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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, Presiding Judge

TONIA D. WILLIAMS, MARION B.)
SMALLS, T.W. by his Guardians)
Ad Lite, TONIA D. WILLIAMS and)
CHARLES WILLIAMS and S.S. by)
Her Guardian ad Litem,)
RITA SHAW,)

Appellants.)

v.)

GEICO CASUALTY COMPANY,)
GEICO INDEMNITY COMPANY,)
GOVERNMENT EMPLOYEES)
INSURANCE COMPANY, GEICO)
GENERAL INSURANCE COMPANY,)

Respondents.)

Case Number: 09-CP-27-00639

APPELLATE CASE NUMBER
2013-002645

AMENDED RECORD ON APPEAL


R. THAYER RIVERS, JR.
Post Office Box 668
Ridgeland, South Carolina 29936
(843) 726-8136

Attorney for the Appellants

E. Mitchell Griffith, Esquire
Kelly D. Dean, Esquire
Griffith Sharp & Liipfert, LLC
Post Office Drawer 570
Beaufort, South Carolina 29901-0570

15/ Harry C Brown Sr

HARRY C. BROWN, SR.

Post Office Box 824

Ridgeland, South Carolina 29936

843-726-7920

15/ Clifford Bush III

CLIFFORD BUSH, III

28 Old Jericho Road

Beaufort, SC 29906

843-379-9500

Attorneys for the Appellants

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Law Office of R. Thayer Rivers, Jr.

A handwritten signature in cursive script, appearing to read "R. Thayer Rivers, Jr.", written over a horizontal line.

R. THAYER RIVERS, JR.
Post Office Box 668
Ridgeland, South Carolina 29936
(843) 726-8136

Attorney for the Appellants

Ridgeland, South Carolina,
May 18, 2015.

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARION B. SMALLS,

Plaintiff,

vs.

EARL MARTIN, GEICO CASUALTY
COMPANY, GEICO INDEMNITY
COMPANY, GOVERNMENT EMPLOYEES
INSURANCE COMPANY, GEICO
GENERAL INSURANCE COMPANY,

Defendants.

TONIA D. WILLIAMS,

Plaintiff,

vs.

EARL MARTIN, GEICO CASUALTY
COMPANY, GEICO INDEMNITY
COMPANY, GOVERNMENT EMPLOYEES
INSURANCE COMPANY, GEICO
GENERAL INSURANCE COMPANY,

Defendants.

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S ~~SHAW~~ by her Guardian
Ad Litem, RITA SHAW,

Plaintiff,

vs.

EARL MARTIN, GEICO CASUALTY
COMPANY, GEICO INDEMNITY
COMPANY, GOVERNMENT EMPLOYEES
INSURANCE COMPANY, GEICO
GENERAL INSURANCE COMPANY,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 09-CP-27-639

ORDER DENYING PLAINTIFFS'
MOTION TO RECONSIDER

CIVIL ACTION NO. 09-CP-27-638

FILED
2010 SEP 23 AM 9:22
MARSHALL BOSHICK
CLERK OF COURT
JASPER COUNTY SC

CIVIL ACTION NO. 09-CP-27-647

T. [REDACTED] BY HIS
GUARDIANS AD LITEM TONIA D.
WILLIAMS AND CHARLES WILLIAMS,

Plaintiff,

vs.

EARL MARTIN, GEICO CASUALTY
COMPANY, GEICO INDEMNITY
COMPANY, GOVERNMENT EMPLOYEES
INSURANCE COMPANY, GEICO
GENERAL INSURANCE COMPANY,

Defendants.

CIVIL ACTION NO. 09-CP-27-645

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The Plaintiffs listed above have moved to reconsider the severance of the claims against the Defendant Earl Martin and against the Defendants Geico Casualty Company, Geico Indemnity Company, Government Employees Insurance Company, Geico General Insurance Company (hereinafter collectively "Geico") pursuant to Rule 20, SCRCP.

A hearing was held before me on the Defendants' motion to sever on June 9, 2010. Present were O. Edworth Liipfert, III, attorney for Geico, Christopher W. Nickels, attorney for Earl Martin, and Harry C. Brown, Sr., attorney for the Plaintiffs.

At the hearing, the Defendant Geico argued that the cases should be severed pursuant to Rule 20(a), SCRCP, on the grounds that the alleged liability of Geico and that of Defendant Martin arise from two separate occurrences. Rule 20(a) Provides, "All persons may be joined as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect or arising out of any the same transaction, occurrence, or series of transactions or occurrences and if any question of law

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or fact common to all defendants will arise in the action." The Defendant Earl Martin is alleged to have negligently caused the Plaintiff's damages by running a stop sign or failing to yield the right of way arising from a automobile accident on October 2, 2006. Geico argues that it could not possibly have any liability for this accident, and whether or not the Defendant Martin was negligent does not have anything to do with the case against Geico. The Plaintiffs have alleged that Geico disposed of the vehicles in which the Plaintiff was traveling without notifying them on January 23, 2007. The Plaintiffs allege that this action was a breach of contract, negligent, grossly negligent, and a violation of the South Carolina Unfair Trade Practices Act because it hindered the Plaintiff's ability to bring a products liability case in this matter. The Defendants argue that disposal of the vehicle constitutes a separate occurrence for which the Defendant Martin has no responsibility. The Defendants rely on two cases for this position. In the case of Chan v. Thompson, the Plaintiff Chan owned an artificial flower manufacturer and the Defendant Thompson was a distributor of the Plaintiff's artificial flowers. A dispute arose between the parties as to whether the Defendant was to be the Plaintiff's exclusive flower distributor, and the Defendant moved to bring into the suit as counter-Defendants other companies owned by the Plaintiff Chan on the grounds that the companies were created to distribute artificial flowers to undermine the alleged exclusive distributor contract. Chan v. Thompson, 302 S.C. 285, 395 S.E.2d 731 (Ct. App. 1990). In this case, the court allowed

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the additional parties to be joined, holding "there is some evidence these companies were set up by the Cans and utilized to channel sales away from [one of the Plaintiff companies] in such a way as to deprive the Thompsons of sales commissions. Permissive joinder was proper." See id. at 291, 735. It is clear from this case that the actions of the other defendants all arose out of the same series of occurrences related to the violation of the exclusive contract. In another South Carolina Court of Appeals case, Valentine v. Davis, the court refused to allow the permissive joinder of a party where two Plaintiffs brought an action against one Defendant based on separate occurrences and a third Plaintiff sought to bring another case against the same Defendant. While it is likely that common facts about the Defendant would be in play in that case, the court found that the claims of the individuals had nothing to do with each other, and therefore were not arising out of a series of occurrences. See id. at 172, 220. The Defendants argue that the case at issue is closer to the Valentine situation. The actions of the two Defendants that may lead to liability are separate and wholly unrelated to each other, like the different occurrences done to each of the Plaintiffs in Valentine, and unlike the series of actions done by related parties in the Chan case. Therefore, the Defendants argue, permissive joinder of the two Defendants for unrelated occurrences is improper and the actions against the two Defendants should properly be severed.

The Defendants argued that in the alternative, there is a substantial likelihood of witness confusion should these cases be

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tried together, and the cases should properly be severed pursuant to Rule 20(b), SCRCF Rule 20(b) provides, "The Court... may order separate trials to prevent delay of prejudice." A substantial likelihood of jury confusion exists for several reasons if the various claims of the two defendants are not severed. First, the insurance of the Defendant driver is not admissible in a tort action in South Carolina. While the Plaintiffs correctly point out that the Geico is a policy of the Plaintiff driver and not the insured, UIM insurance is a confusing area of the law and the jury may well impute the driver's liability to Geico, as it is a car insurance company. The chance of jury confusion also exists given that there are two distinct sets of elements to be proved against each of the Defendants, and multiple causes of action against Geico, including breach of contract, gross negligence with a prayer for punitive damages, and an alleged violation of the South Carolina Unfair Trade Practices Act. Proof of spoliation of the chance to bring a products liability case may also include products experts, which is also factually confusing, and to join the car accident Defendant to all of this will unnecessarily complicate matters further. Therefore, the Court hereby finds that the cases should properly be severed pursuant to Rule 20(b), SCRCF, to avoid jury confusion and prejudice to the Defendants.

The Plaintiffs argued in their motion to reconsider that the events arise out of the same occurrence, the automobile accident that caused the Plaintiffs' damages, and so the cases should properly be brought together. The Plaintiffs rely on United Mine

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Workers of America v. Gibbs for this argument, which holds that Rule 20 must be interpreted to allow for the "broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties, and remedies is strongly encouraged." United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130 (1966). The Plaintiffs argue that the upon the Defendant Martin's motion, the claims of all of the Plaintiffs were consolidated. The Plaintiffs raise in their motion to reconsider that this case is like bringing a products liability case and negligence action out of the same accident together. While it is admitted that this is commonplace in South Carolina, this is significantly different from the case at hand. In the Plaintiffs' example, both the product liability case and the negligence case arise out of one occurrence, the accident. In the case at hand, the accident itself does not trigger any liability on the part of Geico. A separate occurrence, the disposal of the vehicle at a later date, is the only occurrence that can trigger liability for Geico, and Mr. Martin has nothing to do with this event. Therefore, unlike the Plaintiffs' example, there are two distinct occurrences in the case at hand.

In their motion to reconsider, the Plaintiffs have raised that conducting discovery in two cases will be a expensive burden to place upon them. The Court minimized the burden by ordering the discovery taken in one case should apply to both cases. The Plaintiff now argues that if Geico removes its case to Federal Court, all discovery will have to be duplicated. This is not correct. Both Defendants consented at the motion to sever to

conducting joint discovery, and while state court rulings in cases that are later removed are not binding, they are "to be treated with respect." Resolution Trust Corp. v. Palmetto Fort of Mt. Pleasant, 831 F.Supp. 510, 512 (D.S.C. 1993). Absent any objection from either Defendant, there is no reason the Federal Court would not allow the discovery to apply to both actions.

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Having heard arguments of all parties, I hereby deny the Plaintiffs' motion to reconsider. There are two distinct occurrences here. The Defendant Martin's occurrence was allegedly causing the accident, and the Defendant Geico's was allegedly disposing of the vehicle after the accident. The two Defendants have no potential liability in common. This differs from a products case and a negligence case arising from the same accident because there are two distinct occurrences in this case. I also find in this case, the possibility for jury confusion from the introduction of insurance and from having to decide two different actions, one of which, the spoliation case, is complex enough by itself, creates too great a risk of prejudice to the Defendants if the cases were to remain joined. The Defendants have consented to conduct discovery jointly, and the potential removal of one case to Federal Court should not alter the parties' ability to conduct joint discovery. To the extent that the Plaintiff may have to call some of the same damages witnesses live at trial, the court hereby finds that this burden does not outweigh the risk of prejudice to the Defendants if the cases are tried together.

AND SO,

IT IS HEREBY ORDERED that the Plaintiffs' motion for reconsideration is hereby denied;

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'Perry M. Buckner', is written over a horizontal line.

Judge Perry M. Buckner
Presiding Judge
Fourteen Judicial Circuit
Walterboro, South Carolina

September 20, 2010

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

Tonia D. Williams; Marion B. Smalls;
T. W., by his Guardians ad
Litem Tonia D. Williams and Charles
Williams; and S. S., by her
Guardian ad Litem Rita Shaw,

PLAINTIFFS,

v.

GEICO Casualty Company, GEICO
Indemnity Company, Government
Employees Insurance Company, and
GEICO General Insurance Company,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009-CP-27-00639

Order

2012 MAR 19 AM 10:05
MARGARET BOSSICK
CLERK OF COURT
JASPER COUNTY SC

FILED

This matter is before the Court on the Motion for Summary Judgment of the Defendants GEICO Casualty Company, GEICO Indemnity Company, Government Employees Insurance Company, and GEICO General Insurance Company (collectively "GEICO") on the grounds that the Plaintiffs' claims against GEICO form a general claim of negligent third-party spoliation of evidence, which is not a viable cause of action in South Carolina. GEICO also asserts that it is entitled to summary judgment on the Plaintiffs' specific causes of action for breach of contract, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), negligence, and gross negligence because (1) an enforceable contract did not exist between the Plaintiffs and GEICO; (2) SCUTPA does not apply to trade practices in the business of insurance; and (3) GEICO did not owe the Plaintiffs a legal duty of care and the Plaintiffs have not demonstrated that they suffered any damages. This motion is granted.

POSTED
3.21.12

Facts and Procedural History

The relevant facts are not in dispute.

On October 2, 2006, Plaintiffs Tonia D. Williams ("Williams"), Marion B. Smalls, T. W. and S. S. (collectively "the Plaintiffs"), were traveling in Williams' 1998 Ford Explorer in Jasper County, South Carolina, when they were involved in an accident with Earl Martin ("Martin"). Betty Mitchell Clark ("Clark") was also a passenger in the Explorer. The Explorer was insured by GEICO.

On October 6, 2006, the Plaintiffs' attorney wrote a letter to GEICO demanding that they retain possession of the Explorer for a potential products liability suit against Ford. The Plaintiffs did not provide any consideration for this demand.

The Explorer was a total loss, so on or about October 18, 2006, Williams conveyed the title to GEICO and accepted the collision coverage, and GEICO took possession of the Explorer. GEICO retained possession of the Explorer for several months, but then sold it to a salvage yard in January 2007. By March 2007, GEICO had repurchased the Explorer. It was in the same condition as it was before it was sold to the salvage yard, with the exception of three tires and wheels that had been removed, and, according to the Plaintiffs, the rear window. GEICO is still in possession of the Explorer, even though the accident happened more than 5 years ago and the Plaintiffs have not had an expert inspect or request to inspect the Explorer.

Despite the Explorer being in the salvage yard for a brief period, Clark, the other passenger in the Explorer, brought a products liability action, Civil Action No. 2006-CP-27-00442, against Ford regarding alleged defects in the Explorer. Darrell Thomas

Johnson represented her in that matter. The parties completed discovery and the case settled shortly before trial.

On September 29, 2009, the Plaintiffs each filed individual actions against Martin and GEICO. The claims against Martin were for his alleged negligence regarding the accident. The claims against GEICO were for breach of contract, unfair trade practices, negligence, and gross negligence, all regarding GEICO's sale and repurchase of the Explorer to the salvage yard.

Martin and GEICO answered, and by motion filed April 16, 2010, GEICO moved to sever the actions against Martin from the actions against GEICO. By order filed June 28, 2010, Judge Buckner granted GEICO's motion to sever.

On July 2, 2010, the Plaintiffs filed a motion to reconsider. On July 13, 2010, GEICO removed the action to federal court. On July 23, 2010, the Plaintiffs filed a motion to remand, which Judge Gergel granted in an order filed September 8, 2010.

After returning to state court, Judge Buckner denied the Plaintiffs' motion to reconsider in an order dated September 20, 2010. On September 22, 2010, GEICO mailed Judge Buckner's signed order to the Jasper County Clerk of Court for filing, and filed a notice of removal. On September 23, 2010, Judge Buckner's order was filed by the Jasper County Clerk of Court. Also on that date, the Plaintiffs filed a notice of appeal in state court and a motion to remand in federal court.

Judge Gergel granted the Plaintiffs' motion to remand in an order filed December 15, 2010. The Plaintiffs' appeal was dismissed on May 3, 2011, and was remitted to Jasper County on June 23, 2011.

Standard of Review

“[A] motion for summary judgment shall be granted ‘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.’” Media Gen. Commc’ns, Inc. v. S.C. Dep’t of Revenue, 388 S.C. 138, 144, 694 S.E.2d 525, 527 (2010) (quoting Rule 56(c), SCRPC). “In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” Quail Hill, LLC v. County of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted).

Analysis

I. Spoliation

The Plaintiffs’ cause of action against GEICO form a general claim of negligent third-party spoliation of evidence, which is not a viable cause of action in South Carolina. See Cole Vision Corp. v. Hobbs, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011). In Cole Vision, Hobbs, an optometrist, leased space from Cole Vision. Id. at 146, 714 S.E.2d at 538. In the parties’ lease, they agreed that Hobbs would indemnify Cole Vision for any liability arising from events at the office or regarding Hobbs’ treatment of patients, and Cole Vision would be required to retain copies of the medical records of Hobbs’ patients. See id. One of Hobbs’ patients sued him and Cole Vision for malpractice, and after Hobbs refused to defend Cole Vision in the lawsuit, Cole Vision filed a declaratory judgment action. See id. Hobbs asserted a counterclaim for negligent spoliation of evidence based on Cole Vision

allegedly losing the patient's medical records. See id. at 147, 714 S.E.2d at 539. There was some dispute about whether the counterclaim was for general negligence, rather than spoliation, but the court held that "regardless of how his counterclaim is labeled, we analyze it under the same rubric as a claim based on spoliation of evidence." See id. at 149, 714 S.E.2d at 540.

The court recognized that the case presented an unusual situation because it was between co-defendants, and thus was neither a pure third-party spoliation case (where the spoliation claim is against a party that was not involved in the underlying litigation) nor a pure first-party spoliation case (where the spoliation claim is against an opposing party). See id. However, the court held that "South Carolina does not recognize an independent tort for the negligent spoliation of evidence, third-party or otherwise." Id. at 151, 714 S.E.2d at 541.

Here, the Plaintiffs' claims against GEICO present a pure third-party spoliation case. The claims are against GEICO, a third-party that was not involved in the underlying litigation (other than as an insurer), and all of the Plaintiffs' causes of action against GEICO involve GEICO's sale of the Explorer to the salvage yard for a brief period of time, which allegedly resulted in spoliation of evidence from the Explorer. Despite couching their claims under titles of breach of contract, unfair trade practices, negligence, and gross negligence, the Plaintiffs' claims are, at bottom, a claim for third-party spoliation of evidence. See id. at 149 n.3, 714 S.E.2d at 540 n.3 ("What's in a name? That which we call a rose by any other name would smell as sweet." (quoting William Shakespeare, Romeo and Juliet, II, 11, 1-2)). The Plaintiffs appear to agree, as they referred to the "spoliation case" in their motion to

reconsider filed July 2, 2010. Judge Buckner also referred to the "spoliation case" in his order denying the Plaintiffs' motion to reconsider filed September 23, 2010.

Because South Carolina does not recognize the tort of negligent spoliation of evidence, GEICO is entitled to summary judgment. Additionally, even without the holding in Cole Vision, GEICO would still be entitled to summary judgment on each cause of action.

II. Breach of Contract

The "well-settled principles" of contract formation in South Carolina require "an offer and acceptance accompanied by valuable consideration." Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (citation omitted). "Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act or a requested promise by the offeree, amounts to an offer." Id. (citation omitted). "[I]n order for a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement." Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 308, 698 S.E.2d 773, 778 (2010) (citation omitted). Additionally, in order for a contract to be enforceable, all parties must be obligated under it. Alana v. Peachtree Plantations, Inc., 292 S.C. 160, 167, 355 S.E.2d 286, 290 (Ct. App. 1987) (citations omitted).

Here, there was nothing more than the Plaintiffs' unilateral demand, made after Williams accepted the collision coverage and signed over the title, that GEICO indefinitely retain possession of the Explorer. The Plaintiffs did not offer or provide any consideration for this demand, and the Plaintiffs were not obligated to GEICO in any way. In reviewing

the Plaintiffs' demand, GEICO would not have been "justified in inferring a promise [from the Plaintiffs] in return for a requested act or a requested promise by [GEICO]." Carolina Amusement, 313 S.C. at 220, 437 S.E.2d at 125. Because there was no consideration for this demand and because the Plaintiffs were not obligated under it, there was not an enforceable contract between the Plaintiffs and GEICO, and GEICO is therefore entitled to summary judgment on the breach of contract cause of action.

III. SCUTPA

SCUTPA, S.C. Code Ann. §§ 39-5-10 to -170 (1985 & Supp. 2010), "does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, §§ 38-57-10 through 38-55-320." S.C. Code Ann. § 39-5-40(c) (Supp. 2010).¹ Section 38-57-10 provides:

The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the act of Congress of March 9, 1945, (Public Law 15, 79th Congress), by defining, or providing for the determination of, all the practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

¹ The Insurance Trade Practices Act, S.C. Code Ann. §§ 38-57-10 to -320 (2002), was codified in Chapter 55 of Title 38 until 1987, and § 39-5-40(c) was inadvertently not revised to reflect this change from Chapter 55 to Chapter 57. See Trustees of Grace Reformed Episcopal Church v. Charleston Ins. Co., 868 F. Supp. 128, 131 (D.S.C. 1994). It appears that the legislature attempted to remedy this error because the Code Commissioner's Note to § 39-5-40 states that "[i]n subsection (c), 'Chapter 57, §§ 38-57-10 through 38-57-320' was substituted for 'Chapter 55, §§ 38-55-10 through 38-55-410' at the direction of the Code Commissioner." However, it appears that the error was not fully remedied because § 39-5-40 still provides that "[t]his article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, §§ 38-57-10 through 38-55-320." S.C. Code Ann. § 39-5-40(c) (Supp. 2010) (emphasis added). In any event, the legislature's intent is clear, and this Court will disregard this scrivener's error. See Trustees of Grace, 868 F. Supp. at 131-32.

As Judge Currie recognized, “[c]hapter 57 clearly is intended to define and regulate all unfair trade practices in the business of insurance. SCUTPA, through § 39-5-40(c), provides a clear exemption for the practices covered by Chapter 57.” Trustees of Grace, 868 F. Supp. at 130. The Insurance Trade Practices Act “is intended to regulate all unfair trade practices in the business of insurance as evidenced by § 38-57-10.” Id. at 132 (citing State v. Thrift, 312 S.C. 282, 305, 440 S.E.2d 341, 354 (1994)). Accordingly, all unfair trade practices regarding the insurance business are regulated by the Insurance Trade Practices Act and are exempt from the coverage of SCUTPA. Id. Because the Plaintiffs allege unfair trade practices regarding the insurance business, GEICO is entitled to summary judgment on the SCUTPA cause of action.

IV. Negligence and Gross Negligence

“To prevail in a negligence action, a plaintiff must demonstrate: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach.” McKnight v. S.C. Dep’t of Corr., 385 S.C. 380, 386, 684 S.E.2d 566, 569 (Ct. App. 2009) (citation omitted).

A. Duty of Care

The existence of a legal duty of care owed by the defendant to the plaintiff is essential to a negligence claim. Id. at 390–91, 684 S.E.2d at 571 (citation omitted). If the plaintiff cannot show that the defendant owed him a legal duty of care, then the plaintiff cannot establish negligence. Id. at 391, 684 S.E.2d at 571 (citation omitted). Whether the defendant owed a duty of care to the plaintiff is a matter of law for the court to determine. Id. “An affirmative legal duty to act exists only if created by statute, contract, relationship, status,

property interest, or some other special circumstance.” Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003).

