C.J.S. *Insurance* § 821 (2012) (“[t]he burden of proving that there has been a cancellation of a policy rests on the party asserting it. So, where the company, in an action on the policy, defends on the ground that the contract or policy had been canceled, it has the burden of proving cancellation, and incidentally of proving its compliance with conditions precedent to the right to cancel.”).

b. “Mailing” and “Giving” Notice

The South Carolina Supreme Court has addressed the respective meanings of *giving* and *mailing* notice in the context of insurance policies, noting that the terms “mailing written notice” and “giving written notice” are not “necessarily synonymous or substantially similar.” *Edens v. S.C. Farm Bureau Mut. Ins. Co.*, 308 S.E.2d 670 (S.C. 1983) (Littlejohn, J., and Harwell, J.J., dissenting). “Where a cancellation clause provides that the insurer may cancel by mailing the notice to the insured's address or where it contains substantially similar language, the mere mailing is sufficient to effect cancellation.” *Moore*, 120 S.E.2d at 233.

To comply with language that indicates only that notice shall be “given,” however, the insured “shall personally receive the notice in such manner that the insured becomes aware of having received it.” *Edens*, 308 S.E.2d at 671. “The provision involves a physical delivery to the

insured of a document of which he becomes personally aware.” *Id.* (quoting *Selken v. Northland Insurance Company*, 249 Iowa 1046, 90 N.W.2d 29 (1958)). In *Edens*, the Court noted that policy cancellation is an affirmative defense that must be proved by the preponderance of the evidence. The Court ultimately held that where language required only the “giving” of notice, the insurance company’s failure to offer any proof that the cancellation notice was *received* rendered cancellation ineffective. *Id.*

II. Nationwide Failed to Provide Required Notice to Tonya Parks

Nationwide has provided no evidence that notice was mailed to Parks, the agent of record, as required by § 38-75-740, and as further clarified by South Carolina case law. In response to discovery requests propounded by Ms. Grier requesting any and all evidence indicating that notice was properly provide to Parks, Nationwide merely points to the fact that her agent number is shown in the “CC” section of January 14, 2011, non-renewal letter mailed to Ms. Grier. (See Nationwide’s Supp. Resp. to Grier’s 1st Supp. Interrogs., Nov. 6, 2012 [Ex. F]). However, Nationwide has not produced any reliable evidence whatsoever proving that the letter was actually mailed to Parks. In fact, mailing log from January 14, 2011, produced by Nationwide [Ex. E] shows that the non-renewal notice was mailed to Ms. Grier and to GMAC, but it contains no corresponding entry for Parks.

In its attempt to prove notice, Nationwide also points to the affidavit of Franklin Jefferies, the Nationwide underwriter responsible for making the decision not to renew Ms. Grier’s policy. (See Affidavit of Franklin Jefferies ¶¶ 3-6, Ex. C to Nationwide’s Memo. In Opp.). In his affidavit, Jefferies provided the following testimony regarding his actions with respect to the non-renewal of Ms. Grier’s policy:

When I create a non-renewal letter to be sent to a policy holder, my normal business practice is to check the box in the software macro that

automatically sends a notice to the Nationwide agent for the policy. I do this approximately 240 times per year, and I have no reason to believe I did it any differently when I created the non-renewal letter on April 21, 2010. In this case the agent was Tonya Parks.

(Jefferies Aff. ¶ 7)

Mere testimony of compliance with routine business practices to demonstrate compliance with procedures regarding notice, without actual proof of mailing or receipt by the intended party, is insufficient to satisfy the insurer's burden of proving strict compliance with relevant non-renewal provisions. *See, e.g., Lumberman's Mut. Cas. Co.*, 526 F.Supp. at 96. Thus, Nationwide's reliance on Mr. Jefferies' testimony regarding his normal business practices, without any other evidence to support the actual mailing of this notice, is insufficient to satisfy the requirements of § 38-75-740.

In addition to Nationwide's dearth of evidence to prove the *mailing* of notice as required by the statute, neither Nationwide nor Parks can point to any evidence showing that Parks ever *received* the notice. As discussed above, to comply with a requirement that notice be *given*, the burden is on the insurer to prove actual receipt. As set forth above, Parks' testimony reveals that she had no record of the January 14, 2011, non-renewal letter, and, in fact, she could not state with any reliable certainty that she even saw the letter – or any other notice of non-renewal – prior to the date of loss.

CONCLUSION

There is no genuine issue as to any material fact regarding the existence of coverage under the policy at issue at the time of loss, which is the dispositive crux of this case. Nationwide, as the party seeking to cancel an insurance policy, had the burden of proving strict compliance with the notice provisions set forth in S.C. Code Ann. § 38-75-740.

Nationwide has failed to produce any reliable evidence that proper notice was provided to Tonya Parks, the agent of record, and thus, have failed to meet their burden.

Accordingly, the only conclusion that can be drawn is that Nationwide's attempted nonrenewal was ineffective, and coverage under the policy was in place at the time of loss. Therefore, the Court should grant Chartreuse Grier's Motion for Summary Judgment.

November 9, 2012
Greenville, SC

Respectfully submitted,



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Chartreuse Grier

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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,)

Plaintiffs,)

vs.)

Chartreas Grier; Palmetto Health Alliance;)
and Palmetto Richland Memorial,)

Defendants.)

Chartrease Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS

RICHLAND COUNTY
FILED
2012 NOV 19 AM 9:58
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

**THIRD-PARTY PLAINTIFF'S
OBJECTION TO NATIONWIDE'S
NOTICE OF TAKING OF 30(B)(6)
DEPOSITION OF BANK OF NEW YORK**

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

**TO: JAY T. THOMPSON, ESQ. AND ALANA ODOM WILLIAMS, ESQ., ATTORNEYS
FOR THE THIRD-PARTY DEFENDANTS NATIONWIDE PROPERTY & CASUALTY
INSURANCE COMPANY AND TONYA D. PARKS**

PLEASE TAKE NOTICE that Third-Party Plaintiff Chartrease Grier, by and through her undersigned attorneys, objects to the purported notice of taking of the deposition of the 30(B)(6) designee for The Bank of New York Mellon Trust Co., served by you on November 9, 2012, for the following reasons and on the following grounds:

- 1) The date set in the notice for the taking of the examination is only three (3) days after service of the notice was effected, and thus, is in violation of the notice requirements set forth in Rule 30(b)(1) of the South Carolina Rules of Civil Procedure.
- 2) This notice was not provided until after business hours on Friday, November 9, 2012, and the intended deposition was noticed for Monday, November 12, 2012 (which is also a Federal holiday). This is insufficient time to prepare for participation in the examination.
- 3) The information sought in the examination, as set forth in the deposition notice, is neither relevant nor admissible as evidence under the South Carolina Rules of Evidence and other applicable laws of this State.

For the foregoing reasons, allowing this deposition to go forward as noticed would be unduly burdensome and unfairly prejudicial to the Third-Party Plaintiff, Chartreuse Grier.

November 12, 2012

Greenville, SC

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Attorneys for the Defendant/Third-Party Plaintiff,
Chartreuse Grier

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-40-6103

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Civil Action No. 2011-CP-40-6103

Civil Action No. 2011-CP-40-6103

Richland Memorial ("PRM") and dismissal of all Defendants' claims, if any, against Plaintiff in the above-styled action.

The parties stipulate to the Court that each and every claim by Plaintiff against the Defendants and each and every claim by the Defendants against Plaintiff be dismissed without prejudice, each party to bear its own costs.

A proposed order is attached hereto as Exhibit A.

Respectfully submitted this 21st day of November 2012.

WE CONSENT:



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Mark S. Wierman (SC Bar No. 78537)

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Attorneys for Plaintiff

**SIGNATURES CONTINUE
ON NEXT PAGE**

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Richland County 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 v. Chartreas Grier, et al
C.A. No.: 2011-CP-40-6103

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE



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Nationwide Property & Casualty Insurance and
Tonya D. Parks*

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-40-6103

[illegible][illegible][illegible][illegible][illegible][illegible][illegible][illegible][illegible][illegible][illegible][illegible]

Palmetto Richland Memorial ("PRM") and as to Defendants claims against Plaintiff in the above-styled action.

AND THE COURT, being fully informed and advised;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-styled action is hereby dismissed without prejudice.

IT IS SO ORDERED.

The Honorable James R. Barber, III
Judge Presiding

Richland County, South Carolina
November __, 2012.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

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.)

Plaintiffs.)

vs.)

Chartreas Grier, Palmetto Health Alliance,)
and Palmetto Richland Memorial.)

Defendants.)

Chartrease Grier,)

Third-Party Plaintiff.)

vs.)

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

Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS

**THIRD-PARTY PLAINTIFF'S
RESPONSE TO THIRD-PARTY
DEFENDANTS' SUPPLEMENTAL
MEMORANDA SUPPORTING AND
OPPOSING SUMMARY JUDGMENT**

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

2012 NOV 26 AM 10:43
CLERK OF COURT
COURT OF COMMON PLEAS
RICHLAND COUNTY, SOUTH CAROLINA

Third-Party Plaintiff Chartrease Grier ("Grier"), by and through her undersigned attorneys, respectfully submits this Response to Third-Party Defendants' Supplemental Memorandum in Opposition to Grier's Motion for Summary Judgment and Third-Party Defendants' Supplemental Memorandum in Support of Motion for Summary Judgment.

Introduction

The Third-Party Defendants (collectively, "Nationwide") are under the assumption that up until now, the parties in this matter have been operating under the

incorrect statute regarding the notice requirements placed upon an insurer to effectively non-renew a homeowners insurance policy. Nationwide asserts that the newly “discovered” statute is applicable in this case, the non-renewal procedures they followed met the requirements of the “new” statute, and the Third-Party Plaintiff Chartreuse Grier’s Motion for Summary Judgment should be denied.

Nationwide’s misplaced assertion that compliance with the “new” statute alone is unequivocal proof of effective non-renewal hinges on the faulty premise that this “new” statute supersedes and replaces the “old” statute. The “new” statute, however, was designed expressly to expand protection for consumers (i.e., insureds), and the requirements set forth therein are *additional* requirements that an insurer must followed in order to effectively non-renew policies covering homeowners. As set forth in more detail below, the logical and appropriate conclusion regarding the interplay of these two statutes is that they are intended to work in tandem, and both are applicable in this case. Even if Nationwide fully complied with the “new” statute, the requirements of the other statute were not met and the attempted non-renewal was ineffective. Thus, the policy remained in place at the time of loss, and Chartreuse Grier is entitled to summary judgment on the issue of coverage.

Legal Argument

I. Both S.C. Code Ann. § 38-75-740 and § 38-75-1160 govern the non-renewal of the homeowner’s insurance policy in this case

The heart of the matter at hand is whether coverage under Third-Party Plaintiff Chartreuse Grier’s (“Ms. Grier”) homeowner’s insurance policy, underwritten by Nationwide, existed when her home burned down on April 6, 2011. It is undisputed that Nationwide intended to effectuate non-renewal of the policy prior to its expiration date of

March 24, 2011. As set forth in more detail in the brief in support of Ms. Grier's Motion for Summary Judgment, Nationwide did not comply with the requirements of § 38-75-740, which rendered the attempted non-renewal ineffective.

a. Article 9 – Scope and non-renewal provisions

Article 9 of Chapter 75 of the South Carolina Insurance Law is entitled "Cancellation, Nonrenewal, and Renewal of Property and Casualty Insurance." Sections 38-75-730 and 740 of Article 9 set forth the specific requirements an insurer must follow to cancel or non-renew a policy.

i. Sections 730 and 740

Section 730(a) enumerates the only reasons for which an insurer may cancel or non-renew a policy, which are in pertinent part (1) non-payment of premium, (2) material misrepresentation of fact by the insured, (3) substantial change in the risk assumed, (4) substantial breaches of contractual duties, conditions, or warranties, and (5) loss of the insurer's reinsurance. S.C. Code Ann. § 38-75-730 (1976, as amended).

Section 740 deals specifically with non-renewal, and provides the specific procedure an insurer must follow to non-renew a policy for one of the reasons listed in § 38-75-730:

(b) A policy written for a term of one year or less may be nonrenewed by the insurer at its expiration date by *giving or mailing written notice of nonrenewal to the insured and the agent of record*, if any, not less than sixty days prior to the expiration date of the policy for any nonrenewal that would be effective between November first and May thirty-first and not less than ninety days for any nonrenewal that would be effective between June first and October thirty-first.

....

(d) The notice required by this section must be *given or mailed to the insured and the agent at their addresses shown in the policy or*,

if not reflected therein, at their last known addresses. Proof of mailing is sufficient proof of notice.

S.C. Code Ann. § 38-75-740 (1976, as amended)(emphasis added).

This statute also states that “[n]o insurance policy may be nonrenewed by an insurer except in accordance with the provisions of this section ... and any nonrenewal attempted which is not in compliance with this section ... is ineffective.” Thus, in order to effectuate non-renewal of an insurance policy under this section, the notice must be given or mailed to both the insurer and the agent of record at their last known addresses.

ii. Scope of Article 9

Section 38-75-710 of Article 9 explains that “[t]his article applies to all property insurance and casualty insurance, as defined in Section 38-1-20, except for automobile insurance and any other type of property or casualty insurance as to which there are specific statutory provisions of law governing cancellation, nonrenewal, or renewal of policies.”

b. Article 13: Scope and non-renewal provisions

The South Carolina Legislature enacted the Property and Casualty Insurance Personal Lines Modernization Act in 2004. See S.C. Code Ann. §§ 38-73-210, *et seq.* This Act provided for the addition of several new insurance provisions to Title 38, including Article 13 of Chapter 75, entitled Property Insurance Cancellation and Nonrenewal. Like the other provisions in the 2004 Act, Article 13 is rooted in concerns about consumer protection. It applies only to property insurance on risks located in this state, and its primary purpose is to “promote the public welfare by regulating insurance rates to the end that they may not be excessive, inadequate, or unfairly discriminatory” S.C. Code Ann. §§ 38-75-1130(A)(1) and 38-75-1110(A)(1).

Again, in the vein of consumer protection, the Legislature added § 38-75-1160, which provided requirements for the substantive content of any notice sent by an insurer in an attempt to cancel or non-renew a policy on property covered by Article 13. The notice provisions of Article 13 are discussed in more detail below.

c. The Omnibus Coastal Property Insurance Reform Act of 2007

In response to growing concerns about damage resulting from hurricanes and other natural disasters in this state, the South Carolina Legislature enacted Act 78, known as the Omnibus Coastal Property Insurance Reform Act of 2007 (“Omnibus Act”). The Omnibus Act, among other things, provided tax credits for individual taxpayers who retrofit their properties to prevent hurricane loss, and it created limitations on insurance cancellation based on climactic conditions. *See* Omnibus Act of 2007, No. 78, §§ 3, 14, 2007 S.C. Acts 313.

In addition, the Omnibus Act simultaneously revised the non-renewal provisions of both Article 9 and Article 13 (in Sections 14 and 15 of the Omnibus Act, respectively). *Id.* at §§ 14-15. Specifically, both § 38-75-740 and § 38-75-1160 were updated to include identical, corresponding language regarding notices required for cancellations or non-renewals that would become effective during hurricane season, which require a 90-day notice, versus those that would become effective otherwise, which require only a 60-day notice.

As discussed above, § 38-75-1160, mandates that certain content be included in a notice of cancellation or non-renewal of an insurance policy covering property included in the scope of Article 13. This statute, in its current form as revised by the Omnibus Act, provides as follows:

(A)(1) Except for a cancellation pursuant to Section 38-75-730, a cancellation or refusal to renew by an insurer of a policy of insurance covered in this article is not effective unless the insurer delivers or mails to the named insured at the address shown in the policy a written notice of the cancellation or refusal to renew. This notice must:

(a) be approved as to form by the director or his designee before use;

(b) state the date not less than sixty days for any cancellation or refusal to renew that is effective between November first and May thirty-first and not less than ninety days for any cancellation or refusal to renew that is effective between June first and October thirty-first after the date of the mailing or delivering on which the cancellation or refusal to renew becomes effective;

(c) state the specific reason of the insurer for cancellation or refusal to renew and provide for the notification required by Section 38-75-1180(B);

(d) inform the insured of his right to request in writing within thirty days of the receipt of notice that the director review the action of the insurer. The notice of cancellation or refusal to renew must contain the following statement in bold print to inform the insured of this right:

"IMPORTANT NOTICE: Within thirty days of receiving this notice, you or your attorney may request in writing that the director review this action to determine whether the insurer has complied with South Carolina laws in canceling or nonrenewing your policy. If this insurer has failed to comply with the cancellation or nonrenewal laws, the director may require that your policy be reinstated. However, the director is prohibited from making underwriting judgments. If this insurer has complied with the cancellation or nonrenewal laws, the director does not have the authority to overturn this action."

(e) inform the insured of the possible availability of other insurance which may be obtained through his agent, or through another insurer; and

(f) state that the Department of Insurance has available a buyer's guide regarding property insurance shopping and availability, and provide applicable mailing addresses and telephone numbers, including a toll-free number, if available, for contacting the Department of Insurance.

d. Response to Nationwide's Argument

Nationwide maintains that because § 38-75-1160 also includes language related to the non-renewal of property insurance policies, it must therefore supersede or replace the nonrenewal provisions found in Article 9. Nationwide predicates this conclusion on the notion that § 38-75-1160 is a "specific statutory provision" governing nonrenewal, thus

exempting it from the scope of Article 9 as stated in §38-75-710, *supra*. Nationwide's determination to assert this position is belied by the fact that while § 38-75-740 requires that notice be "given or mailed" to both the insured and the agent, § 38-75-1160 makes no mention of the agent. Thus, by arguing that compliance with § 38-75-1160 is *prima facie* proof that Ms. Grier's policy was non-renewed, Nationwide hopes to divert attention away from the fact that it failed provide proper notice as required by § 38-75-740. Unfortunately, this argument does not hold up.

In its argument that § 38-75-1160 renders § 38-75-740 inapplicable to Ms. Grier's policy, Nationwide first points to the fact that Article 13 applies only to property risks in this state and also contains a provision that relates to notice for nonrenewal. From this, Nationwide concludes without further reasoning that § 38-75-740 must not be applicable to policies that cover property in South Carolina.

The interpretation of "specific" that Nationwide seems to adopt is contrary to the actual language and content of the relevant statutes. For example, § 38-75-730 sets forth a list of reasons for which a property or casualty insurance policy can be cancelled or non-renewed, and insurers must cite one of those reasons. Section 38-75-1160, however, requires only that the insurer state the reason for nonrenewal and places no limit on the reasons for which a policy may be canceled. Likewise, § 38-75-740 specifies that proof of mailing is proof of notice, which suggests that there is some burden on the insurer to show its compliance. Section 38-75-1160, however, is silent in this regard. Further, if § 38-75-1160 were to supersede §§ 38-75-730 and 740, the non-renewal requirements included in both those statutes would no longer apply to any homeowner's insurance policies covering property within this state.

Nationwide then cites Bulletin 2004-11, issued by the South Carolina Department of Insurance ("the Department") in 2004 to "provide information to insurers regarding cancellation/non-renewal forms." In this Bulletin, the Department indicates that the requirements in § 38-75-1160 apply to "homeowners, mobile homeowners and dwelling fire" insurance policies. Nationwide presumably points to this to suggest "homeowners, mobile homeowners and dwelling fire" policies are "other type[s] of property or casualty insurance" with specific statutory provisions of law governing nonrenewal" and are accordingly exempted from the scope of Article 9 and the requirements of § 38-75-740.

In 2007, however, the Department of Insurance promulgated Bulletin 2007-05, which explained the changes brought about by the Omnibus Act. [See Exhibit A]. Under Section 14 of the Act, the Bulletin stating "the notice requirements for cancellation and non-renewal have changed as follows," and goes on to group together the relevant provisions of Articles 9 and 13. At the conclusion of the explanation of Section 14, the Department then cites the language of § 38-75-710, confirming that the provisions above, i.e., §§ 38-75-740 and 1160, apply to all property insurance and casualty insurance. It is clear from this Bulletin that the Department supports the view the provisions are cumulative, not exclusive.¹

To further support this position, it is important to emphasize the fact that the Legislature concurrently revised the nonrenewal provisions by, among other things, adding identical/corresponding language regarding the time for notice. If the legislature had intended Article 13 to replace and be exempted from the scope of Article 9, it would

¹ See also Exhibit B, excerpted from the Homeowners Insurance FAQs on the Department's website showing that non-renewal notice is governed by § 38-75-740.
<http://doi.sc.gov/faqs/Pages/Homeowners.aspx>.

have said so. In light the blatant dearth of legislative discourse on this subject, it seems a big stretch to presume such oversight (and lack of foresight) on the Legislature's part.

Lastly, Nationwide points out that since the enactment of § 38-75-1160, there have been no published opinions of any court applying §§ 38-75-730 or 740. In Nationwide's view, this is further evidence that the provisions of Article 9 no longer apply to property in South Carolina. It is only fair, then, to counter that assertion by pointing out that there have also been no published opinions of any court applying § 38-75-1160, which was originally enacted in 2004. The absence of published opinions is obviously a poor bellwether of the applicability of statutory provisions.

e. Public policy – consumer protection and the role of insurance agents

In its quest to avoid liability, Nationwide has zeroed in on the idea that § 38-75-1160 appears to exempt insurers from providing nonrenewal notice to its agents. In doing so, it has perhaps obscured its view of the bigger picture. Section 38-75-1160 is a statute about the *content* of renewal notices, not a statute about whether and to whom such notice should be sent. It was enacted solely to offer additional protection to insureds, not to relieve insurers of an inconvenient burden, and it does not mention agents because they are not the intended beneficiaries.

Insurance agents represent their insureds and are a necessary conduit between the insurance company and these individuals. This sentiment is echoed in the testimony of Nationwide underwriter, Franklin Jefferies:

Q: Now you said this a couple of times, but is Ms. Grier's agent – she's supposed to advise her client of the presence of these conditions?

A: The agent services the customer to advise them about the need to pay policies, about the need to provide

information on drivers, about anything related to the policy,
as a go-between the company and the customer.

(Jefferies Dep. 73:6-14)[Exhibit C].

To eliminate the requirement that agents be notified when the policies of the insureds are slated for cancellation or nonrenewal is not only contrary to the intent of the statutes at issue but also contrary to public policy in general.

II. Nationwide did not comply with § 38-75-740 and coverage existed on the date of loss

As set forth fully in the memorandum in support of Ms. Grier's Motion for Summary Judgment, previously filed with the Court and fully incorporated herein by reference, Nationwide failed to comply with the notice provisions of § 38-75-740, which govern the method by which a non-renewal must be provided in order to be effective.

Conclusion

There is no genuine issue as to any material fact regarding the existence of coverage under the policy at issue at the time of loss, which is the dispositive crux of this case. Nationwide, as the party seeking to cancel an insurance policy, had the burden of proving strict compliance with the notice provisions set forth in S.C. Code Ann. § 38-75-740. Nationwide has failed to produce any reliable evidence that proper notice was provided to Tonya Parks, the agent of record, and thus, have failed to meet their burden.

Accordingly, the only conclusion that can be drawn is that Nationwide's attempted nonrenewal was ineffective, and coverage under the policy was in place at the time of loss. Therefore, the Court should grant Chartreuse Grier's Motion for Summary Judgment.

[SIGNATURE ON THE FOLLOWING PAGE]

November 26 2012
Greenville, SC

Respectfully submitted,



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Attorneys for the Defendant/Third-Party
Plaintiff, Chartreuse Grier

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,

Plaintiffs,

vs.

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

Defendants.

Chartrease Grier,

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

Civil Action No. 2011-CP-40-6103

**THIRD-PARTY DEFENDANTS'
SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO
DEFENDANT/THIRD-PARTY
PLAINTIFF CHARTREASE GRIER'S
MOTION TO AMEND ANSWER AND
THIRD PARTY COMPLAINT**

RECEIVED
C.C.P. & G.S.

NOV 23 AM 9:00

RICHLAND COUNTY
FILED

Third-Party Defendants Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Parks"), by and through their undersigned counsel, respectfully submit this Supplemental Memorandum in Opposition to Defendant/Third-Party Plaintiff Chartrease Grier's ("Grier") Motion to Amend Answer and Third Party Complaint.

In addition to the reasons set forth in Nationwide and Parks' earlier Memorandum in Opposition to the Motion to Amend, Nationwide and Parks request that the Court deny the Motion to Amend on the following bases:

- 1) The proposed negligence and negligent misrepresentation causes of action would both fail as a matter of law and would only be dismissed pursuant to Rule 12(b)(6), so it would be futile and would prejudice Nationwide and Parks to allow Grier to amend her Third Party Complaint to assert these causes of action;
- 2) The single case cited by Grier to support her argument that she should be allowed to assert futile causes of action, *Tanner v. Florence County Treasurer*, is distinguishable and does not provide a basis for Grier to assert new causes of action that would be futile and would prejudice Nationwide and Parks;
- 3) The "indemnity and contribution" claim that remains in the proposed Amended Third Party Complaint has been rendered moot by the agreed satisfaction of Grier's mortgage and dismissal of the Plaintiff's claims against Grier; and
- 4) Allowing the proposed Amended Third Party Complaint after depositions and discovery have been completed would cause prejudice to Nationwide and Parks.

LEGAL ARGUMENT

It is well settled that the Court may deny leave to file an amended complaint, or portions of an amended complaint, if it would be futile because the causes of action in the amended complaint would fail as a matter of law. *See, e.g., United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008) (holding the district court properly denied motion to amend complaint because proposed amendments did not state claim for relief); *GE Inv. Private Placement Partners II v. Parker*, 247 F.3d 543, 548 (4th Cir. 2001) ("Leave to amend may properly be denied where amendment would be futile."). *See also* cases cited in Nationwide and Parks' earlier Memorandum in Opposition to the Motion to Amend.

1. The Proposed Negligence Cause of Action Would Fail as a Matter of Law.

Grier's proposed Amended Third Party Complaint would assert a negligence cause of action against the insurance agent who sold her an insurance policy, Tonya Parks, claiming as follows:

88. Parks owed a duty to Third-party Plaintiff to advise her on insurance coverage for her home.
89. Parks breached this duty by failing to advise Third-party Plaintiff to obtain alternative insurance.

(Proposed Am. Answer/Third Party Compl. ¶¶ 88-89.) However, this proposed cause of action must fail because, as a matter of law, Parks owed no duty of care to advise Grier.

To maintain a negligence cause of action, a plaintiff must show four elements:

- 1) a duty of due care owed to the plaintiff;
- 2) a breach of that duty;
- 3) legally protected injury (*i.e.*, damages); and
- 3) proximate causation.

Moore v. Weinberg, 383 S.C. 583, 588, 681 S.E.2d 875, 878 (2009). Failure to show any of these elements means the cause of action must fail.

"The existence of a duty owed is a question of law for the courts." *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.C. 7, 12, 620 S.E.2d 326, 329 (2005) (citing *Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001); *Washington v. Lexington Cty. Jail*, 337 S.C. 400, 523 S.E.2d 204 (Ct. App. 1999)).

It is well established that an insurance agent owes no duty to advise an insured. *Houck*, 366 S.C. at 12, 620 S.E.2d at 329 (plaintiffs conceded insurance agent had no duty to advise insured); *Carolina Prod. Maint., Inc. v. United States Fid. & Guar. Co.*, 310 S.C. 32, 38,

425 S.E.2d 39, 43 (1992) (affirming finding that insurance agent had no duty to advise insured); *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988) (“Generally, an insurer and its agents owe no duty to advise an insured.”). See also *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 437 (4th Cir. 2003) (applying S.C. law); *CRC Scrap Metal Recycling v. Hartford Cas. Ins. Co.*, No. 7:12-146-HMH, 2012 U.S. Dist. LEXIS 147696, at *23-24 (D.S.C. Oct. 15, 2012) (applying S.C. law); *Hendrix Ins. Agency, Inc. v. Cont’l Cas. Co.*, No. 7:10-2141-HMH, 2010 U.S. Dist. LEXIS 117336, at *16 (D.S.C. Nov. 3, 2010) (applying S.C. law); *Great Am. Ins. Co. v. Mills*, No. 4:06-cv-01971-RBH, 2008 U.S. Dist. LEXIS 42570, at *27-28 (D.S.C. May 29, 2008) (applying S.C. Law); *Northfield Ins. Co. v. Evian HPR*, No. 9:01-883-23, 2002 U.S. Dist. LEXIS 26684, at *15 (D.S.C. Aug. 28, 2002) (applying S.C. law). The insurance agent is an agent of the insurer and owes a duty only to the insurer, not to the insured.

The only time an insurance agent may owe a duty to the insured is if the agent undertakes to advise the insured despite having no duty to do so, in which case the agent must exercise due care in the advice she gives.¹ *Houck*, 366 S.C. at 12, 620 S.E.2d at 329; *Carolina Prod. Maint.*, 310 S.C. at 38, 425 S.E.2d at 43; *Trotter*, 297 S.C. at 471, 377 S.E.2d at 347. However, if the agent does not undertake to advise the insured, then the agent owes no duty to advise the insured.

In *Trotter*, the Court explained:

An insurer may assume a duty to advise an insured in one of two ways: (1) he may expressly undertake to advise the

¹ This is an application of the fundamental tort principle of an “affirmative act” in which, “[a]s a general rule, a person has no duty to act affirmatively to protect the interests of others.” F.P. Hubbard & R.L. Felix, *The South Carolina Law of Torts* 103 (4th Ed. 2011) (citing cases). However, if a person “voluntarily acts for the benefit of the plaintiff, then he must act with due care.” *Id.* at 115 (citing cases).

insured; or (2) he may impliedly undertake to advise the insured. It is the insured, however, who bears the burden of proving the undertaking.

An implied undertaking may be shown if: (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.

Trotter, 297 S.C. at 472, 377 S.E.2d at 347 (citations omitted).

Grier's proposed negligence claim against Parks would incorrectly assert that Parks owed a duty to advise Grier. This assertion directly contravenes clear South Carolina law and cannot stand. The proposed negligence claim would not assert that Parks undertook to advise Grier and thereby assumed a duty to use due care in giving advice. Such an assertion simply does not exist in the proposed negligence claim. Instead, it would starkly allege that Parks completely failed to advise Grier.

For these reasons, the proposed negligence claim against Parks would only be dismissed pursuant to Rule 12(b)(6), SCRPC. Therefore, it would be futile to amend the Third Party Complaint to assert this cause of action, and the Court should deny Grier's Motion to Amend.

2. The Proposed Negligent Misrepresentation Cause of Action Would Fail as a Matter of Law.

Grier's proposed Amended Third Party Complaint would assert a negligent misrepresentation cause of action against Nationwide, claiming as follows:

82. Nationwide had a duty to exercise reasonable care in giving information to Third-party Plaintiff and her agents because Nationwide had a pecuniary interest in Third-party Plaintiff's insurance policy.

83. Nationwide breached this duty by representing to GMAC that Third-party Plaintiff's insurance policy would be renewed upon payment of the policy premium.

(Proposed Am. Answer/Third Party Compl. ¶¶ 82-83.) However, this proposed cause of action should not be allowed because there is no allegation of a negligent misrepresentation made to Grier, which is a required element of the cause of action.

To recover in a negligent misrepresentation action, the plaintiff must first allege and prove that the defendant made a false representation of fact to the plaintiff. *Hurst v. Sandy*, 329 S.C. 471, 481, 494 S.E.2d 847, 852 (Ct. App. 1997); *Kelly v. S.C. Farm Bureau Mut. Ins. Co.*, 316 S.C. 319, 323, 450 S.E.2d 59, 62 (Ct. App. 1994). A representation allegedly made to a person or entity other than the plaintiff does not support a claim for negligent misrepresentation.

Grier's proposed negligent misrepresentation claim against Nationwide would fail as a matter of law because there is no allegation that Nationwide made any alleged misrepresentation to Grier. On its face, the proposed cause of action alleges that Nationwide made a misrepresentation to a third party, GMAC. GMAC was not acting on Grier's behalf. In written discovery responses, the Bank has specifically stated that GMAC did not intend to act as Grier's agent, did not intend to act in the interest of Grier, did not intend to act on behalf of Grier, and did not intend to act for the benefit of Grier with regard to the Nationwide insurance policy at issue in this case. See Pl.'s Resp. to Third-Party Defs.' Interrogs. ## 9 - 12 [Exhibit A].

For these reasons, the proposed negligent misrepresentation claim against Nationwide would only be dismissed pursuant to Rule 12(b)(6), SCRCP. Therefore, it would be futile to

amend the Third Party Complaint to assert this cause of action, and the Court should deny Grier's Motion to Amend.

3. *Tanner v. Florence County Treasurer* does not apply.

Grier's brief in support of her motion to amend the third party complaint relies heavily on *Tanner v. Florence Cty. Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999), for the proposition that futility of a proposed amended pleading is not a sufficient ground to deny the amended pleading. However, *Tanner* is distinguishable and does not provide a basis for Grier to assert futile causes of action in this case. *Tanner* turned on the lower courts' erroneous finding that the plaintiff must present facts to support his proposed new cause of action in order to amend his complaint. Here, however, the shortcoming that precludes Grier's proposed Amended Third Party Complaint is a failure of law, not a failure of fact.

In *Tanner*, the plaintiff filed a motion to supplement his complaint to add an additional cause of action for negligence against the defendant County. *Id.* at 556, 521 S.E.2d at 155. The trial court denied the plaintiff's motion on the basis that the County was immune from the proposed new cause of action under the South Carolina Tort Claims Act. *Id.* at 557, 521 S.E.2d at 155. The Court of Appeals upheld this claim based on the evidentiary facts of the case, finding that there was no proof in the record that the County had failed to follow the proper procedures, which was necessary to support a negligence cause of action against the County. *Id.* at 558, 521 S.E.2d at 156.

However, the Supreme Court reversed on the basis that, in seeking to amend or supplement a pleading, the plaintiff is not required to provide factual evidence to support his

allegations. *Id.* at 560, 521 S.E.2d at 156. The basis of the Supreme Court's conclusion was as follows:

At the initial hearing on supplementation, Petitioner was not required to provide evidence to the Court of his allegation. The Court of Appeals specifically recognized that the immunity defense might not be available to the County if Petitioner could provide evidence that the County had his correct address. The trial court and the Court of Appeals both erred by requiring Petitioner to present this evidence at the pleadings stage in order to allow the supplemental complaint

Id. at 560, 521 S.E.2d at 157.

In this case, *Tanner* is inapposite because the basis for the Supreme Court's conclusion in *Tanner* does not apply here. Unlike the plaintiff in *Tanner*, the fatal failure of Grier's proposed amended Third-Party Complaint is not merely Grier's inability to present facts to support her proposed new causes of action. Rather, it is a failure of law in that Grier's allegations in the proposed new causes of action, even if taken as true, are legally untenable and would fail to assert a cause of action, thus requiring dismissal under Rule 12(b)(6), SCRPC.

Specifically, as discussed above, the proposed new negligence cause of action is based on an alleged legal duty where, *as a matter of law*, there is no legal duty. Therefore, this proposed cause of action cannot stand. Similarly, the proposed new negligent misrepresentation cause of action is based on an alleged misrepresentation to a party other than Grier, which is insufficient to support a negligence misrepresentation claim. Therefore, this proposed cause of action also cannot stand.

For these reasons, the proposed new causes of action in Amended Third Party Complaint would be futile as a matter of law, not as a matter of fact. As cited above and in Nationwide and Parks' earlier Memorandum in Opposition to the Motion to Amend, there is

abundant case law holding that the Court may deny a motion to amend a pleading if the amended pleading would be futile. Therefore, the Court should not allow Grier's proposed Amended Third Party Complaint.

4. The "indemnity and contribution" claim is moot.

The "indemnity and contribution" claim that remains in the proposed Amended Third Party Complaint has been rendered moot because the Bank that held Grier's mortgage has agreed that the mortgage will be satisfied and has dismissed its claims against Grier. The crux of the indemnity and contribution claim is that Nationwide and Parks should be liable for any damages Grier sustains in the Bank's foreclosure action because Grier claims the foreclosure would not have occurred but for Nationwide's denial of her insurance claim. (See Proposed Am. Answer/Third Party Compl. ¶¶ 91-94). However, the Bank has voluntarily dismissed its entire foreclosure action against Grier. Therefore, since there is no foreclosure, there is no right to indemnity for the foreclosure. As a matter of law, Grier has no right of indemnity against Nationwide or Parks, and the Court should not allow Grier to amend her Third Party Complaint to continue asserting an "indemnity and contribution" claim.

5. Allowing the proposed Amended Third Party Complaint after depositions and discovery have been completed would cause prejudice to Nationwide and Parks.

The Court should not allow the proposed Amended Third Party Complaint because it would result in prejudice to Nationwide and Parks. Rule 15, SCRC, does not allow for amended pleadings that would cause prejudice to other parties. "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Pool v. Pool*, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998).

“[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 Exp. Co., Inc.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994)

Grier is asking the Court to allow her proposed Amended Third Party Complaint at the eleventh hour, during the week that this case is on the jury trial roster. Critical discovery has already been completed without taking into account the new claims. Nationwide has already taken Grier’s deposition and conducted extensive written discovery. Because the proposed new causes of action are fundamentally different than the existing causes of action, there would almost certainly have been different areas of inquiry during discovery if the causes of action had been in the case. However, Nationwide and Parks are precluded from conducting a second deposition of Grier regarding the proposed new causes of action. In addition, Nationwide and Parks do not have time to conduct written discovery under the South Carolina Rules of Civil Procedure under the proposed new causes off action.

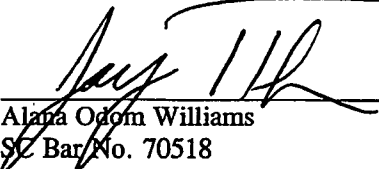
Further, this case is on the current jury trial roster. Nationwide and Parks would be prejudiced if the Court were to allow new causes of action into the case on the eve of trial, with no opportunity for Nationwide and Parks to prepare for or defend against these causes of action.

CONCLUSION

Because Grier's proposed Amended Third Party Complaint would assert futile causes of action that would only be dismissed pursuant to Rule 12(b)(6), SCRCF and would cause prejudice to Nationwide and Parks, the Motion to Amend should be denied.

Respectfully submitted,

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Columbia, South Carolina

November 28, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
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.)
Chartrease Grier; Palmetto Health)
Alliance; and Palmetto Richland)
Memorial,)
Defendants.)

IN THE COURT OF COMMON PLEAS

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

RICHLAND COUNTY
FILED
DEC - 6 AM 11:03
JENNIFER W. MOBRIDE
C.P. & G.S.

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 SCRCP 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 SCRCP 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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Attorneys for Defendant/Third-Party
Plaintiff, Chartreuse Grier

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,)

Plaintiffs,)

vs.)

Chartreas Grier; Palmetto Health Alliance;)
and Palmetto Richland Memorial,)

Defendants.)

Chartrease Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

RICHLAND COUNTY
FILED
2013 APR 25 AM 11:12
JEANETTE W. McBRIDE
C.C.P. & G.S.

**NOTICE OF MOTION AND MOTION
TO ALTER OR AMEND AND/OR
FOR RECONSIDERATION**

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

TO: THIRD-PARTY DEFENDANTS NATIONWIDE PROPERTY & CASUALTY
INSURANCE COMPANY & TONYA PARKS, THROUGH THEIR ATTORNEYS
OF RECORD, ALANA ODOM WILLIAMS, ESQ., AND JAY T. THOMPSON,
ESQ., OF NELSON MULLINS RILEY & SCARBOROUGH, LLP.

PLEASE TAKE NOTICE that the Third-Party Plaintiff, Chartrease Grier (hereinafter
"Grier"), by and through her undersigned attorneys, will move before the Honorable Allison

Renée Lee, presiding judge of the Richland County Court of Common Pleas, at a date and time to be set by the Court, for an order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure altering or amending her order of April 4, 2013, which (1) denies Grier's Motion to Amend Answer/Third-Party Complaint, (2) denies Grier's Motion for Summary Judgment, (3) and grants the Third-Party Defendants' (hereinafter referred to collectively as "Nationwide" except where specifically named) Motion for Summary Judgment. Written notice of such order was received by Grier on April 11, 2013.

Grier moves this Court to reconsider and/or alter or amend its order in the following respects:

1. To alter and/or amend its order by granting Grier's motion to amend her answer and third-party complaint, thereby allowing Grier to assert the causes of action for negligence against third-party defendant, Tonya Parks, and negligent misrepresentation against third-party defendant, Nationwide, and particularly:
 - a. To amend the order to provide that the facts plead in the proposed Amended Answer and Third-Party Complaint, along with the arguments of the parties and other evidence on record, support the proposed cause of action for negligence against Parks;
 - b. To amend the order to provide that the interests of justice support the proposed amendment, as the existence of an implied duty owed to Grier by Parks is based on the facts surrounding the parties' relationship and should not be precluded as legally untenable prior to an inquiry into, and determination based upon, said facts;

- c. To amend the order to provide that the facts plead in the proposed Amended Answer and Third-Party Complaint, along with the arguments of the parties and other evidence on record, support the proposed cause of action for negligent misrepresentation against Nationwide;
- d. To amend the order to provide that the proposed cause of action for negligent misrepresentation against Nationwide would not fail as a matter of law;
- e. To amend the order to provide that the communications between GMAC and Nationwide raise factual issues that, in the interest of justice, demand further inquiry, particularly as relate to Grier's relationship to both GMAC and Nationwide;
- f. To amend the order to provide that the proposed amended pleading, arguments of the parties and memoranda filed on behalf of Grier, specifically Grier's Reply to Third Party Defendants' Memorandum in Opposition to Chartrease Grier's Motion to Amend, indicate the existence of, and contain reference to, ample evidence regarding communications between Nationwide and GMAC, wherein the latter claims to represent Grier in discussions relating to the payment and acceptance of premiums and renewal of the subject insurance contract; thus raising questions of fact that demand further inquiry; and/or
- g. To amend the order to provide that neither Parks nor Nationwide would be prejudiced by the proposed amendments, and/or that neither has met its burden of establishing said prejudice; specifically, in light of one or more of the following facts contained in the record:
 - i. Grier's Motion to Amend was filed on June 11, 2012, almost six months before a hearing on this matter;

- ii. Nationwide took Grier's deposition on September 10, 2012, three months *after* Grier's Motion to Amend, providing Nationwide with ample notice of the proposed amended causes of action and opportunity to question Ms. Grier regarding the same;
 - iii. Nationwide, joined by Grier, submitted a *Joint* Motion for Continuance and proposed Scheduling Order on or around October 23, 2012, moving this Court to continue trial on this matter due to, among other things, the number of pending motions and the parties' need to conduct additional discovery, including depositions; and/or
 - iv. Most of the evidence in support of both the proposed negligence claim against Parks and the proposed negligent misrepresentation claim against Nationwide was provided by Nationwide in the initial stages of discovery and, in part, gave rise to these causes of action.
- 2. For an order reversing its previous decision to deny Grier's motion for summary judgment and for an order finding that Grier is entitled to summary judgment on the issue of the existence of a valid contract of insurance in place at the time of loss, and particularly:
 - a. To alter its order to provide that to effectively non-renew a homeowner's insurance policy in South Carolina such as the one at issue in this case, an insurer must comply with the non-renewal requirements contained in § 38-75-740 in addition to those requirements set forth in § 38-75-1160;
 - b. To reverse its previous finding that § 38-75-1160 supersedes and/or replaces the non-renewal provisions set forth in § 38-75-740;
 - c. To amend its order to provide that Nationwide's attempt to non-renew the contract was ineffective as a matter of law;
 - d. To amend its order to provide that Nationwide failed to produce evidence sufficient to meet its burden of proving strict compliance with § 38-75-740(d), regarding non-renewal notice to the agent, Tonya Parks;

3. To amend the order to provide that Nationwide is not entitled to judgment as a matter of law on the issue of effective non-renewal of the policy at issue due to, in whole or in part, the applicability of S.C. Code Ann. § 38-75-740, and other provisions of Article 9, to the non-renewal of the homeowner's insurance policy in this case;
4. To amend the order to provide that Nationwide is not entitled to summary judgment on the issue of compliance with the non-renewal requirements S.C. Code Ann. § 38-75-1160 due to the existence of disputed issues of material fact, including but not limited to, the following:
 - a. Whether Nationwide has met its burden of strict compliance with this non-renewal statute;
 - a. Whether Nationwide can prove it met the "delivers or mails" requirement found in S.C. Code Ann. § 38-75-1160;
 - b. Whether the mailing log produced by Nationwide constitutes definitive proof of mailing; and/or
 - c. Whether Grier received any notice of the attempted non-renewal *prior to* the loss of her home by fire.
5. To alter or amend the order to provide that Nationwide is not entitled to summary judgment on Grier's breach of contract claim, particularly in light of the fact that the record contains ample reference to numerous questions of material fact regarding the formation and existence of a valid contract between Nationwide and Grier, including but not limited to:
 - i. Whether Nationwide's communications with GMAC prior to the expiration of the policy constituted offer and acceptance sufficient to create a valid contract; and/or
 - ii. Whether Nationwide's accepted the \$993.00 premium payment, effectively reinstating the policy on its renewal date of March 24, 2011;

6. To alter or amend the order by finding in favor of Grier and against Nationwide on the issue of the issue of coverage at the time of loss and, accordingly, finding that Nationwide is not entitled to summary judgment on the issue of bad faith;
7. To alter or amend the order to provide that Nationwide is not entitled to summary judgment on Grier's breach of contract claim against Parks, and particularly to amend the order to provide that Grier has produced factual evidence to indicate that the parties' relationship and/or prior business dealings could have impliedly created a contractual duty owed by Parks to Grier;
8. To amend the order to provide that, viewing the evidence in the light most favorable to Grier, Parks is not entitled to judgment as a matter of law.
9. To amend the order to provide that, viewing the evidence in the light most favorable to Grier, Nationwide is not entitled to judgment as a matter of law;
10. To amend the order to deny Nationwide's Motion for Protective Order and Motion for Summary Judgment, in order to allow Grier to obtain deposition testimony from Nationwide related to the recorded conversations between GMAC and Nationwide, produced by Nationwide and described more fully above;
11. To alter or amend the order by clarifying how and why the pending Motion for a Protective Order filed by Nationwide on May 10, 2012, was not addressed in the Court's order; and/or
12. To amend the order to correct any and all other errors of law and/or fact contained in the previous order or raised at the hearing.

This motion is based upon the pleadings, all motions and their supporting exhibits, the oral arguments of the parties, the Court's order of April 4, 2013, Rule 59 of the South Carolina Rules of Civil Procedure, and upon the applicable common and statutory law.

April 22, 2012
Greenville, SC

Respectfully submitted,



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Attorneys for the Defendant/Third-Party
Plaintiff, Chartreuse Grier

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,)

Civil Action No. 2011-CP-40-6103

Plaintiffs,)

vs.)

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

Defendants.)

**THIRD-PARTY DEFENDANTS'
MEMORANDUM IN OPPOSITION
TO DEFENDANT/THIRD-PARTY
PLAINTIFF CHARTREASE GRIER'S
MOTION TO ALTER OR AMEND
AND/OR FOR RECONSIDERATION**

Chartrease Grier,)

Third-Party Plaintiff,)

vs.)

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

Third-Party Defendants.)

Third-Party Defendants Nationwide Property & Casualty Insurance Company ("Nationwide") and Tonya D. Parks ("Parks"), by and through their undersigned counsel, respectfully submit this Memorandum in Opposition to Defendant/Third-Party Plaintiff Chartrease Grier's ("Grier") Motion to Alter or Amend and/or for Reconsideration.

Nationwide and Parks submit that a hearing is not necessary regarding Grier's motion to alter or amend, and the motion may be determined on briefs filed by the parties, without

oral argument. *Pollard v. Cnty. of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994). (“Under Rule 59(f), SCRCP, a Rule 59(e) motion ‘may in the discretion of the court be determined on the briefs filed by the parties *without oral argument*.’”).

Nationwide and Parks¹ request that the Court deny the Motion to Alter or Amend on the following bases:

- 1) Grier’s motion does not articulate any valid basis to alter or amend the judgment under Rule 59(e), SCRCP; and
- 2) Grier’s motion is merely a list of points on which Grier requests that the Court change its conclusions to find in Grier’s favor, with no basis in law for reaching the proposed alternative conclusions.

LEGAL ARGUMENT

I. Grier’s Motion Fails to Articulate Any Valid Basis to Alter or Amend the Judgment.

Grier’s motion to alter or amend does not set forth any basis on which the Court should alter or amend the April 4, 2013 Order. In fact, the motion fails to articulate any legal basis justifying a change to the Order.