Here, the Plaintiffs cannot show that GEICO owed them a legal duty of care regarding the retention of the Explorer. While GEICO was Williams’ insurer, that relationship did not include a duty to indefinitely retain a total loss vehicle after paying the value of the vehicle, and this insurer-insured relationship did not exist between GEICO and the other Plaintiffs. Accordingly, because GEICO did not owe the Plaintiffs a legal duty of care regarding the retention of the Explorer, GEICO is entitled to summary judgment on the negligence and gross negligence causes of action.

B. Damage

Even if GEICO did owe the Plaintiffs a legal duty of care regarding the retention of the Explorer, the Plaintiffs have not suffered any damages from its temporary sale.

Negligence is not actionable unless it is the proximate cause of an injury to the plaintiff.” Hurd v. Williamsburg County, 353 S.C. 596, 611, 579 S.E.2d 136, 144 (Ct. App. 2003) (citations omitted). If a plaintiff fails to establish that he suffered damages, then the defendant is entitled to a verdict. See Stevens v. Allen, 342 S.C. 47, 53, 536 S.E.2d 663, 666 (2000).

Here, the Plaintiffs have neither demonstrated nor attempted to demonstrate that they have suffered any damage as a result of the salvage yard being in possession of the Explorer for a brief time period. The Plaintiffs did not seek to have an expert inspect the Explorer before it was sold to the salvage yard, and they have not sought to have an expert inspect the Explorer since GEICO regained possession of it. Additionally, the fact that the

products liability case brought by Clark, the other passenger in the Explorer, went forward and settled shortly before trial demonstrates that the brief period of time that the Explorer was at the salvage yard did not affect the Plaintiffs' ability to bring and effectively prosecute a products liability action against Ford. Accordingly, because the Plaintiffs have failed to show that they have suffered any damages from GEICO's temporary sale of the Explorer, GEICO is entitled to summary judgment on the negligence and gross negligence causes of action.

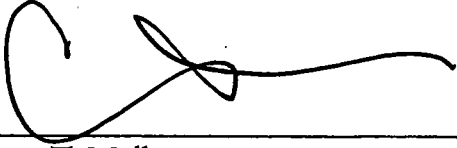
Conclusion

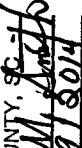
The Plaintiffs' claims against GEICO form a general claim of negligent third-party spoliation of evidence, which is not a viable cause of action in South Carolina, and GEICO is entitled to summary judgment on all of the causes of action for that reason. As additional grounds for granting this motion, GEICO is entitled to summary judgment (1) on the breach of contract cause of action because an enforceable contract regarding the retention of the Explorer did not exist between the Plaintiffs and GEICO; (2) on the SCUTPA cause of action because SCUTPA does not apply to trade practices in the business of insurance; and (3) on the negligence and gross negligence causes of action because GEICO did not owe the Plaintiffs a legal duty of care regarding the retention of the Explorer and the Plaintiffs have not demonstrated that they suffered any damages from its temporary sale. Therefore, it is

ORDERED that GEICO's motion for summary judgment is granted.

AND IT IS SO ORDERED.

3/12, 2012
Beaufort, South Carolina


Carmen T. Mullen
Resident Judge, Fourteenth Judicial Circuit

TRUE COPY
MARGARET BOSTICK
CLERK OF COURT
JASPER COUNTY, SC
BY: 
DATE: 4/29/2014



GRIFFITH SADLER SHARP
ATTORNEYS AT LAW

Matthew D. Cavender
Griffith, Sadler & Sharp, PA
600 Monson Street
PO Box 570
Beaufort, SC 29901
P 843.521.4242
F 843.521.4247
W griffithsadlerssharp.com
E mcavender@griffithsadlerssharp.com

E. MITCHELL GRIFFITH+
NANCY D. SADLER+
MARY E. SHARP+*
O. EDWORTH LIPPERT, III
MICHAEL D. FREEMAN
KELLY DENNIS DEAN
MARSHALL H. WALDRON, JR.
MATTHEW D. CAVENDER
+ certified mediator
* also admitted in NC

March 16, 2012

The Honorable Margaret Bostick
Jasper County Clerk of Court
Post Office Box 248
Ridgeland, South Carolina 29936-0248

Re: **Tonia D. Williams, et al. v. GEICO Casualty Company, et al.**
Civil Action No. 2009-CP-27-00639
GS&S #6329

FILED
2012 MAR 19 AM 10:05
MARGARET BOSTICK
CLERK OF COURT
JASPER COUNTY SC

Dear Ms. Bostick:

Enclosed in regard to the above-captioned matter are the original and one (1) copy of the *Order* granting summary judgment to the GEICO Defendants. I would appreciate you filing the original and returning the clocked copy to me in the enclosed self-addressed, stamped envelope.

With kindest regards, I remain

Very truly yours,

Matthew D. Cavender

MDC/lbs
Enclosures

cc: Harry C. Brown, Sr.
R. Thayer Rivers

MAILED

MAR 19 2012
JASPER COUNTY
CLERK OF COURT

Handwritten: 4/1/13

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-27-00639

TONIA D. WILLIAMS, MARION B. SMALLS, et al

GEICO CASUALTY COMPANY, GEICO INDEMNITY

PLAINTIFF(S)

COMPANY, et al
DEFENDANT(S)

Submitted by: CAROLINE SCRANTOM	Attorney for : ☐ Plaintiff ☐ Defendant
	or ☐ 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

Received
12-4-13

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: Plaintiff's Rule 59(e) Motion to Reconsider was filed March 27, 2012. Following a hearing April 24, 2012, the Court granted leave to conduct additional discovery in this matter with the intention of setting another hearing before ruling. Following a subsequent hearing on Plaintiffs' Rule 59(e) Motion to Reconsider Summary Judgment, conducted in Beaufort County on November 12, 2013, the Court hereby DENIES Plaintiff's Motion to Reconsider.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

RECEIVED
CLERK OF COURT
JASPER COUNTY SC
22 JAN 18 AM 8:38

FILE

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
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 interest or additional taxable 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.**

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-27 -639

MARION B. SMALLS
PLAINTIFF,

VS.

EARL MARTIN, GEICO
CASUALTY COMPANY,
GEICO INDEMNITY COMPANY,
GOVERNMENT EMPLOYEES
INSURANCE COMPANY,
GEICO GENERAL INSURANCE
COMPANY

DEFENDANTS

S U M M O N S

2009 SEP 29 PM 3:40
MARSHALL GOSNICK
CLERK OF COURT
JASPER COUNTY SC

FILED

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Petition of the Plaintiff in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Petition upon the subscriber, Plaintiff's Attorney, Harry C. Brown, Sr., Esquire, LAW OFFICE OF HARRY C. BROWN, SR., Post Office Box 824, Ridgeland, South Carolina 29936, within thirty (30) days from and after the date of service hereof (exclusive of the date of such service); and, if you fail to answer the Petition within the time aforesaid and to serve a copy of your Answer, the Plaintiff in this action will apply to the Court for the relief demanded in the petition.

HARRY C. BROWN, SR.
ATTORNEY FOR THE PLAINTIFF
LAW OFFICE OF HARRY C. BROWN, SR.
P.O. BOX 824
RIDGELAND, S.C. 29936
TELEPHONE (843) 726-7920
FACSIMILE (843) 726-7923

Ridgeland, South Carolina
9/29, 2009

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) FOURTEENTH JUDICIAL CIRCUIT
CASE NO.: 2009-CP-27-639

MARION B. SMALLS,
PLAINTIFF,

COMPLAINT
(JURY TRIAL DEMANDED)

VS.

EARL MARTIN, GEICO
CASUALTY COMPANY,
GEICO INDEMNITY COMPANY,
GOVERNMENT EMPLOYEES
INSURANCE COMPANY,
GEICO GENERAL INSURANCE
COMPANY

DEFENDANTS

2009 SEP 29 PM 3:40
MARGARET BOSCHICK
CLERK OF COURT
JASPER COUNTY SC

FILED

The Plaintiff, Marion B. Smalls (herein referred to as Plaintiff Smalls), above-named, complaining of the acts and/ or omissions of Earl Martin (herein referred to as Defendant Martin), and GEICO Casualty Company, GEICO Indemnity Company, Government Employees Insurance Company, GEICO General Insurance Company (herein referred to as Defendant GEICO), above-named, would allege and show, through undersigned counsel, unto this Honorable Court the following:

1. Plaintiff Smalls is a citizen of and resident of the County of Jasper, State of South Carolina.
2. Upon information and belief Defendant Earl Martin is a citizen and resident of the County of Jasper, State of South Carolina.
3. Upon information and belief Defendant GEICO is a Corporation organized and existing under the laws of one of the states of the United States, other than the State of South Carolina. Defendant GEICO transacts significant business in the County of Jasper, State of South Carolina, and that jurisdiction and venue are proper.
4. This Court has jurisdiction over these matters based upon Article V of the South Carolina Constitution, S.C. Code Ann. Sections 36-2-802 and 36-2-803 (Law. Co-op. 1976) and its plenary powers.
5. That this Court has jurisdiction to hear this matter as the incident giving rise to this cause of action occurred in Jasper County, South Carolina.

FOR A FIRST CAUSE OF ACTION
(Negligence Against Defendant Martin)

6. Plaintiff Smalls realleges, reasserts and incorporates by reference the allegations of the foregoing paragraphs as if repeated herein verbatim.
7. On October 2, 2006, Plaintiff Smalls was a restrained passenger in a 1998 Ford Explorer traveling West on US Highway 278 near Ridgeland, Jasper County, South Carolina.
8. That Defendant Martin was the driver of a 1997 Mercury SUV traveling on SC Highway 39 attempting to cross US Highway 278 Jasper County, South Carolina.
9. That Defendant Martin failed to yield the right of way violently striking the vehicle Plaintiff Smalls was a restrained passenger in on October 2, 2006.
10. Upon impact the vehicle that Plaintiff Smalls was a passenger in spun, overturned, struck a ditch and landed right side up.
11. That as a result of the aforesaid violent impact, Plaintiff Smalls sustained significant personal injuries which were due to and caused by, and were the direct and proximate result of the negligence, carelessness, recklessness, willfulness and wantonness of the Defendant Martin in one or more of the following particulars, to-wit:
 - a. In failing to have his vehicle equipped with proper brakes, or if so equipped, in failing to properly apply them;
 - b. In failing to maintain a proper look-out, in violation of the Applicable Statutes of the State of South Carolina.
 - c. In failing to use the degrees of care and caution that a reasonable prudent person would have used under the circumstances;
 - d. In failing to exercise ordinary or even slight care in the operation and control of his vehicle;
 - e. In failing to stop at the stop sign to avoid hitting the Plaintiff's vehicle;
 - f. In violently striking and crashing into the Plaintiff's vehicle;
 - g. In failing to keep his automobile under proper control.
 - h. In failing to yield the right of way.
12. That as a proximate result of Defendant Martin's negligence, carelessness, recklessness, willfulness, and wantonness as herein set forth and as a direct and proximate result thereof, Plaintiff Smalls was violently thrown forward and jerked back injuring her back, neck, head, shoulder, and other parts of her body, from which she has suffered and will continue to suffer great physical pain, humiliation and mental anguish, has expended and will in the future expend monies for medical care and treatment.

13. Plaintiff Smalls is informed and believes that she is entitled to have a judgment against Defendant Martin for actual and punitive damages and the cost of this action including reasonable attorney fees.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract against Defendant GEICO)

14. Plaintiff Smalls re-alleges reasserts and incorporates by reference the allegations in the foregoing paragraphs as if repeated herein verbatim.
15. That Defendant GEICO is in the business of selling automobile insurance policies.
16. That Plaintiff Smalls was a restrained passenger in the 1998 Ford Explorer insured through Defendant GEICO that was involved in an automobile accident on October 2, 2006.
17. That Defendant GEICO sold the owners of 1998 Ford Explorer that Plaintiff Smalls was a restrained passenger in an automobile insurance policy on said vehicle.
18. That the owners of the automobile insurance policy on the 1998 Ford Explorer with Defendant GEICO were entitled to certain policy benefits.
19. That Defendant GEICO pursuant to those policy benefits took possession of the 1998 Ford Explorer.
20. That Defendant GEICO agreed with Plaintiff Smalls to preserve, not alter or change the 1998 Ford Explorer due to the catastrophic nature of the accident and the possibility of a manufacturer's defect. That the agreement created a duty on Defendant GEICO's part to preserve the vehicle as agreed.
21. That Defendant GEICO notwithstanding this agreement sold the 1998 Ford Explorer to a salvage yard. The salvage yard owners subsequently sold tires, windows and other parts from the vehicle.
22. Defendant GEICO breached its contract with Plaintiff Smalls by selling the 1998 Ford Explorer to a salvage yard.
23. As a direct and proximate cause of the Breach of Contract by Defendant GEICO, Plaintiff Smalls' ability to pursue an action in Products Liability has been impaired.
24. As a direct and proximate result of Defendant GEICO's Breach of Contract, Plaintiff Smalls does believe she is entitled to have judgment against Defendant GEICO for actual and punitive damages and the cost of the action including reasonable attorney fees.

FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practice against Defendant GEICO)

25. That Plaintiff Smalls re-alleges, reasserts and incorporates by reference the allegations of the foregoing paragraphs as if repeated herein verbatim.
26. That the Defendant GEICO's conduct is an unfair and deceptive trade practice.
27. That Defendant GEICO's conduct is harmful to the public and capable of repetition.
28. That as a direct and proximate cause of Defendant GEICO's unfair and deceptive trade practice, Plaintiff Smalls' ability to pursue a Products Liability Action has been impaired.
29. Further as a direct and proximate cause of Defendant GEICO's unfair and deceptive trade practice, Plaintiff Smalls does believe she is entitled to have judgment against Defendant GEICO for actual and punitive damages and the cost of this action including reasonable attorney fees. Plaintiff Smalls further believes she is entitled to have such award of damages tripled as a result of Defendant GEICO's Unfair Trade Practice.

FOR A FOURTH CAUSE OF ACTION
(Negligence against Defendant GEICO)

30. That Plaintiff Smalls re-alleges, reasserts and incorporates by reference the allegations of the foregoing paragraphs as if repeated herein verbatim.
31. That Plaintiff Smalls informed the Defendant GEICO by letter on October 6, 2006 regarding the fatal and tragic accident and the possible manufacturing defect of the 1998 Ford Explorer
32. That Plaintiff Smalls informed Defendant GEICO about the importance of not altering the 1998 Ford Explorer in anyway.
33. That Plaintiff Smalls informed Defendant GEICO of the importance of said vehicle not be salvaged or sold.
34. That Defendant GEICO sold the 1998 Ford Explorer to a salvage yard where tires, windows and other parts were sold.
35. That Defendant GEICO's sale of the 1998 Ford Explorer to a salvage yard was a breach of its duty of due care to preserve said vehicle in the condition it was in on October 2, 2006.
36. That the Defendant GEICO knew or should have known that selling the vehicle to a salvage yard could likely result in alterations being made and that Plaintiff Smalls' right

and her ability to seek evaluation of the vehicle would be impaired as a direct and proximate result of the same.

37. That as a direct and proximate result of Defendant GEICO's actions Plaintiff Smalls' ability to pursue a products liability action has been impaired.
38. Plaintiff Smalls is informed and believes that she is entitled to have a judgment against Defendant GEICO for actual and punitive damages and the cost of this action including reasonable attorney fees.

FOR A FIFTH CAUSE OF ACTION
(Gross Negligence against Defendant GEICO)

39. Plaintiff Smalls re-alleges, reasserts and incorporates by reference the allegations of the foregoing paragraphs as if repeated herein verbatim.
40. That Plaintiff Smalls by letter dated October 6, 2006 requested Defendant GEICO to preserve the 1998 Ford Explorer in the same condition that it was in on October 2, 2006 because of a possible manufacturing defect and the importance of said vehicle not be salvaged or sold.
41. That Defendant GEICO owed Plaintiff Smalls a duty to preserve the vehicle in the same condition that it was in on October 2, 2006.
42. That Defendant GEICO's sale of the 1998 Ford Explorer vehicle to a salvage yard was a breach of its duty to preserve the vehicle in the same condition that it was in on October 2, 2006.
43. That Defendant GEICO's sale of the 1998 Ford Explorer to a salvage yard after notification by Plaintiff Smalls of a possible manufacturing defect constitutes gross negligence in that such conduct was careless, willful, wanton, reckless and heedless.
44. That Defendant GEICO's action constituting gross negligence including but are not limited to the following:
 - a. Sale of 1998 Ford Explorer to a salvage yard without Plaintiff Smalls' permission.
 - b. Sale of vehicle to salvage yard where parts were sold.
 - c. Sale of certain parts from said vehicle prohibited certain diagnostic testing essential for an action in Products Liability.
 - d. Repurchase of said vehicle from the salvage yard owners.
 - e. Said vehicle in a "worse condition" after the sale and repurchase from the salvage yard owners by Defendant GEICO.
 - f. Sale of vehicle with reckless disregard for the duties and obligations owed to Plaintiff Smalls.

- g. Deliberately misleading Plaintiff Smalls as to what items were sold from the vehicle.
45. As a direct and proximate result of Defendant GEICO's willful, wanton, reckless and heedless conduct, Plaintiff Smalls' ability to pursue a Products Liability action has been impaired.
46. Plaintiff Smalls is informed and believes that she is entitled to have a judgment against Defendant GEICO for actual and punitive damages and the cost of this action including reasonable attorney fees.

RESERVATION OF ADDITIONAL CAUSES OF ACTION

47. Plaintiff Smalls re-alleges, reasserts and incorporates by reference the allegations of the foregoing paragraphs as if repeated herein verbatim.
48. Plaintiff Smalls hereby reserves the right to amend her pleadings as necessary to assert any additional causes of actions revealed during the discovery process.

WHEREFORE, Plaintiff Smalls prays that that Court inquire into the matters herein and grant her a judgment in a reasonable sum of actual damages, punitive damages, costs and such other relief and further relief as the Court may deem just and proper, all in an amount in excess of twenty-five thousand dollars (\$25,000.00).

Respectfully submitted,

Law Office of Harry C. Brown, Sr.,

By: _____

HARRY C. BROWN, SR.
ATTORNEY FOR THE PLAINTIFF
P.O. BOX 824

RIDGELAND, S.C. 29936
TELEPHONE (843) 726-7920
FACSIMILE (843) 726-7923

Ridgeland, South Carolina
9/29, 2009

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

TONIA D. WILLIAMS,
Plaintiff,

vs.

EARL MARTIN, GEICO CASUALTY
COMPANY, GEICO INDEMNITY
COMPANY, GOVERNMENT EMPLOYEES
INSURANCE COMPANY, GEICO
GENERAL INSURANCE COMPANY,

Defendants.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO. 09-CP-27-638

ANSWER

(Jury Trial Demanded)

TO: HARRY C. BROWN, SR., ATTORNEY FOR THE PLAINTIFF:

The Defendants, GEICO CASUALTY COMPANY, GEICO INDEMNITY COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, GEICO GENERAL INSURANCE COMPANY (hereinafter "GEICO"), answering the Plaintiff's Complaint would allege and state as follows:

1. GEICO denies each and every allegation not specifically admitted hereinafter.

FOR A FIRST DEFENSE

2. GEICO admits the allegations contained in Paragraphs 1 and 2 of Plaintiff's Complaint.

3. GEICO denies the allegations contained in Paragraph 3 of Plaintiff's Complaint and demands strict proof thereof.

4. Paragraphs 4 and 5 of Plaintiff's Complaint states a

conclusion of law and, accordingly, an answer is not required; to the extent an allegation of fact is made, GEICO denies it.

FOR A FIRST DEFENSE TO THE FIRST CAUSE OF ACTION
(Negligence Against Defendant Martin)

5. Paragraph 6 of Plaintiff's Complaint contains no allegations against GEICO and therefore no answer is required. To the extent an allegation of fact is alleged, GEICO denies the same and demands strict proof thereof.

6. GEICO admits only so much of the allegations contained in Paragraph 7 of Plaintiff's Complaint that states that on or about October 2, 2006, Plaintiff Shaw was a passenger in a vehicle on U.S. Highway 278 near Ridgeland, South Carolina; however, GEICO denies the remaining allegations of Paragraph 7 of Plaintiff's Complaint and demands strict proof thereof.

7. GEICO admits only so much of the allegations contained in Paragraph 8 of Plaintiff's Complaint that states that Defendant Martin was traveling on Highway 39 attempting to cross Highway 278 in Jasper County, South Carolina; however GEICO denies the remaining allegations of Paragraph 8 of Plaintiff's Complaint and demands strict proof thereof.

8. In answering Paragraph 9 of Plaintiff's Complaint, GEICO admits that Defendant Martin failed to yield the right-of-way, causing a collision with the vehicle driven by Williams.

9. GEICO lacks information or knowledge sufficient to form a belief as to the truth of the matters asserted in Paragraph 10 of Plaintiff's Complaint, and therefore denies same and demands strict

proof thereof.

10. GEICO admits only so much of the allegations contained in Paragraph 11 of Plaintiff's Complaint that states that Plaintiff sustained personal injuries as a result of the negligence of Defendant Martin, but lacks sufficient information to form a belief as to the remaining allegations of Paragraph 11, including subparts, of Plaintiff's Complaint, and demands strict proof thereof.

11. GEICO admits only so much of the allegations contained in Paragraph 12 of Plaintiff's Complaint that states that Defendant Martin's negligence was a cause of the accident and some injuries that were sustained by the Plaintiff; however GEICO denies the remaining allegations of Paragraph 12 of Plaintiff's Complaint and demands strict proof thereof.

12. GEICO lacks information or knowledge sufficient to form a belief as to the truth of the matters asserted in Paragraph 13 of Plaintiff's Complaint, and therefore denies same and demands strict proof thereof.

FOR A FIRST DEFENSE TO THE SECOND CAUSE OF ACTION
(Breach of Contract against Defendant GEICO)

13. Paragraph 14 of Plaintiff's Complaint contains no allegations against GEICO and therefore no answer is required. To the extent an allegation of fact is alleged, GEICO denies the same and demands strict proof thereof.