The South Carolina Supreme Court has stated that “Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (analyzing and applying federal law regarding Rule 59(e)). *See also Camp v. Camp*, 378 S.C. 237, 240, 662 S.E.2d 458, 460 (Ct. App. 2008) (“Rule 59(e), SCRCP, is identical to its federal counterpart, Rule 59(e), FRCP”), *rev’d*

¹ Grier’s motion to alter or amend inconsistently used the term “Nationwide” to refer sometimes only to Nationwide Property & Casualty Insurance Company and sometimes collectively to both Third-Party Defendants. This inconsistent identification of the parties is confusing and misleading, resulting in further failure to articulate a basis to alter or amend the Court’s Order.

on other grounds, 386 S.C. 571, 689 S.E.2d 634 (2010). Therefore, South Carolina courts generally follow federal law in interpreting and applying Rule 59(e).

Under federal law, the Fourth Circuit Court of Appeals has set forth three limited circumstances under which a court may alter or amend a judgment pursuant to Rule 59(e): “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005) (appeal from South Carolina federal district court) (quoting *Pac. Ins. Co. v. Am. Nat’l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir.1998)); *E.E.O.C. v. Lockheed Martin Corp., Aero & Naval Systems*, 116 F.3d 110, 112 (4th Cir. 1997). If the moving party does not effectively show at least one of these three circumstances justifying a change to the court’s order, then the order should not be changed. “Mere disagreement” with how a trial court applied a particular standard of law “does not support a Rule 59(e) motion.” *Hutchinson v. Stanton*, 994 F.2d 1076, 1082 (4th Cir. 1993). Similarly, reconsideration of a judgment under Rule 59(e) is unwarranted where “parties simply ask the court to change its mind.” *Pettyjohn v. Mission-St. Joseph’s Health Sys., Inc.*, 202 F.R.D. 208, 209 (W.D.N.C. 2001).

Further, the court should alter or amend a judgment only in extraordinary circumstances, because “reconsideration of a judgment after its entry is an extraordinary remedy.” *Ridgeway v. Stevenson*, No. 3:10-490-RBH, 2011 WL 1466325, at *1 (D.S.C. 2011) (Harwell, J.) (denying Rule 59(e) motion to alter or amend an order granting summary judgment to the defendant) (quoting *Pac. Ins. Co. v. Am. Nat’l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir.1998)).

As set forth below, Grier has not alleged any of the three circumstances under which a court may alter or amend a judgment pursuant to Rule 59(e). Therefore, Grier's motion to alter or amend should be denied.

A. No intervening change in controlling law.

Rule 59(e) allows the court to alter or amend a judgment if the controlling law has changed since the entry of judgment. *Bogart*, 396 F.3d at 555. “[A] change in controlling law results where a subsequent decision creates a significant shift in a court’s analysis.” *Teamsters Local 617 Pension & Welfare Funds v. Apollo Grp., Inc.*, 282 F.R.D. 216, 222 (D. Ariz. 2012) (internal quotations and citations omitted). The purpose of this rule is to ensure that the court’s conclusion is based on an accurate analysis of the current controlling legal principles.

Grier has not alleged any change in the controlling law for this case, because there has been no change in the controlling law. The Court issued its Order on April 4, 2013. Grier submitted the motion to alter or amend on April 22, 2013. In this intervening period, there was no change in the law applicable to this case. The Court correctly set forth the controlling law in its April 4, 2013 Order, so there is no basis to alter or amend the Order.

B. There is no new evidence for the Court to consider.

Rule 59(e) allows the court to alter or amend a judgment if new evidence has been discovered that was not previously available when the evidence was submitted to the court. *Bogart*, 396 F.3d at 555. A Rule 59(e) motion may not be used “to submit evidence which should have been previously submitted.” *Rouse v. Nielsen*, 851 F. Supp. 717, 734 (D.S.C. 1994); *Corretjer Farinacci v. Picayo*, 149 F.R.D. 435, 437 (D.P.R. 1993) (finding that, to merit reconsideration, the moving party must present material evidence that was unavailable at

the time of trial). Rule 59(e) does not provide an opportunity to present evidence that the moving party could have presented, but did not present, prior to the court's order.

Here, the parties submitted all applicable evidence to the Court in numerous briefs and during the November 28, 2012 hearing. In fact, the Court even allowed Grier an additional opportunity to submit a brief after the hearing date regarding Grier's motion to amend the Complaint, and the additional brief was filed on or around December 6, 2012. Grier has not set forth any new evidence that the Court did not consider in its April 4, 2013 Order. Therefore, there is no basis to alter or amend the Order.

C. No clear error of law or manifest injustice.

Finally, Rule 59(e) allows the court to alter or amend a judgment if doing so is necessary to correct a clear error of law or to prevent manifest injustice. *Bogart*, 396 F.3d at 555. A clear error of law has been defined as "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000).

Grier has not alleged any clear error of law. Without setting forth any analysis, Grier has simply requested that the Court change its conclusions to rule in Grier's favor. However, the April 4, 2013 Order was based on the Court's valid interpretation of the applicable South Carolina statutes, procedural rules, and case law. The Court correctly analyzed the statute that Grier contended was controlling, S.C. Code Ann. § 38-75-740, but concluded, correctly, that S.C. Code Ann. § 38-75-1160 controls the facts of this case. There is no controlling precedent to the contrary, and the Court did not make any clear error of law.

Grier also has not alleged any manifest injustice anywhere in the motion to alter or amend. Rather, Grier's motion is simply a request for the Court to reach a different

conclusion. There is no manifest injustice in finding that Defendants complied with the applicable law; and, therefore, there is no basis to alter or amend the Order.

II. There is No Basis in Law For the Court to Reach Grier's Proposed Alternative Conclusions.

Grier's Motion to Alter or Amend is nothing more than a list of twenty-seven conclusory points (including sub-parts) that Grier does not like about the Court's Order because the Court did not rule in Grier's favor. The motion simply requests that the Court change its conclusions to find in Grier's favor, with no basis in law for reaching the proposed alternative conclusions.

Item No. 1 in Grier's Motion to Alter or Amend, which has ten distinct subparts, requests that the Court change its ruling with regard to Grier's Motion to File an Amended Answer and Third-Party Complaint, which the Court denied. However, Grier merely repeats the same arguments from her Motion to File an Amended Answer and Third-Party Complaint, with no analysis and no legal support for her request to change the Court's ruling.

Item No. 2 in Grier's Motion to Alter or Amend, which has four subparts, seeks to have the Court change its ruling to find in Grier's favor on her Motion for Summary Judgment. Again, however, Grier merely restates the arguments set forth in her Motion for Summary Judgment, including the incorrect assertion that the Third-Party Defendants have the burden of proof to show that Grier is not entitled to summary judgment. This Court already heard and considered these arguments and Grier provides no additional legal support or basis for this Court to alter its ruling on Grier's Motion for Summary Judgment.

Item Nos. 3 through 9 in Grier's Motion to Alter or Amend, which have numerous subparts among them, essentially ask that the Court change its ruling to find that Nationwide and Parks are not entitled to summary judgment. Rather than setting forth any legal grounds in

support of altering the judgment, Grier only outlines the conclusions that she would prefer this Court have reached. These conclusions are insufficient as grounds for altering or amending the Court's order.

Item No. 10 in Grier's Motion to Alter or Amend requests that the Court change its ruling on Nationwide's Motion for Protective Order regarding Grier's attempt to conduct multiple depositions of the same party, which is prohibited under Rule 30, SCRPC. In her motion, Grier sought to depose Nationwide a second time regarding alleged conversations between GMAC and Nationwide. However, Grier has provided no justification or legal support for the Court to change its ruling. Further, the alleged conversations are of no significance, as the Court already ruled that, "Grier has not alleged that Nationwide made a misrepresentation to her; rather, she alleges that Nationwide made a misrepresentation to GMAC, a third party. GMAC was not acting on Grier's behalf." (Order at pg. 5.)

Item 11 in Grier's Motion to Alter or Amend asks the Court "[t]o alter or amend the order by clarifying how and why the pending Motion for a Protective Order filed by Nationwide on May 10, 2012, was not addressed in the Court's order." The May 10, 2012 motion for protective order requested a confidentiality order regarding certain confidential, proprietary documents that Grier requested in discovery. Before filing the motion for protective order, Nationwide's counsel attempted twice to consult with Grier's counsel. *See emails from Jay Thompson to Allison Moon* (attached hereto as "Exhibits A & B"). However, Grier's counsel did not respond until five days later, after the motion was sent to the Court for filing. Nationwide submitted a proposed order along with the motion, which was modeled after and substantially identical to the form order provided by the United States District Court for the District of South Carolina and required for use in all cases in the federal district court.

Grier's counsel stated for the first time at the November 28, 2012 hearing that they did not oppose entry of a confidentiality order, but they took issue with certain provisions of the proposed order. Therefore, at the hearing, the Court decided that it would not rule on the motion for protective order at that time and exhorted counsel to consult and attempt to reach a consensus on a proposed protective order. As the Record reflects, the Court allowed the parties more than four months before issuing the April 4, 2013 Order. However, Grier never provided an alternative to the proposal Nationwide had already set forth, so the parties never submitted a proposed protective order or notified the Court that the parties were unable to reach consensus on a proposed protective order. In granting Nationwide and Parks' motion for summary judgment, the April 4, 2013 Order ended the case. Therefore, it rendered the Nationwide's May 10, 2012 Motion for Protective Order moot, and it was unnecessary for the Court to issue a ruling on the motion for protective order.

The final item in Grier's motion to alter or amend, No. 12, is a "catch-all" provision requesting the Court "to correct any and all other errors of law and/or fact." Grier, however, fails to set forth any alleged "other errors of law/and or fact" for the Court to reconsider.

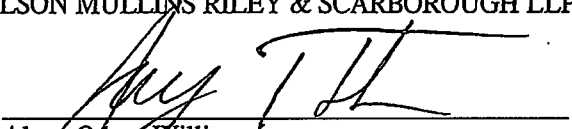
Accordingly, because Grier's motion merely requests that the Court change its conclusions to find in Grier's favor, with no basis in law for reaching the proposed alternative conclusions, there is no basis for this Court to alter or amend the Order.

CONCLUSION

For the reasons set forth above, Nationwide and Parks request that the Court deny the Motion to Alter or Amend and/or for Reconsideration.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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(803) 799-2000

*Attorneys for Third-Party Defendants Nationwide Property &
Casualty Insurance Company and Tonya D. Parks*

Columbia, South Carolina

May 30, 2013

EXHIBIT A

Jay Thompson

From: Jay Thompson
Sent: Friday, May 04, 2012 9:06 AM
To: 'Allison Moon'; 'Sarah Brown'; 'sbradley@scottbradleylaw.com'; 'mgriffin@babco.com'
Cc: Alana Odom Williams
Subject: Bank of New York Mellon v. Chartreuse Grier v. Nationwide Property & Casualty Insurance Company and Tonya D. Parks
Attachments: Proposed Consent Confidentiality Order.docx

Bank of New York Mellon v. Chartreuse Grier v. Nationwide Property & Casualty Insurance Company and Tonya D. Parks
South Carolina Court of Common Pleas, Richland County
C/A No. 2011-CP-40-6103

Dear Counsel:

We are working to finalize the Third-Party Defendants' responses to Third-Party Plaintiff's discovery requests. We have determined that we need a confidentiality order in place before we can produce the documents responsive to request for production # 25 to Nationwide. We would like to request consent to the attached proposed confidentiality order from all parties represented by counsel, including the Plaintiffs and Defendant/Third-Party Plaintiff Grier.

We have prepared the attached proposed Consent Confidentiality Order for your review. The content is basically the form confidentiality order used by the federal court for the District of South Carolina, which can be downloaded from the District Court's website.

Please review this proposed confidentiality order and let us know if you have any objections. If you will consent to this confidentiality order, we would appreciate it if you could send us back a signed copy of the respective signature page.

We intend to file a motion for confidentiality order next week, before the deadline for Third-Party Defendants' responses to Third-Party Plaintiff's discovery requests. We believe it will streamline the process if all counsel will consent to the proposed order.

Please feel free to contact us if you have any questions or concerns.

Thank you,
Jay Thompson

Nelson Mullins

Jay T. Thompson
Attorney at Law
jay.thompson@nelsonmullins.com

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EXHIBIT B

Jay Thompson

From: Allison Moon <allison@moonlawsc.com>
Sent: Thursday, May 10, 2012 10:25 AM
To: Jay Thompson
Subject: Re: Bank of New York Mellon v. Chartreuse Grier v. Nationwide Property & Casualty Insurance Company and Tonya D. Parks

Jay:

I havent had a chance to look at this in any detail and apologize for the delay in getting back to you. I plan on getting to this today and request that you give me until tomorrow morning to get back to you. Thanks

On Tue, May 8, 2012 at 4:04 PM, Jay Thompson <Jay.Thompson@nelsonmullins.com> wrote:

Dear Counsel:

Please let us know if you will consent to the proposed confidentiality order. We plan to file a motion for confidentiality order tomorrow or Thursday, and we would prefer to file it as a consent motion.

Thank you

Jay

Nelson Mullins

Jay T. Thompson

Attorney at Law
jay.thompson@nelsonmullins.com

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(View Bio)

State of South Carolina) In the Court of Common Pleas
County of Richland) Fifth Judicial Circuit
2011-CP-40-06103

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,)

Plaintiffs,)

Vs.)

Transcript of Record

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.)

November 28, 2012
Columbia, South Carolina

B e f o r e:

The Honorable Alison R. Lee, Judge

A p p e a r a n c e s:

Alana Williams, Esq.
Jay Thompson, Esq.
Allison Moon, Esq.
Sarah Brown, Esq.

Bonnie H. Kelly, CVR
Circuit Court Reporter

I N D E X

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EV.</u>

-- NO EXHIBITS ENTERED --

1 THE COURT: We are here on Docket No. 2011-CP-40-
2 06103, *Bank of New York vs. Chartreuse Grier vs.*
3 *Nationwide Property and Casualty and Tonya Parks.*

4 Basically, this is a third-party action that I'm
5 hearing motions on today between Chartreuse Grier and
6 Nationwide Property and Tonya Parks. On behalf of
7 Chartreuse Grier is ...

8 MS. MOON: Allison Moon and Sarah Brown from Moon Law
9 Firm.

10 THE COURT: And Sarah Brown?

11 MS. MOON: Yes, ma'am.

12 MS. BROWN: Yes.

13 THE COURT: And on behalf of Nationwide and Parks is
14 ...

15 MR. THOMPSON: Good morning, Your Honor. Jay Thompson
16 and my partner Alana Williams.

17 THE COURT: Okay. Thank you. I have had the
18 opportunity to go through the file and there were a number
19 of motions that were outstanding. What I'd like to do is
20 get a clear indication of what is still pending and what
21 is not pending. So let me go through what I have and go
22 from there.

23 There were a number of motions that were filed earlier
24 this year. There is a -- in May of 2012, there was a
25 motion for protective order, filed by defendant Nationwide

1 Property and Casualty, relating to, I guess, the
2 confidentiality of certain documents. Has that been
3 resolved?

4 MR. THOMPSON: That is still pending, Your Honor.

5 THE COURT: Does that need to be taken care of?

6 MS. MOON: Your Honor, we have no problem with getting
7 a confidentiality order for the policies and procedures
8 that were specifically requested. But the actual wording
9 of the order accounts for much more than that. So that's
10 the only reason why we're not -- we hadn't consented to --

11 THE COURT: So attached to the motion was Exhibit A,
12 which is a protective order. You all have problems with
13 that?

14 MS. MOON: No, I did -- the problem -- I -- it
15 includes a lot more than the actual policies and
16 procedures that are being withheld on the event that --
17 you know, for the confidentiality issue. I don't have a
18 problem with having a confidentiality order for the policy
19 and procedures. But that order encompasses a lot more
20 than that.

21 THE COURT: Have y'all ever discussed this?

22 MR. THOMPSON: We have not discussed the content of
23 that proposed order.

24 THE COURT: You all need to have a conversation about
25 that.

1 Then on July 6, there was a motion -- the defendant's
2 motion to compel. Is that still -- need to be heard?

3 MR. THOMPSON: Yes, Your Honor.

4 THE COURT: (As read) "Compel proper response to
5 request for admissions"? So that ---

6 MR. THOMPSON: Yes, Your Honor.

7 THE COURT: --- needs to be heard?

8 MR. THOMPSON: Yes, Your Honor.

9 THE COURT: Then on November the 7th, there was a
10 motion -- oh, that's the plaintiff's motion. So I'll just
11 skip over that one. The plaintiff being Bank of New York.

12 And then there's a motion to sever. Is that still an
13 issue or is that -- because as I understand it, the Bank
14 of New York has basically done a stipulation of dismissal.

15 MR. THOMPSON: Yes, Your Honor.

16 THE COURT: And so is -- is that motion still needed?

17 MR. THOMPSON: We believe that motion's moot.

18 MS. MOON: Yes. I don't believe that it's to be
19 determined at this point.

20 THE COURT: Okay. Then what I have are -- there's a
21 motion about taking a 30(B)(6) deposition from November
22 the 19th. Is that still an issue?

23 MS. MOON: Yes, Your Honor.

24 THE COURT: Motion on November the 16th for a
25 protective order to -- to preclude the second deposition

1 of Nationwide.

2 MS. MOON: Your Honor, the -- I'm sorry. I thought
3 that was the one you were talking about earlier.

4 The 30(B)(6) deposition motion is no longer necessary.
5 That deposition has been taken.

6 And then the -- the motion for protective order I'm
7 assuming is still --

8 THE COURT: To take a second 30(B)(6) from Nationwide.

9 MR. THOMPSON: Yes, Your Honor. That motion is
10 pending.

11 THE COURT: And it still needs to be heard.

12 MR. THOMPSON: Yes, Your Honor.

13 (Brief pause.)

14 THE COURT: I will not hear the May 10, 2012 motion
15 for protective order. You all need to sit down and
16 discuss the confidentiality order that's attached. If you
17 all haven't had a conversation about that, I'm not going
18 to take it up until you all have a conversation and
19 determine what you can agree and disagree on.

20 Let's talk about the motion to compel, the response to
21 the request to admit.

22 MR. THOMPSON: Your Honor, Jay Thompson, representing
23 the third-party defendants here. First, if it pleases the
24 Court, may we refer to ourselves as plaintiff and
25 defendant, as opposed to third-party claim -- third-party

1 defendant?

2 THE COURT: Yes, that's fine.

3 MR. THOMPSON: Thank you. The defendants here,
4 Nationwide Property and Casualty Insurance and Tonya
5 Parks, have filed this motion to compel on the basis that
6 we served -- let me back up just a little bit.

7 The causes of action pending against Nationwide and
8 Ms. Parks are: breach of contract, bad faith, failure to
9 pay insurance claim; and the -- the indemnity and
10 contribution claim, which we contend is also now moot.

11 There is and never has been a contract between the
12 plaintiff Ms. Grier and Defendant Parks. And so we served
13 a request to admit, asking for an admission that there is
14 not a contract. That request to admit was denied.

15 We followed up with interrogatories and requests for
16 production, asking for all evidence that you contend there
17 ever was a contract between Ms. Grier and Ms. Parks. And
18 their response was simply to identify some documents from
19 the internet and that sort of thing, indicating that Ms.
20 Parks is an agent of Nationwide Insurance, which is not in
21 dispute.

22 THE COURT: Well, let me ask you this: Did you -- did
23 you get a written response to your request to admit?

24 MR. THOMPSON: Yes, ma'am. And that response was to
25 deny the request.

1 THE COURT: Okay. And that is a -- while you may
2 disagree with the -- the answer, that is -- to admit or
3 deny is correct; is it not?

4 MR. THOMPSON: It -- it is a response, yes. And the
5 basis of the motion to compel is that it is not a valid
6 response, because there is absolutely no reason to contend
7 that there was ever a contract between them. And so ---

8 THE COURT: Well, that's -- that's the whole -- that
9 is the whole part of this law suit, is it not, whether or
10 not there was a contract and whether or not -- at least
11 the -- the allegations in -- in the posture of the case is
12 that there is a dispute as to whether or not there was a
13 policy in effect?

14 MR. THOMPSON: Yes, ma'am. And that's a contract -- a
15 dispute as to a contract between Ms. Grier and Nationwide
16 Insurance Company, not Ms. Parks.

17 In both the depositions of Ms. Grier and the
18 deposition of Ms. Parks, both of them testified that they
19 didn't have a contract between themselves. The contract
20 is between Ms. Grier and Nationwide.

21 And so that's the basis, and sole basis, of the motion
22 to compel a proper response here is that the contention --
23 the -- the ongoing contention, apparently, that there is -
24 - was a contract between Ms. Grier and Ms. Parks has no
25 basis. And we -- ultimately, that will come back up when

1 we get to the summary judgement issue later.

2 THE COURT: Well -- okay. And -- and basically, based
3 on that, I'm going to deny the motion. They answered --
4 they -- they denied your request to admit, which in my
5 view, places the -- the issue -- creates an issue for
6 discovery to occur and take place. And you've done that
7 and you've gotten an answer.

8 While you may disagree with what the answer is, they
9 still answered it. And so I'm going to deny that one and
10 -- so we can spend our time talking about more substantive
11 issues.

12 And that's not to discount your argument. It's just I
13 believe that -- from what I've read in this particular
14 file and all the documents I've read, that in their view,
15 it -- it may be reasonable for them to deny the request,
16 and for discovery to continue on that particular issue.

17 To the extent that you all disagree as to whether or
18 not there is a contract or not a contract, I know that
19 that is the subject of the summary judgement motion, and
20 we'll take that up at the appropriate time. And so I'll
21 just deny it on that basis.

22 MR. THOMPSON: Thank you, Your Honor.

23 (Brief pause.)

24 THE COURT: Let's go to the motion to amend the third-
25 party complaint, and that was filed on June the 11th of

1 2012. I have, in fact, reviewed all the documents and
2 I've reviewed the file. And I'm familiar with the claims
3 and the allegations that are -- been made. And so I'll be
4 happy to hear on that motion. I -- and I've read the
5 opposition -- the memo in opposition, as well as the brief
6 in support.

7 MR. THOMPSON: Your Honor, we also filed this morning
8 a supplemental opposition to that. And I handed a copy of
9 that to your law clerk.

10 THE COURT: Which -- which I have. I have -- I have
11 not -- obviously not reviewed it this morning, but --
12 because I'm just now seeing it. But I -- I have that.

13 Yes, ma'am.

14 MS. MOON: All right. Thank you, Your Honor. This
15 motion to amend the complaint was filed with the proposed
16 amended complaint on June 11th, prior to any discovery
17 having been done. So as you know from our brief, we
18 contend that there was no prejudice. In fact, everyone
19 was on notice, pretty much, throughout the discovery
20 process that this was something that was going to be, you
21 know, at least part of our discovery.

22 There is -- the factor of lack of notice of a new
23 issue is not present in this case to deny our motion to
24 amend. And it -- once we have filed a motion to amend,
25 you know, we think the burden shifts to the party opposing

1 to show that allowing an amendment would be prejudicial.
2 And we just think that they can't do that.

3 I will -- the motion -- their response to our motion
4 to amend, their initial response, was almost entirely
5 based on the fact of our breach of -- us restating our
6 breach of contract claim against Parks. And --

7 THE COURT: What was the -- the -- as I understand it,
8 the -- the new issue was to -- to allege negligence.

9 MS. MOON: Negligence against both Parks and
10 Nationwide, as well as, you know, keeping the breach of
11 contract claims against both.

12 And the -- the only changes were to add those two
13 causes of action for negligence. So ---

14 THE COURT: One is -- one is negligent
15 misrepresentation as to Nationwide, and the other one is
16 negligence as to Parks.

17 MS. MOON: That's correct. We just don't see how --
18 that there was any prejudice that they can show at this
19 point.

20 THE COURT: Yes, sir.

21 MR. THOMPSON: Your Honor, we're opposing this motion
22 on the ground -- two grounds: futility and prejudice.
23 And much of this is addressed in the brief, and I
24 understand Your Honor has not had the opportunity to
25 review it yet because it was just handed up earlier.

1 But the prejudice issue is because of the timing of
2 where we are today: That we are presumably on the eve of
3 trial; and if new causes of action are inserted into the
4 case now and we're called to trial potentially as early as
5 tomorrow, then there's no opportunity for anyone to
6 conduct any discovery on those new causes of action that
7 previously haven't been in the case.

8 THE COURT: So at the time that the motion was filed
9 in June, there's been no discovery on those issues?

10 MR. THOMPSON: We have not conducted any discovery,
11 because the causes of action are not pending. No, ma'am.

12 The -- if we -- we deposed the plaintiff, Ms. Grier,
13 we would be precluded from re-deposing her, absent a court
14 order. And so we're prejudiced on that ground and the
15 discovery's been conducted.

16 Discovery was not conducted on the proposed new causes
17 of action, and if the motion were granted, we would be
18 going into trial having no opportunity to conduct
19 discovery on those causes of action. That's the prejudice
20 argument.

21 The futility argument is three fold, and the three
22 parts being three different causes of action. One is the
23 breach of contract, which is the same issue we were
24 discussing -- or we alluded to earlier at least, that
25 there's no basis to allege a breach of contract against

1 defendant Tonya Parks because there was no contract. And
2 there's no -- absolutely no evidence that there is. Ms.
3 Grier has admitted in her deposition that there was not.

4 Secondly, and ---

5 THE COURT: Let me stop you there. So that -- you're
6 claiming that that is a -- that that is new, that the
7 allegations relating to the breach of contract claim is --
8 is different than the -- than the previous one?

9 MR. THOMPSON: No, we're not claiming that. We're
10 claiming that to assert an amended complaint that
11 continues to assert an untenable cause of action against
12 Ms. Parks shouldn't be allowed, because it's just going to
13 be dismissed or summary judgement granted upon that.

14 THE COURT: Well, isn't ---

15 MR. THOMPSON: And there's case law supporting that.

16 THE COURT: Isn't the amended complaint really to talk
17 about the new causes of action that have been added, and
18 not the ones that are already there?

19 MR. THOMPSON: And that was the next two points that I
20 was going to --

21 THE COURT: All right.

22 MR. THOMPSON: -- the negligence cause of action
23 against Ms. Tonya Parks, and the proposed
24 misrepresentation cause of action against Nationwide.

25 THE COURT: Because that's what I'm really focused on,

1 those --

2 MR. THOMPSON: Yes, Your Honor.

3 THE COURT: Unless they are different allegations in
4 the other causes of action that were not raised before,
5 but --

6 MR. THOMPSON: No, they were not.

7 THE COURT: Okay.

8 MR. THOMPSON: So first, the negligence -- proposed
9 negligence cause of action against Tonya Parks: The brief
10 that we handed up earlier addresses this, that a
11 negligence cause of action, of course, requires you show
12 duty, breach, causation, and harm.

13 As a matter of law in South Carolina, an insurance
14 agent does not owe a duty to the insured to advise her.
15 And the basis -- the quoted basis out of the proposed
16 amended complaint is that the agent did owe a duty to the
17 insured to advise her. That is in direct contradiction of
18 South Carolina law.

19 It would -- we would turn around and immediately file
20 a 12(B)(6) motion on it, which would be granted, because
21 it directly violates the law. There is no duty.

22 The only way there could be a duty is if the agent,
23 you know, undertakes to advise. And then the agent has a
24 due care -- duty of due care to use due care in offering
25 that advice.

1 Well, the proposed allegation in the proposed amended
2 complaint -- third-party complaint, is that there was no
3 undertaking done, that there was no advice. It was a --
4 an alleged failure to advise.

5 South Carolina law, that we've cited in the brief, is
6 very clear that there is no duty on the part of an agent
7 to advise the insured. And so on the basis of futility,
8 that -- that is the negligence argument there.

9 On the notice of misrepresentation claim, it's a
10 similar futility argument that the allegation -- we'll
11 take it on its face and assume it's true for purposes of
12 this stage of the process -- the allegation is that
13 Nationwide made a misrepresentation to a third party
14 that's not a party to the case and -- a mortgage entity
15 known as "GMAC" -- and there is not a proposed allegation
16 that Nationwide made any alleged misrepresentation to Ms.
17 Grier. It's just not there in the proposed amended
18 complaint.

19 One of the mandatory elements of the cause of action
20 is a misrepresentation made to the plaintiff, and there's
21 no allegation of that.

22 The proposed allegation is an alleged
23 misrepresentation to somebody else, that -- that somebody
24 else has answered in discovery responses that they were
25 not acting as Ms. Grier's agent; they did not intend to

1 act on her behalf; they did not intend to act for her
2 benefit; they did not intend to act as her agent.

3 And so there's no basis there to go forward with that
4 cause of action. It would also be subject to a 12(B)(6)
5 dismissal action.

6 Now, in the brief that our opponents submitted to the
7 Court yesterday, they raised this *Tanner* case, the *Tanner*
8 *vs. the Florence County Treasurer*, saying that the
9 futility argument is not sufficient to deny a motion to
10 amend.

11 The *Tanner* case doesn't apply here. The reason being,
12 the *Tanner* case specifically held that a trial court
13 wrongly denied a motion to amend on the basis that there
14 was no evidence in the record, and so it was on the basis
15 of facts in the record. And the Supreme Court ultimately
16 said, "Yeah. But if you give them a chance to do
17 discovery, there might become facts in the record."

18 That's not what's going on here. This -- these causes
19 of action are not futile because of a lack of facts.
20 They're futile as a matter of law, because the allegations
21 do not withstand scrutiny under the required elements of a
22 cause of action.

23 Under the proposed negligence cause of action, the
24 allegation there is a duty that the law strictly says
25 there is not a duty.

1 Under the negligent misrepresentation cause of action,
2 the allegation is an alleged misrepresentation to a third
3 party, and as a matter of law, that does not support a
4 negligent misrepresentation cause of action. So that's
5 the futility argument.

6 And then there's the prejudice argument, that we would
7 be prejudiced because here we are on the eve of trial with
8 a proposal to put in new causes of action. That's all,
9 Your Honor.

10 THE COURT: Thank you. Ms. Moon?

11 MS. MOON: Thank you, Your Honor. We also just got
12 the new brief this morning, so we haven't had a chance to
13 look into any of the issues in any depth.

14 But we would contend that -- that there has absolutely
15 been facts that have been uncovered through discovery to
16 support the negligence claim against Parks, as well as
17 negligent misrepresentation on the part of Nationwide.

18 At Parks deposition, she discussed how she'd gone out
19 to the property and talked to Ms. Grier about things. I
20 can -- might could pull that testimony if need be.

21 But there -- there's definitely been testimony to
22 support a cause of action for negligence against Parks.

23 In fact, Franklin Jeffries has been deposed, who is
24 the underwriter who was in charge of making the decision
25 to begin the non-renewal process. And he has some

1 testimony in his deposition about what the duties of an
2 agent are and what they're supposed to -- what he assumed
3 that they were doing.

4 As far as the negligent misrepresentation by
5 Nationwide -- by Nationwide, you know, the -- Ms. Grier
6 was definitely a third-party beneficiary of whatever
7 representations were occurring between them -- between
8 Nationwide and GMAC; it's her mortgage -- who is her
9 mortgage service company's servicer, who was -- she was
10 paying her mortgage payments into -- and they were taking,
11 escrowing [sic] her insurance. It came through there.

12 So she had every right to rely on the fact that they
13 were going to be insuring, that she paid her insurance,
14 and that a policy was in place. She had been doing it for
15 a number of years, had no reason to believe that that
16 wasn't going to still be the case.

17 So you know, if -- if it -- not -- if -- even with
18 them denying that they were acting as her agent and on her
19 behalf -- and "them" being GMAC -- there is testimony on
20 the part of Ms. Grier that supports those allegations.

21 And if counsel for Nationwide wants to file a motion
22 to dismiss or a motion for summary judgement on those
23 issues, then they are more than welcome to do so after
24 they've been entered into the case.

25 THE COURT: I'll look at the -- yes, sir?

1 MR. THOMPSON: Just a couple of points to address
2 those specific statements, if I may, Your Honor.

3 The -- with regard to the statement that defendant
4 Tonya Parks went to the property, that testimony is in the
5 record; and that happened well before any of the non-
6 renewal issues in this case came up, like more than a year
7 before. That -- that was completely separate and
8 unrelated.

9 With regard to the mention of the underwriter's
10 testimony about what he is -- opinion of what an agent's
11 duties are, that -- you know, it was an unsolicited
12 opinion by someone who's never been an agent and doesn't
13 know what an agent's duties are. Just volunteering up
14 something off the top of his head. It -- it's -- it's not
15 evidence to support that there's a duty, when South
16 Carolina law clearly says there's not a duty.

17 And then on the negligent misrepresentation claim, Ms.
18 Moon was referring to the right to rely, which is another
19 one of the elements -- mandatory elements of the causes of
20 action. But we don't even get to that. So that -- that's
21 not at play here, because the alleged misrepresentation
22 that would be set forth in this new cause of action was
23 not a misrepresentation to Ms. Grier. It was to somebody
24 else. And you can't just bring a cause of action saying
25 that the defendant said something that was untrue to some

1 other third party, and that was a mis -- a negligent
2 misrepresentation to me. South Carolina law doesn't
3 support that.

4 To the extent that the Court would be inclined to
5 allow it in, I believe we're entitled to conduct discovery
6 on these things. The case law that's, again, cited in the
7 brief that we handed up earlier today, clearly states that
8 a party is prejudiced by not being allowed to conduct
9 discovery on it; and if that -- if an amendment is granted
10 in -- late in the stages of the process, that it should be
11 granted with leave to conduct additional discovery. Thank
12 you.

13 THE COURT: I'll -- I'll look at it, since I haven't
14 had a chance to read the brief. I'll wait and not rule on
15 that until such time as I rule on the brief on those
16 issues.

17 MS. MOON: Your Honor, can I be allowed to reply to
18 some of the issues he raised ---

19 (The Court and Ms. Moon speak simultaneously.)

20 THE COURT: I'll -- I'll let you do it, but we're not
21 going ---

22 MS. MOON: If we can't do it right now, can we brief -
23 --

24 THE COURT: No. I ---

25 MS. MOON: --- the ---

1 THE COURT: I will -- I'll be happy to hear from you.
2 I'm not trying to foreclose you from -- from, you know,
3 replying. I just know that once we go down -- once we
4 start replying, it keeps going back and forth and back and
5 forth and back and forth. So I'll let you reply, and then
6 we're going to move on.

7 MS. MOON: Okay. The -- what I would like to bring up
8 is the fact that the testimony from Parks and the
9 testimony from Franklin Jeffries is -- you know, the --
10 the weight that's given to it is going to be a question of
11 fact for the jury, and not necessarily a question of law.

12 And just the fact that they are there does not -- the
13 testimony is there does not completely foreclose -- you
14 know, support them having a motion to dismiss even before
15 the causes of action are allowed.

16 Also, the discovery has been conducted on this. We
17 had depositions of Ms. Grier and Ms. Parks on the same
18 day, at counsel for Nationwide's office, here in Columbia.
19 Spent hours and hours. Everyone, I think, got to ask the
20 questions that they wanted to ask.

21 And I believe I can show that everybody asked
22 questions that dealt with negligence and the breach of
23 contract. In fact, a lot of the facts that deal with the
24 breach of contract -- supporting the breach of contract,
25 are the same facts that support the negligence claim.

1 So in effect, these aren't really claims that they
2 need to -- that they're totally unfamiliar with, because
3 it's the same fact -- we're alleging the same facts.

4 THE COURT: And to the extent that you need to respond
5 to the memorandum that was provided today, I'll give you
6 til Friday to do that. And then there need not be any
7 responses to that -- to that brief. I'll -- I'll just
8 take that information.

9 I've got -- that means I will have four documents
10 relating to this particular motion, and -- and I'll -- and
11 everyone's position should be well stated. And I'll
12 review them in light of the -- the arguments that you've
13 made on this particular point.

14 MR. THOMPSON: Thank you, Your Honor.

15 MS. MOON: Thank you, Your Honor.

16 THE COURT: Let's go to the plaintiff's motion for
17 summary judgement. It was filed on November the 5th of
18 2012. It was filed before the defendant's motion, so
19 that's why I'm taking that one up first.

20 I've read the -- the motion and the memorandum, and
21 apparently there appears to be some dispute as to which
22 statute applies. And so I'd like to hear the argument
23 about that first.

24 I understand the -- the facts and the -- the course of
25 events as explained by both parties as to what occurred

1 with this particular policy. I understand that the --
2 that the fire occurred on April the 6th, that the -- that
3 the policy was subject -- the policy ended on March the
4 24th. The -- one of the questions is whether or not there
5 was a renewal or whether -- and -- and/or whether there
6 was appropriate notice of non-renewal.

7 I understand that the plaintiff has set forth one
8 specific statute that applies, and the defense sets forth
9 another set of statutes. And so -- both in Title 38
10 relating to insurance. One is 38-75 -- I think it's 75-
11 740; and the other one is 38-75- -- was it 11?

12 MR. THOMPSON: It's 1160, Your Honor.

13 THE COURT: Thank you. And so I think part of my
14 focus would be on that particular issue. I read both of
15 the statutes yesterday. And -- and I'm interested to hear
16 what your arguments are about which one applies and why.

17 And then I understand that there are allegations and
18 information that was attached about whether there was
19 compliance with whatever statute you're each claiming
20 applies.

21 So Ms. Moon, I'll hear from you, since it's your
22 motion. I'm sorry --

23 MS. BROWN: Thank you, Your Honor. Thank you.

24 THE COURT: Ms. -- Ms. Brown.

25 MS. BROWN: I'm sorry.

1 THE COURT: Yes, ma'am.

2 MS. BROWN: I'll start with our position on the
3 statutes, the one contained in 740, in Article 9, and 1160
4 in Article 13.

5 We contend that they are both applicable, and this is
6 based on, initially, the scope of Article 9, I think is
7 what -- that Nationwide is contending -- indicates that
8 the provisions in Article 13 replace those in Article 9,
9 relying on the sentence about, you know, unless there's a
10 specific statutory provision of law governing our renewal.

11 And while the provisions of 1160 in Article 13 address
12 non-renewal, they are not -- it's not addressing non-
13 renewal in the same sense that Article 9 is.

14 Article 9 sets forth the way that notice should be
15 given, to whom notice should be given, you -- you know,
16 more of a logistical approach to the notice requirements
17 placed on an insurer for cancellation or non-renewal of a
18 policy. It applies to property and casualty insurance.

19 And while Article 13, which was enacted later -- even
20 though it addressed the fact that they were amended
21 concomitantly, it was enacted as a part of the Omnibus
22 Coastal Act -- Reform Act, which is a consumer protection
23 statute, designed to limit insurers's ability to cancel
24 policies that cover property of more vulnerable insureds,
25 such as homeowners, mobile homeowners, dwelling fires,

1 etc. And --

2 THE COURT: And that's what we have in this particular
3 case, is a dwelling fire, right?

4 MS. BROWN: That's right. Yes, ma'am.

5 And so while that -- Nationwide contends that makes it
6 more -- a more specific statute, and you know, thus it
7 replaces Article 9 and is exempted from the scope of
8 Article 9, our position is it merely enhances -- it -- it
9 -- it -- it places additional requirements on an insurer
10 if they are going to cancel or non-renew policies of these
11 more vulnerable insureds.

12 It -- it is more -- 1160, in Article 13, is more of a
13 statute about the content of the notice. This is what you
14 need to put in the notice. It's not, you know, how you --
15 the method for sending the notice; it's not necessarily to
16 whom it should be sent. It doesn't mention the agent
17 because, it's -- again, a consumer protection statute, and
18 it's meant to provide additional notice to insureds about
19 what to do if their policy is going to be cancelled or
20 non-renewed.

21 It is not notice that an agent needs. So it is a
22 contents requirement, in addition to the notice
23 requirements in Article 9.

24 And if Article 13 were to supercede or replace Article
25 9 or be exempted from the scope of Article 9, it would be

1 saying that Article 9 no longer applies to insurance
2 policies covering property in the State of South Carolina.

3 And in response to that, these statutes were amended
4 together as part of -- or they were amended side by side
5 as part of the 2007 Omnibus Act, that language in both 740
6 and 1160 were changed to be, you know, nearer to each
7 other.

8 So if you were going to non-renew, you know, during
9 hurricane season or if it's not hurricane season, you have
10 60 days vs. 90 days, that language was added to 1160 to
11 include that, you know, make sure you spell this out in
12 the notice as opposed to just, you know, this is the
13 notice; this is the amount of time that you have to, you
14 know, comply with an order to cancel or non-renew.

15 THE COURT: Well, the fact that they were amended at
16 the same time, wouldn't that at least put forth the
17 suggestion that the legislature would have had notice of
18 what was contained in both of those statutes and would be
19 able to change and amend it so that they would, in fact,
20 mirror each other? I mean, 1160 does contain a provision
21 at the beginning that says (as read): "... unless the
22 insurer delivers or mails to the name insured at the
23 address shown on the policy ." It doesn't include the
24 provision that 740 has -- or maybe it's 730, that says
25 also that it -- that it must be provided to the -- the

1 agent.

2 And so -- and it still contains the same information
3 about, you know -- you know, when you have to send the
4 notice; very similar if -- if it doesn't mirror exactly
5 what's in 740.

6 But it also adds additional provisions that are not in
7 740, which talks about, you know, the -- the -- that it
8 has to have that information in bold print, informing the
9 insured the -- the right to have -- to request review or
10 have the attorney contact the director, to review and
11 determine whether or not it's -- the cancellation or non-
12 renewal's appropriate; and that -- that type of
13 information.

14 So wouldn't the fact that they're -- that the
15 legislature's amending it at the same time, wouldn't that
16 specifically indicate that they did not intend for them to
17 be mirror images because they'd -- they'd left out that
18 provision talking about notice to the -- to the agent?

19 MS. BROWN: Well, again, I -- it's our position that
20 these are additional requirements, specifically aimed at
21 protecting insurers. So as opposed to the notice that has
22 to be sent for all policies covering property in South
23 Carolina/not in South Carolina, you know, we have to do
24 this, this, and this.

25 If it's this specific kind of -- of policy, you also

1 have to include additional language to the insured, the
2 intended recipient of these protections in this consumer
3 protection act, essentially. And that it's not just --
4 it's intent is to protect the insured.

5 So it doesn't mention the agent in the content of the
6 notice. The agent -- it's -- public policy supports the
7 notion that the agent should be notified. They're the
8 conduit between the insurance company and the insured.
9 And they're in a better position, knowledge-wise and by
10 virtue of their relationship with both the insured and the
11 insurer, to convey information to assist the insured, for
12 whom they work, their -- for whom they -- you know, who
13 they represent.

14 And that to say this statute, which is designed to add
15 additional protections to insureds, is going to lessen the
16 requirements -- the notice requirements placed on an
17 insurer to non-renew or cancel a policy is adverse to --
18 to the notion of public policy, underlying the entire
19 purpose that the Omnibus Act was created.

20 It is -- I -- I do not believe the legislature
21 intended to lessen the requirements on insurers. I think
22 that they intended to add additional requirements in the
23 content of the notice, to afford these additional
24 protections for these certain types of policies. Not to
25 say that if it's a policy of insurance for a homeowner

1 within this state, you no longer have to -- you know, have
2 the burden of notifying the agent, the agent doesn't need
3 to know, etc.

4 I think that it is understood that the agent -- it is
5 absolutely important to notify the agent in all
6 circumstances because of their relationship with both
7 parties, the insured and the insurer.

8 And in certain circumstances, the insurer has N
9 additional burden of providing protective information to
10 the insureds, so that they may, you know, appropriately
11 take -- or take the appropriate steps to prevent the
12 cancellation or non-renewal, to get in touch with their
13 agent.

14 THE COURT: Well, then what about the language in
15 1160(A)(1) that says (as read): "... except for a
16 cancellation, pursuant to Section 38-75-730," which seems
17 to carve out that 730 would still apply when it -- when --
18 when it applies to a cancellation, but -- but not as to
19 the refusal to renew or the notice of non-renewal?

20 Because the -- this -- 1160 goes on to say (as read):
21 "A cancellation or refusal to renew, by an insurer of a
22 policy covered in this article, is not effective un --
23 unless the insurer delivers or mails, to the named insured
24 at the address shown on the policy, written notice of the
25 cancellation or refusal to renew."

1 And then goes on to talk about, you know, what is to
2 occur with the notice, when it has to be sent, what it
3 should contain.

4 And so how do you -- how do you square that? I mean,
5 if -- if they had wanted to carve out an exception or they
6 -- they wanted to make them subject to each other, the
7 legislature certainly could have added in language that
8 acknowledged that -- that 740 existed, you know,
9 restrictions on non-renewal; and taken into -- taken into
10 account the fact that 740 may or may not apply to property
11 under the property insurance cancellation renewal
12 provisions of Article 13.

13 MS. BROWN: The cancellation -- in 730, from my
14 understanding of it, beginning the first part of it, lists
15 the reasons for the -- you know, can be -- that an insured
16 can face a non-renewal or cancellation. Second part is
17 for cancellation based on non-payment of premiums.

18 And I believe the -- the legislature expressly
19 excludes cancellation under 730 because those are
20 cancellations based on an overt act of the insured. The
21 insured has not paid the premiums, policy is cancelled.
22 They're not entitled to the -- to the additional notice
23 and the additional protection in the same way that a
24 unilateral decision by an insurance company to cancel or
25 non-renew a policy, the effect that that has on the

1 insured. An insured has control over the payment or non-
2 payment of premiums, generally.

3 If an insurance company, however, wants to non-renew
4 or cancel your policy for any of these other reasons, the
5 insured is not in the same position to have the affect on
6 this unilateral decision made by the insurance company to
7 cancel or non-renew.

8 Thus, I think 730 was carved out to exclude
9 cancellation for non-payment of premiums, because that is
10 an act undertaken by the insured, the insured has control
11 over; and they are not entitled to the same additional
12 protections that cancellation or non- -- or that non-
13 renewal -- that non-renewal decision made by an insurance
14 company would have on an insured.

15 THE COURT: Let's say -- let's just say that -- that
16 one or both of these statutes apply. What is it that
17 you're seeking summary judgement on? Are you seeking
18 summary judgement that -- that Nationwide could not non- -
19 - non-renew, or are you seeking summary judgement on the
20 fact that there was, in fact, a policy in effect?

21 MS. MOON: Your Honor, if -- if I may. Our position
22 for summary judgement is essentially just based on one of
23 our arguments. We did not include the argument that there
24 was acceptance of payment or a -- you know, the policy was
25 in effect because of acceptance of payment. Our motion

1 for summary judgement was that they had an improper
2 renewal that did not comply with the laws of South
3 Carolina; and did not -- so the policy was in effect.

4 If our motion for ---

5 THE COURT: I'm sorry. Let's -- let's -- let's go
6 back. Because there -- there -- so what you're -- what
7 you're saying is that you want summary judgement saying
8 that Nationwide did not comply with one or both of the
9 statutes, indicating their intent not to renew the policy.
10 And so therefore, what happens?

11 MS. MOON: I think that -- as far as their intent, you
12 know, I think that it's undisputed that their intent was
13 to renew the -- to -- have an effective non-renewal.
14 There renewal just was not effective under South Carolina
15 law.

16 But then what happens is that the policy is in place,
17 we still have issues to --

18 THE COURT: The policy could be in place.

19 MS. MOON: If the non-renewal was ineffective, then
20 the policy renewed -- would -- would have renewed. But
21 there would still be issues in play that are not part of
22 our motion for summary judgement that, you know, we felt
23 like we couldn't legitimately argue, were questions of law
24 as to whether or not there was any sort of bad faith or
25 the negligence on the part of Nationwide, as far as

1 accepting payment, going out and their adjustment of the
2 claim, the denial of the damages that were caused -- that
3 were caused by the denial of the claim.

4 This is ---

5 THE COURT: So -- so I -- I'm just trying to
6 understand what happens if I were to grant your -- if I
7 were to grant your summary judgement, what -- what would
8 be the legal affect of granting that motion, in terms of
9 what's -- what the issues are in the case and what
10 remains.

11 MS. MOON: The legal effect of granting our motion for
12 summary judgement, Your Honor, would be that you -- the
13 Court would recognize that there was an ineffective non-
14 renewal, and that the policy did in fact renew. And that
15 their -- and that at that point, that we would still be
16 hashing out their -- the actual denial of the claim
17 itself.

18 They're -- they've been claiming that the policy --
19 Nationwide's been claiming that there was never a policy
20 in effect, which has been the basis of numerous -- or
21 never a contract in effect at the time of the loss, which
22 has been the basis of a lot of their motions and
23 arguments. And this would just get rid of all those
24 arguments, and simplify the matter to be about the -- you
25 know, if -- when the policy was in effect, whether or not

1 it needed to be paid out on the loss.

2 THE COURT: Okay. So then, there are no issues about
3 whether payment was made?

4 MS. MOON: There are -- there are. That is an
5 alternative theory of recovery that, you know, is
6 separate, that we're not asking for the Court to decide as
7 a matter of law at this point.