14. GEICO admits the allegations contained in Paragraph 15 of Plaintiff's Complaint.

15. GEICO admits only so much of the allegations contained in Paragraph 16 of Plaintiff's Complaint that states that Plaintiff Shaw was a passenger in the 1998 Ford Explorer and was insured with GEICO, and was involved in an accident on October 2, 2006. In further answering Paragraph 16 of Plaintiff's Complaint, GEICO denies the remaining allegations and demands strict proof thereof.

16. GEICO admits only so much of the allegations contained in Paragraphs 17 of Plaintiff's Complaint that states GEICO sold the owners an automobile insurance policy under which the owners were entitled to certain policy benefits. In further answering Paragraphs 17 and 18 of Plaintiff's Complaint, GEICO denies the remaining allegations and demands strict proof thereof.

17. GEICO admits only so much of the allegations contained in Paragraph 19 of Plaintiff's Complaint that states that alleges GEICO adjusted the property damage loss to the Plaintiff vehicle that was involved in an accident on October 2, 2006, and stored the vehicle at a storage facility. In further answering, GEICO deny the remaining allegations of Paragraph 19 of Plaintiff's Complaint and demands strict proof thereof.

18. GEICO denies Paragraph 20 of the Plaintiff's Complaint, but would affirmatively allege that the Plaintiff, through counsel, requested that GEICO place a hold on the vehicle owned by the Plaintiffs and that Plaintiff's counsel indicated that he may investigate a manufacturing defect to the vehicle; however, GEICO denies that there was any agreement that created a duty on the part of GEICO to preserve the vehicle in question. In further

answering, GEICO denies the remaining allegations not specifically admitted with regard to Paragraph 20 of Plaintiff's Complaint.

19. GEICO admits only so much of the allegations contained in Paragraph 21 of Plaintiff's Complaint that states GEICO sold to a salvage yard the vehicle in question, but would deny the remaining allegations of Paragraph 21 of the Plaintiff's Complaint, and would specifically allege that GEICO subsequently regained possession of the vehicle and the only items missing were three (3) tires from the 1998 Ford Explorer.

20. GEICO denies the allegations contained in Paragraph 22 of Plaintiff's Complaint and demands strict proof thereof.

21. GEICO denies the allegations contained in Paragraph 23 of Plaintiff's Complaint, and would specifically allege that a no time has Plaintiff's counsel attempted to view and/or inspect the 1998 Ford Explorer since the accident in question, and has had over two and one-half (2-1/2) years to make an inspection, and that this vehicle has been the subject of a products liability suit with numerous inspections by other experts.

22. GEICO denies the allegations contained in Paragraph 24 of Plaintiff's Complaint and demands strict proof thereof.

FOR A FIRST DEFENSE TO THE THIRD CAUSE OF ACTION
(Unfair Trade Practice against Defendant GEICO)

23. Paragraph 25 of Plaintiff's Complaint contains no allegations against GEICO and therefore no answer is required. To the extent an allegation of fact is alleged, GEICO denies the same.

24. GEICO denies the allegations contained in Paragraphs 26,

27, 28, and 29 of Plaintiff's Complaint and demands strict proof thereof.

FOR A FIRST DEFENSE TO THE FOURTH CAUSE OF ACTION
(Negligence against Defendant GEICO)

25. Paragraph 30 of Plaintiff's Complaint contains no allegations against GEICO and therefore no answer is required. To the extent an allegation of fact is alleged, GEICO denies the same.

26. GEICO denies the allegations contained in Paragraphs 31 through 38 of Plaintiff's Complaint and demands strict proof thereof.

FOR A FIRST DEFENSE TO THE FIFTH CAUSE OF ACTION
(Gross Negligence against Defendant GEICO)

27. Paragraph 39 of Plaintiff's Complaint contains no allegations against GEICO and therefore no answer is required. To the extent an allegation of fact is alleged, GEICO denies the same.

28. GEICO denies the allegations contained in Paragraphs 40 through 46 of Plaintiff's Complaint and demands strict proof thereof.

29. Paragraphs 47 and 48 of Plaintiff's Complaint contains no allegations against GEICO and therefore no answer is required. To the extent an allegation of fact is alleged, GEICO denies the same.

FOR A SECOND DEFENSE TO ALL CAUSES OF ACTION
(Failure to State a Claim)

30. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

31. The Defendant/Third-Party Plaintiffs' Answer, Counterclaims and Third-Party Complaint fails to state a claim upon

which relief can be granted and, accordingly, should be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(6).

FOR A THIRD DEFENSE TO ALL CAUSES OF ACTION
(Jurisdiction)

32. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

33. The Defendant would allege that personal jurisdiction does not exist as the Defendant is incorporated and domiciled in a state other than the State of South Carolina.

34. The Plaintiff has not plead facts sufficient to confer personal jurisdiction over the Defendant, and therefore, this action should be dismissed pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure.

FOR A FOURTH DEFENSE TO ALL CAUSES OF ACTION
(Waiver)

35. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

36. The Plaintiff's claims are barred in whole, or in part, by Plaintiff's waiver.

FOR A FIFTH DEFENSE TO ALL CAUSES OF ACTION
(Estoppel)

37. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

38. The Plaintiff's claims are barred in whole, or in part, by the doctrine of estoppel.

FOR A SIXTH DEFENSE TO ALL CAUSES OF ACTION
(Laches)

39. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

40. The Plaintiff's claims are barred in whole, or in part, by the doctrine of laches.

FOR A SEVENTH DEFENSE TO ALL CAUSES OF ACTION
(Frauds)

41. The allegations previously set forth herein are realleged and adopted as part of this Defense as if repeated verbatim.

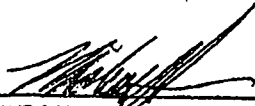
42. The Plaintiff's claims against the Defendant are based upon alleged express warranties are barred in whole, or in part, by the statute of frauds.

WHEREFORE, having answered the Complaint of the Plaintiff, and set forth the affirmative defenses herein, the GEICO Defendants pray as follows:

- a. Dismissal of the Plaintiff's Complaint;
- b. Trial by jury of all matters so triable;
- c. Costs and disbursements for the defense of this action; and
- e. For such other and further relief as this Court may deem just and proper.

[ATTORNEY SIGNATURE BLOCK ON THE FOLLOWING PAGE]

GRIFFITH, SADLER & SHARP, P.A.

By: 

E. MITCHELL GRIFFITH
MICHAEL D. FREEMAN
600 Monson Street
Post Office Drawer 570
Beaufort, South Carolina 29901-0570
(843) 521-4242
Attorneys for the GEICO Defendants

Beaufort, South Carolina

November 6, 2009

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARION B. SMALLS,

Plaintiff,

v.

EARL MARTIN, GEICO CASUALTY
COMPANY, GEICO INDEMNITY
INSURANCE COMPANY,
GOVERNMENT EMPLOYEES
INSURANCE COMPANY, GEICO
GENERAL INSURANCE COMPANY,

Defendants.

TONIA D. WILLIAMS,

Plaintiff,

v.

EARL MARTIN, GEICO CASUALTY
COMPANY, GEICO INDEMNITY
INSURANCE COMPANY,
GOVERNMENT EMPLOYEES
INSURANCE COMPANY, GEICO
GENERAL INSURANCE COMPANY,

Defendants.

~~SHAW~~ by her Guardian
Ad Litem, RITA SHAW,

Plaintiff,

v.

EARL MARTIN, GEICO CASUALTY
COMPANY, GEICO INDEMNITY
INSURANCE COMPANY,
GOVERNMENT EMPLOYEES
INSURANCE COMPANY, GEICO
GENERAL INSURANCE COMPANY,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 09-CP-27-639

MOTION FOR RECONSIDERATION

CASE NUMBER: 09-CP-27-638

2010 JUL -2 PM 4:51
JASPER COUNTY SC

TONYA W. by his Guardians)
 Ad Litem, TONIA WILLIAMS and)
 CHARLES WILLIAMS,)
)
 Plaintiff,)
)
 v.)
)
 EARL MARTIN, GEICO CASUALTY)
 COMPANY, GEICO INDEMNITY)
 INSURANCE COMPANY,)
 GOVERNMENT EMPLOYEES)
 INSURANCE COMPANY, GEICO)
 GENERAL INSURANCE COMPANY,)
)
 Defendants.)

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Marion B. Smalls, by and through his attorney, Harry C. Brown, Sr. and R. Thayer Rivers, Jr., pursuant to Rule 59(e) the South Carolina Rules of Civil Procedure, will move before the Honorable Perry M. Buckner on the tenth day after the service hereof or as soon thereafter as this matter may be heard for reconsideration of his Order dated June 23, 2010, which severs the causes of action against the various defendants.

Rule 20 provides:

All persons may join in one action as Plaintiffs if they assert any right to relieve jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact, to all these persons will rise in the action.

The Plaintiff has filed an action against the Defendant Martin over an automobile wreck that took place in Jasper County, South Carolina. The case against the Defendant GEICO is based upon, after being notified of the rights of the Plaintiffs in a potential products liability case, the Defendant GEICO disposed of the automobile thereby jeopardizing the Plaintiffs' products case.

The Martin case is a negligence case which will be handled on the principles of negligence. The "spoliation case" is like a legal malpractice case. It is a trial inside a trial. That is, the Plaintiffs will have to prove the existence of a potential products liability case wherein the liability of the manufacturer would have combined and concurred (emphasis added) to cause damage to the four Plaintiffs involved. This will be a prerequisite for the Plaintiffs to prevail in any spoliation action against GEICO. The bringing of a tort action against a driver combining with a products case against a manufacturer is a very common matter in South Carolina and certainly subject to the jurisdiction and order of this court. It is not uncommon to have an insurance company as a named Defendant in South Carolina and every trial judge knows how to properly instruct the jury as to what, if any, consideration that is to be given.

The second grave offense given to the Plaintiffs is that if this matter is severed, GEICO will more likely than not remove their case to Federal Court. This means not only will the Plaintiffs have to go through the expense of two separate trials and two separate venues which are many, many miles apart and have substantial different rules, the Court's ruling that the parties should have the right to use the discovery of one case to be used in the other will have zero precedence with an federal judge and will cause enormous expense to the Plaintiffs. The Plaintiffs have all suffered grievous injuries and the cost in transporting doctors and medical experts from both the state court action and a federal court action (which will almost undoubtedly will take place at different times and even different years) is a tremendous burden placed upon the Plaintiffs.

The Plaintiffs would respectfully submit that in balancing the equities, the harm done to them is substantially greater than requiring the Defendants to defend one action in state court in Jasper County, South Carolina, and as such would amount to the standard of an abuse of discretion to sever the cases.

Respectfully submitted,

Law Office of R. Thayer Rivers, Jr.



R. THAYER RIVERS, JR.

Post Office Box 668

Ridgeland, South Carolina 29936

843-726-8136

Law Office of Harry C. Brown, Sr.



HARRY C. BROWN, SR.

Post Office Box 824

Ridgeland, South Carolina 29936

843-726-7920

July 1, 2010

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Tonia D. Williams; Marion B.
Smalls; T. W., by his
Guardians ad Litem Tonia D.
Williams and Charles Williams;
and S. S., by her
Guardian ad Litem Rita Shaw,

PLAINTIFFS,

v.

GEICO Casualty Company, GEICO
Indemnity Company, Government
Employees Insurance Company,
GEICO General Insurance Company,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

C/A No. 2009-CP-27-00639

GEICO's Motion for
Summary Judgment

TO: HARRY C. BROWN SR. AND R. THAYER RIVERS JR., ATTORNEYS FOR
THE PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE that Defendants GEICO Casualty
Company, GEICO Indemnity Company, Government Employees Insurance
Company, and GEICO General Insurance Company (collectively
"GEICO") will move before the presiding judge of the Court of
Common Pleas for the 14th Judicial Circuit, Jasper County, at
such place and time as the Court may appoint, for an order
granting GEICO's Motion for Summary Judgment pursuant to Rule
56, SCRPC.

The grounds for this motion are that the Plaintiffs' claims
against GEICO form a general claim of negligent third-party
spoliation of evidence, which is not a viable cause of action in

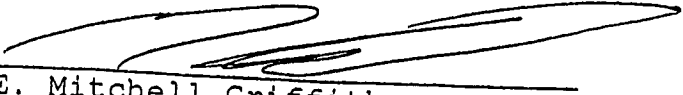
South Carolina, and GEICO is entitled to summary judgment on all the causes of action for that reason. As additional grounds for granting this motion, GEICO is entitled to summary judgment (1) on the breach of contract cause of action because an enforceable contract regarding the retention of the Explorer did not exist between the Plaintiffs and GEICO; (2) on the SCUTPA cause of action because SCUTPA does not apply to trade practices in the business of insurance; and (3) on the negligence and gross negligence causes of action because GEICO did not owe the Plaintiffs a legal duty of care regarding the retention of the Explorer and the Plaintiffs have not demonstrated that they suffered any damages from its temporary sale.

This motion is based on the pleadings, applicable law, filed exhibits, and such further evidence as may be presented.

[SIGNATURE PAGE FOLLOWS]

GRIFFITH, SADLER & SHARP, P.A.

By:



E. Mitchell Griffith
O. Edworth Liipfert
Matthew D. Cavender
600 Monson Street (29902)
Post Office Drawer 570
Beaufort, South Carolina 29901
(843) 521-4242 (telephone)
(843) 521-4247 (facsimile)
emg@gandspa.com
wliipfert@gandspa.com
mcavender@gandspa.com

ATTORNEYS FOR GEICO

November 16, 2011
Beaufort, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Tonia D. Williams; Marion B. Smalls; T. W., by his Guardians ad Litem Tonia D. Williams and Charles Williams; and S. S., by her Guardian ad Litem Rita Shaw,

PLAINTIFFS,

v.

GEICO Casualty Company, GEICO Indemnity Company, Government Employees Insurance Company, GEICO General Insurance Company,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

C/A No. 2009-CP-27-00639

Memorandum in Support
of GEICO's Motion for
Summary Judgment

Facts

On October 2, 2006, Plaintiffs Tonia D. Williams ("Williams"), Marion B. Smalls, T. W., and S. S. (collectively "the Plaintiffs") were traveling in Williams' 1998 Ford Explorer in Jasper County, South Carolina, when they were involved in an accident with Defendant Earl Martin ("Martin"). Betty Mitchell Clark ("Clark") was also a passenger in the Explorer.

The Explorer was insured by Defendants GEICO Casualty Company, GEICO Indemnity Company, Government Employees Insurance

Company, or GEICO General Insurance Company (collectively "GEICO").

After the accident, the Explorer was a total loss, so Williams conveyed the title to GEICO and accepted the collision coverage, and GEICO took possession of the Explorer. The Plaintiffs' attorney then wrote a letter to GEICO demanding that they retain possession of the Explorer for a potential products liability suit against Ford. The Plaintiffs did not provide any consideration for this demand. GEICO retained possession of the Explorer for several months, but then sold it to a salvage yard. GEICO then repurchased the Explorer. It was in the same condition as it was before it was sold to the salvage yard, with the exception of three tires and wheels that had been removed. GEICO is still in possession of the Explorer, even though the accident happened almost 5 years ago and the Plaintiffs have not inspected or requested to inspect the Explorer.

Despite the Explorer being in the salvage yard for a brief period, Clark, the other passenger in the Explorer, brought a products liability action, Civil Action No. 2006-CP-27-00442, against Ford regarding alleged defects in the Explorer. Darrell Thomas Johnson represented her in that matter. The parties completed discovery and the case settled shortly before trial.

Procedural History

On September 29, 2009, the Plaintiffs each filed individual actions against Martin and GEICO. The claims against Martin were for his alleged negligence regarding the accident. The claims against GEICO were for breach of contract, unfair trade practices, negligence, and gross negligence, all regarding GEICO's sale and repurchase of the Explorer to the salvage yard.

Martin and GEICO answered, and by motion filed April 16, 2010, GEICO moved to sever the actions against Martin from the actions against GEICO. By order filed June 28, 2010, Judge Buckner granted GEICO's motion to sever.

On July 2, 2010, the Plaintiffs filed a motion to reconsider. On July 13, 2010, GEICO removed the action to federal court. On July 23, 2010, the Plaintiffs filed a motion to remand, which Judge Gergel granted in an order filed September 8, 2010.

After returning to state court, Judge Buckner denied the Plaintiffs' motion to reconsider in an order dated September 20, 2010. On September 22, 2010, GEICO mailed Judge Buckner's signed order to the Jasper County Clerk of Court for filing, and filed a notice of removal. On September 23, 2010, Judge Buckner's order was filed by the Jasper County Clerk of Court. Also on that date, the Plaintiffs filed a notice of appeal in

state court and a motion to remand in federal court.

Judge Gergel granted the Plaintiffs' motion to remand in an order filed December 15, 2010. The Plaintiffs' appeal was dismissed on May 3, 2011, and was remitted to Jasper County on June 23, 2011.

Standard of Review

"[A] motion for summary judgment shall be granted '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.'" Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 144, 694 S.E.2d 525, 527 (2010) (quoting Rule 56(c), SCRPC). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Quail Hill, LLC v. County of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted).

Argument

- I. GEICO IS ENTITLED TO SUMMARY JUDGMENT ON ALL CAUSES OF ACTION BECAUSE SPOILIATION IS NOT A VIABLE CAUSE OF ACTION IN SOUTH CAROLINA.

The Plaintiffs' causes of action against GEICO form a general claim of negligent third-party spoliation of evidence, which is not a viable cause of action in South Carolina.

In Austin v. Beaufort County Sheriff's Office, 377 S.C. 31, 659 S.E.2d 122 (2008), the court considered the tort of negligent spoliation of evidence by a third party, and noted the elements that West Virginia recognized when it adopted the tort, but the court declined to adopt the tort under the particular facts of that case. See Austin, 377 S.C. at 34-35, 659 S.E.2d at 124. After Austin, there was a great deal of speculation about whether the court would eventually adopt the tort of third-party spoliation of evidence in South Carolina, but the court laid that speculation to rest when it released its opinion in Cole Vision Corp. v. Hobbs, ___ S.C. ___, 714 S.E.2d 537 (2011).

In Cole Vision, Hobbs, an optometrist, leased space from Cole Vision. Id. at ___, 714 S.E.2d at 538. In the parties' lease, they agreed that Hobbs would indemnify Cole Vision for any liability arising from events at the office or regarding

Hobbs' treatment of patients, and Cole Vision would be required to retain copies of the medical records of Hobbs' patients. See id. One of Hobbs' patients sued him and Cole Vision for malpractice, and after Hobbs refused to defend Cole Vision in the lawsuit, Cole Vision filed a declaratory judgment action. See id. Hobbs asserted a counterclaim for negligent spoliation of evidence based on Cole Vision allegedly losing the patient's medical records. See id. at ___, 714 S.E.2d at 539. There was some dispute about whether the counterclaim was for general negligence, rather than spoliation, but the court held that "regardless of how his counterclaim is labeled, we analyze it under the same rubric as a claim based on spoliation of evidence." See id. at ___, 714 S.E.2d at 540.

The court recognized that the case presented an unusual situation because it was between co-defendants, and thus was neither a pure third-party spoliation case (where the spoliation claim is against a party that was not involved in the underlying litigation) nor a pure first-party spoliation case (where the spoliation claim is against an opposing party). See id. However, the court held that "South Carolina does not recognize an independent tort for the negligent spoliation of evidence, third-party or otherwise." Id. at ___, 714 S.E.2d at 541.

Here, the Plaintiffs' claims against GEICO present a pure third-party spoliation case. The claims are against GEICO, a

third-party that was not involved in the underlying litigation (other than as an insurer), and all of the Plaintiffs' causes of action against GEICO involve GEICO's sale of the Explorer to the salvage yard for a brief period of time, which allegedly resulted in spoliation of evidence from the Explorer. Despite couching their claims under titles of breach of contract, unfair trade practices, negligence, and gross negligence, the Plaintiffs' claims are, at bottom, a claim for third-party spoliation of evidence. See id. at ____ n.3, 714 S.E.2d at 540 n.3 ("What's in a name? That which we call a rose by any other name would smell as sweet." (quoting William Shakespeare, Romeo and Juliet, II, 11, 1-2)). The Plaintiffs appear to agree, as they referred to the "spoliation case" in their motion to reconsider filed July 2, 2010, a copy of which is attached as Exhibit A. Judge Buckner also referred to the "spoliation case" on page 7 of his order denying the Plaintiffs' motion to reconsider filed September 23, 2010, a copy of which is attached as Exhibit B.

Because South Carolina does not recognize the tort of negligent spoliation of evidence, GEICO is entitled to summary judgment. Additionally, even without the holding in Cole Vision, GEICO would still be entitled to summary judgment on each cause of action.

II. GEICO IS ENTITLED TO SUMMARY JUDGMENT ON THE PLAINTIFFS' BREACH OF CONTRACT CAUSE OF ACTION BECAUSE THERE WAS NOT AN ENFORCEABLE CONTRACT BETWEEN THE PLAINTIFFS AND GEICO.

The "well-settled principles" of contract formation in South Carolina require "an offer and acceptance accompanied by valuable consideration." Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (citation omitted). "Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act or a requested promise by the offeree, amounts to an offer." Id. (citation omitted). "[I]n order for a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement." Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 308, 698 S.E.2d 773, 778 (2010) (citation omitted). Additionally, in order for a contract to be enforceable, all parties must be obligated under it. Alana v. Peachtree Plantations, Inc., 292 S.C. 160, 167, 355 S.E.2d 286, 290 (Ct. App. 1987) (citations omitted).

Here, there was nothing more than the Plaintiffs' unilateral demand, made after Williams accepted the collision coverage, that GEICO indefinitely retain possession of the Explorer. The Plaintiffs did not offer any consideration for this demand, and the Plaintiffs were not obligated to GEICO in

any way. In reviewing the Plaintiffs' demand, GEICO would not have been "justified in inferring a promise [from the Plaintiffs] in return for a requested act or a requested promise by [GEICO]." Carolina Amusement, 313 S.C. at 220, 437 S.E.2d at 125. Because there was no consideration for this demand and because the Plaintiffs were not obligated under it, there was not an enforceable contract between the Plaintiffs and GEICO, and GEICO is therefore entitled to summary judgment on the breach of contract cause of action.

III. GEICO IS ENTITLED TO SUMMARY JUDGMENT ON THE PLAINTIFFS' UNFAIR TRADE PRACTICES CAUSE OF ACTION BECAUSE THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT DOES NOT APPLY TO TRADE PRACTICES IN THE BUSINESS OF INSURANCE.

The South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. §§ 39-5-10 to -170 (1985 & Supp. 2010), "does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, §§ 38-57-10 through 38-55-320." S.C. Code Ann. § 39-5-40(c) (Supp. 2010).¹ Section

¹ The Insurance Trade Practices Act, S.C. Code Ann. §§ 38-57-10 to -320 (2002), was codified in Chapter 55 of Title 38 until 1987, and § 39-5-40(c) was inadvertently not revised to reflect this change from Chapter 55 to Chapter 57. See Trustees of Grace Reformed Episcopal Church v. Charleston Ins. Co., 868 F. Supp. 128, 131 (D.S.C. 1994). It appears that the legislature attempted to remedy this error because the Code Commissioner's Note to § 39-5-40 states that "[i]n subsection (c), 'Chapter 57, §§ 38-57-10 through 38-57-320' was substituted for 'Chapter 55,

38-57-10 provides:

The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the act of Congress of March 9, 1945, (Public Law 15, 79th Congress), by defining, or providing for the determination of, all the practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

As Judge Currie recognized, "[c]hapter 57 clearly is intended to define and regulate all unfair trade practices in the business of insurance. SCUTPA, through § 39-5-40(c), provides a clear exemption for the practices covered by Chapter 57." Trustees of Grace, 868 F. Supp. at 130. The Insurance Trade Practices Act "is intended to regulate all unfair trade practices in the business of insurance as evidenced by § 38-57-10." Id. at 132 (citing State v. Thrift, 312 S.C. 282, 305, 440 S.E.2d 341, 354 (1994)). Accordingly, all unfair trade practices regarding the insurance business are regulated by the Insurance Trade Practices Act and are exempt from the coverage of SCUTPA. Id. Because the Plaintiffs allege unfair trade

§§ 38-55-10 through 38-55-410' at the direction of the Code Commissioner." (However, it appears that the error was not fully remedied because § 39-5-40 still provides that "[t]his article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 57, §§ 38-57-10 through 38-55-320." S.C. Code Ann. § 39-5-40(c) (Supp. 2010) (emphasis added). In any event, the legislature's intent is clear, and the court should disregard this scrivener's error. See Trustees of Grace, 868 F. Supp. at 131-32.

practices regarding the insurance business, GEICO is entitled to summary judgment on the SCUTPA cause of action.

IV. GEICO IS ENTITLED TO SUMMARY JUDGMENT ON THE PLAINTIFFS' NEGLIGENCE AND GROSS NEGLIGENCE CAUSES OF ACTION BECAUSE GEICO DID NOT HAVE A DUTY TO INDEFINITELY RETAIN POSSESSION OF THE EXPLORER AND THE PLAINTIFFS HAVE NOT SUFFERED ANY DAMAGES FROM ITS TEMPORARY SALE.

"To prevail in a negligence action, a plaintiff must demonstrate: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." McKnight v. S.C. Dep't of Corr., 385 S.C. 380, 386, 684 S.E.2d 566, 569 (Ct. App. 2009) (citation omitted).

A. GEICO did not owe a duty to the Plaintiffs to indefinitely retain possession of the Explorer.

The existence of a legal duty of care owed by the defendant to the plaintiff is essential to a negligence claim. Id. at 390-91, 684 S.E.2d at 571 (citation omitted). If the plaintiff cannot show that the defendant owed him a legal duty of care, then the plaintiff cannot establish negligence. Id. at 391, 684 S.E.2d at 571 (citation omitted). Whether the defendant owed a duty of care to the plaintiff is a matter of law for the court to determine. Id. "An affirmative legal duty to act exists

only if created by statute, contract, relationship, status, property interest, or some other special circumstance."

Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co., 355 S.C. 614, 618 S.E.2d 586, 588 (2003).

Here, the Plaintiffs cannot show that GEICO owed them a legal duty of care regarding the retention of the Explorer. While GEICO was Williams' insurer, that relationship did not include a duty to indefinitely retain a total loss vehicle after paying the value of the vehicle, and this insurer-insured relationship did not exist between GEICO and the other Plaintiffs. Accordingly, because GEICO did not owe the Plaintiffs a legal duty of care regarding the retention of the Explorer, GEICO is entitled to summary judgment on the negligence and gross negligence causes of action.

B. The Plaintiffs have not suffered any damages from GEICO's temporary sale of the Explorer.

Even if GEICO did owe the Plaintiffs a legal duty of care regarding the retention of the Explorer, the Plaintiffs have not suffered any damages from its temporary sale.

Negligence is not actionable unless it is the proximate cause of an injury to the plaintiff." Hurd v. Williamsburg County, 353 S.C. 596, 611, 579 S.E.2d 136, 144 (Ct. App. 2003) (citations omitted). If a plaintiff fails to establish that he

suffered damages, then the defendant is entitled to a verdict. See Stevens v. Allen, 342 S.C. 47, 53, 536 S.E.2d 663, 666 (2000).

Here, the Plaintiffs have neither demonstrated nor attempted to demonstrate that they have suffered any damage as a result of the salvage yard being in possession of the Explorer for a brief time period. The Plaintiffs did not seek to inspect the Explorer before it was sold to the salvage yard, and they have not sought to inspect the Explorer since GEICO regained possession of it. Additionally, the fact that the products liability case brought by Clark, the other passenger in the Explorer, went forward and settled shortly before trial demonstrates that the brief period of time that the Explorer was at the salvage yard did not affect the Plaintiffs' ability to bring and effectively prosecute a products liability action against Ford. Accordingly, because the Plaintiffs have failed to show that they have suffered any damages from GEICO's temporary sale of the Explorer, GEICO is entitled to summary judgment on the negligence and gross negligence causes of action.

Conclusion

The Plaintiffs' claims against GEICO form a general claim

of negligent third-party spoliation of evidence, which is not a viable cause of action in South Carolina, and GEICO is entitled to summary judgment on all the causes of action for that reason. As additional grounds for granting this motion, GEICO is entitled to summary judgment (1) on the breach of contract cause of action because an enforceable contract regarding the retention of the Explorer did not exist between the Plaintiffs and GEICO; (2) on the SCUTPA cause of action because SCUTPA does not apply to trade practices in the business of insurance; and (3) on the negligence and gross negligence causes of action because GEICO did not owe the Plaintiffs a legal duty of care regarding the retention of the Explorer and the Plaintiffs have not demonstrated that they suffered any damages from its temporary sale.

[SIGNATURE PAGE FOLLOWS]

GRIFFITH, SADLER & SHARP, P.A.

By: 

E. Mitchell Griffith
O. Edworth Liipfert
Matthew D. Cavender
600 Monson Street (29902)
Post Office Drawer 570
Beaufort, South Carolina 29901
(843) 521-4242 (telephone)
(843) 521-4247 (facsimile)
emg@gandspa.com
wliipfert@gandspa.com
mcavender@gandspa.com

ATTORNEYS FOR GEICO

November 16, 2011
Beaufort, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF JASPER)

TONIA D. WILLIAMS)

MARION B. SMALLS,)

T. W., BY HIS)

GUARDIANS AD LITEMS)

TONIA D. WILLIAMS AND)

CHARLES WILLIAMS,)

S. S., BY HER)

GUARDIAN AD LITEM RITA)

SHAW)

PLAINTIFFS,)

VS.)

GEICO CASUALTY COMPANY,)

GEICO INDEMNITY COMPANY,)

GOVERNMENT EMPLOYEES)

INSURANCE COMPANY,)

GEICO GENERAL INSURANCE)

COMPANY)

DEFENDANTS.)

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2009-CP-27-638

CASE NO.: 2009-CP-27-639

CASE NO.: 2009-CP-27-645

CASE NO.: 2009-CP-27-647

MEMORANDUM IN OPPOSITION TO
DEFENDANT GEICO'S MOTION FOR
SUMMARY JUDGMENT

TO: E. MITCHELL GRIFFITH, ESQUIRE, ATTORNEY FOR DEFENDANT GEICO:

FACTS

1. Plaintiffs were traveling West on US Highway 278 in Ridgeland, Jasper County, South Carolina on October 2, 2006 in a 1998 Ford Explorer when they were involved in a tragic and catastrophic accident. Betty Mitchell Clark died as a result of the accident. Decedent Betty Mitchell Clark was represented by Attorney D.T. Johnson who brought a Products Liability action on behalf of her estate against Ford Motor Company.
2. The 1998 Ford Explorer was insured through Defendant GEICO. The contract of insurance was between Plaintiff Charles Williams, Plaintiff Tonia Williams and Defendant GEICO.

3. Immediately after the accident on October 2, 2006, Defendant GEICO was forwarded a letter of Notice of Non-Spoilation of Evidence on October 6, 2006 by Plaintiffs (Exhibit A).
4. Defendant GEICO forwarded Plaintiff Williams a Power of Attorney/Odometer Disclosure Form sometime shortly thereafter (Exhibit B). The letter of Non-Spoilation was sent to Defendant GEICO prior to the execution of the Power of Attorney/Odometer Disclosure Form and prior to the execution of the satisfaction of Title Lien (Exhibit C). The Power of Attorney/Odometer Form was executed on October 18, 2006 and the satisfaction of lien was executed on October 31, 2006.
5. During the inspection of the 1998 Ford Explorer by Attorney David C. Marshall of Turner, Padgett, Graham & Laney, P.A. who represented Ford Motor Company and Investigator Jim Bryan of the Law Office of D.T. Johnson, who represented the Estate of Decedent Betty Mitchell Clark in their Products Liability action against Ford Motor Company arising out of this accident, it was stated "the vehicle is no longer in the same condition as it appeared to be in the photos taken shortly after the crash produced by your office" (Exhibit D).
6. Defendant GEICO advised Plaintiffs by telephone on March 19, 2007 that said vehicle had been sold to a salvage yard. (See Exhibit E).
7. On March 29, 2007, Defendant GEICO advised Plaintiffs that Defendant GEICO had regained ownership of the 1998 Ford Explorer and that the "vehicle is intact with the exception of three tires and wheels that were sold". (Exhibit F).
8. When Plaintiffs' counsel went to expect the vehicle at Parks Auto Salvage, Ravenel, South Carolina, Plaintiffs' counsel was informed by William Roy Parks, operator and owner of Parks Auto Salvage that in addition to the tires and rims been sold off said vehicle, the back glass was also sold and that he was instructed not to discuss these matters with

Plaintiffs' attorney. (See Exhibit G- Affidavit of William Roy Parks, Owner and operator of Parks Auto Salvage, Raveland, South Carolina.).

9. Defendant GEICO's letter dated March 29, 2007 from its employee Kelly Stone indicated that three tires and wheels were sold only.
10. The Affidavit of William Roy Parks, owner and operator of Parks Auto Salvage Sales and Service states that in addition to the three tires and wheels being sold, the back glass of said vehicle was also sold.
11. Plaintiffs expert, Edward L. Robinson, Ph.D states that "the tires and wheels have been removed from the vehicle and are unavailable for examination and testing. Therefore, it is my professional opinion that it is impossible for any qualified, impartial accident reconstructionist to make a valid determination of the presence or absence of defects which would constitute product liability. Obviously, the integrity and proper function of the tires and wheels are major factors in the analyses of vehicle roll-over accidents. In this case, their contribution to the cause of the accident or their effect on the severity of the accident cannot be determined." (Exhibit H).

PROCEDURAL HISTORY

Plaintiffs' concur with Defendant GEICO's Procedural History of this case.

STANDARD FOR REVIEW OF SUMMARY JUDGMENT

Under South Carolina law, "summary judgment may be rendered only when 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 that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry onto the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E. 2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be considered most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm. 362 S.C. 1.605 S.E. 2d 744 (Ct. App. 20040). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E. 2d 20, 29 (S.C. 2008).

"When determining if any triable issue of facts exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA Inc., 377 S.C. 129, 133-34, 559 S.E. 2d 496, 498 (2008). "If triable issues exist, those issues must go to the jury." Schmidt v. Courtney, 357 S.C. 310, 592 S.E. 2d 329 (Ct. App. 2003).

"Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Id (internal quotation marks omitted); accord Lantam v. Blue Cross and Blue Shield of South Carolina, Inc. 349 S.C. 356, 363, 563 S.E. 2d 331, 334 (2002); Doe v. Batson, 345 S.C. 316, 322, 548, S.E. 2d 854, 857 (2001); Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 112, 410 S.E. 2d 537, 543 (1991).

"The South Carolina Supreme Court recently clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc. 678 S.E. 2d 801, 802-3 (S.C. 2009). In Hancock, the court held that "in cases applying the preponderance of the 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." Id. at 803. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

ARGUMENT

I. GEICO's Motion for Summary Judgment on all causes of action because Spoilation is not a viable cause of action in South Carolina should be denied because Defendant GEICO's Motion is premature.

Under South Carolina law, "summary judgment may be rendered only when 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 that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry onto the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E. 2d 839, 841 (Ct. App. 1986).

"Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery." Id (internal quotation marks omitted); accord Lantam v. Blue Cross and Blue Shield of South Carolina, Inc. 349 S.C. 356, 363, 563 S.E. 2d 331, 334 (2002); Doe v. Batson, 345 S.C. 316, 322, 548, S.E. 2d 854, 857 (2001); Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 112, 410 S.E. 2d 537, 543 (1991).

"The South Carolina Supreme Court recently clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc. 678 S.E. 2d 801, 802-3 (S.C. 2009). In Hancock, the court held that "in cases applying the preponderance of the 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." Id. at 803. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

In this present case discovery is not complete. Defendant GEICO and its employees have not been deposed. Plaintiffs expert has not inspected the vehicle. Plaintiffs expert has not been deposed. Hence, Defendant GEICO's Motion is premature and should be denied.

II. GEICO's Motion for Summary Judgment on Plaintiffs' Breach of Contract Cause of Action should be denied because there was an enforceable contract between the Plaintiff and GEICO.

Defendant GEICO through its adjusters, Buck Abele, mutually agreed on October 6, 2006 not to alter the said vehicle in any way. (See Exhibit A).

"Consideration" is a benefit to party promising or a loss of detriment to party to whom promise is made. Shayne of Miami, Inc. v. Greybow, Inc., 101 S.E.2d 486, 232 S.C. 161.

Loss or detriment to the promisee is sufficient as a consideration for a contract. Theodore v. Mozie, 95 S.E.2d 173, 230 S.C. 216.

"When determining if any triable issue of facts exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA Inc., 377 S.C. 129, 133-34, 559 S.E. 2d 496, 498 (2008). "If triable issues exist, those issues must go to the jury." Schmidt v. Courtney, 357 S.C. 310, 592 S.E. 2d 329 (Ct. App. 2003).

In the present case, the consideration is the impairment by Defendant GEICO to Plaintiffs to pursue their action against Ford Motor Company for a Products Liability case.

Hence, the agreement between Defendant GEICO and Plaintiff (Exhibit A) along with consideration as outlined above makes the contract between Defendant GEICO and Plaintiffs a legally enforceable contract.

Defendant GEICO's Motion for Summary Judgment should be denied because there is a legally enforceable contract between the Plaintiffs and Defendant GEICO.

III. GEICO'S Summary Judgment Motion on Plaintiffs Unfair Trade Practices Cause of Action because the South Carolina Unfair Trade Practices Act does not apply to Trade Practices in the business of insurance should be dismissed.

Without quoting any case law or an opinion from the South Carolina Court of Appeals or Supreme Court, the defense takes the position that the South Carolina Unfair Trade Practices Act does not apply to insurance. They note that the plain wording of the statute was "inadvertently not revised to reflect this change from Chapter 55 to Chapter 57" and take the position that since legislative error was plain, it should be ignored. The plain and simple fact is that there is no case law from the Appellate Courts of the State of South Carolina that would

uphold that position and the Plaintiff takes the position that such alleged insurance unfair dealing is cognizable under the South Carolina Unfair Trade Practices Act.

IV. GEICO's Motion for Summary Judgment on Plaintiffs' Negligence and Gross Negligence Causes of Action should be denied.

"When determining if any triable issue of facts exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA Inc., 377 S.C. 129, 133-34, 559 S.E. 2d 496, 498 (2008). "If triable issues exist, those issues must go to the jury." Schmidt v. Courtney, 357 S.C. 310, 592 S.E. 2d 329 (Ct. App. 2003).

"The South Carolina Supreme Court recently clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 678 S.E. 2d 801, 802-3 (S.C. 2009). In Hancock, the court held that "in cases applying the preponderance of the 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." Id. at 803. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

Defendant GEICO and Plaintiffs entered into a valid and enforceable contract (See Exhibit A). Defendant GEICO had a duty to perform the contract as agreed. Defendant GEICO's failure to perform the contract as agreed upon by the parties by selling parts of the vehicles impaired Plaintiffs ability to pursue a Products Liability action. Moreover, Defendant GEICO instructed the salvage yard where the vehicle is located not to cooperate with Plaintiffs.

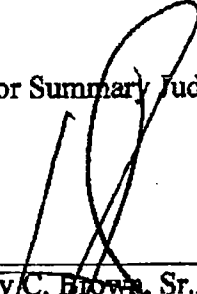
Defendant GEICO's Motion for Summary Judgment on the Negligence and Gross Negligence Cause of Action should be denied because of the negligent and gross negligence of Defendant GEICO in the performance with the agreed contract between Defendant GEICO and Plaintiffs.

Defendant GEICO's Motion for Summary Judgment is further premature because Defendant GEICO's Motion was filed in November 2011.

Only in mid December 2011 did Plaintiffs counsel receive the initial Answers to Interrogatories and Request for Production. The Answers to Plaintiffs Interrogatories and Request to Produce was in response to Plaintiffs Motion to Compel. Among the items produced by Defendant GEICO is a report showing damage to both rear tires (Exhibit I). Per Defendant GEICO's admissions these tires were sold after Plaintiffs request to preserve said vehicle.

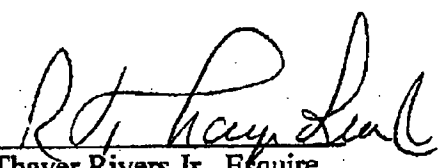
The receipt of recent Interrogatories and Request for Production from Defendant GEICO show a number of NHTSA recalls which Plaintiffs have not had time to explore.

Plaintiffs pray that Defendant GEICO's Motion for Summary Judgment be dismissed.



Harry C. Brown, Sr., Esquire
Attorney for Plaintiffs
P.O. Box 824
Ridgeland, SC 29936
Telephone: (843) 726-7920
Facsimile: (843) 726-7923

1/3, 2012
Ridgeland, South Carolina



R. Thayer Rivers Jr., Esquire
Attorney for Plaintiffs
P.O. Box 441
Ridgeland, SC 29936
Telephone: (843) 726-8136
Facsimile: (843) 726-4401

1/3, 2012
Ridgeland, South Carolina

69

Plaintiffs Exhibit A

Harry Brown, Esquire
P. O. Box 824
Ridgeland, SC 29936
(843) 762-7920

October 6, 2006

Via/Facsimile: 703-543-0429
Buck Abele
GEICO
P. O. Box 962
Bluffton, SC 29910

Re: **NOTICE OF NON-SPOILIATION OF EVIDENCE**
Automobile/1998 Ford Explorer/Tag 506-TNM
Insurance Policy Number: 1010633004

Dear Buck:

This letter is to confirm that I am the attorney for Tonya Williams/Charles Williams. Please accept this letter as a non-spoliation notice regarding the automobile that Tonya Williams was driving on October 2, 2006, a 1998 Ford Explorer, South Carolina tag number 506-TNM, which is titled to Tonya Williams/Charles Williams.

There is concern that the vehicle referenced above has a manufacturing defect that led to several personal injuries and one death. On yesterday we spoke and you agreed not to move this vehicle until Monday, October 9, 2006, and we discussed the importance of not altering this vehicle in any way, including seat belts, until my investigators have had a chance to perform a thorough inspection. Also, immediately prior to moving the vehicle, you agreed to notify me of the address of where the vehicle will be stored. It is imperative that this vehicle not be salvaged or sold until we have had a chance to conduct a thorough investigation.

Please call me at the above number at your earliest convenience to let me know the exact address of where you plan to have the vehicle stored.

Thank you for your prompt attention in this matter. I look forward to hearing from you.

Sincerely,

Harry Brown

HB/pf

Plaintiff Exhibit # B

P.2

NOTICE: This form may be used only when title is physically held by licensor or holder of the title. Failure to do so may result in fines and/or imprisonment.

POWER OF ATTORNEY-ODOMETER DISCLOSURE FORM

NOTICE: This form may be used only when title is physically held by licensor or holder of the title. Failure to do so may result in fines and/or imprisonment.

VEHICLE DESCRIPTION Year 92 Make FORD Model Type EXP Body Type CU
VIN (Vehicle Identification Number) 1FMDU32E 6150521
PART A. POWER OF ATTORNEY TO DISCLOSE MILEAGE

Federal and State law requires that you state the mileage upon transfer of ownership (49 USC 3275C 56-19-240(1)). False statement may result in fines and/or imprisonment (49 USC 3275C 56-19-240(1)).

PLEASE PRINT: I, James D. Williams, (Licensor/Transferor's Name) do hereby certify that I am the owner of the vehicle described above, exactly as stated in the following disclosure:

- I state that the odometer now reads 107,187 (no tens) miles and to the best of my knowledge that it reflects the actual mileage of the vehicle described herein, unless one of the following statements is checked:
- I hereby certify that to the best of my knowledge, the odometer reading reflects the actual mileage in excess of 100,000 miles.
 - I hereby certify that the odometer reading is NOT the actual mileage. WARNING: ODOMETER DISCREPANCY

James D. Williams (Licensor/Transferor's Name) James D. Williams (Agent's Name) 10/18/07 (Date of Signature)

PART B. Power of Attorney to Revoke This Document and Acknowledge Odometer Disclosure (PART B IS INVALID UNLESS PART A HAS BEEN COMPLETED.)

PLEASE PRINT: I, James D. Williams, (Transferor's Name) do hereby certify that I am the owner of the vehicle described above, exactly as stated in the following disclosure:

I state that the odometer now reads 107,187 (no tens) miles and to the best of my knowledge that it reflects the actual mileage of the vehicle described herein, unless one of the following statements is checked:

- I hereby certify that to the best of my knowledge, the odometer reading reflects the actual mileage in excess of 100,000 miles.
- I hereby certify that the odometer reading is NOT the actual mileage. WARNING: ODOMETER DISCREPANCY

James D. Williams (Transferor's Name) James D. Williams (Agent's Name) 10/18/07 (Date of Signature)

PART C. CERTIFICATION (To be completed when Part A or Part A and B have been used) 49 USC 327 (56-15)

PLEASE PRINT: I, James D. Williams, (Person exercising power of attorney) hereby certify that the mileage I have disclosed on the title document is consistent with that provided on the odometer disclosure. Further, upon examination of the title and any transportation documents for the vehicle described above, the odometer disclosure I have made on the title document is correct and no additional liability under Federal or State Law.