8 THE COURT: So that's still an issue as to whether or
9 not there was a policy in effect.

10 MS. MOON: Yes. If you would deny our motion, Your
11 Honor, we would still be arguing those facts. If you
12 granted our motion, I have not made any sort of decision
13 or talked to any co-counsel about what we would do about
14 those claims, as far as the acceptance of payment and that
15 sort of thing; other than the fact that the acceptance of
16 payment would -- is evidence of the fact that there was a
17 non -- you know, that the policy was renewed.

18 And Your Honor, that -- that's why we sort of limited
19 our motion to the one issue that we felt like was strictly
20 an issue of -- a legal issue, you know, that as a matter
21 of law, this ---

22 THE COURT: Is there -- is -- and I'm sorry. I'm
23 switching gears. Is -- is there any dispute as to whether
24 or not they complied with that portion of, let's say, 740,
25 since that's the one that was initially argued, that

1 notice was mailed to the insured, being Ms. Grier, and
2 that that's all that the statute required as -- as it
3 relates to Ms. Grier?

4 I understand that you're saying that notice also had
5 to be -- notice or -- had to be mailed or given to the
6 agent, which is what you're claiming wasn't done in this
7 particular case. But there's no dispute that at least it
8 was mailed, and that there's evidence that it was mailed
9 to Ms. Grier. And the statute doesn't require that it has
10 to be received or accepted.

11 MS. MOON: Your Honor, the -- you know, with this
12 motion, we're not disputing that Grier -- about -- about
13 Grier's notice at this point. You know, there is evidence
14 that goes both ways. The weight of the evidence, you
15 know, is going to be a question of fact for the jury. You
16 know ---

17 THE COURT: What do you mean "there's evidence that
18 goes both ways?"

19 MS. MOON: Ms. Grier is -- is -- there's testimony
20 that Ms. Grier said that she did not receive ---

21 THE COURT: But the statute doesn't require receipt,
22 does it?

23 MS. MOON: Right. And that that's -- you know, they -
24 - then there's a proof of mailing that shows that they
25 mailed a notice, you know, according to their proof of

1 mailing. But the actual, you know -- I would -- or I
2 would at this point, for the purposes of this motion, say
3 that that is, you know, the -- the authenticity or the
4 veracity of that is not necessarily at issue here, and
5 should be something put in front of --

6 THE COURT: Well, do you have any evidence to dispute
7 the veracity or authenticity of it?

8 MS. MOON: No. I mean, I -- I think we're fine with
9 the mail log at this point. I would say that we're not
10 disputing notice with Ms. Grier at this point.

11 THE COURT: Okay. So as I understand the argument,
12 you're argument is simply that if regardless of whether
13 740 applies or 1160 applies, that what was required was
14 that Nationwide had to give notice to the insurer -- to
15 the -- to the agent, at least under the language of 740.
16 And you're claiming that that was not done.

17 MS. MOON: That is correct, Your Honor.

18 THE COURT: And you're claiming that was not done
19 because ...

20 MS. MOON: Your Honor, the -- it was not -- it was not
21 done because the statute -- 740 statute contemplates that
22 the burden is on the insurer to prove that the notice was
23 given or mailed to the agent of record, at their address,
24 or last known address -- at -- or the last known address
25 or the address that was in the policy.

1 And that -- the -- it's -- you know, South Carolina
2 case law and federal -- South Carolina federal court law
3 and the statutes all are very clear that that burden is on
4 Nationwide in this case, and their burden to prove strict
5 compliance with that statute, the notice statute.

6 In this case, they're unable to do that because the
7 proof that is required is either proof of mailing, which
8 would be sufficient. And in this case, they just cannot
9 provide any proof of mailing. They have -- we have a mail
10 log that shows that it was sent to Ms. Grier and the
11 mortgage company, and is very absent about whether or not
12 it was sent to -- it's just noticeably absent that Ms.
13 Parks was anywhere on there.

14 They have submitted -- you know, the -- the other way
15 to do it is to have a proof that the notice was given.
16 The two ways you can prove that the notice was given is
17 that you would either have to have -- either have to have
18 a -- proof that it was received and an awareness that it
19 was received.

20 In this case there is no evidence that it was received
21 nor is there any evidence of awareness. In fact, there is
22 a complete lack of -- there's the opposite. We have
23 testimony from Ms. Parks where she states that she was not
24 aware of this notice. She does not recall getting this
25 notice. It was not in her file, where she claims that if

1 she had gotten it, it would be. There is no email, even
2 if email was allowed as -- as mailing. And --

3 THE COURT: Well, email would suffice as notice, would
4 it not?

5 MS. MOON: If you -- if they could show an email where
6 it would -- been sent -- received by her.

7 THE COURT: Well, does it have to be received?

8 MS. MOON: It does, Your Honor. The case law
9 indicates that -- *Eden vs. South Carolina Farm Bureau*
10 *Mutual Insurance Company* says that (as read): "Where the
11 requirement -- notice requirement indicates that notice be
12 given, the recipient shall personally receive notice in
13 such a manner that the insured becomes aware of having
14 received it."

15 And the Court in that case held that the insurance
16 company's failure to offer proof of the receipt of notice
17 did not satisfy the requirement that notice be given --
18 the statute requirement that notice be given.

19 The only proof that has been offered up to this point
20 that -- to try and support that she was given or received
21 notice was a -- the fact that the non-renewal letter, that
22 was sent to Ms. Parks, according to the mail long -- the
23 bottom of the actual letter has (as read): "cc colon",
24 and then Ms. Parks agency number.

25 That is not proof that it was sent to any sort of

1 address. I -- you know, there's a proof of an actual --
2 just a line at the -- the line of the bottom of a page
3 does not do it. I just recently sent a couple of letters
4 out that cc'd people that I found out later that that
5 actually did not occur. So I don't think that that has
6 any indication of it actually being put in the mail to the
7 last known address.

8 THE COURT: The information that you cited from *Edens*,
9 was that in the dissent or is that in the case in chief?

10 MS. MOON: Case in chief. It's in our first brief in
11 support of our motion for summary judgement.

12 THE COURT: Yeah. And I'm -- I'm looking and it says
13 (as read): "Littlejohn and Harwell dissenting." So I
14 just didn't know whether the -- the language you quoted
15 was from the dissent or whether it was from ---

16 MS. MOON: No. I was quoting ---

17 THE COURT: --- the case in chief.

18 MS. MOON: --- from the case in chief.

19 THE COURT: And so you're saying the -- while there
20 may be a "cc" on it, there's no evidence that it was
21 actually sent whether ---

22 MS. MOON: That's correct.

23 THE COURT: --- whether by email or otherwise.

24 MS. MOON: Well, you know, just because there is
25 something that is directed to you in a way that, you know,

1 the sender or the drafter of the letter might assume that
2 you've received it, does not mean -- does not prove that
3 you have received it and does not mean that you will
4 receive it.

5 THE COURT: What about the affidavit of Ms. Parks?

6 MS. MOON: Ms. Parks affidavit, first of all, was
7 filed at the eleventh hour, well after her deposition was
8 taken. She -- and the affidavit states that she basically
9 assumed that since Franklin Jeffries claimed that he
10 checked the box on their computer system saying "please
11 send notice to the agent," that she would have somehow --
12 something in some system would have been sent in her -- to
13 her in her computer system.

14 She testified in her deposition -- I asked her about
15 it. Prior to this affidavit, I asked her, "Do you have
16 any sort of internal computer system with Nationwide, that
17 you, you know, put it in case notes?"

18 I showed her the screen shots that Franklin Jeffries
19 was testifying about when he said that, "Oh, if that -- if
20 I said that in my screen shots, then that means I would
21 have let that in. I would have actually checked the agent
22 box, and I assume that's -- that it goes off into the
23 internet so that it eventually gets there to her."

24 She had no knowledge of those screen shots. She
25 didn't know what type of system would have -- you know,

1 she would have even begin to look in to see if -- that --
2 to get notice.

3 Just because something gets put into an alert in a
4 computer system, that someone may or may never log into or
5 actually click on the link of, is the same as just sending
6 something off into the oblivion and hoping that they
7 happen to go out of their way to go find it.

8 THE COURT: Did she -- did she actually deny receiving
9 it?

10 MS. MOON: She had no -- I mean, I -- hold on one
11 second, Your Honor. She had no knowledge -- doesn't --
12 she did not recall receiving any memo that Grier's policy
13 would be set for non-renewal in March of 2011.

14 THE COURT: Was that from her deposition ---

15 MS. MOON: It was.

16 THE COURT: --- or affidavit?

17 MS. MOON: Page 80, line 3.

18 Page 67 and 71 of her deposition states that she does
19 not -- (as read): "... does not believe that she had the
20 2011 non-renewal and cancellation letters to Grier in her
21 file prior to April 6, 2011," which was the date of the
22 fire.

23 The only -- and that's sort of tied to the absence of
24 anything in her file. She testified that if anything ever
25 came to her, she would -- that had to do with Ms. Grier,

1 any policy, she immediately would print it out or open the
2 mail and stick it in the specific file.

3 Her file contained probably 10 pages, I think maybe 22
4 at most, that said -- and her only copies of the -- the
5 notice were faxed to her after the loss. They had time
6 stamps on them that were dated after the loss.

7 There is -- any -- if -- we have the screen shots of
8 Franklin Jeffries's computer that show him just sort of
9 noting, yeah, the agent should be notified. There's no
10 screen shot showing that any box was checked or anything
11 went anywhere else. Even if there were, she would have
12 had to actually seen it and received it; and she cannot
13 test -- she did not testify to that.

14 I asked her if there was ---

15 THE COURT: Well, let me ask ---

16 MS. MOON: Okay.

17 THE COURT: I -- I'm sorry. I didn't mean to
18 interrupt, but doesn't -- if -- I understand that your
19 position is if they can't establish conclusively -- I -- I
20 assume it's -- if they can't establish conclusively that
21 it was done, that therefore, they didn't -- they didn't
22 comply with the statute.

23 But to the extent that there may be information, would
24 that not create a factual question? Is that -- is that
25 something that a jury can determine, whether or not there

1 was compliance, or whether or not -- whether -- whether to
2 believe the witness that it would have been checked or it
3 would have been sent; or are those all -- all factual
4 issues that would then require the jury to make some
5 determination as to -- to whether or not there was
6 compliance with the statute?

7 MS. MOON: May I let Sarah Brown reply?

8 MS. BROWN: If I may address that, Your Honor. I -- a
9 factual issue to be put to jury in this case I believe
10 would -- would be, you know, conflicting evidence that,
11 you know, she had knowledge of receipt and letter of this,
12 evidence her testimony is reliable and would a jury
13 determine that, you know, yes or no, she did receive it.

14 Our -- I -- I believe that -- as the statute mandates
15 strict compliance and case law is clear, that without
16 proof of mailing to show that something has been given,
17 and that compliance has -- you know, there's been strict
18 compliance -- you have to show actual knowledge of
19 receipt.

20 All that Ms. Parks says is that it was sent through
21 the internal system. She has no recollection of seeing
22 it. She says that she can't recall that she knew anything
23 about this cancellation prior to April 7. She doesn't say
24 -- recall that she got -- that she had any discussions,
25 that she saw any emails, that she -- there's no indication

1 she got the letters prior to April 6 or 7.

2 And a mere statement that it was sent to her through
3 this internal system, if she can't show -- if there's
4 nothing conflicting -- regarding that she had actual
5 knowledge of the existence of this letter and this notice
6 of non-renewal as required by the statute prior and at the
7 -- at --

8 THE COURT: She says -- she says on -- in her
9 affidavit, paragraph No. 4 (as read): "At some time prior
10 to when Ms. Grier's claim arose in April, 2011, I received
11 notice that the policy would not be renewed at the next
12 renewal period, due to specific hazardous conditions on
13 the property. I received notice from the underwriter
14 through our internal memo system, which is how
15 Nationwide's agents communicate with underwriters and
16 screen us about policies."

17 The -- and so that seems to indicate that before
18 April, she was aware. She -- she had received in -- in --
19 and she indicates very specifically that she -- you know,
20 what she received.

21 And so would that not create -- at least be at odds
22 with I assume whatever was in her -- her deposition
23 testimony -- could be at odds with what was in her
24 deposition testimony, that would create an issue of fact
25 as to whether or not the jury chose to believe her?

1 MS. BROWN: Our -- our position is that just because
2 something is -- is sent to an intended recipient, and it
3 may --

4 THE COURT: She said she received it, which is what
5 you're claiming she has to acknowledge, is that it was
6 received by her.

7 MS. BROWN: The actual knowledge of receipt and
8 something being delivered to you are -- are -- are two
9 completely different ---

10 THE COURT: Well ---

11 MS. BROWN: --- things.

12 THE COURT: --- does the statute require
13 comprehension, or just the fact that it was received? It
14 says -- the statute says "notice is given."

15 MS. BROWN: Right. And in the case law interpreting
16 notice requirements in non-renewal and cancellation
17 statutes says that in order to comply with a -- something,
18 you know, just a given requirement, is that the recipient
19 has to be actually aware of the receipt.

20 And sending something through an internal system, that
21 Ms. Parks did not know how to access and has no knowledge
22 of actual receipt, aware of this notice, the contents of
23 this notice, I do not believe that that is -- is a factual
24 issue in dispute.

25 I don't -- you know, I don't necessarily dispute that

1 it was sent through this internal system. But I -- there
2 are no facts that indicate that Ms. Parks had actual
3 appreciable knowledge of receipt, which is the way that an
4 insured can show compliance with the given language in a
5 notice requirement.

6 THE COURT: Well, it -- then can you point, either in
7 her deposition where she acknowledges that she was not
8 aware of the contents of that notice or the contents of
9 the non-renewal before -- before the claim --

10 MS. BROWN: So on page 71 of her -- of Ms. Parks
11 deposition, starting on line 5. The question (as read):

12 "Were you aware prior to her phone call this policy
13 was cancelled?"

14 "I can't recall."

15 "So you don't know whether or not you were ever mailed
16 anything about cancellation of the policy prior to April
17 7; is that correct?"

18 "I don't recall."

19 "Do you recall getting any emails about the
20 cancellation ---

21 THE COURT: Well, what about non-renewal, the notice
22 of non-renewal? That's what we're talking about, not the
23 cancellation of the policy itself. But we're talking
24 about non-renewal.

25 Because I understand that -- at least from reading the

1 briefs, that there's information -- there's some claim
2 that -- that the -- GMAC sent the monies, and Nationwide
3 returned the monies, indicating that -- that the policy
4 had been cancelled -- the policy was not in effect, and it
5 was -- it was not renewed and it expired or cancelled or
6 whatever.

7 But -- but we're talking about here specifically is a
8 notice of non-renewal, and that's what the statute
9 requires is the notice of non-renewal.

10 MS. BROWN: In -- if I may take a moment to review
11 this and think about that. I -- I -- my understanding is
12 that in Alice's line of questioning, all the --
13 cancellation/non-renewal were used interchangeably. And
14 she is speaking of the same notice and -- and called it --
15 and I don't mean to put words in Ms. Moon's mouth, but
16 that when she says "the cancellation of the policy," she
17 is describing and trying to elicit testimony about the
18 notice, the letter of non-renewal, not a cancellation
19 after, based on an acceptance of the premium payments.

20 THE COURT: Okay.

21 MS. BROWN: This is still using the term
22 "cancellation" interchangeably with "non-renewal."

23 THE COURT: I'd ask for you all to hand up the
24 original deposition of Ms. Parks, and unless -- unless
25 there's some other particular point, I think I understand

1 what the issue is. And the whole issue is about whether
2 notice was given, and -- and I understand that I'll have
3 to read case law associated with that, as well as
4 reviewing the deposition itself.

5 Is there anything further you need to argue on ---

6 MS. MOON: No, Your Honor.. When you said "the
7 original deposition," are you looking at the sealed
8 deposition?

9 THE COURT: Yes, ma'am.

10 MS. MOON: Okay. We did not bring that. Can I ---

11 THE COURT: You can send it back. You -- you can send
12 it back. It's fine. That's not a problem.

13 I understand that it may not be brought, but as long
14 you have it and I can get a copy -- get -- I can get the
15 original. And I'll -- and when I'm finished with it, it
16 will be in the file. So if you -- we get to the point
17 that it needs to be used at trial, it'll be -- already be
18 in the file.

19 MS. BROWN: In the meantime, would you like the -- the
20 photocopy of the complete deposition?

21 THE COURT: No. Because then I'll have the photo and
22 the original.

23 MS. MOON: Okay.

24 THE COURT: And I'd -- and -- and that's fine, this
25 afternoon is -- is soon enough to get it to me.

1 Any -- anything further before I go and hear from Mr.
2 Thompson or Ms. Williams?

3 MS. MOON: I do not believe so, Your Honor.

4 MS. BROWN: No, Your Honor.

5 THE COURT: All right. Yes, sir, Mr. Thompson.

6 MR. THOMPSON: Thank you, Your Honor. There's a lot
7 of issues there. You -- you had asked them to start with
8 the statutory instructions, Your Honor.

9 THE COURT: And I'm going to ask you to do the same
10 thing.

11 MR. THOMPSON: Okay. Thank you. One of the very
12 important points on anything we're talking about regarding
13 statutory construction here is the issue of cancellation
14 vs. non-renewal. Ms. Brown was just alluding that -- that
15 they've used those terms interchangeably a lot. And
16 that's inappropriate.

17 Cancellation and non-renewal are two very different
18 things, defined differently in the statutes and addressed
19 differently in the statutes, with completely different
20 requirements. And I'm going to get to that further later
21 on, but a great deal of what's been discussed and a great
22 deal of what's in the briefs from the plaintiff only
23 applies to cancellation, and has nothing to do with this
24 case.

25 THE COURT: And I understand that -- that they may --

1 that it may have started off as a non-renewal. But at
2 some particular point, I guess after the claim was made,
3 there was -- whatever language, and I'm not asking for you
4 to go into detail because I don't think I need to -- to --
5 to gather that as to what happened after April the 6th.

6 MR. THOMPSON: Uh-huh.

7 THE COURT: But I assume that sometime after April 6,
8 it was either referred to -- that either -- there's a view
9 that it was either cancelled or that it was not renewed,
10 or that it was renewed but cancelled. But I think my
11 focus for purposes of the plaintiff's motion for summary
12 judgement is what existed at the time that the notice was
13 sent to Ms. Grier of Nationwide's intent not to renew the
14 policy.

15 MR. THOMPSON: Yes, Your Honor. I -- I -- I
16 understand those things. And -- and after I -- talk about
17 the statutory construction here, I'll address those
18 points.

19 First, there is -- we need to address Article 9 of the
20 statute -- which includes Sections 730 and 740 -- and
21 Article 13 are two completely different articles of the
22 statute. They are both comprehensive articles that apply
23 to the complete process of cancellation and non-renewal.
24 One is not just a subset or just additional requirements
25 to be read in tandem with the other. There's absolutely

1 nothing in the statute that says that. In fact, there's
2 several things in the statute that specifically
3 contradicts that.

4 There is nothing in this statute that says that it is
5 a consumer protection statute or that it was created to
6 protect the insureds or to provide additional requirements
7 for protection of insureds. All of those things are a
8 forced interpretation that aren't there.

9 Now, if we go back, Article 9 is the one that existed
10 first. We refer to it in our brief as "the old statute"
11 when we're referring to Section 740.

12 Now, Article 9 was originally created back in 1986.
13 It was substantively unchanged all the way up until 2004.
14 When it was originally created, it applied to property and
15 casualty insurance in the State of South Carolina.

16 It specifically has a scope section, 38-75-710, that
17 says that it (as read): "... applies to property and
18 casualty insurance, except any type of property and
19 casualty insurance where there are other specific
20 statutory provisions of law governing cancellation, non-
21 renewal, or renewal of policies."

22 That exception is the reason that Article 13 came into
23 play later.

24 Running parallel with that, there is a long line of
25 common law statutory construction principles -- and I'm

1 prepared right now to hand up a number of cases, if Your
2 Honor wants them -- addressing the fact that when you have
3 a general statute and a specific statute on the same
4 subject matter, the specific statute prevails and is the
5 one that is controlling. And that's what we have here.

6 Now, again, Article 9, enacted in 1986, the insurance
7 world changed dramatically from '86 up through the early
8 2000s, you know, throughout the '90s, Y2K, all of that.

9 In 2002, approximately, during Governor Sanford's
10 administration here, the South Carolina General Assembly
11 started revamping South Carolina's insurance law. One of
12 Governor Sanford's pet projects was the revamping of
13 Workers Comp insurance law, for example. Lots and lots of
14 changes were made.

15 In 2004, the Property and Casualty Insurance Personal
16 Lines Modernization Act was passed. That is the act that
17 created Article 13, including section 1160. Now,
18 plaintiff's counsel earlier said that Article 13,
19 including 1160, was enacted by the 2007 Omnibus Coastal
20 Reform Act. That's factually inaccurate. It was created
21 by the 2004 Modernization Act.

22 And the entire purpose of the Modernization Act, as
23 stated, was to streamline and modernize and bring up to
24 speed these statutes that had been in place since the mid
25 80's and were now archaic and needed to be streamlined and

1 updated.

2 You know, this is the act right here (indicates.) I
3 know Your Honor can't read it, but it's an entire page,
4 just the prologue information, as to why the act was
5 created, and it doesn't say anything about to provide
6 additional protections for insureds and that sort of
7 thing.

8 It is -- Article 13 is a comprehensive account of all
9 aspects of cancellation and non-renewal. It's got 14
10 different sections governing all of those aspects.
11 Nothing there says it's to be read in tandem with section
12 740, which was the previous requirement for non-renewal.
13 Instead --

14 THE COURT: But it does say in some parts that it's to
15 be read in tandem with 730.

16 MR. THOMPSON: 730. As Your Honor specifically
17 mentioned earlier, 730 is specifically carved out,
18 including in section 1160, as an express indication that
19 the cancellation provisions of 730 can still apply.

20 There is nothing anywhere that says the non-renewal
21 provision of 740 can still apply. That intent is not in
22 the statute at all. It's a sharp and distinct contrast
23 from 730 to 740 cancellation and non-renewal.

24 The non-renewal provisions were completely superceded
25 by 1160. The -- and the forced interpretation ---

1 THE COURT: Let me -- let me ---

2 MR. THOMPSON: Yes, Your Honor.

3 THE COURT: Let me ask this: Would -- would the
4 provisions of 740 apply to automobile insurance?

5 MR. THOMPSON: No, Your Honor. Because the Article 9
6 scope section, that was enacted way back in 1986, excepted
7 automobile insurance from the scope. That is section 38-
8 75-710. It has an exception for automobile insurance. So
9 740 does not apply to automobile insurance, and it never
10 did.

11 THE COURT: And so -- because I think, for -- for
12 those people who may not be in the insurance industry,
13 when you talk about property and casualty --

14 MR. THOMPSON: Right.

15 THE COURT: -- it's not just about real property.
16 It's about all property.

17 MR. THOMPSON: Personal property.

18 THE COURT: Right.

19 MR. THOMPSON: Yes. Property all inclusive.

20 In fact, the phrase is property insurance and
21 cancellation -- not cancellation -- property insurance and
22 casualty insurance are two defined terms in the
23 definitions section. And I've got that section. We can
24 look at it if we need to. But --

25 THE COURT: Does it really -- does it really define

1 it, so that -- that a -- that a person who's not in the
2 insurance industry would understand it?

3 MR. THOMPSON: (Laughing) If you're not in the
4 insurance industry or the legal profession, probably not.

5 THE COURT: I -- I -- I -- I read them. I mean, I --
6 I spent -- I -- I spent time trying to figure out, because
7 they both claim that they address property and casualty.
8 And so my question is, okay, if they both address property
9 and casualty, how do I know which one really applies?

10 MR. THOMPSON: Okay. Article 9, that's the one that
11 includes 730 and 740 -- it says property and casualty.
12 Article 13, enacted by the Modernization Act in 2004, says
13 nothing about casualty. It is property only.

14 And more than that, the name of the act that enacted
15 it is the "Property and Casualty Insurance Personal Lines
16 Modernization Act." So it's not just property. It's
17 property personal lines. It's very specific. Personal
18 lines as opposed to commercial lines. It doesn't apply to
19 commercial property. It applies to personal property.

20 THE COURT: So ---

21 MR. THOMPSON: Including personal residences.

22 THE COURT: So what you're saying then is that Article
23 9 would apply to commercial, it would apply to -- it -- it
24 --

25 MR. THOMPSON: It applies to commercial property still

1 today. It applies to casualty insurance still today,
2 which would include personal injury insurance, that sort
3 of thing. Not -- not auto.

4 THE COURT: Okay.

5 MR. THOMPSON: That -- that's casualty insurance.

6 THE COURT: And -- and so Article 13 then would apply
7 only to, basically, real property.

8 MR. THOMPSON: It applies to real -- well, it includes
9 personal property, you know, a person's tangible
10 possessions.