James D. Williams (Signature) James D. Williams (Printed Name) 10/18/07 (Date of Certification)

This document is void if any information entered herein has been erased or altered by any means. No authorized printing or reproduction of this document is strictly prohibited. Photo copy may be made only as a completed document for record-keeping purposes for the parties named herein.

20 07 03:33p

Plaintiff Exhibit C

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS
& PUBLIC TRANSPORTATION
COLUMBIA
FORM 470

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 07-20-2007 BY 60322 UCBAW

OWNER NAME <i>Denise Williams</i>		VEHICLE MAKE <i>1988</i>	
VEHICLE TYPE <i>SW</i>		VEHICLE REGISTRATION <i>1FM2U3245000250801</i>	
YEAR <i>1988</i>		VEHICLE TITLE NO. <i>770008013726627</i>	

Has been fully satisfied and paid on _____
DATE SATISFIED *10/31/2001*

Regina F. Adams
NAME OF ENGINEER

AK
BY

ASST. 46
TITLE

STATE OF SOUTH CAROLINA
COUNTY OF *Spartanburg*

Subscribed and sworn to before me
this *20th* day of *April* 2006
[Signature]
NOTARY PUBLIC

868 F.Supp. 128
(Cite as: 868 F.Supp. 128)

C

United States District Court,
D. South Carolina,
Charleston Division.

TRUSTEES OF GRACE REFORMED EPISCOPAL
CHURCH, Plaintiffs,

v.

CHARLESTON INSURANCE CO., T.M. Mayfield
& Co., and Gay & Taylor, Defendants.

Civ. A. No. 2:92-2957-22.
May 12, 1994.

Insured brought state tort action against independent insurance adjusting corporations and others. Action was removed to federal court. On adjuster's motion for summary judgment and for partial summary judgment, the District Court, Currie, J., held that: (1) covenant not to execute between insured and another tort-feasor did not bar insured from seeking additional recovery against adjuster, and (2) insureds' South Carolina Unfair Trade Practices Act (SCUTPA) cause of action for alleged unfair trade practices in adjusting insureds' claims was precluded by insurance practices exemption; and (3) prior state court order, finding cause of action under SCUTPA, was not binding on federal court.

Motion for partial summary judgment granted.

West Headnotes

[1] Compromise and Settlement 89 ⚡ 17(2)

89 Compromise and Settlement

89I In General

89k14 Operation and Effect

89k17 Conclusiveness

89k17(2) k. Persons Concluded. Most

Cited Cases

Release 331 ⚡ 37

331 Release

331II Construction and Operation

331k37 k. Covenant Not to Sue or Execute.

Most Cited Cases

Under South Carolina law, settlement or covenant not to sue one tort-feasor does not discharge any other tort-feasor unless its terms so provide or plaintiff has received full compensation. S.C.Code 1976, § 15-38-50(1).

[2] Compromise and Settlement 89 ⚡ 17(2)

89 Compromise and Settlement

89I In General

89k14 Operation and Effect

89k17 Conclusiveness

89k17(2) k. Persons Concluded. Most

Cited Cases

Release 331 ⚡ 37

331 Release

331II Construction and Operation

331k37 k. Covenant Not to Sue or Execute.

Most Cited Cases

Plaintiffs were not barred by their settlement and covenant not to execute with one tort-feasor from seeking additional recovery with another tort-feasor where covenant not to execute expressly stated that it did not discharge any other tort-feasor and plaintiffs arguably had not received their full measure of damages from previous settlements. S.C.Code 1976, § 15-38-50(1).

[3] Antitrust and Trade Regulation 29T ⚡ 152

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk152 k. Exemptions and Safe Harbors.

Most Cited Cases

(Formerly 92Hk6 Consumer Protection)

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(Cite as: 868 F.Supp. 128)

Alleged unfair trade practices committed by independent insurance adjusting corporation in adjusting insureds' claims was exempt from coverage under South Carolina Unfair Trade Practices Act. S.C.Code 1976, §§ 38-57-10 to 38-57-320, 39-5-10 et seq., 39-5-40(c).

[4] Antitrust and Trade Regulation 29T 152

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk152 k. Exemptions and Safe Harbors.

Most Cited Cases

(Formerly 92Hk6 Consumer Protection)

All unfair trade practices regarding insurance business are regulated by Insurance Trade Practices Act and are exempt from coverage under South Carolina Unfair Trade Practice Act. S.C.Code 1976, §§ 38-57-10 to 38-57-320, 39-5-10 et seq., 39-5-40(c).

[5] Removal of Cases 334 114

334 Removal of Cases

334VIII Proceedings in Case After Removal

334k114 k. Effect of Proceedings in State Court Before Removal. Most Cited Cases

Interlocutory state court ruling prior to removal is subject to reconsideration by federal court and, while to be treated with respect, is neither final nor conclusive.

[6] Removal of Cases 334 114

334 Removal of Cases

334VIII Proceedings in Case After Removal

334k114 k. Effect of Proceedings in State Court Before Removal. Most Cited Cases

Interlocutory state court order entered prior to removal of case to federal court, which determined that alleged unfair trade practices committed by adjuster in resolving insured's claims were not exempt from South Carolina Unfair Trade Practices Act (SCUTPA), was not binding on federal court. S.C.Code 1976, § 39-5-10 et seq.

[7] Statutes 361 189

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k189 k. Literal and Grammatical Interpretation. Most Cited Cases

Although court generally should read statute as literally written, courts will reject such reading if it would render statute meaningless, produce absurd results, or defeat plain legislative intention.

[8] Antitrust and Trade Regulation 29T 152

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk152 k. Exemptions and Safe Harbors.

Most Cited Cases

(Formerly 92Hk3 Consumer Protection)

Section of South Carolina Unfair Trade Practices Act (SCUTPA) exempting from SCUTPA's coverage unfair trade practices covered and regulated under Chapter 55 of Title 38 was to be read as referring to Title 57, in which unfair insurance practices were regulated, instead of Title 55; it was obvious that when Insurance Trade Practices Act was recodified as Chapter 57, exemption provision in SCUTPA inadvertently was not revised to reflect change; mistake in reference would be ignored where real intent of legislature was manifest. S.C.Code 1976, §§ 38-57-10 to 38-57-320, 39-5-40(c).

[9] Antitrust and Trade Regulation 29T 152

29T Antitrust and Trade Regulation

29TIII Statutory Unfair Trade Practices and Consumer Protection

29TIII(A) In General

29Tk152 k. Exemptions and Safe Harbors.

Most Cited Cases

(Formerly 92Hk6 Consumer Protection)

By precluding unfair trade practices covered and regulated by Insurance Trade Practices Act, South Carolina Unfair Trade Practices Act (SCUTPA) ex-

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empts from coverage of SCUTPA all unfair trade practices in business of insurance; exemption provision prevents other practices regulated by Insurance Code, but not contained in Insurance Trade Practices Act, from being basis for SCUTPA cause of action. S.C.Code 1976, §§ 38-57-10 to 38-57-320, 39-5-40(c).

*129 Fleet Freeman and Justin O'Toole Lucey, Mt. Pleasant, SC, for plaintiffs.

James Dowell Gandy, III, Charleston, SC, for defendants.

ORDER

CURRIE, District Judge.

This action arises from several insurance claims made by Plaintiffs concerning damage to their church building allegedly caused by Hurricane Hugo and an earlier wind storm. Jurisdiction is based upon diversity of citizenship pursuant to 28 U.S.C. § 1332. This matter is presently before the court on Defendant Gay & Taylor's Motion for Summary Judgment and Motion for Partial Summary Judgment. The court has carefully reviewed the record in this matter and heard oral argument. For the reasons stated below, the court denies the Motion for Summary Judgment and grants the Motion for Partial Summary Judgment.

I. PROCEDURAL BACKGROUND

Plaintiffs originally filed this action in state court against the property insurer, Charleston Insurance Company ("C.I.C."), two independent insurance adjusting corporations, *130 and four individual adjusters. The individual adjusters were dismissed. Plaintiffs then settled with and dismissed C.I.C. This dismissal created complete diversity of citizenship among the remaining parties.^{FN1} The remaining defendants then removed the case to this court pursuant to 28 U.S.C. § 1441 and § 1446(b). Plaintiffs recently settled with and dismissed Defendant T.M. Mayfield & Co., one of the independent insurance adjusting corporations. The only remaining causes of action are against Gay & Taylor for negligent or wrongful adjustment and violation of the South Carolina Unfair Trade Practice Act, S.C.Code Ann. § 39-5-10, et seq. ("SCUTPA").

^{FN1}. At the time Plaintiffs commenced this action there was not complete diversity of citizenship because one of the individual adjusters and C.I.C. are citizens of South

Carolina.

II. DISCUSSION

A. MOTION FOR SUMMARY JUDGMENT

In its Motion for Summary Judgment, Gay & Taylor argues that Plaintiffs, through their settlement and covenant not to execute with C.I.C., have received the full measure of their damages and are barred from seeking additional recovery. For reasons set forth below, the court denies Gay & Taylor's motion.

[1] Plaintiffs sued Defendants in tort. Under South Carolina law, a settlement or covenant not to sue with one tortfeasor does not discharge any other tortfeasor unless its terms so provide or the plaintiff has received full compensation. S.C.Code Ann. § 15-38-50(1); Vaughn v. Anderson, 300 S.C. 55, 58, 386 S.E.2d 297, 299 (Ct.App.1989).

[2] The covenant not to execute between Plaintiffs and C.I.C. expressly states that it does not discharge any other tortfeasor:

By signing this Covenant Not to Execute, it is not intended that the Trustees release or discharge from any claims, demands, damages, expenses, actions or causes of action, known or unknown, which Trustees may have as a result of causes of action against any other entity including, but not limited to T.M. Mayfield & Co. or Gay & Taylor, Inc., for all claims, demands, damages, actions or causes of action, known or unknown, are expressly reserved hereunder.

Covenant Not to Execute, at 2. Furthermore, Gay & Taylor has not established that Plaintiffs have received their full measure of damages from previous settlements. In their answers to Rule 16(b) Interrogatories Plaintiffs seek damages totaling \$383,497.40. Plaintiffs claim they have recovered \$254,280.12 in settlements. They arguably have uncompensated damages in the sum of \$129,217.28. Accordingly, Gay & Taylor's Motion for Summary Judgment is denied.

B. MOTION FOR PARTIAL SUMMARY JUDGMENT

[3] In its Motion for Partial Summary Judgment, Gay & Taylor contends that Plaintiffs' SCUTPA cause of action for alleged unfair trade practices in adjusting Plaintiffs' insurance claims is precluded because this conduct is exempt from coverage under SCUTPA.

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(Cite as: 868 F.Supp. 128)

The court agrees.

[4] Gay & Taylor relies upon § 39-5-40(c) of SCUTPA as the basis for its Motion for Partial Summary Judgment. This section states: "This article does not supersede or apply to unfair trade practices covered and regulated under Title 38, Chapter 55, §§ 38-55-10 through 38-55-410." S.C.Code Ann. § 39-5-40(c). Sections 38-55-10 through 38-55-410 have been recodified at S.C.Code Ann. §§ 38-57-10 through 38-57-320. The declaration of purpose section to Chapter 57 of Title 38, § 38-57-10, provides: "The purpose of this chapter is to regulate trade practices in the business of insurance ... by defining, or providing the determination of, all the practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." Chapter 57 clearly is intended to define and regulate all unfair trade practices in the business of insurance. SCUTPA, through § 39-5-40(c), provides a clear exemption for the practices covered by Chapter 57. Therefore, all unfair trade practices regarding the insurance business are regulated *131 by the Insurance Trade Practices Act, §§ 38-57-10 *et seq.*, and are exempt from the coverage of SCUTPA.

Plaintiffs argue that the § 39-5-40(c) exemption does not apply in the present case for three reasons. First, Plaintiffs contend that prior to removal, the state court ruled on this identical issue, denying Gay & Taylor's motion for summary judgment, and that the prior order became the law of this case. Second, Plaintiffs argue that § 39-5-40(c) only exempts unfair trade practices covered and regulated under Chapter 55 of the Insurance Code and that courts are bound by statutes as written. Third, Plaintiffs contend that even if § 39-5-40(c) removes unfair trade practices covered and regulated under Chapter 57 of the Insurance Code as the basis for a cause of action under SCUTPA, § 39-5-40(c) does not prevent other practices regulated by the Insurance Code from being the basis for a SCUTPA cause of action. The court addresses each of these arguments in turn.

[5][6] First, this court is not bound by the prior state court order.^{FN2} An interlocutory state court ruling prior to removal, such as the state court ruling in this case, is subject to reconsideration by a federal court and, while to be treated with respect, is neither final nor conclusive. General Investment Co. v. Lake

Shore & Michigan Southern Ry. Co., 260 U.S. 261, 267, 43 S.Ct. 106, 110, 67 L.Ed. 244 (1922); Thornton, 703 F.Supp. at 1231. Because this court concludes that Plaintiffs' SCUTPA cause of action is precluded it declines to treat the state court order as the law of the case.

FN2. Whether rulings of an earlier district judge in a case become binding as the "law of the case" upon a subsequent district judge is not a rigid rule, but more a matter of proper judicial administration which varies with the circumstances so that it may sometimes be proper for a district judge to treat earlier rulings as binding, sometimes not. Hill v. BASF Wyandotte Corp., 696 F.2d 287, 290 n. 3 (4th Cir.1982); Thornton v. Cessna Aircraft Co., 703 F.Supp. 1228, 1231 (D.S.C.1988), *aff'd*, 886 F.2d 85 (4th Cir.1989).

[7][8] Second, Plaintiffs' argument that Section 39-5-40(c) applies to Chapter 55 of Title 38, not Chapter 57 of Title 38, is without merit. Although a court generally should read a statute as literally written, courts will reject such a reading if it would render the statute meaningless, produce absurd results, or defeat the plain legislative intention. Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, ---, 440 S.E.2d 364, 366 (1994); Fort Hill Natural Gas Authority v. Easley, 310 S.C. 346, ---, 426 S.E.2d 787, 788-89 (1993); Purvis v. State Farm Mut. Auto. Ins. Co., 304 S.C. 283, 288, 403 S.E.2d 662, 665-66 (Ct.App.1991). To read § 39-5-40(c) as Plaintiffs propose would render it a nullity. Chapter 55 of Title 38 neither defines nor regulates unfair trade practices in the insurance business.^{FN3} This court must presume that the General Assembly did not intend for § 39-5-40(c) to be meaningless. See Purvis, 304 S.C. at 288, 403 S.E.2d at 666.

FN3. This chapter requires insurers to do business in their own names, prohibits discrimination in the issuance of policies, limits insurers making loans to their officers and directors, prohibits tontine policies, provides a procedure to revoke an insurer's license if it does not pay a final judgment, prohibits an insurer from doing business in the state if its charter is canceled or revoked, prohibits insuring an uninsurable person with intent to defraud, prohibits presenting false claims for

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payment, prohibits an insurance agent from having any interest in debits collected for sick, accident or death benefits, and limits the connection between undertakers and life insurers. This chapter does not define any of the activities regulated in the chapter as unfair trade practices.

The Insurance Trade Practices Act, Chapter 57 of Title 38, was designated as Chapter 55 of Title 38 until 1987. It is obvious that when the Insurance Trade Practices Act was recodified as Chapter 57 in 1987, § 39-5-40(c), which has not been amended since 1971, inadvertently was not revised to reflect the change. Recently, another judge of the United States District Court for the District of South Carolina confronted the identical issue and held that § 39-5-40(c) should be read to refer to Title 57 instead of Title 55. *Colonial Life & Accident Ins. Co. v. American Family Life Assurance Co.*, 846 F.Supp. 454, 462 (D.S.C.1994) (Shedd, J.). This court agrees that this is the correct reading of the statute. As Judge Shedd noted:

*132 Under general principles of statutory construction, where as here, the legislature has made a mistake in a reference in a statute to another statute and the real intent of the legislature is manifest and would be defeated by adherence to the terms of the mistaken reference, a court may disregard the mistaken reference or read it as corrected in order to give effect to the legislative intent.

Id. at 462 n. 14 (citing *Curry v. Department of Corrections*, 423 So.2d 584, 585 (Fla.Ct.App.1982)).

[9] Finally, because § 39-5-40(c) exempts from coverage unfair trade practices regulated by Chapter 57 of Title 38 it exempts from coverage all unfair trade practices regarding the business of insurance. The Insurance Trade Practices Act to which § 39-5-40(c) refers is intended to regulate all unfair trade practices in the business of insurance as evidenced by § 38-57-10. *State v. Thrift*, 312 S.C. 282, ---, 440 S.E.2d 341, 354 (1994) (to determine the purpose and scope of an act one can examine the preamble.); *Spartanburg v. Leonard*, 180 S.C. 491, 186 S.E. 395 (1936) (preamble of an act may be used as a guide in determining legislative intent). Therefore, by precluding unfair trade practices covered and regulated under Chapter 57, § 39-5-40(c) exempts from the coverage of SCUTPA all unfair trade practices in the

business of insurance.^{FN4} Accordingly, the Motion for Partial Summary Judgment of Gay & Taylor on the SCUTPA cause of action is granted.

FN4. The fact that Chapter 59 of Title 38 is not included in the exemption of § 39-5-40(c) does not alter this conclusion. Chapter 59 enumerates acts by insurers which constitute improper claims practices. Chapter 59 neither defines nor regulates unfair trade practices in the insurance business. Because § 39-5-40(c) provides an exemption for unfair trade practices in the insurance business there is no reason for it to make reference to Chapter 59. Plaintiffs were free to bring a cause of action under Chapter 59 if they desired.

IT IS SO ORDERED.

D.S.C., 1994.
Trustees of Grace Reformed Episcopal Church v.
Charleston Ins. Co.
868 F.Supp. 128

END OF DOCUMENT

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
Civil Action no.: 09-CP-27-00639

TONIA D. WILLIAMS, MARION B.)
SMALLS, T. [REDACTED] W. [REDACTED] by)
And through his Guardians ad Litem)
TONIA D. WILLIAMS and CHARLES)
WILLIAMS; and S. [REDACTED] S. [REDACTED],)
By and through her Guardian ad Litem,)
RITA SHAW,)

Plaintiffs,)

v.)

GEICO Casualty Company; GEICO)
Indemnity Company, Government)
Employees Insurance Company, and)
GEICO General Insurance Company,)

Defendants.)

RULE 59(e)
MOTION FOR RECONSIDERATION

FILED
2012 MAR 28 PM 3:26
MARGARET E. JOSEPH
CLERK OF COURT
JASPER COUNTY, SC

The Plaintiffs in the above captioned matter hereby move the Honorable Carmen T. Mullen to reconsider, amend or otherwise change her Order of March 12, 2012, which granted Summary Judgment to the GEICO Defendants. Said Order was received by the attorney for the Plaintiff's March 19, 2012.

FACTUAL BACKGROUND

The Plaintiffs were involved in an extremely serious automobile accident which occurred on October 2, 2006. On October 5, 2006, Harry C. Brown, Sr., as attorney for the Plaintiffs, verbally notified the adjuster for GEICO that he represented the Plaintiff's on the above matter and requested that the vehicle in question not be moved, altered, or otherwise disposed of as he was pursuing a products liability action (see attached letter – Exhibit 1). This was followed by a letter of October 6, 2006, by attorney Brown to the GEICO adjuster which was faxed at that time to Buck Abele, the GEICO adjuster in question. The letter further noted that the adjuster had agreed not to move the vehicle. Thereafter, agents for GEICO contacted the client CHARLES

WILLIAMS, and negotiated a settlement for the total loss of the vehicle in question. As per the existing record, such was done without notice to, participation of, or acquiescence by attorney Harry C. Brown, Sr., who had placed GEICO on notice as to his representation of the Plaintiffs. GEICO sold the vehicle in question to a salvage yard in January of 2007. GEICO thereafter notified attorney Brown of the sale and that they had retrieved the vehicle thereby ratifying their agreement to preserve the vehicle.

The Summons and Complaint in this matter was filed in the matter on September 29, 2009. The answer was filed November 3, 2009. Standard discovery, interrogatories and request to produce was served on attorney Mitchell Griffith, attorney for the Defendant on January 8, 2010 (see attached Exhibit 2). Thereafter, the following sequence of events occurred:

1. Motion to Sever by the Defendants – April 6, 2010.
2. Motion to Sever granted - June 28, 2010.
3. Removal to Federal Court by Defendant – July 13, 2010.
4. Plaintiff's Motion to Remand to State Court granted – September 8, 2010.
5. Denial of Plaintiffs' Motion to Reconsider action to sever – September 20, 2010.
6. Second removal to Federal Court September 22, 2010.
7. Notice of Intent to Appeal severance filed September 22, 2010.
8. Remand of Removal – December 15, 2010.
9. Severance Order Appeal dismissed May 3, 2011.
10. Case remitted from the SC Court of Appeals to the Jasper County Court of Common Pleas – September 23, 2011.

Thus the entire first two years of the litigation of this matter was substantially spent with the Defendants trying to get the matter removed to Federal District Court which failed.

On July 18, 2011, attorney Brown corresponded with attorney Griffith in regard to the lack of reply to the discovery which had been pending for some 18 months at that time. (See Exhibit 3 {letter of July 18 2011}). On September 15, 2011, the Plaintiffs by attorney Harry C. Brown, Sr., filed a motion to compel answers to the discovery which at that time had been outstanding since January of 2010, some 20 months. Without having complied with discovery and with a motion to compel outstanding and on the non-jury docket, the Defendants filed a

motion for Summary Judgment on November 16, 2011. Prior to the Motion to Compel being heard in the December term of common pleas non-jury for Jasper County, they agreed to furnish the discovery and the motion to compel was withdrawn. Discovery was finally produced December 12, 2011 with the Summary Judgment hearing being held January 4, 2012. This would give the Plaintiffs, in the middle of the Christmas season, about 2 weeks to arrange and have heard depositions of the various GEICO employees, the 30(b)(6) deposition for GEICO, the motion to produce voluminous amounts of documents from GEICO (which were not included in the discovery) all to be able to be ready for a motion for Summary Judgment on January 4, 2012.

The Plaintiffs maintain it was improper to hear and order Summary Judgment in this matter when the discovery had not been forthcoming from the Defendants for a period of almost 2 years since it had been issued.