11 THE COURT: Whatever -- home -- home and contents.

12 MR. THOMPSON: Exactly. That's what I was about to
13 say. For example, a homeowner policy includes different
14 coverages, typically, for the dwelling and ---

15 THE COURT: And the casualty portion of that is if
16 somebody is injured on your property.

17 MR. THOMPSON: Yes. And that's Article 9.

18 THE COURT: And that's Article 9.

19 MR. THOMPSON: It's not the currently applicable
20 Article 13. You know, when the -- the Modernization Act,
21 it specifically said it was enacted, quote, "so as to
22 provide regulation of property insurance, cancellation,
23 and non-renewal."

24 THE COURT: So let me ask you this: If your
25 homeowner's policy covers both your -- your real property

1 and your contents as well as casualty, does that mean that
2 both sections would apply? That Article 9 would apply
3 because it relates to casualty, and Article 13 would apply
4 because it relates to the building and the contents?

5 MR. THOMPSON: In insurance terminology, that's
6 actually not going to happen. A homeowner's policy often
7 will have a personal injury component to it, but that's a
8 homeowner's policy. It's not categorized under a casualty
9 insurance policy. That's a property insurance policy.

10 Yes, ma'am.

11 Now, Article 13, this is the -- the new article passed
12 in 2004 by the Modernization Act -- again, it includes
13 comprehensive sections dealing with all aspects of non-
14 renewal. It includes a section -- section 1180, about
15 notice for reasons of cancellation or non-renewal. It
16 includes Section 1210, prohibited grounds for refusal of
17 issue of policy; Section 1220, prohibited grounds for
18 refusal to renew a policy.

19 So the contentions that Article 13 applies only to the
20 content of the letter are unfounded. There's nothing in
21 the statute that says that. The article goes much farther
22 than the content of the letter.

23 As Your Honor was pointing out early -- earlier,
24 Section 1160 itself specifically says the ways that notice
25 is to be given, to whom the notice is to be given, and the

1 logistics of it, which are the three points that Ms. Brown
2 said earlier, are not in Article 13.

3 They're specifically in 1160. It specifically says it
4 is be -- to be, quote, "delivered or mailed to the
5 insured." So that's the way and that's the "to whom."
6 That parallels -- again, as Your Honor was earlier
7 alluding, that parallels the old statute 740 which said it
8 was to be, quote, "given or mailed to the insured and the
9 agent of record."

10 There is no reason for the legislature to enact a new
11 provision that parallels all the requirements of the old
12 provision. If those two were somehow to be read in tandem
13 with one another, that just creates confusion. And that
14 creates unnecessary redundant provisions. If the two are
15 to be read in tandem of one another, you don't need the
16 same statements in both places. The only reason you do
17 need parallel statements in both places is because they
18 are separate, and they are to be read separately from one
19 another.

20 Article 13 is the specific exception that is alluded
21 to in the scope of Article 9, providing specifically to
22 property personal lines insurance.

23 THE COURT: So basically, what I gather then is if I
24 were to accept your proposition for which -- which statute
25 applies, if I were to apply 38-75-1160, then there would

1 not be a requirement to either give notice or deliver or
2 mail to the agent any information relating to non-renewal.

3 MR. THOMPSON: To the non-renewal. That -- that's
4 correct. That's what the statute requires, and that's
5 part of the Modernization streamlining procedures.

6 Because since the previous Article 9 was done in '86,
7 everything's been computerized; everything's been
8 streamlined, the cumbersome process of printing out mail
9 to your own agent and putting a stamp on it for all of the
10 millions of mailings that you send in a given week by the
11 insurance company, doesn't happen any more and it's not
12 required any more. The insurance companies communicate
13 with their agents electronically.

14 That is the reason that the requirements were changed.
15 They were expressly changed with the new statute that now
16 says "delivered or mailed to the insured." And it
17 conspicuously dropped the requirement of delivered or
18 mailed to the agent.

19 It should not be read in tandem just to say that, oh,
20 we're also going to go back and draw back in these old 740
21 requirement of given or mailed to the agent.

22 Now, we do draw back in the 730, because it is
23 specifically carved out in Section 1160. And so Section
24 730, that applies only to cancellations, is still valid.
25 Section 740 does not apply to property personal lines,

1 which is what we have here now.

2 You know, seven -- Section 1160, which is the one at
3 issue here -- the title of it specifically says, "This is
4 the notice requirement." It doesn't say it's the content
5 requirement, and it doesn't say it's only about what your
6 letter is supposed to look like. It is the notice
7 requirement and it has all aspects of the notice
8 requirement.

9 Within 1160 it refers you -- specifically refers you
10 out to Section 1180, dealing with the reasons, stating --
11 it says that you've got to state the reasons. 1160 has
12 the timing of it. It talks about the 60 and the 90 days.
13 All of that is in 1160.

14 It does not need to be and should not be read in
15 tandem with 740. To read it in tandem with 740 forces the
16 Court to read parallel provisions that are almost
17 identical, but not exactly identical. And then you're
18 reading conflicting terminology, and there's no reason to
19 do that.

20 Now -- yes, Your Honor? .

21 THE COURT: What -- what is your argument -- if I were
22 to find, for example, that 740 applied, what is your
23 argument about notice being given or mailed to the agent?

24 MR. THOMPSON: To the agent. The argument is two
25 fold. One is, there's been a lot of discussion about what

1 does "given" mean. And the plaintiffs are contending that
2 "given" means that there has to be actual cognitive
3 awareness that it was received. This is -- this is point
4 one.

5 That contention is based entirely on case law dealing
6 with cancellation of an insurance policy. It is not based
7 on a single case that has anything to do with non-renewal.
8 It's based mostly on the *Edens v. State Farm* case that was
9 discussed earlier. That's a 1983 case which happened even
10 before Article 9 existed. It wasn't interpreting a
11 statute at all that dealt with a given requirement.

12 The phrase "given," that was being interpreted in that
13 case, was a phrase from the insurance policy. So it
14 wasn't interpreting that at all.

15 So all of the case law that has been set forth for
16 this idea of actual awareness of receipt, it completely
17 doesn't apply to the non-renewal context. So that's point
18 one.

19 Point two, as Your Honor alluded to earlier, Tonya
20 Parks has an affidavit in the record specifically stating
21 that she did receive it.

22 Now, there's been a number of allusions to Ms. Parks
23 deposition testimony. In -- in the deposition, Ms. Parks
24 said several times, "I don't recall; I don't remember," on
25 the date of the deposition.

1 She didn't say, "It never was sent to me." She didn't
2 say, "I know that it didn't come to me." She said, "I
3 don't remember right now."

4 And so those are the two points: One is the case law
5 doesn't apply. It -- it's old, it applies only to
6 cancellation, and it only dealt with interpretation of the
7 language of a policy, not a statute. Two is Parks said
8 specifically under oath in an affidavit saying actual
9 knowledge I received it.

10 And so that -- on that basis, those two points, the
11 evidence is in the record actually to support summary
12 judgement for the defendants here under 740 or 1160. But
13 it -- 740 doesn't apply for all the reasons that we've
14 discussed. But even if it did, the evidence is still
15 there.

16 THE COURT: Okay. And I really don't need to get into
17 the issue of cancellation vs. non-renewal.

18 MR. THOMPSON: But may I -- I understand. May I
19 address it very quickly for one specific reason?

20 THE COURT: Very quickly.

21 MR. THOMPSON: The specific reason is the plaintiff's
22 summary judgement motion has this burden-shifting idea in
23 there. And essentially, the plaintiffs are arguing that
24 they should be entitled to a plaintiff's summary judgement
25 without even putting up any evidence, because they're

1 saying that the defendants have the burden of proof.

2 Now, that's -- the reason I say that's related to the
3 cancellation and non-renewal distinction, every single
4 case that is cited in support of that idea of burden
5 shifting is a cancellation case. There is not one case
6 anywhere -- in fact, we -- we searched nationwide and we
7 can't find a case that -- that says that the defendant,
8 the insurance company, has the burden of proof on a non-
9 renewal. That is only for cancellation.

10 And there are abundant reasons for that. It's because
11 a cancellation, what the insurance company is doing is
12 they're taking an insurance policy that is in place for a
13 certain period of time, and they're cutting it short
14 before that stated period of time ends.

15 It's got an increased sense of urgency. It's cutting
16 short the policy that was already in place, and so the
17 insurer is held to a higher standard there. And that's
18 why this burden of proof issue on a cancellation only
19 applies to cancellation.

20 A non-renewal is completely different. All a non-
21 renewal is is that when the stated term of the policy
22 ends, the insurance company is just saying we're not going
23 to start a new term.

24 All of those provisions about -- about burden of proof
25 shifting have nothing to do with that. And so the idea

1 that the burden is on the defendant in this case is
2 inapplicable. And that's the only ---

3 THE COURT: And -- and this is not a -- well, from the
4 defendant's point of view, this is not a cancellation,
5 because your position is that you -- you complied with the
6 requirements of notifying them of the intent not to renew.
7 And when the policy expired -- when the policy period
8 ended on March the 24th -- and if the date's not correct,
9 I --

10 MR. THOMPSON: That's correct.

11 THE COURT: -- you know, of 2011, there was no
12 obligation to write an additional policy or to renew the
13 policy, because you had provided that notice that you did
14 not intend to do that, absent some steps taken by the
15 homeowner, which -- which is not really an issue in this
16 case.

17 MR. THOMPSON: That's correct. And the only thing I
18 would add to that is I'm not aware of a single allegation
19 in the case that this is a cancellation issue. It's
20 strictly non-renewal. The cancellation case law and the
21 statutes don't come into play.

22 THE COURT: And they -- and what I gather from the
23 plaintiff's point of view is that basically they never --
24 they either never received the information about non-
25 renewal, or if I rule in their favor on summary judgement,

1 that there could -- that there was an ineffective attempt
2 to non-renew, which placed the obligation on Nationwide to
3 renew the policy.

4 And assuming that the premiums were paid to renew the
5 policy, then there should have been a policy in effect.
6 And that's why they're viewing it as a cancellation,
7 because you've said -- well, I guess it's not a
8 cancellation. That's why they -- they're saying it was
9 bad faith, because there should have been a policy in
10 effect; and by denying that there was a policy ---

11 MR. THOMPSON: I -- I think that's a fair
12 characterization of their position, and would -- you know,
13 it's not a cancellation issue.

14 THE COURT: Okay.

15 MR. THOMPSON: There were a couple of issues raised
16 specifically with regard to Ms. Parks testimony, for
17 example, about -- they -- they were talking about screen
18 shots that the underwriter Franklin Jeffries had, and that
19 sort of thing. Those are separate issues.

20 THE COURT: They are.

21 MR. THOMPSON: They -- they don't really apply here.
22 There's very specific reasons that Ms. Parks doesn't --
23 doesn't recognize those, because the message that was sent
24 from Mr. Jeffries to her doesn't come across looking like
25 that. It's a completely different issue.

1 THE COURT: Is there -- is there something else that's
2 crucial?

3 MR. THOMPSON: I'm checking my notes to make sure.

4 THE COURT: Because I -- I tell you what I'd like to
5 do is I'd like to hear just briefly in reply, and then I'm
6 sure you all are aware that Judge Cooper's retirement
7 ceremonies are supposed to begin at noon.

8 MR. THOMPSON: Okay.

9 THE COURT: What I would like to do is finish up this
10 motion and then take a recess. And then maybe come back
11 at two o'clock and -- and hear on the defendant's motion
12 for summary judgement and those issues, if that's
13 acceptable.

14 MR. THOMPSON: Yes, Your Honor. The -- the only other
15 point is Your Honor raised earlier that the 2007 Omnibus
16 Coastal Reform Act amended both Article 9 and Article 13.
17 And it amended them in the same ways.

18 It is a clear recognition two -- three years after the
19 Modernization Act was passed, creating the new Article 13,
20 that Article 13 applies parallel and separately from
21 Article 9, the old Article 9. If it didn't, there would
22 be no reason to amend them in the same ways and to put
23 parallel language into them.

24 If the -- if -- parallel language would not be needed
25 if they're to be read in tandem. That just creates

1 redundancy, which violates the cardinal principles of
2 statutory instruction.

3 The fact that they were both amended by the same act
4 at the same time in the same way is a clear indication
5 that the two acts apply separately.

6 THE COURT: Thank you.

7 MR. THOMPSON: Yes, Your Honor.

8 THE COURT: Any reply to what -- what's been argued?

9 MS. BROWN: Yes, Your Honor, briefly. First, I'd like
10 to address the issue of cancellation vs. non-renewal and
11 the -- the cases cited deal with cancellation.

12 And it's our position that in statutes -- if you look
13 at 730 and 740 side by side -- 730 being cancellation, 740
14 being non-renewal -- the language is still -- you know,
15 cancellation not effective unless written notice given or
16 mailed to agent of record, last known address, etc., etc.
17 Same thing, same language for non-renewal.

18 Therefore, I don't see any reason why interpretation
19 of the notice requirements of cancellation -- if you're
20 determining, you know, what is mailing, what is proof,
21 what is giving -- should not absolutely apply -- uniformly
22 applicable to non-renewal, notice of cancellations;
23 especially because the language is the same: given,
24 mailed, notice, agent of record, insured, etc.

25 Second, in terms of the Article 13 being more specific

1 because it's property insurance and homeowners's property
2 insurance, the title -- if we're going to go with the
3 titles, the title of Article 9 is "Property and Casualty
4 Insurance." Homeowners's insurance policies absolutely
5 cover casualty as well.

6 Again, I think that's another indication that 13 is
7 not a specific statute that supercedes in the way that,
8 you know, arguments -- and you said you had numerous cases
9 saying that if the statute isn't more specific, it
10 controls over the more general.

11 Often -- and I don't have the case on hand, but I can
12 provide that to you -- there are numerous -- also numerous
13 cases that state a more specific statute, in certain
14 situations, is intended to clarify a more general statute,
15 not necessarily replace it due -- you know, as a result of
16 its specificity.

17 Third, just a brief -- to that issue with the 1984
18 case that we had cited, where the language about "given"
19 was in the policy. As you stated, in -- Article 9 was
20 created in 1985, and it was already created and codified
21 sort of inconsistencies in these notice requirements that
22 were previously included in policies.

23 The statute was created to make more uniform what
24 these notice requirements are. And for that reason, I see
25 no impediment to applying the previous arguments and

1 determinations of what it means to give, whether that's
2 language to give notice that was previously included into
3 -- in a policy, or give notice as codified to make these
4 policies more uniform.

5 I think that an interpretation of what "give" means is
6 applicable to give notice in a statute per -- just as
7 applicable as it is to giving notice in policy language.

8 THE COURT: Okay. Thank you for those. What, I'd like
9 to do is let's -- let's take a break. And is two o'clock
10 acceptable to be able to return? Or do we need to tell
11 you to come back another day or -- or you all prepared ---

12 MR. THOMPSON: Two o'clock's fine with us, Your Honor.

13 MS. MOON: Two o'clock's fine with us.

14 THE COURT: Okay. And then -- when we come back at 2,
15 then we'll discuss the defense's motion for summary
16 judgement, and -- and I have the -- the memoranda on that
17 as well.

18 MR. THOMPSON: And I think that's the last one we may
19 -- is that correct?

20 THE COURT: What I have is that -- that would be the -
21 - the -- the motion was filed on November the 6th with
22 attachments. There were briefs filed on the 13th, an
23 affidavit on the 13th. There was also another brief filed
24 on the 26th. And that -- that's all that I have as it
25 relates to --

1 MR. THOMPSON: I think that's correct, Your Honor.

2 MS. MOON: That's correct.

3 THE COURT: Okay.

4 MR. THOMPSON: Two o'clock right here?

5 THE COURT: Two o'clock right here. Thank you. I
6 appreciate it.

7 MR. THOMPSON: Thank you.

8 MS. MOON: Thank you.

9 (Off the record at 11:58 a.m.)

10 (Back on the record at 2:01 p.m.)

11 THE COURT: All right. We're on the record. Thank
12 you all for letting us take that break and coming back.
13 We are now ready to hear -- I'm ready to hear the motion
14 for summary judgement that was filed by the third-party
15 defendant.

16 And so as I stated, we -- I reviewed the -- the
17 memoranda that had been filed and I have copies of all
18 those; and I've -- and I've read through them. And so,
19 Ms. Williams, I'll be happy to hear from you.

20 MS. WILLIAMS: Thank you, Your Honor. May it please
21 the Court. Alana Williams on behalf of the third-party
22 defendants, Nationwide Insurance Company and Tonya Parks.

23 We are here on our -- I'll just say defendant's and
24 plaintiff's so I don't get tongue tied with the third
25 party prefix, since there's no longer a first party.

1 But we are here on the defendant's motion for summary
2 judgement.

3 There are three claims asserted against both
4 defendants: breach of contract, bad faith denial of
5 insurance claim, and indemnity and contribution.

6 The defendant's respectfully request summary judgement
7 for the following reasons: First, I'd like to address the
8 claims against the individual Tonya Parks.

9 The plaintiff initiated a claim for breach of contract
10 against Tonya Parks. Well, Ms. Parks is a Nationwide
11 insurance agent, and she should be -- these claims against
12 her should be dismissed on summary judgement, because it's
13 undisputed that the plaintiff never had any contract with
14 Ms. Parks.

15 When specifically asked to identify any purported
16 contracts related to this case, the plaintiff has
17 repeatedly identified only her former insurance policy
18 with Nationwide. The plaintiff has never identified any
19 contract with Ms. Parks and she cannot, in fact, do so.

20 Tonya Parks is merely an agent of Nationwide who never
21 entered into a contract with the plaintiff. South
22 Carolina law is clear that an agent cannot be sued on a
23 contract made on behalf of the principal if the name of
24 the principal is evident at the time of the contract, and
25 it is clear that the agent did not intend to bind himself.

1 Here the former insurance policy clearly reflects that
2 the contract was between the plaintiff and Nationwide
3 Insurance Company. The policy also clearly lists Tonya
4 Parks as the agent.

5 The policy does not, and neither does any evidence on
6 the record, reflect that there was a contract between the
7 plaintiff and Ms. Parks; thus, the plaintiff cannot
8 proceed on the breach of contract action against Ms. Parks
9 where it is undisputed that there was no contract; and
10 summary judgement should be granted on this claim.

11 In addition to the breach of contract claim, the
12 plaintiff also asserts bad faith refusal to pay insurance
13 benefits against Tonya Parks. Well, where there is no
14 contract of insurance between the plaintiff and Ms. Parks,
15 then there can be no claim for bad faith -- for insurance
16 bad faith, because the first element for a claim of
17 insurance bad faith is a mutually binding contract of
18 insurance.

19 The plaintiff clearly did not have a binding contract
20 of insurance with Ms. Parks; therefore, the plaintiff
21 cannot even bring a claim for bad faith failure to pay
22 insurance benefits against Ms. Parks as an individual.
23 And so we respectfully request summary judgement be
24 granted as to Ms. Parks on this claim.

25 The last claim that the plaintiff brings against Ms.

1 Parks is for contribution and indemnity. The plaintiff
2 cannot get contribution in this case against anyone,
3 because that only occurs among joint tortfeasors, and one
4 of those parties seeks to offset a judgement or -- offset
5 a prior judgement against another.

6 Here there is no prior judgement to offset, and the
7 plaintiff is not a joint tortfeasor with Nationwide and
8 Parks.

9 The plaintiff also cannot maintain a claim for
10 indemnification for the mortgage foreclosure, because that
11 action was dismissed and the plaintiff will now be getting
12 her mortgage satisfied, due to a retroactively placed
13 insurance policy that the bank had on the property.

14 In other words, the bank dismissed its foreclosure
15 action last week and will be satisfying the plaintiff's
16 mortgage, because the bank's insurance company placed a
17 policy on the property that would cover the damage for the
18 dwelling that occurred on April, 2011. Thus, the claim
19 for indemnification is essentially moot.

20 Now, to the extent that the plaintiff still asserts a
21 claim for equitable indemnification, she has no right to
22 indemnity as a matter of law, because the right to
23 indemnity only arises if the party seeking it was not
24 personally at fault to any degree.

25 In this particular situation, the plaintiff herself

1 was at fault for the foreclosure, because she defaulted on
2 her loan before the fire; and after the fire, she
3 attributed her inability to make her mortgage payments on
4 delayed income stream, not because of an insurance claim
5 that was not paid.

6 Accordingly, summary judgement should be granted as to
7 these claims against Ms. Parks.

8 So as relates to Ms. Parks as an individual defendant,
9 the claims asserted against her fail as a matter of law
10 and summary judgement should be granted because there's no
11 genuine issue of material fact establishing that there was
12 any contract between the plaintiff and Ms. Parks
13 whatsoever. And where there is no contract, then there
14 could be no bad faith denial on the part of Ms. Parks to
15 the plaintiff; and there's certainly no indemnification
16 for a mortgage foreclosure action that has now been
17 dismissed.

18 The plaintiff also asserts claims against Nationwide
19 Insurance Company. For the reasons articulated by Mr.
20 Thompson earlier here today before the Court in his
21 arguments regarding the contract, those same reasons, we
22 believe, apply to Nationwide's motion for summary
23 judgement as to plaintiff's claim for breach of contract.

24 In this particular situation, Nationwide complied with
25 all of the applicable statutory provisions in order to

1 non-renew a policy: Nationwide sent the policy to the
2 insured, notified its agent; it was done in a timely
3 manner, and the policy sets forth that the contract would
4 not be renewed at it's expiration of March 24, 2011,
5 unless the plaintiff remedied several hazardous conditions
6 that were listed on that letter and contacted Nationwide
7 to notify them that those hazards had been remedied.

8 THE COURT: Let's just say for the sake argument that
9 if I were to grant the plaintiff's motion for summary
10 judgement as it relates to the non-renewal portion, where
11 -- where would that put us with respect to Nationwide?

12 MS. WILLIAMS: If you were to grant plaintiff's motion
13 for summary judgement with respect to the contract, then
14 essentially the Court would be saying that there was a
15 contract in place at the time of the loss.

16 THE COURT: So if I were to say that Nationwide failed
17 to follow the terms of the statute as to their non-
18 renewal, are you saying that there is then evidence that
19 the policy was renewed?

20 MS. WILLIAMS: Well, it would be -- according to the
21 statute, it would appear that the non-renewal would have
22 been ineffective. It doesn't necessarily mean that the
23 policy automatically renews because ---

24 THE COURT: Well, that's what I'm trying -- that's --
25 that's my question.

1 MS. WILLIAMS: Yes. But I -- that's ---

2 (The Court and Ms. Williams speak simultaneously.)

3 THE COURT: That's what I'm trying to find out.

4 MS. WILLIAMS: Uh-huh. That -- that ---

5 THE COURT: Sort of ---

6 MS. WILLIAMS: --- one of our gray areas in this
7 because the 740 statute says it would be -- in order for
8 it to be effective, you'd have to -- as well as 1160. So
9 if you had an ineffective non-renewal, and there wasn't,
10 you know, the payment and acceptance of a premium, there
11 wasn't a new policy issued, there was never a bill that
12 was sent, we would definitely -- likely be in a gray area,
13 I guess, that -- in that situation.

14 THE COURT: So would that -- or those would all be
15 questions for the jury? In other words, there -- there's
16 -- there are disputed facts?

17 MS. WILLIAMS: Yes. Shall I proceed?

18 THE COURT: Yes, ma'am.

19 MS. WILLIAMS: Okay. Thank you. I want to go into
20 the plaintiff's claim for bad faith failure to pay
21 insurance benefits against Nationwide.

22 Now, the plaintiff's claim of -- for bad faith failure
23 to pay fails as a matter of law because there's no record
24 evidence supporting the elements necessary to maintain
25 this claim. One of the key elements to maintain a bad

1 faith claim is that the insurer must have acted in bad
2 faith with respect to its denial of the payment.

3 South Carolina law is clear that there can be no bad
4 faith if the insurer has a reasonable basis for denying
5 the came -- the claim. That's the standard here, a
6 reasonable basis for denial of the claim.

7 The State Supreme Court articulates this point in
8 *Crossley vs. State Farm*, in *Helena Chemical vs. Allianz*
9 *Underwriters*, and in *Varnadore vs. Nationwide Mutual*.

10 In *Hanson vs. United Services Auto Association*, the
11 Court of Appeals states that (as read): "Generally, if
12 there's a reasonable ground for contesting a claim, the
13 denial of the claim does not constitute bad faith."

14 In this case, Nationwide clearly had a reasonable base
15 -- basis for denying coverage. First, the insurance
16 contract was no longer in effect at the time of the claim,
17 because the contract had expired without being renewed.

18 Second ---

19 THE COURT: Wait a minute. Before -- before you go
20 there, is that -- is that a question of fact?

21 MS. WILLIAMS: Whether or not the contract had been --

22 THE COURT: You said the contract expired without --
23 without ---

24 MS. WILLIAMS: Yeah. That's not a question of fact,
25 because that would speak to whether or not Nationwide

1 complied with the statute. And we're -- we -- the Court
2 would have to determine which statute applies.

3 THE COURT: No. What I'm saying is your statement was
4 that the policy expired without renewal or payment --
5 payment of the premiums, what I thought I heard you say.

6 MS. WILLIAMS: I said the claim -- because the
7 contract had expired without being renewed. That's
8 correct.

9 In order to renew this particular contract, Ms. Grier
10 would have had to remedy the properties on her -- remedy
11 the properties, excuse me -- remedy the hazards on her
12 property, provide evidence to Nationwide that those
13 hazards had been remedied, and then Nationwide would
14 consider entering into another contract again with Ms. --
15 with the plaintiff.

16 THE COURT: So simply paying the premium would not
17 have put the policy in effect?

18 MS. WILLIAMS: No. But for the bad faith cause of
19 action, for that -- for that claim for that element, the
20 determination for reasonable basis for denial is at -- is
21 -- that has to be done based on what was occurring at the
22 time of the claim, what evidence was available at the time
23 of the claim. And in this case, the evidence reflects
24 that the policy expired.

25 In addition, Nationwide as -- had a claims adjuster.

1 When the claim came in, the claims adjuster investigated
2 to find out whether or not the policy would be -- the
3 claim would be covered and the coverage amount. And what
4 he learned at that time is that a notice of non-renewal
5 was in fact sent to the plaintiff with notice to the
6 agent; the notice provided that the contract would not be
7 renewed unless certain property hazards were remedied; and
8 the plaintiff had not in fact remedied those -- those
9 hazards.

10 In addition, no bill had been sent out to the
11 plaintiff for a new policy; and no -- new policy contract
12 had not been sent out, which is typically what occurs when
13 a policy's going to be renewed.

14 THE COURT: And evidence of all that is in the
15 exhibits that are attached to your motion in memorandum?

16 MS. WILLIAMS: Yes.

17 THE COURT: And so any claim or allegation that the --
18 the -- GMAC sent a check to cover the premium, or would
19 have traditionally or historically been the premium for
20 the policy, that would not affect as to whether or not
21 there was coverage or there was payment for coverage.

22 MS. WILLIAMS: No. And the claims adjuster was aware
23 of that; and what they say was that an unsolicited payment
24 had been received by Nationwide, and was turned back
25 around prior to the accident -- the incident occurring and

1 refunded back to Ms. Grier.

2 THE COURT: And what exhibit number is that? Can you
3 tell me that?

4 MR. THOMPSON: That should be in the Bruce Irick
5 affidavit.

6 THE COURT: Bruce Irick?

7 MS. WILLIAMS: Yes. It should be in the Bruce Irick
8 affidavit.

9 THE COURT: Exhibit K.

10 THE COURT REPORTER: Irick?

11 THE COURT: I-r-i-c-k.

12 Yes, ma'am. Go ahead.

13 MS. WILLIAMS: So at the time that the claim arose,
14 Nationwide had a reasonable basis for denying the claim
15 based upon the information that it had available to it at
16 that time, based upon it's cursory investigation of what
17 had occurred.

18 Bruce Irick, in his affidavit, testifies that he
19 checked with the underwriter to find out about the non-
20 renewal and the reasons; he checked with the agent; maybe
21 checked with everyone to see whether or not Ms. Grier had,
22 in fact, provided any information indicating she wanted to
23 renew by remedying -- remedying the hazardous conditions
24 on her property.

25 He also found that an unsolicited payment was sent in,

1 but was immediately returned to Ms. Grier because there
2 was, in fact, no policy in place.

3 Accordingly, the record evidence precludes a finding
4 of bad faith as a matter of law because Nationwide clearly
5 had a reasonable basis for denying the plaintiff's claim
6 at that time.

7 Now, there are also a couple of other elements in a
8 claim for bad faith that are not present in this case.
9 There was no binding -- mutually binding contract of
10 insurance, because again, that policy expired March 24 and
11 the claim arose April 6, after the policy expired.

12 THE COURT: Let me ask you this: Is the issue about
13 whether there's a reasonable basis, is that similar to the
14 -- to those cases or the line that talks about gross
15 negligence; and if the party exercised the slightest --
16 the slightest degree of care, then that generally
17 precludes gross negligence?

18 Would -- would this be the same -- would the
19 reasonable basis for the bad faith be if there's any
20 evidence that shows an alternative basis that -- other
21 than just obstinance and just plain out "we're not gonna
22 honor the claim," that there's any evidence to support
23 that there is -- there is a reason for the denial of the
24 claim, is that sufficient?

25 MS. WILLIAMS: That is sufficient.

1 THE COURT: And that's sufficient as far as summary
2 judgement's concerned in determining as a matter of law.

3 MS. WILLIAMS: That's -- that's sufficient.

4 THE COURT: Is there -- and is -- is that one of the
5 cases that you've cited? *Helena Chemical* or *Varnadore* --
6 which ...

7 MS. WILLIAMS: Yes. Because -- yes. *Helena Chemical*
8 *vs. Allianz Underwriters* and *Crossley vs. State Farm*. And
9 those are also cited in the ---

10 THE COURT: Brief.

11 MS. WILLIAMS: --- memorandum. And then there's
12 *Hanson* as well *vs. United Service Auto Association*.

13 THE COURT: Yes, ma'am.

14 MS. WILLIAMS: And finally, the other element that we
15 contend was not met for bad faith is that there must a
16 refusal by the insured to pay benefits due under a
17 contract of insurance. And here, we contend that
18 Nationwide did not refuse to pay benefits due under a
19 contract of insurance again, because all evidence
20 reflected that the contract had expired.

21 Where an insurer's refusal to pay benefits is
22 justified as a matter of law, the Court of Appeals has
23 found that this element of bad faith denial cause of
24 action is not met.

25 Here, Nationwide's refusal to pay benefits was

1 justified as a matter of law, because Nationwide denied
2 the plaintiff's claim after the policy expired, so
3 benefits were not due under the policy. Accordingly --

4 THE COURT: But it's not just -- it's not the denial -
5 - it's not the denial of benefits after the policy. It's
6 the denial of the claim, because -- because the claim did
7 not -- because the event that triggered the claim did not
8 occur within the policy period.

9 MS. WILLIAMS: That's correct.

10 THE COURT: Okay.

11 MS. WILLIAMS: In addition, Rule 56(E) requires that
12 summary judgement be entered against the plaintiff on his
13 claim if appropriate, because the plaintiff has never
14 filed anything even attempting to rebut the defendant's
15 summary judgement arguments on bad faith and also on the
16 indemnity and contribution.

17 The only thing that the plaintiff's filed in
18 opposition to Nationwide's summary judgement was a brief
19 which addresses only the statutory construction issues.

20 The rule requires that an adverse party may not rest
21 upon the mere allegations or denials in their pleading
22 with regards to opposing summary judgement.

23 The last cause of action against Nationwide is the
24 contribution and indemnity, and as stated before,
25 contribution just can't happen in this case. It's not

1 proper in this particular situation because there are no
2 joint tortfeasors and there's no judgements to be offset.

3 Also, plaintiff cannot maintain the claim for
4 indemnification, again because the mortgage foreclosure
5 has been dismissed and the plaintiff's now going to be
6 having her mortgage satisfied by the bank. So
7 accordingly, that claim is moot.

8 For these reasons, the defendants respectfully request
9 that this Court grant summary judgement: One, as to the
10 individual, Tonya Parks, on all claims, because she was
11 merely acting as an agent and she had no contract or duty
12 to the plaintiff whatsoever.

13 We also request summary judgement as to Nationwide on
14 the breach of contract claim for the reasons set forth
15 here today, primarily by Mr. Thompson.

16 The contribution and indemnification claim does not
17 apply as a cause of action under the circumstances of this
18 case. So we seek summary judgement on those claims as to
19 both defendants.

20 And finally, we seek summary judgement on the bad
21 faith claim against Nationwide because there was clearly a
22 reasonable basis for denial of the benefits on an expired
23 policy.

24 THE COURT: Thank you. Ms. Moon.

25 MS. MOON: Thank you. Yes. We have not filed a brief

1 in opposition to this. We got called to trial twice and
2 were picking battles as they came up. So if we could --
3 you know, if it becomes something that we need to brief,
4 then that is -- then -- that we are willing to do with the
5 Courts permission.

6 However, we are willing now to argue oral arguments
7 against the motions for summary judgment. An entry of
8 judgment in favor of the defendants Nationwide, in this
9 case, is inappropriate on the breach of contract claim
10 because their reasons for bringing up are that there is no
11 contract, and that the contract was not in place at the
12 time of the loss; therefore, they could not have breached
13 it.

14 We believe that there is issues of fact that are in
15 the record, contrary to what Nationwide's asserted, that
16 do put that in question.

17 THE COURT: And what's that evidence?

18 MS. MOON: Well, besides our motion to -- the --
19 there's a law about whether or not it was a proper non-
20 renewal. We have other theories of recovery in this case
21 that are supported by the evidence, such as, even if there
22 was an effective non-renewal, Nationwide effectively is
23 estopped from denying that they don't have -- didn't have
24 a claim because of their affirmative statements made to
25 GMA's -- representative GMAC that the policy would be

1 effective through the policy period of April, 2011 through
2 April, 2012. I believe that was -- and they even say with
3 the policy -- if -- there's a recording of this
4 conversation where they actually say what the policy
5 limits are, policy effective date; and that if premium is
6 paid, that that policy will be renewed.

7 THE COURT: Okay. And what -- and -- and I guess what
8 I'm looking for is where is that -- where is that
9 evidence? Where can I find that?

10 MS. MOON: We have -- we have been unable to get it so
11 far in the record to -- because of trying to get a witness
12 to come forward to testify about it with personal
13 knowledge of it.

14 Apparently, the Nationwide representative we were
15 told, who's on the call, no longer works for Nationwide
16 and their whereabouts are unknown.

17 We filed -- this gets into the next motion. But we
18 filed a 30(B)(6) deposition noticed in early November,
19 before we were called to trial the first time, and asked
20 for -- to be just -- had two issues that we asked for:
21 One being the payment that was made as a result of this
22 telephone call that, once again, we believe there evident
23 -- there's evidence in the record -- that's actually in
24 this record from the deposition that we did get, that
25 payment was made, payment was accepted; that's a question

1 of fact for the jury whether or not their putting it in,
2 crediting her account, leaving it in for a few days, and
3 then issuing a return check -- not to the mortgage company
4 that paid it, but to Ms. Grier, that was received, by her
5 testimony, after the fire in her home. She just received
6 this check, and didn't know what it was. Never been
7 cashed.

8 The premium's been paid; should probably still be in
9 the account actually.

10 She -- there's -- so that is obviously a question of
11 fact, and there is disputed -- there is conflicting
12 testimony that needs to be ferreted out by the jury.

13 Whether or not that acceptance of payment was an
14 immediate reinstatement of the insurance contract is
15 something that is also a question of fact; however, there
16 is case law that indicates that there's are -- that
17 acceptance of payment is a defense to renewal -- I mean,
18 non-renewals and cancellation.

19 THE COURT: You -- can you cite me to that case law?

20 MS. MOON: Let me find it.

21 (Brief pause.

22 MS. MOON: I'm sorry, Your Honor. Sarah Brown from my
23 office went to go meet somebody to pick up the deposition
24 transcript. So I'm one person short.

25 THE COURT: Well, I'll -- I'll give you the

1 opportunity to come back to that.

2 MS. MOON: Okay.

3 THE COURT: So are you -- I -- I'm -- I'm still a
4 little -- are you saying that there -- that there is a
5 witness or you have identified a witness who ---

6 MS. MOON: Of the recording. Sorry.

7 THE COURT: --- who either can identify or indicate
8 that the payment was made and accepted, or -- I understand
9 that Ms. Grier says that she received a check and she
10 didn't know what it was for.

11 MS. MOON: Uh-huh.

12 THE COURT: But is there -- or someone from GMAC who
13 had the conversation? I mean, is --

14 MS. MOON: We did -- did a deposition of Ms. Jeanette
15 -- Bauerle. And she was the -- a supervisor of the
16 department that had the authority to look at the payments
17 in and out of accounts, individual insurance accounts.

18 THE COURT: Is that from -- is that from Nationwide or
19 GMAC?

20 MS. MOON: That's from Nationwide.

21 THE COURT: And what's her last name?

22 MS. MOON: Bauerle?

23 MR. THOMPSON: Bauerle, Your Honor; B-a-u-e-r-l-e.

24 THE COURT: Okay. And her testimony is what?

25 MS. MOON: That the payment was -- that a payment was

1 made; couldn't tell from the. She couldn't tell why they
2 -- the recording -- and she said that she could testify as
3 to any personal knowledge of the recording. And she
4 wouldn't really say whether or not she thought that that
5 was a pavement in -- as a result of the conversation that
6 was had on the recording. She said the amount of -- the
7 payment was made, the amount of time that it was in the
8 account, and when it was sent back.

9 THE COURT: Okay. Yes, ma'am.

10 MS. MOON: Well, the recording -- like I said, we're
11 having a little bit of trouble trying to get the
12 depositions necessary to get it in -- is between a
13 representative of Balboa, which is -- has been bought in
14 the past year from -- by QBE First Insurance Company, who
15 is the party that has settled out with GMAC, which is why
16 they are not here.

17 They -- we have noticed their deposition, or have
18 attempted to notice her deposition, when we didn't get
19 called to trial last week. We had -- prior to that, like
20 I said, attempted to -- in our first 30(B)(6) notice to
21 Nationwide said that we wanted somebody to testify as to
22 the authenticity of the recording. Counsel for Nationwide
23 said that they were going to stipulate to the authenticity
24 and no witness was produced.

25 THE COURT: And the authenticity of what?

1 MS. MOON: I am not sure. I was not actually privy to
2 that conversation. This is what I have been told.

3 THE COURT: No. I'm saying what -- you were
4 requesting the -- someone ---

5 MS. MOON: We were requesting someone to testify as to
6 the recording, the way that it was worded. And so we still
7 needed someone to testify about authenticity before we
8 could amend the 30(B)(6) deposition notice.

9 Things got crazy, we got called to trial the Monday
10 that that deposition was supposed to be taking place. And
11 it just didn't work out that we were able to amend.

12 So we have since -- when we didn't get called to trial
13 two weeks ago, when -- looked like we weren't going to go
14 to trial, we filed another 30(B)(6) deposition notice,
15 which is what they have filed a motion for a protective
16 order regarding. That notice is more specific, but it is
17 entirely about the recording.

18 We've never seen the -- like I said, the person -- the
19 Nationwide representative no longer -- we've been told no
20 longer works for Nationwide and their whereabouts are
21 unknown.

22 We have gotten no other name of anyone with personal
23 knowledge. Everyone that we talked to with Nationwide, I
24 play the tape for, doesn't seem to be able to say anything
25 about it.

1 THE COURT: And do you have -- and you don't have a
2 transcript of the recording.

3 MS. MOON: No. But I have a disk.

4 THE COURT: And what do you claim the -- the evidence
5 -- the recording is?

6 MS. MOON: A representative from GMAC -- later found
7 out not to be actually GMAC, to be Balboa -- calling a
8 representative of Nationwide asking about two policies:
9 The first one is not relevant to this case; and the second
10 one is the policy that is relevant on Ms. Grier's
11 property. It's on March 11, you know, less than a month
12 before the fire, it -- saying "I'm checking on the -- the
13 GMAC representative, claiming their checking on the
14 renewal status of the policy. The Nationwide
15 representative says, "That policy is set for renewal at a
16 -- for the --" and they ask for the dates; and they
17 specify the dates for the upcoming year, which would be
18 within the coverage, within the loss period. They specify
19 the coverage amount on the dwelling, and they specify that
20 if the -- a certain premium's paid, that it will be
21 renewed.

22 THE COURT: And they gave a dollar amount of the
23 premium?

24 MS. MOON: Yes. And it matches exactly the dollar
25 amount that was -- showed up in Ms. Grier's insurance -- I

1 mean, Ms. Grier's section of her Nationwide account.

2 THE COURT: Okay. Yes, ma'am.

3 MS. MOON: So there is evidence that -- in this case
4 that at least there was -- if not -- if there even was a
5 proper non-renewal, which we claim there's not -- but even
6 if there was, that the policy was -- that Nationwide
7 waived its non-renewal by making statements that the
8 policy would be in place upon payment. And then payment
9 was made.

10 Therefore, we think that there is obvious -- there are
11 obvious facts that should all go in front of the jury that
12 need to be decided before the questions of law as to what
13 the reasonableness of their denial of the claim would be.

14 THE COURT: What -- okay. What about the allegations
15 as it relates to Ms. Parks?

16 MS. MOON: Ms. Parks -- we also think that summary
17 judgement is inappropriate for Ms. Parks at this time. We
18 think that there are facts in the record that a jury could
19 reasonably determine that there was a implied contract, or
20 one -- you know, as -- as has been stated previously.

21 Even though as a general rule an insurance agent has
22 no duty to advise an insured at the point of application,
23 absent an expressed or implied undertaking to do so, we
24 believe that there was at least evidence that Ms. Grier
25 thought that she was making a expressed or -- someone --

1 other people in her agency.

2 She'd been going to them for years, going directly to
3 -- there's testimony from her that she'd been going
4 directly to them and paying her premiums for her auto
5 insurance; that she was with the previous owner of the
6 agency.

7 There's just long-standing history of her going there
8 and a relationship with this agency that Parks inherited
9 and had -- was the owner of at the time of the ---

10 THE COURT: And so how does that give rise to a
11 contract that Ms. Parks had ---

12 MS. MOON: Well, Your Honor, according to *Carolina*
13 *Production Maintenance Incorporated*, which is citing
14 *Trotter*, that says there is an implied duty -- (as read):
15 "To determine whether implied duty is created, Courts
16 consider several factors including: Whether the agent
17 received consideration beyond a mere payment of premium;
18 the insured made a clear request for advice; or there is a
19 course of dealing, over an extended period of time, which
20 would put an objectively reasonable insurance agent on
21 notice that his advice was being sought and relied on."

22 We think that all of those things are in place here,
23 at least enough to get it in front of the jury.

24 THE COURT: And so what would be the contract?

25 MS. MOON: It would be an implied contract. We would

1 -- I mean, we have found that -- no expressed written
2 contract -- I mean, I will -- I would say this, it is not
3 the strongest argument that we have. We obviously -- the
4 same fact pattern is obviously a better argument under
5 negligence. We are not willing to give it up until we are
6 sure that we're going to get the negligence in.

7 THE COURT: Well -- but still, what's -- I mean -- I
8 guess I'm trying to figure out if there's a contract
9 between Ms. Parks and Ms. Grier, what's the basis of the
10 contract?

11 MS. MOON: Ms. Grier had been going to that agency and
12 paying her premiums. She felt like she had the
13 relationship. She testified that she thought that they
14 would call her and tell her when payments would be due,
15 what she needed to do to keep certain policies in place;
16 not just this one, other ones.

17 These were her -- this was her agency. She felt like
18 she had some sort of long-term contractual relationship;
19 they were looking out for her.

20 THE COURT: So what contract are you claiming was
21 breached?

22 MS. MOON: The implied -- just an implied contract
23 between her and that agency.

24 THE COURT: Okay. Let -- let's look at it from the
25 standpoint of what a jury would have to consider, or

1 better yet, what a judge would have to charge a jury.
2 When -- when you talk about contract and you talk about
3 breach of contract, you talk about the meeting of the
4 minds, you talk about the consideration; we talk about the
5 exchange of promises.

6 And so I guess I'm trying to figure out in -- in -- as
7 it relates to this particular case and these allegations,
8 what would be the terms of the contract that existed
9 between -- between Ms. Grier and Ms. Parks?

10 I understand that you're saying that there was a long-
11 standing relationship between the two of them, but -- in
12 that she had other policies with Ms. Parks's agency, the
13 insurance agency, but -- and she may have paid premiums;
14 but I understand -- from what I gather from you, she paid
15 her car insurance premiums to Ms. Parks, but -- but under
16 her mortgage, the -- the -- the -- the mortgage company or
17 the mortgage servicing company was escrowing those
18 payments and they were the ones who were paying on the
19 insurance policy as it related to the property.

20 So I guess I'm trying to figure out is what is that
21 contractual relationship and -- and what -- what were the
22 promises or exchange of promises, and what consider -- you
23 know, I understand that -- that you may -- that part of
24 you argument might be, you know, that -- you know, I had a
25 long-standing relationship and I wanted to continue to do

1 business with them. And -- and that was part of the
2 contractual relationship.

3 But I'm trying to relate in terms of the allegations
4 in this complaint what you're claiming was the contract
5 and the breach of the contract, as it relates between
6 Parks and Ms. Grier.

7 MS. MOON: Ms. Grier -- Ms. Grier had gone and
8 procured all the insurance that she had gotten over a --
9 and I don't have the exact date here -- but it was like a
10 10-year period. Her and her husband had started going
11 there, like I said, when the previous owner owned the
12 agency.

13 And that's -- they didn't automatically -- the
14 mortgage company didn't go out and procure this insurance
15 policy, it just happened to be the same agent that she
16 used. Her and her husband had gone and gotten it in 2006,
17 I believe, and the mortgage company ended up paying the
18 premiums through the escrow.

19 She was, at least, it may have been, you know, an
20 erroneous assumption, but she believed that she had been
21 going to this place and they were going to provide her
22 insurance for, you know, what she needed; and they would
23 help her find it, for all of her -- all of her insurance
24 needs. It wasn't just about this. She believed that she
25 had a -- kind of like -- some implied contractual

1 relationship with them, that they would help her stay
2 insured and find insurance.

3 I mean, she still sort of -- I mean, her -- she
4 laments having lost that; that she's no longer able to go
5 over there and ...

6 THE COURT: And so how does the bad faith relate to
7 Ms. Parks?

8 MS. MOON: Ms. Parks -- the elements of bad faith are
9 that there is a contract and there is a -- not -- a
10 refusal to pay and -- under the insurance policy. And I
11 would probably say that -- that, you know, we probably
12 amend our complaint to confirm the evidence that we don't
13 have a bad faith claim against Ms. Parks as far as bad
14 faith non-payment of insurance proceeds.

15 I'd also state that we're willing to amend the amended
16 complaint, if and when it gets granted, too, to conform
17 with the facts that have occurred in recent weeks that --
18 and do away with the indemnity and contribution claims as
19 well.

20 THE COURT: Okay. So basically, what you're saying,
21 as to Ms. Parks, there would not be any bad faith refusal
22 and would not be any indemnification and/or contribution.
23 But you're claiming that there are factual issues as it
24 relates to whether there was a contract between Ms. Parks
25 and Ms. Grier.

1 MS. MOON: Yes.

2 THE COURT: Would the same apply as to the indemnity
3 as to Nationwide?

4 MS. MOON: Your Honor, I think that we can't -- we'd
5 have a really hard time claiming it now that that has gone
6 away.

7 THE COURT: Okay. Okay. Anything further?

8 MS. MOON: Just that, you know, the majority of the
9 motions for summary judgement of theirs -- of Nationwide's
10 is premised on the fact that there was no insurance
11 contract at the time of loss, and really that's definitely
12 not a unquestionable premise.

13 And also that bad -- it starts -- as far as the bad
14 faith claim against Nationwide, we obviously believe there
15 was a mutually binding contract of insurance for reasons
16 stated previously in other motions. The refusal of the
17 insurer to pay benefits under the contract is obviously
18 dependent upon the questions as they are to whether or not
19 there's a contract in place.

20 THE COURT: And -- and let's just assume that we get
21 past the -- the contract issue. I mean, I understand that
22 the -- that -- but you have -- you have to show bad faith
23 refusal to pay benefits, right? So if there's -- if
24 there's a reasonable dispute, then it's not necessarily
25 bad faith.

1 And I -- and I understand your position that it was --
2 that there's at least disputed testimony as to whether or
3 not the contract should have been renewed, but if -- and
4 if the jury were -- if -- if the jury were to find that
5 the contract should have been renewed, then what's your
6 argument at that particular point?