Trial court abused its discretion in granting Summary Judgment before plaintiff had full and fair opportunity to complete discovery, where plaintiff was dilatory in pursuing discovery, depositions were scheduled for week following hearing, and event though delay was not attributable to defendant, it was not solely attributable to Plaintiff. Doe ex rel. Doe v. Batson (S.C. 2001) 345 S.C. 316, 548 S.E.2d 854.

The filing of the discovery answers and responses almost immediately prior to the Summary Judgment being heard deprived the Plaintiffs of very valuable rights. The complaint of this was made in oral argument and the court herself from the bench mused about the actions of the adjuster in settling the case such as, was it done the knowledge and consent of attorney Brown, was he involved in it, etc. At the very least, this "quick rush to judgment" denied the Plaintiff the following:

1. The deposition of the adjuster as to how and why the collision damage was settled in the face of attorney Brown's letter of representation.
2. The 30(b)(6) deposition of the GEICO person most knowledgeable about the case.
3. The Plaintiff's had no opportunity to move to produce the GEICO file to see the internal decision making in this.

4. The Plaintiff's were deprived of the opportunity to do a Motion to produce all GEICO manuals involving training guidelines, etc, regarding settling claims after an attorney is involved.
5. The Plaintiff's were denied the opportunity to determine who called the salvage yard in question and ordered them not to discuss the matter with attorney Brown.
6. The Plaintiff lost the opportunity to probe the internal claim process of GEICO in the removal and sale of the salvaged vehicle in the face of their acknowledgement to attorney Brown that they would hold it.
7. The Plaintiff lost the opportunity to determine why GEICO, after initially honoring the request to hold the vehicle, did not notify attorney Brown of their thereafter refusal to do so, or their request for any sums of money to continue holding the vehicle.

The Plaintiffs would respectfully submit that the case law in South Carolina is very clear that after an insurance company is put on notice by an attorney for persons covered by the policy and injured in a wreck covered by the policy, a settlement of any portion of the claim outside of the presence, acquiescence and knowledge by the Plaintiff attorney is both non-binding and a separate tort.

**WAS THERE A CONTRACT BY AND BETWEEN THE PARTIES
ON THE DATE IN QUESTION**

At the time of the disastrous wreck, Charles Williams had insurance through GEICO which included both uninsured and underinsured as well as collision coverage. As noted above, the attorney for the Plaintiffs had put GEICO on notice as to his representation of them and requested that the vehicle be kept secure. This was acquiesced in by GEICO. Thereafter, in violation of the laws of the State of South Carolina, the claim was settled without the knowledge, acquiescence, or further input by attorney Brown and the vehicle was sold for salvage again without notice to attorney Brown. It is obvious that at the time the request to secure the vehicle was made, there as a binding contract of insurance between Mr. Williams and GEICO, and attorney Brown, as attorney for the Plaintiffs, had the right to rely on that contract in negotiating the agreement with GEICO to preserve the vehicle. After the insurance company agreed to hold

the vehicle, attorney Brown relied to his and clients' detriment on the representations made by GEICO that they would in fact hold the vehicle. No notice was ever given to him that they would not honor such agreement nor was any request made after the alleged settlement of the property damage for funds to cover the cost of holding said vehicle. The actions of the Defendant GEICO caused to the detriment of both he and his clients to not be able to show a proper chain of custody and preservation of the evidence as is necessary by the laws of the State of South Carolina. (see letter from defense attorneys in the products case brought by attorney Tom Johnson on the same wreck where they raised the issue of lack of preservation of the evidence as well as chain of custody {Exhibit 4}).

BREACH OF CONTRACT

Contrary to Page 6 of the Court's Order, the evidence clearly shows that the demand to preserve the evidence was not made after Williams accepted the collision coverage. In fact, the demand had been sent by attorney Brown prior to any agreement to settle the insurance coverage. Under both the contract that existed between the parties at the time the request was made and the detrimental reliance that the Defendant GEICO placed upon attorney Brown and his clients, there is evidence in the record of an agreement and obligation by and between the parties to preserve the vehicle. At the very least, there would have been an obligation by GEICO to inform attorney Brown that they were no longer going to honor the agreement after a certain date and if so, what he could do as far as preserving the evidence.

UNFAIR TRADE PRACTICES

It would be difficult to imagine a more unfair trade practice than here where the Defendant GEICO has not only violated the agreement to not move the vehicle, but further they misled attorney Brown as to what items had been sold off the vehicle (they claim 3 tires and one rim). In actuality, the back glass was gone also. Glass defects was the gravamen of the separate products case brought by attorney Johnson in this matter. This is even more grievous by the

unchallenged affidavit of the owner of the salvage yard that GEICO employees had called him and demanded that he not have any conversations with attorney Brown or divulge what happened by and between the parties.

The Insurance Trade Practices Act, S.C. code Ann. Section 38-57-10 to -320 (2002), was codified in Chapter 55 of Title 38 until 1987, and Section 39-5-40(c) was inadvertently not revised to reflect this change from Chapter 55 to Chapter 57. See Trustees of Grace Reformed Episcopal Church v. Charleston Insurance Co., 868 F. Sup. 128, 131 (D.S.C. 1994). It appears that the legislature attempted to remedy this error because the Code Commissioner's Note to Section 39-5-40 states that "[i]n subsection (c), 'Chapter 57, Section 38-57-10 through 38-57-320' was substituted for 'Chapter 55, Section 38-55-10 through 38-55-410' at the direction of the Code Commissioner." However, it appears that the error was not fully remedied because Section 39-5-40 still provides that "[t]his article does not supersede or apply to unfair trade practices covered and regulated under title 38, Chapter 57, Section 38-57-10 through 38-55-320." S.C. Code Ann. Section 39-5-40 (c) (Supp. 2010) (emphasis added). In any event, the legislature's intent is clear, and this court will disregard this scrivener's error. See Trustees of Grace, 868 F. Sup. At 131-32.

The Plaintiff's would respectfully submit that their own citation shows that this matter is in fact not excluded by the Unfair Trade Practices Act.

NEGLIGENCE

This Court's Order as to negligence clearly sets out the standards of care, the breach of the duty involved and the damages flowing therefrom. After having been put on notice by the attorney for the Plaintiffs of his representation the Defendant GEICO settled the collision damage without notice to, participation in or acquiescence in by the attorney for the Plaintiffs. All of which violates the laws of the State of South Carolina. They further gave no notice to the attorney for the Plaintiff that they were going to go back on their word to him of the agreement to keep the vehicle intact and available. There was further no opportunity given to the attorney for the Plaintiffs to come up with any other method to preserve the vehicle such as (a) buy it himself; (b) pay some reasonable cost for continued storage; or (c) at least letting him know of their intentions so he could have expedited an examination of the vehicle in question.

The Plaintiff's complaint as to various breaches, delicts and torts damages certainly reaches the "scintilla" of evidence standard which prevails for Summary Judgment motions in the State of South Carolina. At the very least, the complaint by attorneys for the initial products case that the chain of custody nor preservation of the vehicle could be proven certainly raises the inference that any claim brought by these Plaintiffs would have been weakened, if not destroyed, which is sufficient to show damages at this point. It is also undisputed that one person was killed and the other parties were taken by helicopter to adjacent emergency rooms for treatment.

CONCLUSION

Having addressed the order of March 12, 2012, the Plaintiffs submit that the Order is at the very least premature and that a period of some 90 to 120 days should be set to allow the Plaintiff's to do the discovery they would normally have done had their discovery arrived more timely than two weeks prior to the Motion of Summary Judgment in a matter of this importance.

Respectfully submitted,



R. THAYER RIVERS, JR.

Post Office Box 668
Ridgeland, SC 29936
843-726-8136



HARRY C. BROWN, SR.

Post Office Box 824
Ridgeland, SC 29936
843-726-7920

ATTORNEYS FOR THE PLAINTIFFS

March 27, 2012.

Plaintiffs Exhibit A

Harry Brown, Esquire
P. O. Box 824
Ridgeland, SC 29936
(843) 762-7920

October 6, 2006

Via Facsimile 703-443-0429
Buck Abele
GEICO
P. O. Box 962
Bluffton, SC 29910

2012 JAN -4 AM 8:31
MARGARET DOSTICK
CLERK OF COURT
JASPER COUNTY, SC

FILED

Re: NOTICE OF NON-SPOILIATION OF EVIDENCE
Automobile/1998 Ford Explorer/Tag 506-TNM
Insurance Policy Number: 1010633004

Dear Buck:

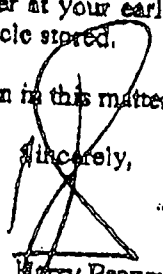
This letter is to confirm that I am the attorney for Tonya Williams/Charles Williams. Please accept this letter as a non-spoilation notice regarding the automobile that Tonya Williams was driving on October 2, 2006, a 1998 Ford Explorer, South Carolina tag number 506-TNM, which is titled to Tonya Williams/Charles Williams.

There is concern that the vehicle referenced above has a manufacturing defect that led to several personal injuries and one death. On yesterday we spoke and you agreed not to move this vehicle until Monday, October 9, 2006, and we discussed the importance of not altering this vehicle in any way, including seat belts, until my investigators have had a chance to perform a thorough inspection. Also, immediately prior to moving the vehicle, you agreed to notify me of the address of where the vehicle will be stored. It is imperative that this vehicle not be salvaged or sold until we have had a chance to conduct a thorough investigation.

Please call me at the above number at your earliest convenience to let me know the exact address of where you plan to have the vehicle stored.

Thank you for your prompt attention in this matter. I look forward to hearing from you.

Sincerely,



Harry Brown

HB/pf

LAW OFFICE OF HARRY C. BROWN, SR.

11169 North Jacob Smart Boulevard

Post Office Box 824

Ridgeland, South Carolina 29936

Office 843-726-7920

Fax 843-726-7923

January 8, 2010

Attorney E. Mitchell Griffith
Griffith, Sadler & Sharp, P.A.
600 Monson Street
Post Office Drawer 570
Beaufort, S.C. 29901-0570

RE: Tonia D. Williams
Case No.: 2009-CP-27-638

Dear Attorney Griffith:

Enclosed herewith and served upon you please find Plaintiff's Request for Production and First Set of Interrogatories along with a Certificate of Mailing on the above-captioned matter. If there are any questions, please call (843) 726-7920.

Sincerely,

Harry C. Brown Sr., Esquire

LAW OFFICE OF HARRY C. BROWN, SR.

11169 North Jacob Smart Boulevard

Post Office Box 824

Ridgeland, South Carolina 29936

Office 843-726-7920

Fax 843-726-7923

July 18, 2011

(By U.S. Mail & Fax 843-521-4247)

Attorney E. Mitchell Griffith
Griffith, Sadler & Sharp, P.A.
600 Monson Street
Post Office Drawer 570
Beaufort, S.C. 29901-0570

Re: **Tonia D. Williams v. Earl Martin, et al.**

Case No.: 2009-CP-27-638

Marion B. Smalls v. Earl Martin, et al.

Case No.: 2009-CP-27-639

**T. Williams by his Guardians ad Litem Tonia D. Williams and
Charles Williams v. Earl Martin, et al.**

Case No.: 2009-CP-27-645

S. Shaw by her Guardian ad Litem Rita Shaw v. Earl Martin, et al.

Case No.: 2009-CP-27-647

Dear Attorney Griffith:

On January 8, 2010, we served First Interrogatories and First Request for Production on behalf of the above-captioned Plaintiffs. Copies of which are attached. To date, we have not received Defendants' responses. Please let me know when I can expect your responses and please further allow this letter to serve as our Rule 11 consultation. If there are any questions, please call (843) 726-7920. Thank you.

Sincerely,

Harry C. Brown Sr., Esquire

cc R. Thayer Rivers, Jr.

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Exhibit 3

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

Plaintiffs Exhibit D

JUL 19 2007

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

David C. Marshall

DMarshall@TurnerPadget.com

Writer's Direct Dial: (803) 254-2200

FOR YOUR INFORMATION

July 17, 2007

VIA U.S. MAIL

Darrell Thomas Johnson, Jr.
Law Office of Darrell Thomas Johnson, Jr., LLC
Post Office Box 1125
Hardeeville, SC 29927

Harry C. Brown Esq.
PO Box 824
Ridgeland, SC
29936
Mailed Copy
7/20/07 (39)

RE: Tyrone Clark, individually and as Husband/Next of Kin, and
Personal Representative of Estate of Betty Mitchell Clark v.
Earl Martin, Ford Motor Company
Civil Action No: 06-CP-27-442
Our File No: 5100.242

Dear Mr. Johnson:

On July 3, 2007, I attended a vehicle inspection of the subject 1998 Ford Explorer in Ravenel, South Carolina in the above-referenced case. It concerns me that the vehicle is no longer in the same condition as it appeared to be in the photos taken shortly after the crash and produced by your office. Most troublesome is that fact that the vehicle no longer has any tires or wheels as shown in the photos. Your investigator Jim Bryan stated the vehicle appears to be in a "worse" condition than when he last observed and photographed it. He also informed me that he attempted to contact your office via telephone during the inspection regarding the condition of the vehicle. Examination and inspection of the tires and any internal and external damage to the vehicle as a result of the crash is essential for our evaluation of the allegations in this case.

As such, I would also ask that you review and supplement your response to Interrogatory No. 18 of Ford's First Set of Interrogatories requesting information regarding any removal of parts from the vehicle and the chain of custody of the same. Furthermore, please indicate who has title, ownership, and possession of the vehicle, currently and at all prior times, since the date of the crash.

Additionally, in this regard, please find enclosed a proposed Consent Motion and Order for Preserving Evidence in this case. I respectfully request that you give this matter your immediate attention. If the proposed motion and order meet with your approval, kindly execute the same in the appropriate spaces and return them to my attention by **Thursday, July 26, 2007**. Upon receipt, I will execute them on Ford's behalf and see to filing with the Court. By copy of this letter to counsel for Defendant Earl Martin, I am asking him to do the same.

88

Ⓟ

NESS • LITIGATION • SOLUTIONS

of America Plaza • 17th Floor • 1901 Main Street (29201) • PO Box 1473 • Columbia, SC 29202
(803) 254-2200 • Fax (803) 799-3957 • turnerpadget.com

Exhibit 4

TURNER PADGET

July 17, 2007

Page 2

In the event that you find any revisions or alterations to the enclosed proposed motion or order necessary, please call me as soon as possible to discuss them. If I do not receive a response from you by Thursday, July 26, 2007, I will consider the lack of response a refusal of consent.

Thank you in advance for your cooperation and assistance in this matter, and I will look forward to hearing back from you in the very near future. In the meantime, please let me know if you have any questions or require additional information.

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.



David C. Marshall

Enclosures

cc: Christopher W. Nickels

Plaintiff Exhibit #1

STATE OF SOUTH CAROLINA
COUNTY OF JASPER
TONIA D. WILLIAMS, MARION B.
SMALLS, T. W. W.,
by and through his Guardians ad
Litem TONIA D. WILLIAMS and
CHARLES WILLIAMS; and
S. S. by her
Guardian ad Litem, RITA SHAW

Plaintiffs,

v.

GEICO CASUALTY COMPANY,
GEICO INDEMNITY COMPANY,
GOVERNMENT EMPLOYEES
INSURANCE COMPANY,
GEICO GENERAL INSURANCE
COMPANY,

Defendants.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2009-CP-27-639

MEMORANDUM IN SUPPORT
OF PLAINTIFF'S MOTION
TO RECONSIDER

2013 NOV 12 PM 4:40
MARGARET BOSNICK
CLERK OF COURT
JASPER COUNTY SC

FILED

On or about October 2, 2006, the Plaintiffs were traveling west on U.S. Highway 278 near Ridgeland South Carolina in a 1998 Ford Explorer. The Defendant, Earl Martin, ran a stop sign, striking the vehicle the Plaintiffs were in. One passenger was killed; the Plaintiff, Tonia Williams had to be transferred by helicopter to a hospital in Savannah, Georgia; and the other plaintiff passengers received serious injuries. The Plaintiff Tonia Williams has medical bills in excess of \$90,000. Thereafter on October 5, Harry C. Brown, Sr., as attorney for the Plaintiffs, verbally communicated with Buck Abele, adjuster for Defendant GEICO, requesting that the 1998 Ford Explorer be kept intact for examination by Plaintiff's experts in regard to an accident reconstruction and possible products liability case. Such preservation was agreed to. This was followed up by a letter on October 6, 2006 (Plaintiff's Exhibit 1) which referenced the telephone call and further requested that the vehicle be held pending further investigation. Thereafter in violation of the agreement by the defendant GEICO to preserve the vehicle, it was sold to a salvage yard (Plaintiff's Exhibit ____).

Further, as per the Affidavit of Plaintiff Tonia Williams (Plaintiff's Exhibit ____), she never signed the DMV Power of Attorney (Plaintiff's Exhibit ____) and the document which was used to transfer the 1998 Ford Explorer contained a signature which was a forgery. By action filed in 2006-CP-27-0442 by Darrell Thomas Johnson, Jr. on behalf of the passenger Tyrone Clark v. Ford Motor Company et al., a products liability case was filed against, among others, Ford Motor Company for injuries received as a result of defects to said vehicle. This suit was settled

in an undisclosed amount. As part and parcel of that suit, an objection was made by counsel for the Defendants as to the improper chain of custody of the vehicles (attached Exhibit ____). Thereafter, upon being apprised of the violation of their agreement to preserve the vehicle, the Defendant GEICO retrieved the vehicle and sent to Harry C. Brown Sr., attorney for the Plaintiffs, a list of what had been sold. In fact, this list missed the missing back glass. That further as a result of the missing tires and rims, the reconstruction expert for the Plaintiff was unable to reconstruct the collision and discover possible delicts, defects and other deficiencies (copy of expert letter enclosed).

Thereafter Attorney Harry C. Brown Sr. determined that the vehicle was in a salvage yard located in Ravenel, South Carolina and while attempting to retrieve the vehicle, was notified by the salvage yard owner that the Defendant GEICO had specifically instructed the salvage yard operator not to discuss the vehicle nor any facts or circumstances around its acquisition with Attorney Brown (copy of affidavit attached as Exhibit ____). As per the Plaintiff's Rule 59(e) Motion for Reconsideration, the Defendant spent substantially 18 months in initial litigation in attempt to have the matter moved to federal district court which was to no avail. Upon the Plaintiff's objection as to the lack of discovery and the untimeliness of the motion for summary judgment, leave of court was granted to allow the counsel for the Plaintiff to go in to discover certain adjustment practices by the Defendant GEICO, the 30(b)(6) deposition of the GEICO employee having the most knowledge of the actions of GEICO in the above matter. Such has now been done and it is now appropriate to address the issues in the initial summary judgment order by the court. The deposition of Kelly Stone, the 30(b)(6) person specified by GEICO in this matter has revealed the following:

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

2. Page 17, Line 16-20:

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

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

Page 22, Line 4-Line 15:

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

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

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

A. No sir, I have no idea.

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

A. That we had recovered the vehicle?

A. Yes."

Page 23, Line 3-Line 7:

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

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

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

3. Page 26 Line 19 – Page 27, Line 7.

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

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

A. Mr. Miller.

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

A. What did who say?

Q. Attorney Heitin.

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

Page 40, Line 15-20.

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

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

The gist of this is that GEICO realized they had an affirmative duty to secure the car and they had screwed up by letting it go and had to get it back. This was a decision made at the highest level of GEICO headquarters in Macon Georgia with no mention of any funds for reimbursement costs or anything else, just that their insured's attorney had been misled by them and had not been treated fairly or correctly.

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

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

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

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

A. I have no idea.

Q. But he helped you draft that letter there?

A. Yes, sir.

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

A. Yes, sir.

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

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

Q. Yes.

A. What kind of error?

Q. In the sale of the vehicle?

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

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

A. Yes, sir.

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

A. No, sir.

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

A. Yes, sir.

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

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

A. You deal directly with the attorney.

Q. You deal directly with the attorney?

A. Yes sir.”

and again (Page 50, Line 11-Page 51, Line 5) never asked for any monies for reimbursement, costs or anything else involved with the preservation of the vehicle per the request for the attorney for the wreck victims and their agreement to honor this request.

“Q. But do you know of anyone who, from GEICO, who would have requested money for the salvage of the vehicle –

A. I don't.

Q. -- or storage of the vehicle?

A. To request money, I'm not sure what you're referring to.

Q. For example, it's my understanding now that the vehicle is in Ravenel, correct?

A. I don't know where the vehicle is located.

Q. Specifically, did you ever request any money from Attorney Tom Johnson regarding this vehicle?

A. I've never requested any money from Mr. Johnson regarding anything.

Q. Have you ever requested any monies from Attorney Harry Brown regarding this vehicle?

A. I've sent letters to you asking if you were wanting to purchase the vehicle.

Q. But nothing regarding the storage of the vehicle, correct, or salvage?

A. Not that I'm aware of. I haven't sent any letter."

5. Contrary to Page 6 of the Court's Order, the evidence clearly shows that the demand to preserve the evidence was not made after Williams accepted the collision coverage. In fact, the demand had been sent by attorney Brown prior to any agreement to settle the insurance coverage. Under both the contract that existed between the parties at the time the request was made and the detrimental reliance that the Defendant GEICO placed upon attorney Brown and his clients, there is evidence in the record of an agreement and obligation by and between the parties to preserve the vehicle. At the very least, there would have been an obligation by GEICO to inform attorney Brown that they were no longer going to honor the agreement after a certain date and if so, what he could do as far as preserving the evidence. This is especially so when there is evidence in the record that Plaintiff Tonia Williams never signed the title to the vehicle and that such title had to be forged to give any title to the salvage yard. The testimony of the GEICO employees shows that there is a continuing insurance contract by and between the parties and that GEICO through its practices and customs as well as the law was honor bound to deal with the attorney for the insured.
6. It would be difficult to imagine a more unfair trade practice than here where the Defendant GEICO has not only violated the agreement to not move the vehicle, but further they misled attorney Brown as to what items had been sold off the vehicle (they claim 3 tires and one rim). In actuality, the back glass was gone also. Glass defects was the gravamen of the separate products case brought by attorney Johnson in this matter. This is even more grievous by the unchallenged affidavit of the owner of the salvage yard that GEICO employees had called him and demanded that he not have any conversations with attorney Brown or divulge what happened by and between the parties.

The Insurance Trade Practices Act, S.C. code Ann. Section 38-57-10 to -320 (2002), was codified in Chapter 55 of Title 38 until 1987, and Section 39-5-40(c) was inadvertently not revised to reflect this change from Chapter 55 to Chapter 57. See *Trustees of Grace Reformed Episcopal Church v. Charleston Insurance Co.*, 868 F. Sup. 128, 131 (D.S.C. 1994). It appears that the legislature attempted to remedy this error because the Code Commissioner's Note to Section 39-5-40 states that "[un subsection (c), 'Chapter 57, Section 38-57-10 through 38-57-320' was substituted for 'Chapter 55, Section 38-55-10 through 38-55-410' at the direction of the Code Commissioner." However, it appears that the error was not fully remedied because Section 39-5-40 still

provides that “[t]his article does not supersede or apply to unfair trade practices covered and regulated under title 38, Chapter 57, Section 38-57-10 through 38-57-320.” S.C. Code Ann. Section 39-5-40 (c) (Supp. 2010) (emphasis added). In any event, the legislature’s intent is clear, and this court will disregard this scrivener’s error. See *Trustee’s of Grace*, 868 F. Sup. At 131-32.

The Plaintiff’s would respectfully submit that their own citation shows that this matter is in fact not excluded by the Unfair Trade Practices Act. This is especially so when, as evidenced in the record, to the effect that GEICO or someone in their employ forged the name of the Plaintiff Tonia Williams on the bill of sale for the vehicle.

7. This Court’s Order as to negligence clearly sets out the standards of care, the breach of the duty involved and the damages flowing therefrom. After having been put on notice by the attorney for the Plaintiffs of his representation the Defendant GEICO settled the collision damage without notice to, participation in or acquiescence in by the attorney for the Plaintiffs. All of which violates the laws of the State of South Carolina as well as the admitted practices of the Defendant GEICO. They further gave no notice to the attorney for the Plaintiff that they were going to go back on their word to him of the agreement to keep the vehicle intact and available. There was further no opportunity given to the attorney for the Plaintiffs to come up with any other method to preserve the vehicle such as (a) buy it himself; (b) pay some reasonable cost for continued storage; or (c) at least letting him know of their intentions so he could have expedited an examination of the vehicle in question. By their own admission, never requested any of that nor even apparently saw the necessity of it, just an affirmative duty by GEICO to rectify the wrong they had done by not honoring the spoliation agreement. The Plaintiffs complaint as to various breaches, delicts and torts damages certainly reaches the “scintilla” of evidence standard which prevails for Summary Judgment motions in the State of South Carolina. At the very least, the complaint by attorneys for the initial products case that the chain of custody nor preservation of the vehicle could be proven certainly raises the inference that any claim brought by these Plaintiffs would have been weakened, if not destroyed, which is sufficient to show damages at this point.
8. “The South Carolina Supreme Court recently clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment, Hancock v. Mid-South Management Co., Inc. 678 S.F. 2d 801. 802-3 (S.C. 2009). In Hancock, the court held that “in cases applying the preponderance of the 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.” Id. at 803. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

CONCLUSION

The Plaintiffs respectfully submit that the court's initial order in this matter was premature and contains substantial factual error in the date of the notice to GEICO of the request for preservation of the vehicle. The Plaintiffs would further submit that under the "scintilla" reaffirmation by our appellate courts, that there is ample evidence here to give a tryer of fact an opportunity to determine factual disputes, and in fact most of the facts in this case are not in disputed.

LAW OFFICE OF R. THAYER RIVERS, JR.



R. THAYER RIVERS, JR.
ATTORNEY FOR THE PLAINTIFFS
P.O.BOX 668,
304 RUSSELL STREET
RIDGELAND, SOUTH CAROLINA 29936
(843) 726-8136-FAX 843 726 4401
SC BAR NO.: 4754

November 11, 2013
RIDGELAND, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

Civil Action no.: 09-CP-27-00639

TONIA D. WILLIAMS, MARION B.)
SMALLS, T [REDACTED] W [REDACTED], by)
And through his Guardians ad Litem)
TONIA D. WILLIAMS and CHARLES)
WILLIAMS; and S [REDACTED] S [REDACTED],)
By and through her Guardian ad Litem,)
RITA SHAW,)

Plaintiffs,)

v.)

GEICO Casualty Company; GEICO)
Indemnity Company, Government)
Employees Insurance Company, and)
GEICO General Insurance Company,)

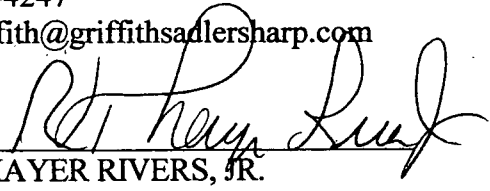
Defendants.)

CERTIFICATE OF SERVICE

TO: E. MITCHELL GRIFFITH, ESQUIRE, attorney for the Defendants.

This is to certify that I have this date faxed and emailed a true and accurate copy of the Affidavit of Tonia D. Williams, a copy of which is attached hereto, to E. Mitchell Griffith, Esquire, to the following:

E. Mitchell Griffith, Esquire
VIA FAX: 843-521-4247
VIA EMAIL: mgriffith@griffithsadlerssharp.com


R. THAYER RIVERS, JR.
Post Office Box 668
Ridgeland, South Carolina 29936
(843) 726-8136

Attorney for the Plaintiff

Ridgeland, South Carolina,
November 11, 2013

2013 NOV 12 PM 4:41
MARGARET BOSLICK
CLERK OF COURT
JASPER COUNTY SC

FILED

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

JUL 19 2007

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

David C. Marshall

DMarshall@TurnerPadget.com

Writer's Direct Dial: (803) 271-2100

FOR YOUR INFORMATION

July 17, 2007

VIA U.S. MAIL

Darrell Thomas Johnson, Jr.

Law Office of Darrell Thomas Johnson, Jr., LLC

Post Office Box 1125

Hardeeville, SC 29927

Harry C. Brown Esq
PO Box 824
Ridgeland, SC
29936
Mailed Copy
7/20/07 (139)

RE: Tyrone Clark, individually and as Husband/Next of Kin, and
Personal Representative of Estate of Betty Mitchell Clark v.
Earl Martin, Ford Motor Company
Civil Action No: 06-CP-27-442
Our File No: 5100.242

Dear Mr. Johnson:

On July 3, 2007, I attended a vehicle inspection of the subject 1998 Ford Explorer in Ravenel, South Carolina in the above-referenced case. It concerns me that the vehicle is no longer in the same condition as it appeared to be in the photos taken shortly after the crash and produced by your office. Most troublesome is that fact that the vehicle no longer has any tires or wheels as shown in the photos. Your investigator Jim Bryan stated the vehicle appears to be in a "worse" condition than when he last observed and photographed it. He also informed me that he attempted to contact your office via telephone during the inspection regarding the condition of the vehicle. Examination and inspection of the tires and any internal and external damage to the vehicle as a result of the crash is essential for our evaluation of the allegations in this case.

As such, I would also ask that you review and supplement your response to Interrogatory No. 18 of Ford's First Set of Interrogatories requesting information regarding any removal of parts from the vehicle and the chain of custody of the same. Furthermore, please indicate who has title, ownership, and possession of the vehicle, currently and at all prior times, since the date of the crash.

Additionally, in this regard, please find enclosed a proposed Consent Motion and Order for Preserving Evidence in this case. I respectfully request that you give this matter your immediate attention. If the proposed motion and order meet with your approval, kindly execute the same in the appropriate spaces and return them to my attention by **Thursday, July 26, 2007**. Upon receipt, I will execute them on Ford's behalf and see to filing with the Court. By copy of this letter to counsel for Defendant Earl Martin, I am asking him to do the same.

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Bank of America Plaza • 17th Floor • 1901 Main Street (29201) • PO Box 1473 • Columbia, SC 29202

Phone (803) 254-2200 • Fax (803) 799-3957 • turnerpadget.com

TURNER PADGET

July 17, 2007

Page 2

In the event that you find any revisions or alterations to the enclosed proposed motion or order necessary, please call me as soon as possible to discuss them. If I do not receive a response from you by Thursday, July 26, 2007, I will consider the lack of response a refusal of consent.

Thank you in advance for your cooperation and assistance in this matter, and I will look forward to hearing back from you in the very near future. In the meantime, please let me know if you have any questions or require additional information.

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

A handwritten signature in dark ink, appearing to read "D. C. Marshall", with a long horizontal flourish extending to the right.

David C. Marshall

Enclosures

cc: Christopher W. Nickels

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)
)
IN THE INTEREST OF:)
)
)
TONIA WILLIAMS)
)
)
)
)
)

AFFIDAVIT

PERSONALLY APPEARED before me, **TONIA WILLIAMS** who after first duly sworn, deposes and says as follows:

1. My name is Tonia D. Williams.
2. My Date of Birth is December 15, 1968.
3. My social security number is 248-55-0891.
4. I am over twenty one (21) years of age.
5. I reside at 574 Stellars Jay Road, Ridgeland, Jasper County, South Carolina.
6. I was involved in a tragic and catastrophic accident on October 2, 2006.
7. One (1) passenger was killed and I was Air Lifted to Memorial Health University, Savannah, Ga.
8. I suffered a subdural hematoma and underwith months of treatment.
9. The attached document (DMV Power of Attorney) contains a signature which purports to be mine.
10. I did not sign that document.
11. This is not my signature.

FURTHER AFFIANT SAITH NOT

Tonia Williams
Tonia D. Williams

Sworn and subscribed to before me

This 6th day of November, 2013

[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: February 25, 2023

STATE OF SOUTH CAROLINA

)

) **AFFIDAVIT OF WILLIAM TROY PARKS**

COUNTY OF CHARLESTON

)

PERSONALLY APPEARED before me William Troy Parks, who upon being duly sworn, states as follows:

1. That my name is William Troy Parks and I own and operate Parks Auto Salvage Sales and Service in Ravenel, South Carolina.

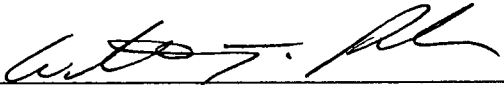
2. In the year 2006, I acquired from Geico a 1998 Ford Explorer STK No. 7A0058, VIN NO. 1FMZU32E5WUC50501.

3. I sold the tires and rims off the vehicle and on or around October 20, 2007, sold the black glass off the vehicle.

4. Sometime after that I was contacted by a representative of Geico and told not to discuss these matters with Attorney Harry C. Brown, Sr. As it happened, Mr. Brown came to my shop that day to check on the vehicle and I notified him of the instructions I had received from Geico.

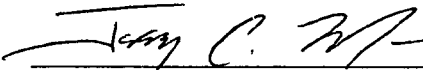
5. Eventually, upon further instructions from Geico the vehicle was returned to the owner or their agents.

FURTHER AFFIANT SAYETH NOT.


WILLIAM TROY PARKS

SUBSCRIBED and SWORN TO

Before me this 11 day of ~~August~~ ^{NOVEMBER}, 2011.

 (L.S.)
NOTARY PUBLIC FOR SC
My Commission Expires: 8-26-20

LAW OFFICE OF HARRY C. BROWN, SR.

11169 North Jacob Smart Boulevard
Post Office Box 824
Ridgeland, South Carolina 29936

Office 843-726-7920

Fax 843-726-7923

March 28, 2007

By Fax & U.S. Mail/Returned Receipt Requested
Ms. Kelly Stone
GEICO
One Geico Center
Macon, Georgia 31296-0001

Re : Claim #: 0134026740101088
Your Insured: Charles and Toni Williams
Our Client: Toni Williams
Vehicle #: Automobile/1998 Ford Explorer Tag 506-TNM

Dear Ms. Stone :

Per your telephone conversation on March 19, 2007, you advised me that GEICO had sold the above-captioned vehicle to Parks Salvage, Ravenel, South Carolina on January 23, 2007. I forwarded a letter of Non-Spoliation of Evidence to GEICO on October 6, 2006 regarding said vehicle. GEICO was very aware of the Non-Spoliation position.

Your sale of said vehicle has impaired our ability to exercise our rights relating to pursuing an action for damages from that accident. As such, it appears that GEICO has acted in Bad Faith regarding this matter.

Very truly yours,

Harry C. Brown, Sr., Esquire.



- Government Employees Insurance Company
- GEICO General Insurance Company
- GEICO Indemnity Company
- GEICO Casualty Company

Regional Office:
One GEICO Center ■ Macon, GA 31295-0001

March 29, 2007

Harry C. Brown
Attorney at Law
PO Box 824
Ridgeland SC 29936

Claim Number: 013402674 0101 088

Date of Loss: October 2, 2006
Insured: Charles Williams
Your Client: Tonia Williams

Dear Mr. Brown:

This is to acknowledge receipt of your letter dated March 28, 2007.

Please be advised we have regained ownership of the salvage of Mr. William's 1998 Ford Explorer. The salvage is located at Insurance Auto Auctions, 430 Tannenbaum Road, Ravenel, SC, 29470-9508. Their phone number is 843 556 7620.

We have been advised the vehicle is intact with the exception of three tires and wheels that were sold.

Please advise if you would like to inspect the vehicle or if you want to purchase the salvage. If you have any questions, please contact me at the number below.

Sincerely,

Kelly Stone

Kelly Stone
Claims Examiner
1-800-841-8842 x17070

OFFICE MEMORANDUM

TO: <u>GEICO-DIRECT</u>	DEPARTMENT/DIVISION <u>CLAIMS DEPT.</u>	CLAIM# <u>0134026740101088-01</u>
INSURED: <u>CHARLES WILLIAMS</u>	DATE OF LOSS : <u>10/02/2006</u>	
10-03-06: RECIEVED ASSIGNMENT. 10-05-06: INSPECTED PH VEHICLE, DEEMED A TOTAL LOSS, ADVISED PH CHARLES WILLIAMS, FATALITY, SISTER IN LAW OF PH DIED, ADVISED PH OF TOTAL LOSS AND TOTAL LOSS PROCEDURE AND VALUE DETERMINATION. RECIEVED PERMISSION TO MOVE SALVAGE, WILL NOT MOVE UNTIL 10-09-06 PER PH ATTORNEY REQUEST, MARLON KIMPSON. 843-216-9180. 10-06-06: CONTACTED IAA-CHARLESTON, RECIEVED STOCK NUMBER, 2539829. REQUESTED TO BE WRAPPED, CATHY. 10-06-06: MADE OFFER TO PH CHARLES WILLIAMS. BASED ON CCC, OFFER INCLUDES SC STATE TAXESD AND FEES, OFFER ACCEPTED, MR. WILLIAMS TO CALL BACK MONDAY WITH LIEN-HOLDER INFORMATION SO CLAIM CAN BE PROCESSED. 10-07-06: MR. WILLIAMS CALLED AND ACCEPTED OFFER, EXPLAINED THAT FILE WILL SENT TO TOTAL LOSS DEPT, (FATALITY), CLOSED FILE AND TLTD.		
FROM : <u>BUCK ABELE</u>	DIVISION OR OFFICE <u>Auto Damage Dept.</u>	DATE : <u>10/05/2006</u>

Harry Brown, Esquire
P. O. Box 824
Ridgeland, SC 29936
(843) 762-7920

October 6, 2006

Via/Facsimile: 703-543-0429

Buck Abele
GEICO
P. O. Box 962
Bluffton, SC 29910

**Re: NOTICE OF NON-SPOILIATION OF EVIDENCE
Automobile/1998 Ford Explorer/Tag 506-TNM
Insurance Policy Number: 1010633004**

Dear Buck:

This letter is to confirm that I am the attorney for Tonya Williams/Charles Williams. Please accept this letter as a non-spoliation notice regarding the automobile that Tonya Williams was driving on October 2, 2006, a 1998 Ford Explorer, South Carolina tag number 506-TNM, which is titled to Tonya Williams/Charles Williams.

There is concern that the vehicle referenced above has a manufacturing defect that led to several personal injuries and one death. On yesterday we spoke and you agreed not to move this vehicle until Monday, October 9, 2006, and we discussed the importance of not altering this vehicle in any way, including seat belts, until my investigators have had a chance to perform a thorough inspection. Also, immediately prior to moving the vehicle, you agreed to notify me of the address of where the vehicle will be stored. It is imperative that this vehicle not be salvaged or sold until we have had a chance to conduct a thorough investigation.

Please call me at the above number at your earliest convenience to let me know the exact address of where you plan to have the vehicle stored.

Thank you for your prompt attention in this matter. I look forward to hearing from you.

Sincerely,

Harry Brown

HB/pf

S.C. Department of Motor Vehicles
Form 5047 (8/94)**POWER OF ATTORNEY - ODOMETER DISCLOSURE FORM**

NOTICE: This form may be used only when title is physically held by lienholder or has been lost. This form must be submitted to the DMV by the person exercising Power of Attorney. Failure to do so may result in fines and/or imprisonment.

VEHICLE DESCRIPTION: Year 98 Make FORD Model Type Explorer Body Type _____
VIN (Vehicle Identification Number) 1FMZU32ESW450511

PART A: POWER OF ATTORNEY TO DISCLOSE MILEAGE 49 USC 327 (580.13)

Federal and State law requires that you state the mileage upon transfer of ownership (49 CFR Chapter 327/SC 56-19-240). Providing a false statement may result in fines and/or imprisonment (49 USC 32709/SC 56-19-240(4)).

PLEASE PRINT: I, _____ (Seller/Transferor's Name), appoint _____ (Dealer/Transferee's Name) as my attorney-in-fact, to sign all papers and documents required to secure the title and further grant the authority to endorse and transfer title thereto and to disclose the mileage on the title for the vehicle described above, exactly as stated in my following disclosure.

I state that the odometer now reads _____ (no tenths) miles and to the best of my knowledge that it reflects the actual mileage of the vehicle described herein, unless one of the following statements is checked.

- ☐ 1. I hereby certify that to the best of my knowledge, the odometer reading reflects the amount of mileage in excess of its mechanical limits.
- ☐ 2. I hereby certify that the odometer reading is NOT the actual mileage. **WARNING: ODOMETER DISCREPANCY**

(Transferor's Signature) Charles D. Williams (Printed Name) CHARLES D. WILLIAMS (Date of Statement) 10/18/04
Transferor's Address (Street, City, State, Zip Code) _____

(Transferee's Signature) _____ (Printed Name of Individual Signifying as Transferee) _____

(Transferee's Name - Print or Type Name of Business or Company) _____ Licensed Dealer, Transferee's Address (Street, City, State, Zip Code) _____

PART B: Power of Attorney to Review Title Documents and Acknowledge Disclosure 49 USC 327 (580.14)
(PART B IS INVALID UNLESS PART A HAS BEEN COMPLETED.)

PLEASE PRINT: I, _____ (Transferee's Name), appoint _____ (Transferor's dealership name) as my attorney-in-fact, to sign the mileage disclosure on the title for the vehicle described above, only if the disclosure is exactly as the disclosure completed below.

(Transferee's Signature) _____ (Printed Name) _____

(Transferor's Name - Print or Type Name of Business or Company) _____

(Transferor's Street Address, City, State, Zip Code) _____

Federal and State law requires that you state the mileage upon transfer of ownership (49 CFR Chapter 327/SC 56-19-240). Providing a false statement may result in fines and/or imprisonment (49 USC 32709/SC 56-19-240(4)).

I state that the odometer now reads _____ (no tenths) miles and to the best of my knowledge that it reflects the actual mileage unless one of the following statements is checked.

- ☐ 1. I hereby certify that to the best of my knowledge, the odometer reading reflects the amount of mileage in excess of its mechanical limits.
- ☐ 2. I hereby certify that the odometer reading is NOT the actual mileage. **WARNING: ODOMETER DISCREPANCY**

(Transferor's Signature) _____ (Printed Name) _____ (Date of Statement) _____

Transferor's Address (Street, City, State, Zip Code) _____

PART C: CERTIFICATION - (To be completed when Part A or Parts A and B have been used) 49 USC 327 (580.15)

PLEASE PRINT: I, _____ (Person exercising above powers of attorney) hereby certify that the mileage I have disclosed on the title document is consistent with that provided me in the above power of attorney. Further, upon examination of the title and any reassignment documents for the vehicle described above, the mileage disclosure I have made on the title pursuant to the power of attorney is greater than that previously stated on the title and reassignment documents. This certification is not intended to create any new or additional liability under Federal or State Law.

(Signature) _____ (Printed Name) _____ (Date of Certification) _____

(Street Address) _____ (City) _____ (State) _____ (Zip Code) _____

This document is void if any information entered hereon has been erased or altered by any means. Unauthorized printing or reproduction of this document is strictly prohibited. Photo copy may be made only as a completed document for record-keeping purposes for the parties named herein.

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SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS
& PUBLIC TRANSPORTATION
COLUMBIA
FORM 450

SATISFACTION OF TITLE LIEN

DATE

10/31/06

This is to certify that our/my lien against

NAME TONYA DENISE WILLIAMS		ADDRESS 574 STELLERS JAY RD, RIDGEWAY, SC 2936-7430
MAKE OF VEHICLE Ford	VEHICLE IDENTIFICATION NUMBER 1FMZU32ESWVC50501	
YEAR MAKE 1998	BODY STYLE SW	VEHICLE TITLE NUMBER 770080137266872

has been fully satisfied and paid on

DATE SATISFIED

10/31/2006

REGINA FINANCE

NAME OF LIENHOLDER

BY

TITLE

ASST. MGR.

STATE OF SOUTH CAROLINA

COUNTY OF

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 31 DAY OF OCT 2006

NOTARY PUBLIC

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THE DEPONENT: KELLY STONE

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APPEARANCES:FOR THE PLAINTIFF:

MR. HARRY C. BROWN, SR.
Law Office of Harry C. Brown
11169 North Jacob Smart Blvd
Post Office Box 824
Ridgeland, South Carolina 29936

FOR THE DEFENDANT:

MR. MITCHELL GRIFFITH
Griffith, Sadler & Sharp, PA
600 Monson Street
Post Office Box 570
Beaufort, South Carolina 29901

Also Present:

Clifford Bush
Thayer Rivers, Jr.
Kelly Dean
Debra Booker

Reporter's Note:

Witness RESERVES reading and
signing of the document.

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KELLY STONE

Witness, having first been

duly sworn, testified on

CROSS EXAMINATION

BY MR. BROWN:

Q Ms. Stone, my name is Attorney Harry C. Brown, Sr. I represent Tonia Smalls, Marion Smalls, among others, in a case that we have against GEICO Insurance Company. We are here today to take your deposition. We're trying to find out -- trying to flush out some facts to see what you do know. If at any point in time I ask you a question that you don't understand, just please ask me to repeat it. I talk fast. I'm a small, country boy, so I talk fast at times, and oftentimes my voice elevates unintentionally, but it happens, it's DNA from my mother. If you don't understand a question, just ask me to repeat it. As you well know, the court reporter can't pick up a nod --

A Yes, sir.