7 MS. MOON: The third element is refusal resulted from
8 insurer's bad faith or unreasonable action and a breach of
9 an implied covenant of good faith and fair dealing. We
10 have -- the evidence in this case, on the record up to
11 this point, on a couple of questions that could be -- that
12 we think at least make it to the jury as to the
13 reasonableness of the actions of Nationwide.

14 The first one actually doesn't -- doesn't -- even if
15 you find there is not a contract at the time of the loss,
16 we think that we have at least a reasonable amount of
17 evidence to get in front of the jury the fact that there
18 was a bad faith non-renewal in this case; that they -- Ms.
19 Grier got a -- Ms. Grier will testify that she got
20 something in the mail, which they have discussed earlier,
21 that was returned and resulted in an inspection of her
22 home. That inspection took place after what the evidence
23 has shown would be at screen shots from Franklin Jeffries
24 saying "do not renew under any circumstances"

25 The time line that has come out of this just doesn't

1 add up. It looks weird and -- that's at least -- just the
2 time line of the fact that the -- that all of a sudden on
3 this screen shot it says "do not renew under any
4 circumstances," then an inspection comes out.

5 The inspection itself is, you know, what they're
6 relying on to say that the reason why they didn't renew is
7 -- you know, it sites leaves in gutters and --

8 THE COURT: Well, it's more than just leaves in
9 gutters.

10 MS. MOON: There's a -- there's a -- there is a litany
11 of things, I agree, none of which, by law, would affect
12 the risk enough to cancel under any circumstances; that
13 could be that -- that that could be the decision without -
14 - I mean, it's at least enough question of evidence to go
15 in front of the jury that they -- that there was -- that
16 it wasn't enough to all of a sudden just cancel this
17 insurance policy.

18 Then, their decision was made to cancel ---

19 THE COURT: Well ---

20 MS. MOON: --- and no letter was sent. We have
21 testimony from Franklin Jeffries that he drafted the
22 letter to Ms. Grier at issue here, saying what the issues
23 were and that she needed 30 days to fix or she was going
24 to not renew. But he drafted it 10 months and put it in
25 the system to be sent out in January. So there was a 10

1 month lag time where they were telling her -- giving her
2 time to do something, but not giving her the time.

3 At which point there's also testimony that Ms. Grier
4 had made certain repairs. There's strange testimony that
5 showed up at the end of Ms. Parks's deposition that she
6 had, at some point, been out to the house, looked at some
7 of the repairs that needed to be made, talked to Ms. Grier
8 about it, and -- but she doesn't -- my recollection of the
9 deposition testimony -- and I may as well look that up --
10 is that she did not know when that happened. She could
11 not say whether it happened the January when the notice
12 first came out; whether it happened in October, before the
13 notice came out. I -- I specifically asked her when that
14 was and she could not recall.

15 And at which point, you know, that -- that leaves a
16 question of fact: Was she there before or after Ms.
17 Grier's fixed these things? Was Nationwide under any sort
18 of knowledge that she had? You know, that is all
19 questions of fact that at least, you know, have a chance
20 to make in front of the jury, whether or not they
21 determine the credibility of the testimony, whether they
22 believe Ms. Parks or Ms. Grier is up to them.

23 THE COURT: Is there -- are you proposing expert
24 testimony as to ---

25 MS. MOON: No.

1 THE COURT: So how do you establish that any -- how do
2 you establish the information about the underwriting and
3 whether or not the repairs were such -- or the -- what
4 they claim were problems with the home that needed
5 attention before they would renew the policy would be
6 things that would not affect underwriting?

7 MS. MOON: And I agree that there is a slight -- you
8 know, because we don't have an expert, we don't have
9 anyone to say what -- you know, what industry standards
10 were and that sort of thing. However, we believe we don't
11 need an expert to say that if you tell somebody that they
12 have until -- up to their renewal period, you know, 30
13 days to fix this or 'they're not going to renew, you should
14 at least give them the time from when you make that
15 determination, and not wait nearly a year before you give
16 them 30 days to make that -- those repairs.

17 THE COURT: So what you're claiming is that even if --
18 she may have received notice in January about those items
19 and the policy didn't expire until March, you're claiming
20 that Nationwide was aware of that before January, long --
21 long before the letter was sent.

22 MS. MOON: Yes, Your Honor.

23 THE COURT: And they didn't -- they did not do
24 anything to notify her that repairs or anything along
25 those lines needed to be made.

1 MS. MOON: The testimony of Franklin Jeffries is he
2 drafted the letter as soon as he got the report and did
3 not send it. It was not sent til January. That was
4 April.

5 THE COURT: And he got the report when? He -- he
6 would have gotten the report ---

7 MS. MOON: I think it's April --

8 THE COURT: April, 2010?

9 MS. MOON: You going to have to excuse me, Your Honor.
10 I'm not -- we've split up witnesses. And I am not as
11 familiar with the dates on the exhibits for this witness
12 as I am some of the others.

13 (Brief pause.)

14 THE COURT: I think there's an affidavit that says
15 something about him creating the letter in April of 2010.

16 MS. MOON: Okay. That would be what I was just --

17 THE COURT: Okay.

18 MS. MOON: -- recalling as well. And that is without
19 question during -- you know, the -- the decision to renew
20 was obviously made when there was a contract. I don't
21 think that's the decision to non-renew. I don't think
22 that's a disputed fact here. But ---

23 THE COURT: Well, the decision to non-renew is always
24 during the contract period.

25 MS. MOON: Uh-huh. And you know, they -- it's --

1 there's at least reasonable evidence that there was a
2 action on the part of, you know, Nationwide
3 representatives with regard to the non-renewal decision
4 that breached, you know, covenants of -- implied covenants
5 of good faith and fair dealing.

6 And you know, we'd say with that one as well, that the
7 damages that were caused were by her inability to have the
8 time and the know-how to, you know, get around to
9 contacting and fixing and -- the area with -- is
10 definitely the cause of some of her issues, assuming that
11 it is found that no contract -- the non-renewal was
12 effective. There's just a lot of issues at play here.

13 And as -- as it occurs with the actual payment of the
14 claim, even -- so if it is determined that the contract --
15 as we've maintained that there was a contract, under some
16 theory that we're presenting, in place at the time of the
17 loss, the refusal to pay is just simply a refusal to pay.
18 It is -- that is contingent upon whether or not the
19 contract was in place. So that is not, you know,
20 dispositive of the fact that there's no bad faith claim
21 either.

22 As far as the refusal resulting from the insurer's bad
23 faith or unreasonable action and breach of an implied
24 covenant of good faith and fair dealing, you know, the --
25 it depends on what action we come in under. I mean, we

1 have -- obviously, if the motion for summary judgement
2 that we've filed on the notice to the agent, you know,
3 there is probably -- you know, we -- I really probably
4 don't have an argument as to the bad faith. We -- you
5 know, we'll have to get that in front of the jury.

6 But assuming that we're coming in under policy --
7 Nationwide made statements the policy was reinstated,
8 accepted the payment, and then sent it back, those are all
9 actions that a jury can reasonably determine, you know,
10 were a breaching of good faith and fair dealing; again,
11 breaching, you know, the contract and cancelling and that
12 event as well.

13 And obviously, the damages caused by that would be the
14 loss of her property, inability to build, rebuild, or you
15 know, all the personal property that she's lost. There's
16 all -- going to be evidence of all of the damages, of
17 course.

18 You know, bad faith is based on a standard of
19 reasonableness, and you know, it takes pretty strong facts
20 that that -- and you get to -- be taken away from the jury
21 -- the determination of what is reasonable actions, to
22 take that away from the jury takes something that is more
23 undisputed than we have here.

24 There's a lot of things that are up in the air, and I
25 just don't think that you can decide as a matter of law

1 that there is not a reasonable -- one of the causes of
2 action or issues aren't reasonable.

3 THE COURT: All right. Thank you. Any reply, Ms.
4 Williams?

5 MS. WILLIAMS: Yes, Your Honor. There's no issue of
6 fact regarding a contract with Tonya Parks here because
7 Parks and the plaintiff herself have both admitted that
8 they had not contract. A relationship does not create a
9 contract. They both admitted there is no contract.
10 They've not -- nobody's produced a contract, and so we
11 can't now, in court, try to create a contract when the
12 plaintiff herself says there's no contract.

13 THE COURT: And -- and to what information are you
14 relying to support that?

15 MS. WILLIAMS: That is also in our motion and memo.
16 There is -- we've cited specifically to the deposition
17 testimony from the plaintiff. It's also set forth in an
18 exhibit -- well --

19 (Mr. Thompson confers with Ms. Williams.)

20 MS. WILLIAMS: We asked her -- this is in our summary
21 judgement: "Do you have a contract with Tonya Parks as
22 opposed to Nationwide Insurance?"

23 "I'm going to say no. I'm going to say no."

24 And then Parks testified: "Do you have a contract
25 with Chartreuse Grier?"

1 "No."

2 "Have you ever had any kind of contract with
3 Chartrease Grier?"

4 "No."

5 So as to the breach of contract claim against Tonya
6 Parks, there's -- there's -- the elements are just not
7 there. There is just no contract.

8 And again, we can't create a contract in court by
9 saying they had a relationship. If that's the case, we'd
10 all find ourselves subject to various contracts that we
11 might not have agreed to just because we have
12 relationships with individuals or businesses.

13 As to the bad faith claim, while counsel has set forth
14 a lot of questions of fact, those all related to what has
15 been described as bad faith non-renewal. There's no such
16 thing in South Carolina. There's no cause of action for
17 bad faith non-renewal.

18 Looking at why the renewal was -- occurred, you know,
19 why the decision to non-renew, looking at when it
20 occurred, which Franklin Jeffries -- while counsel does
21 admit she was not privy to his deposition, he does explain
22 clearly the process and procedure, and why the inspection
23 occurred at one point and the notice did not go out until
24 later; and that's because the inspection occurred right
25 after the last renewal period. The notice went out in

1 compliance with South Carolina law, under any statute, 60
2 days and you set forth the reasons for the non-renewal.

3 So the statutory laws of South Carolina says you get
4 60 days, and they can tell you -- they can list 100
5 reasons for non-renewal, and if you can fix them in 60
6 days, then that's what you can do.

7 Chartrease Grier cannot now come and say, well, I'm
8 above the law, and I get special concessions. I need more
9 than 60 days.

10 None the less, that all speaks to a bad faith claim of
11 non-renewal, and there's no such cause of action in South
12 Carolina. It's a bad faith refusal to pay the benefits,
13 and that is what we must look at. And the standard is
14 whether or not there was a reasonable basis for denial of
15 the claim.

16 THE COURT: Well, wouldn't that be some -- maybe not
17 as to the bad faith, but wouldn't that be some evidence of
18 the -- the breach of contract that -- that Nationwide,
19 knowing that, you know, for a period of time in excess of
20 eight or nine months, that there were problems with the
21 home but they chose not to notify her of the -- you know,
22 even though it may be within the statute, they chose not
23 to notify her; and then waited within 60 days to tell her
24 that, you know, you've got 60 days to fix all this. And
25 with the idea that they would be able to terminate the

1 contract because of that, because I've given her the
2 opportunity to -- to -- to -- adequate opportunity to fix.

3 MS. WILLIAMS: No. I don't think that speaks to
4 breach of contract. First of all -- two reasons: One, at
5 the time that the decision was made to non-renew, that's
6 when the agent was first notified as well that the
7 contract was non-renewed.

8 Second, the contract was for a definitive period of
9 time. There is no "you automatically renew your contract;
10 you automatically get contract with this -- this person."
11 If the risks change, then you don't have to renew the
12 contract.

13 So it doesn't speak to breach of contract that they
14 knew, and waited to comply with the statute and send
15 notice. If that -- that's the case, then we'd all be
16 searching behind our contracts to find out exactly when
17 did you know you were going to non-renew or when did you
18 know there was an issue on my property.

19 Because she was given an allotted amount of time to
20 remedy it. And the -- and the notice says, "If you remedy
21 this, you know, provide us with notice and we may consider
22 renewing." So that wasn't even, you know, necessarily a
23 guarantee of renewal.

24 But that does not speak to breach of contract, again
25 because the statutes require that for non-renewal, the

1 notice must be sent according to the statute. It does not
2 say, you know, the minute you decide to non-renew you have
3 to notify them. It doesn't say, you know, if you learn of
4 a hazard or risk, at some point in time, you have to
5 notify them. It says in order to non-renew a contract,
6 you must send notice to the insured and the notice must
7 contain these things and the notice must go out within
8 this time frame.

9 But aside from the breach of contract, none of this
10 supports a claim for -- for bad faith. And there are not
11 facts to -- at -- at issue to go before the jury. None
12 have been presented in motion; none were presented today.

13 Today we were talking about whether or not they should
14 have even decided to non-renew. Again, there's no cause
15 of action for bad faith non-renewal. The cause of action
16 is for bad faith refusal to pay benefits, and that cause
17 of action can only arise when -- when a refusal to pay
18 benefits occurs, not for some reason preceding that where
19 -- if the company decides to not renew and why they decide
20 to do that.

21 And again, as counsel has said, she's not familiar
22 with Franklin Jeffries deposition, and he does clearly and
23 explicitly explain in detail how it worked for this
24 particular case and how it works in every case; and that
25 this plaintiff was simply not singled out ---

1 THE COURT: Uh-huh.

2 MS. WILLIAMS: --- or treated differently than other
3 insureds.

4 In addition, there was conversation -- argument
5 regarding the -- a telephone call between third-party
6 Balboa and Nationwide. And while that -- well, quite
7 frankly, that is not -- they could have talked a long
8 time, but so long as they were not acting as her agent,
9 they can't contract on her behalf.

10 As a -- in the law -- as a matter of law, it's not
11 possible for GMAC to create a contract between Grier and
12 Nationwide. A third party can only create a contract for
13 someone else if that third party's that person's agent, if
14 the agent's been given authority to create or renew a
15 contract.

16 That did not occur here. GMAC was not acting as the
17 plaintiff's agent. GMAC explicitly admits in discovery
18 requests that they were in no form or fashion acting as
19 agent.

20 Several jurisdictions have rejected a proposition that
21 mortgage lender or its servicer are an agent for the
22 borrower. These jurisdictions really say that the
23 relationship is more adversarial than fiduciary is. I
24 mean, that's what got us all here to start off with is
25 they were suing her for defaulting on her mortgage. It's

1 an adversarial relationship, not a fiduciary relationship.

2 And even when a mortgage company is allowed to pay for
3 services with funds from the borrowers escrow account,
4 that does not mean that the mortgage company is the
5 borrower's agent; and it does not give the mortgage
6 company authority to create or renew a contract for the
7 borrower.

8 THE COURT: Is that case law?

9 MS. WILLIAMS: That is a case from the Eleventh
10 Circuit. And I have a pocket brief -- that we weren't
11 necessarily prepared to use today -- but I have a copy for
12 you on that issue I'm happy to hand up to the Court, and
13 we have a copy -- we have some copies for opposing counsel
14 that lists out why a mortgage company is not the agent for
15 --

16 (The Court and Ms. Williams speak simultaneously.)

17 THE COURT: Is ---

18 MS. WILLIAMS: -- the borrower.

19 THE COURT: Is that case cited in the brief or is that
20 cited --

21 MS. WILLIAMS: Yes, it is.

22 THE COURT: It's cited separately from what's in your
23 ---

24 MS. WILLIAMS: That's right. This -- this was a --
25 this is -- I have it in my hand and we have copies here.

1 It's a pocket brief.

2 THE COURT: Okay.

3 MS. WILLIAMS: Just this ---

4 THE COURT: Well, just -- just give me the case cite
5 that you're relying on.

6 MS. WILLIAMS: Certainly.

7 THE COURT: Was there any South Carolina case or
8 Fourth Circuit case?

9 MS. WILLIAMS: No, there were not. We did not have
10 South Carolina cases or Fourth Circuit cases that directly
11 address the mortgage servicer issue.

12 But we do have the fourth -- South Carolina general
13 cases regarding relationship and -- I'm sorry, not
14 relationship -- the agency relationship. And so that --
15 you just can't -- an agency relationship must -- you know,
16 in order to establish that relationship, the agent must
17 represent the principle; and there must be an
18 understanding to perform acts in his name and on his
19 behalf.

20 So essentially, you know -- and I just thought about
21 this from a practical perspective: I have a contract with
22 an insurance company and I pay my escrow into my mortgage
23 company. My mortgage company can't call up -- say my
24 contract is for six months. They can't call up just
25 because I pay escrow and say, "We want to change that to

1 12 months."

2 They're not a party to this contract. They don't get
3 a right to do that. That third party can't call and
4 change or renew or contract on my behalf. I'm simply
5 paying money through them and that money is, like,
6 funneled; and it's basically a design to help people
7 spread their payments out so they don't have to pay all
8 that money at the same time.

9 But they have no -- they're not my agent. They can't
10 contract on my behalf, and in this particular situation,
11 GMAC was not Chartreuse Grier's agent. They couldn't
12 contract on her behalf, and before they dismissed their
13 claim, we have the discovery responses in which they say -
14 - we asked six different ways: Are you her agent or you
15 ask -- your agent? And they said absolutely not.

16 There's no agency relationship between your mortgage
17 company or mortgage servicer and -- and you, unless you
18 specifically get into that.

19 And so South Carolina cases that talk about agency --
20 *City of Greenville vs. Washington American League Baseball*
21 *Club*. It's 205 SC 495. And then South Carolina
22 jurisprudence on agency -- 23 SC Jurist, Agency, Section 9
23 -- also addresses that (as read): "A party asserting
24 agency as a basis for liability, has the burden of proving
25 the existence of the agency."

1 The case that I was referring to from the Eleventh
2 Circuit is the *Telfair vs. First Union Mortgage*
3 *Corporation* case. And that's at 216 F 3rd 1333.

4 And in that case, the -- the *Telfair* Court explained
5 that the lender's administration of the borrower's escrow
6 account did not create an agency relationship.

7 Moreover -- again, I know we just briefly touched
8 these issues, and so I'll briefly touch and step back out
9 of them. There were -- talk about the telephone call
10 between GMAC and Nationwide and there were actually two
11 telephone calls. And in the first telephone call, they
12 called to confirm what they received in the mail, which
13 was notice of non-renewal. And GMA -- and Nationwide at
14 that time did in fact confirm.

15 The second telephone call they called to check a
16 number of policies, and they say -- you know, it's -- they
17 essentially were just asking the addresses, the premium
18 amounts, and that sort of thing. And the Nationwide
19 person does say, "yes, yes, yes, yes, yes," as they're
20 checking those things off.

21 However, again, that does not enter into a contract.
22 There was no, okay, so if we send you a premium on behalf
23 of Ms. Parks -- I mean, the plaintiff, she has given us
24 permission to enter a new contract with you. None of that
25 occurred. None of the things that are necessary to create

1 a contract were established in that phone call.

2 And moreover, I mean, it's obvious that Balboa has now
3 retroactively placed a policy of insurance for that time,
4 and usually force-placed insurance comes into play when no
5 policy of insurance exists. And they have now force-placed
6 policy, retroactive to that time, to cover the dwelling.

7 THE COURT: Okay.

8 MS. WILLIAMS: Thank you.

9 THE COURT: Very briefly, yes, ma'am.

10 MS. MOON: Okay. The conversation between Nationwide
11 and the GMAC/Balboa representative -- you know, it is not
12 only -- you know, I -- I think it is a question of fact
13 when anyone listens to it, whether or not it says, yes,
14 pay this and we're going to non-renew, but that is what
15 our listening to it is. You know, other people might
16 think differently, but that's the question of fact.

17 The conversation also is -- at least brings up a
18 question of fact of Nationwide's belief in its own
19 effectiveness of its non-renewal. A Nationwide
20 representative is giving the policy effective period
21 saying it will renew for the next year.

22 You know, the agency -- you know, whether or not Ms. -
23 - GMAC had the authority to bind anyone is also going to
24 be an issue that is a question of fact. The -- however,
25 the existence of a payment -- the fact that the payment

1 was made is -- is a fact -- there -- evidence in that
2 payment was made as a result of this phone conversation.
3 It went through the account -- however briefly, for a few
4 days it was there -- and returned to Ms. Grier.

5 Nationwide returned the payment to Ms. Grier when the
6 evidence is that she did not make it, that it was made
7 pursuant to this telephone conversation; which is a
8 question of fact as to whether Nationwide believed that
9 this -- had the authority to bind Ms. Grier and whether
10 she would -- being -- her being the one that received the
11 return payment instead of the mortgage company.

12 A couple of cases that I come across in my notes are
13 *Hoard vs. Roper Hospital, Incorporated*, 377 South Carolina
14 503, Court of Appeals -- South Carolina Court of Appeals
15 2008. There was a verbal agreement to renew, and the
16 evidentiary -- it was enough evidence that could be put in
17 front of a jury.

18 THE COURT: All right. Thank you. I will take some
19 time to read through these.

20 I'm not going to talk about the protective order more
21 at this particular point. I'll wait until such time as I
22 decide some of these other issues. It may or may not
23 become moot, depending on what I do with some of the other
24 ones.

25 But if -- if there's the basis to go ahead and

1 schedule it, I'll -- I'll notify the clerk's office to go
2 -- to -- to put it on the roster.

3 And so this case will be continued for a little while,
4 and Judge Barber's aware of the fact that there were a
5 number of motions that I was hearing, and -- and that this
6 would not be coming up for trial this week. So he's aware
7 of that.

8 But I'll just defer that -- I'll just defer that
9 30(B)-- I guess it's the motion for protective order on
10 the 30(B)(6) of Nationwide.

11 MS. MOON: Your Honor, do you have any idea about how
12 long it will be continued.

13 THE COURT: No. I -- to be honest, I don't. There's
14 an awful lot for me to comb through.

15 MS. MOON: Uh-huh.

16 THE COURT: And I understand the interplay between
17 them. So one is necessarily going to decide some of the
18 issues on the other, and I'll -- I'll do it as quickly as
19 I can, but I honestly, I can't tell you it's going to be
20 next week. I know the week after next week I do non-jury
21 again. I have a whole week of non-jury, so ...

22 And it -- and it may end up being that maybe -- you
23 know, depending on when I review it and go through it, I
24 might just ask you to argue the -- the 30(B)(6) at a later
25 point. Maybe if I've got a slot sometime that week,

1 whatever that week is. . It'll be the week of December
2 10th.

3 But I'll -- I'll put in there that I've got several
4 motions under advisement. And so it may -- it -- I don't
5 know that it will come back up on the roster. It might.
6 But it'll -- I'll notify the clerk's office that I have
7 motions under advisement -- substantive motions under
8 advisement.

9 MR. THOMPSON: Thank you, Your Honor.

10 MS. MOON: Thank you, Your Honor.

11 THE COURT: Yeah. And of course, if I decide to amend
12 the -- the complaint, then there'll be additional time.
13 It'll come off the trial roster. So it should come off
14 the trial roster, but I'll -- I'll -- I'll try to look at
15 -- I'll probably look at that one first, and then go to
16 the rest of it.

17 MS. WILLIAMS: Thank you, Your Honor.

18 MS. MOON: Thank you, Your Honor.

19 MS. WILLIAMS: I know it was a lot to listen to today.

20 THE COURT: Yeah. I was -- I was ---

21 MS. WILLIAMS: We appreciate you taking up these ---

22 THE COURT: I wasn't thrilled when I picked up the
23 roster and saw -- picked up the file and saw all these
24 motions. And I was like

25 MS. WILLIAMS: It appears that there was a clerical

1 error and the case was put on the Master's, even though
2 there was no order of reference. And so --

3 THE COURT: Well, usually most foreclosures end up
4 going to the Master's.

5 MS. WILLIAMS: Exactly.

6 THE COURT: So that's why.

7 MS. WILLIAMS: But -- but -- it makes sense, but when
8 we realized, we kept saying, "Why aren't our motions
9 getting heard?"

10 THE COURT: Yeah. Uh-huh.

11 MS. WILLIAMS: That's when we popped up on the trial
12 roster ---

13 THE COURT: That's why I try to -- I tried to go
14 through as many of them as I could. So -- but I -- I'll
15 get back with you as quickly as I can.

16 MS. WILLIAMS: Thank you.

17 THE COURT: Thank you.

18 MS. WILLIAMS: We appreciate your ---

19 THE COURT: Thank you. I appreciate it.

20 MR. THOMPSON: Thank you, Your Honor.

21 THE COURT: Appreciate your patience, too.

22

23

-- END OF TRANSCRIPT RECORD

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, and to the best of my ability, in the Fifth Circuit Court, for Richland County, South Carolina, on the 28th day of November, 2012.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

Bonnie H. Kelly, CVR
Official Court Reporter

Columbia, South Carolina

January 23, 2014