Q -- or an uh-huh, so I would ask that you say yes or no, or if you don't understand the question, I can repeat it for you. The rules of civil procedure in South Carolina say that if you and Mr. Griffith and his co-counsel that represents GEICO have a conversation, then we are entitled to know what you all talked about.

A Yes, sir.

1 Q Okay, are you ready?

2 A Yes, sir.

3 MR. BROWN: Mr. Griffith, do I have permission to
4 proceed, sir?

5 MR. GRIFFITH: Sure.

6 Q MR. BROWN: What is your name, please?

7 A Kelly Stone.

8 Q What is your address?

9 A 406 Dalton's Ridge Drive in Bonaire, Georgia.

10 Q What is your age and citizenship?

11 A My age is 43, and I'm a citizen of the United
12 States.

13 Q Are you employed by GEICO?

14 A Yes, sir.

15 Q How long have you been employed by GEICO?

16 A About 26 and a half years now.

17 Q In what capacity are you employed today?

18 A Today I'm a supervisor in the reports center.

19 Q During the year of '10 -- of '06 what capacity were
20 you employed?

21 A I was a continuing unit examiner.

22 Q A continuing unit examiner. Tell me what a
23 continuing unit examiner does?

24 A They handle claims that involve litigation or
25 serious type injuries.

1 Q So, correct me if I'm wrong, if after what I would
2 call a front line adjuster, an adjuster who gets the case
3 first, if they deem it a serious injury, then they would give
4 the file to you; is that correct?

5 A Yes, sir.

6 Q What would you consider a serious injury?

7 A Most of the time it's like broken bones, if there's
8 a fatality, if they are in ICU for a number of days, life
9 flights, things of that nature would classify it as a serious
10 injury.

11 Q When did you begin your job status as continuing
12 unit supervisor?

13 A I believe it was -- supervisor? I've never been a
14 supervisor in the continuing unit.

15 Q What was your status again, please?

16 A Currently I'm a report center supervisor.

17 Q But you were, back in '06, a?

18 A Continuing unit examiner.

19 Q Examiner, pardon me. Give me the dates of your
20 employment with GEICO as a continuing unit examiner, if you
21 remember?

22 A It was approximately August of 1999 until April of
23 2008.

24 Q What was your date of hire with GEICO?

25 A It was in January of '86.

1 Q Can you tell me some kind of -- what training did
2 GEICO give you, what kind of training?

3 A For?

4 Q Your job.

5 A For which job?

6 Q The consulting unit examiner.

7 A The continuing unit examiner?

8 Q I'm sorry, the continuing unit examiner.

9 A It's been so long ago, I believe there's a course
10 that we had to take, like a week long course of the different
11 aspects of the job, when to put cases on, when to refer them
12 to home office, how to handle a suit when it comes in, things
13 of that nature, but that's -- it's kind of been a long time
14 ago, so I really don't remember all of the aspects of the
15 training.

16 Q So you've had several types of training while
17 you've been employed with GEICO?

18 A At each level you get a different type of training.

19 Q Okay. Tell me what your educational background is,
20 please?

21 A I have a business degree, a bachelor's degree in
22 business administration.

23 Q Where did you go to school?

24 A Mercer.

25 Q Do you have any other degrees besides the bachelors

1 in business administration?

2 A No, sir.

3 Q Presently what are your duties with GEICO?

4 A I'm a supervisor in the report center, and I have a
5 staff of like between 10 and 12 associates.

6 Q Who was your supervisor during October of '06?

7 A I believe that would have been Tim McCord.

8 Q You said Tim?

9 A Yes, sir.

10 Q And McCord, spell the last name for me, please?

11 A M-C-C-O-R-D (spelling).

12 Q And, of course, Tim McCord, he knows, or he reviews
13 everything that you do?

14 A I don't know if he reviewed everything, but he
15 would review some things, I guess.

16 Q More specifically, did you -- did Tim McCord review
17 the file of Tonia Williams?

18 A In reviewing the notes from the adjuster notes,
19 there are some notes from Mr. McCord in the file.

20 Q What did you do today in preparation for this
21 deposition?

22 A I reviewed some of the adjuster notes and some of
23 the correspondence.

24 Q Adjuster notes, those notes are still a part of the
25 GEICO file then?

1 A As far as I know. I don't have that actual file.

2 Q But there is a file that you reviewed today?

3 A I haven't actually seen the actual claim file, just
4 some of the notes and some of the correspondence.

5 Q How did you review those then?

6 A Um --

7 Q Is there a paper, or is there a machine that you
8 looked at?

9 A There is a paper copy.

10 Q Paper?

11 A Yes, sir.

12 Q And what's the title of that file, the title of
13 those notes that you reviewed? If I wanted to come in your
14 office and say, I'm looking for something on your desk, I'm
15 looking for Tonia Williams's file, and you say, well, it's
16 marked under GEICO litigation, how would that file be tagged
17 that you reviewed today for this deposition?

18 A I would have been identified by a claim number.

19 Q So you reviewed for this deposition a file with a
20 claim number, that's how you -- that's how I could get that
21 file from you that you reviewed today in preparation for your
22 deposition?

23 A I'm not really sure what you're asking.

24 Q Well, let me clarify before you answer then. You
25 indicated in your testimony earlier that you reviewed the

1 claims file, or you reviewed some notes for this deposition?

2 A The adjuster notes.

3 Q The adjuster notes, okay. If I wanted to review
4 those same notes, and I called you 10 days from now, I would
5 say, Ms. Stone, I want to review those same adjuster notes
6 that you reviewed in preparation for the deposition, how
7 would you locate those notes?

8 A Well, they're not in my possession, so I would have
9 to check with the handling adjuster who has them to try and
10 give you --

11 Q Who is that handling adjuster?

12 A I'm not 100 percent certain, but I'm assuming that
13 it's Mrs. Booker who has possession of it.

14 Q Mrs. who now?

15 A Mrs. Booker, Debra Booker.

16 Q Mrs. Debra Booker. Upon your review of those
17 adjuster's notes did you take any notes?

18 A No, sir.

19 Q Why did you review that particular file?

20 A To prepare for this deposition today, to refresh my
21 memory as to some of the things that took place.

22 Q Okay. And when you were through reviewing those
23 notes you gave them back to Ms. Debra Booker; is that
24 correct?

25 A To Mr. Griffith.

1 Q Mr. Griffith, so Mr. Griffith has those notes also?

2 A Yes, sir.

3 Q Did Mr. Griffith assist you in your preparation for
4 this deposition today?

5 A Um --

6 MR. GRIFFITH: Harry, I'm going to object to that.
7 What I did with her --

8 MR. BROWN: That's okay, it's fine. Go ahead and
9 answer my --

10 MR. GRIFFITH: No, don't answer that question.

11 THE WITNESS: Okay.

12 MR. BROWN: Okay. All right.

13 Q MR. BROWN: Can you tell me how this claim was
14 assigned to you?

15 A It's taken by someone in the report center, and it
16 just -- it's kind of like roll call to whoever the next
17 available adjuster was.

18 Q Okay.

19 A So it was just I was apparently next in line, and
20 that's how it was assigned to me.

21 Q Were you the only person this claim was assigned
22 to? Were you the only person this --

23 A I was the only continuing unit examiner that was
24 assigned to the file.

25 Q Do you know who else was assigned to this file?

1 A No, sir.

2 Q How many claims, if you could remember, were you
3 assigned during this period?

4 A I have no idea.

5 Q How many claims do you normally handle at one time?

6 A At that time?

7 Q At this one time period?

8 A Again, I have no idea.

9 Q During that time?

10 A I honestly cannot remember how much -- what the
11 volume was at that time.

12 Q Okay. Can you tell me what the term adjuster
13 means?

14 A Adjuster?

15 Q Yes, can you tell me what the term adjuster means?

16 A It's the person who is adjusting the claim.

17 Q Let's go to the review here and your previous
18 employment. Who were you previously employed by?

19 A Prior to working at GEICO?

20 Q Yes.

21 A I worked at TG&Y prior to working at GEICO.

22 Q What kind of organization is that, what kind of
23 company is that?

24 A It's kind of similar to like Walmart.

25 Q Okay.

1 A It was a discount store.

2 Q And, of course, GEICO has many offices, correct?

3 A Yes, sir.

4 Q Which office do you work at?

5 A The Macon office.

6 Q And, of course, you've already indicated that you
7 -- the supervisor during the year 2006 was Tim McCord, right?

8 A Tim McCord, yes, sir.

9 Q Yes, okay. Once a claim is assigned, once it comes
10 in, what is the next process that you engage in?

11 A You attempt to contact the parties involved and
12 discuss with them what happened in the accident.

13 Q And if the parties are engaged with an attorney,
14 what do you do then?

15 A I'm sorry?

16 Q If the parties have an attorney, what do you do?

17 A Then we would contact the attorney.

18 Q Do you know how many people were listed as
19 claimants for this accident of October 2, 2006?

20 A I don't recall how many.

21 Q You know what type of vehicle was involved in the
22 wreck?

23 A I know that it was a Ford. I don't know the year
24 and the model.

25 Q Based upon your review of the file in preparation

1 for today and perhaps a recall on your memory, what were the
2 facts that you ascertained regarding the accident?

3 A From what I remember another vehicle went through a
4 stop sign and struck the Ford vehicle, and it -- I believe it
5 spun out of control or something like that.

6 Q Do you know the name of the insured with GEICO? Do
7 you know the name insured with GEICO was?

8 A According to the notes it was Charles Williams.

9 Q The notes you're talking about is the notes that
10 you reviewed for this deposition?

11 A Yes, sir.

12 Q Do you know when you received the letter of non --
13 the notice of non-spoliation of evidence from my office?

14 A I'm sorry?

15 Q Do you -- when did you receive the letter of notice
16 of non-spoliation of evidence from my office, do you
17 remember?

18 A No, sir, I don't remember.

19 Q Do you remember getting the letter from my office?

20 A Was it sent to me directly, or I remember later
21 seeing the letter that you sent to the auto damage adjuster
22 regarding the non-spoliation.

23 Q When do you remember getting it from him, or when
24 do you remember receiving it, period, or seeing it?

25 A I believe it was sometime around February or March

1 of 2007.

2 Q February or March 2007, okay, so between October
3 and February or March of 2007 --

4 A Yes, sir.

5 Q -- would that letter be a part of the file?

6 A It should be, yes, sir.

7 Q And you were responsible for reviewing the file
8 during that period?

9 A Yes, sir.

10 Q You didn't see that letter?

11 A Not until February or March of 2007.

12 Q Okay. Upon receiving the letter what did you do?

13 A We -- I got in touch with the auto damage adjuster
14 to see what had happened with the vehicle that was in
15 question.

16 Q And who was that auto damage adjuster?

17 A His name was Buck Abele, I think is how he
18 pronounces his name.

19 Q Did you notify your supervisor?

20 A I spoke to the regional legal advisor at the time.

21 Q Who was that?

22 A Ross Miller.

23 Q I'm a little hard of hearing?

24 A Ross.

25 Q R-O-S-S (spelling)?

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1 A Yes, sir.

2 Q Miller. Why did you feel the need to talk with
3 your regional legal advisor?

4 A To get advice on how to handle the situation since
5 it appeared that the vehicle had been sold as salvage.

6 Q What was your first impression once you learned --
7 who did you learn from that the vehicle was sold?

8 A I believe, in looking at the notes, there was a
9 conversation with you, and another attorney had sent a -- or
10 had called in requesting to purchase the salvage.

11 Q Do you know who that was?

12 A I want to say it was somebody by the name of Tom
13 Johnson, but I'm not sure.

14 Q What was your response to him, based upon your
15 notes?

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

21 Q Do you know who gave Mr. Abele the permission to
22 sell the vehicle to the salvage?

23 A According to the notes that I reviewed yesterday,
24 his notes indicated that he spoke to the policyholder and
25 also included speaking to -- or noted that there was an

1 attorney present.

2 Q Do you know those dates?

3 A No, sir, I do not.

4 Q But they are in your -- that file?

5 A They're in the -- yes, sir.

6 Q Would they be in what they call the notes?

7 A They're in the notes from the auto damage adjuster.

8 Q They're in the notes from the auto damage adjuster?

9 A The notes that he created.

10 Q Help me if you would, so there -- from your
11 testimony there's an indication, correct me if I'm wrong,
12 there are two sets of notes, one from the auto damage
13 adjuster that you reviewed, correct?

14 A Yes, sir.

15 Q And then there's another set of notes; what would
16 those notes be called?

17 A We refer to them as A-Log notes, if you're
18 referring to the ones that I would put into the system.

19 Q No, I'm talking about the one you reviewed in
20 preparation for this?

21 A The A -- the adjuster log notes.

22 Q Adjuster log notes, and what do you call them for
23 short?

24 A A-Log.

25 Q A-L-O-G (spelling)?

1 A Yes, sir.

2 Q And they would have -- they are identifiable by the
3 claim number; is that correct?

4 A Yes, sir.

5 Q Okay. Your legal counsel, Mr. Attorney Ross
6 Miller, where is he located at?

7 A He was in Macon. He's since retired.

8 Q Was he staff counsel for you, or he was --

9 A He's not an attorney. He's just a regional legal
10 advisor.

11 Q Regional legal advisor?

12 A Uh-huh (affirmative).

13 Q So he doesn't have -- he's not an attorney then?

14 A No, sir.

15 Q Was he on staff at GEICO?

16 A Yes, sir.

17 Q What was his title?

18 A Regional Legal Advisor.

19 Q What did he tell you, what did he tell you to do
20 when you told him that -- when you spoke to him about the
21 vehicle -- when you told him the facts that you discovered
22 that the vehicle had been sold --

23 A Uh-huh (affirmative).

24 Q -- and you told him what had happened, what did he
25 tell you?

1 A He instructed me to try and get the -- recover the
2 vehicle back.

3 Q Why did he tell you to recover the vehicle back,
4 did he give you a reason?

5 A If he did, I don't recall what that -- what the
6 extent of the conversation was. It was just that because you
7 had requested that, then we were trying to get -- recover the
8 car back for you.

9 Q Mr. Ross Miller, you think he has a file with the
10 conversation between you two?

11 A I would assume not, since he's retired now.

12 Q Would GEICO have that file?

13 A I have no idea.

14 Q If I were to pull your -- or review your A-Log
15 notes, in those A-Log notes would it say that on X date and X
16 year I had a telephone conversation with Ross Miller,
17 regional legal advisor at GEICO, regarding one, two, three,
18 four, five, would your notes say that?

19 A It should, yes, sir.

20 Q And, of course, do you know what kind of notes Mr.
21 Ross -- well, are all employees with GEICO required to keep
22 an A-Log system?

23 A I don't think they're all required, and I don't
24 know what notes Mr. Miller kept as far as this conversation
25 was concerned.

1 Q Your attorney, Mr. Griffith, and I as lawyers we
2 write each other back and forth, documents, and so forth and
3 so on as required by our profession. Within GEICO, the GEICO
4 organization, did you e-mail him, or did you just pick the
5 phone up, or did he e-mail you back, or did he just tell you
6 over the phone to get the car back?

7 A I e-mailed him, and then we met a few moments later
8 to discuss the file.

9 Q So he was in the same department you were in?

10 A He was in the same building, yes, sir.

11 Q And he immediately called a conference with you
12 regarding the file?

13 A Yes, sir.

14 Q And he said, meet me down in room so and so, that's
15 what he said; I'm paraphrasing, what did he say, meet me --
16 and did you bring the complete --

17 A I met him at his office to discuss it.

18 Q Did he tell you to bring the complete file to him?

19 A I have no idea. I can't remember if he said that
20 or not.

21 Q When you went to see him did you take the file?

22 A Mr. Brown, again, I have -- this was a long time
23 ago; I have no idea what was taken with me when I went to
24 discuss it with him.

25 Q Did you take notes?

1 A Again, sir, I have no idea.

2 Q Okay.

3 A It was a long time ago.

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

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

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

11 A No, sir, I have no idea.

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

14 A That we had recovered the vehicle?

15 Q Yes.

16 A Yes, sir.

17 Q By e-mail, fax, telephone conversation, or what?

18 A I'm not sure what the means of communication was.

19 Q But it should be in your notes?

20 A Yes, sir.

21 Q Okay. GEICO has certain procedures that you go by
22 because you've got certain departments, and you said you
23 worked for litigation?

24 A Yes, sir.

25 Q Have you ever received a non-spoliation of evidence

1 notice before?

2 A Honestly, I don't remember.

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

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

8 Q Does GEICO have any -- this is a long question, and
9 my voice is up and down and I don't speak very clearly, okay,
10 so just let me finish before you answer, okay?

11 A Uh-huh (affirmative).

12 Q Does GEICO have any books, regulations, guidelines
13 and policy dealing with non-spoliation of evidence?

14 A Not that I'm aware of.

15 Q You're not saying that they don't -- they don't
16 have them, but you're just not aware of them?

17 A I'm not aware of any.

18 Q But you're not saying that they don't have them,
19 correct?

20 A Again, sir, I'm not -- I'm not aware of any, so I
21 don't know the answer to that question.

22 Q Okay. Did you get a copy of the accident report in
23 this case?

24 A I don't recall specifically if we did or not. It
25 should be in the notes if we did.

1 Q That's your A-Log notes again?

2 A Yes, sir.

3 Q How many employees were working in your area in '06
4 that you worked with?

5 A Working in the continuing unit?

6 Q Yes.

7 A I have no idea.

8 Q This is another long question, okay, and it's got
9 two parts, I want a name and a position, okay, if you could
10 give me the name of every person at GEICO, the name and their
11 position, which means their title, that you discussed this
12 claim with?

13 A That I discussed this claim with?

14 Q Yes.

15 A Like just the claim in general, or -- I don't know
16 if I can answer that question.

17 Q Okay, specifically, the non-spoliation of evidence
18 and the recovery of the vehicle, what persons at GEICO, their
19 name and title?

20 A Ross Miller would have been one, which he's the
21 regional legal adviser.

22 Q Okay?

23 A And the only other person I can think of was, of
24 course, Buck Abele, which is the auto damage adjuster.

25 Q Okay?

1 A And Barry Heitin, who is the home office attorney
2 assigned to the case.

3 Q You said Barry?

4 A Heitin.

5 Q B-A-R-R-Y (spelling)?

6 A Uh-huh (affirmative).

7 Q H-E-I-G-H-T-E-N (spelling)?

8 A H-E-I-T-I-N (spelling).

9 Q H-E-I-T-I-N (spelling), and he is the, what now?

10 A He's the home office claims legal attorney assigned
11 to the file.

12 Q Home office claim legal attorney assigned -- okay.
13 You've told me what you can remember of the conversation
14 between you and Mr. Martin and the conversation with Mr.
15 Abele?

16 A Uh-huh (affirmative).

17 Q How about Mr. Barry Heitin, what kind of -- what
18 were you --

19 A It would have been the same conversation with Mr.
20 Miller, a similar conversation.

21 Q Okay, just help me out. You told Mr. Attorney
22 Heitin about the letter of non-spoliation that you discovered
23 either during the months of February or March of '07?

24 A Yes, sir.

25 Q And you told him that you had spoken with Mr.

1 Abele, the auto adjuster?

2 A Yes, sir.

3 Q And you told him that the vehicle had been sold?

4 A Yes, sir.

5 Q What was his response?

6 A I have no idea. I don't remember.

7 Q You don't know what he told you?

8 A No, sir, I don't remember the conversation, the
9 specifics of the conversation.

10 Q But you -- well, tell me what you told him other
11 than what I said? You told him -- you told him that the
12 letter -- about non-spoliation, correct?

13 A Yes, sir.

14 Q And you told him your conversation with Mr. --

15 A Yes, sir.

16 Q Okay, Mr. Abele?

17 A Yes, sir.

18 Q What was his advice to you?

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

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

25 A Mr. Miller.

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

3 A What did who say?

4 Q Attorney Heitin.

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

8 Q When you left were you ever -- Ross Miller, Buck
9 Abele, yourself and Attorney Heitin, were y'all ever in a
10 meeting together to discuss this matter?

11 A Like in a meeting in the same room, or --

12 Q A conference call?

13 A No, sir.

14 Q But you and Mr. Miller had a conversation, that's
15 correct?

16 A Yes, sir.

17 Q Have you ever met Mr. Buck Abele?

18 A No, sir.

19 Q Have you ever met Mr. Heitin?

20 A Yes, sir.

21 Q He's in the same building that you were in?

22 A No, sir.

23 Q Have you ever been to his office?

24 A To Mr. Heitin's office?

25 Q Yeah.

1 A No, sir.

2 Q So you discussed this by phone?

3 A Yes, sir.

4 Q Did Mr. Miller tell you to call Mr. Heitin?

5 A I don't recall if he gave those instructions.

6 Q Why did you call him then?

7 A Because he was the attorney, the home office claims
8 legal attorney assigned to the case.

9 Q Okay.

10 A And he was assigned to the case because of the
11 potential value of the case with the injuries involved.

12 Q So whenever there is a potential value to a case
13 you call the attorney; he gets put on notice, is that what
14 you're saying?

15 A He gets put on notice, yes, sir.

16 Q So if I get a claim against GEICO tomorrow and I
17 write GEICO a letter, Dear Ms. Kelly Stone, please reserve
18 the sum of 1.25 million dollars, and I send it registered,
19 receipt mail, Mr. Heitin gets a copy of that letter?

20 A Not necessarily.

21 Q But in this particular case why was there a need to
22 talk to Mr. Heitin about this matter?

23 A About the manner of the vehicle?

24 Q Yes.

25 A Just to keep him informed of what was going on.

1 Q Okay. GEICO is a big company, right?

2 A Yes, sir.

3 Q So all vehicles that are -- have a catastrophic
4 injury in it Mr. Heitin is aware of it?

5 MR. GRIFFITH: Object to the form.

6 A THE WITNESS: No, sir, not necessarily.

7 Q Okay, but this one he was?

8 A Yes, sir.

9 Q And you contacted him?

10 A Yes, sir.

11 Q And that should be in your A-Log notes?

12 A It should be, yes, sir.

13 Q Okay, good enough. And, of course, were you -- did
14 you notify him -- you can't remember whether it was by letter
15 or phone or what, you can't remember how you notified him?
16 Mr. Attorney Barry Heitin, did you notify him by letter or
17 what?

18 A Did I notify him about what?

19 Q This whole situation here.

20 A About the vehicle?

21 Q Yes.

22 A I'm assuming that it was by telephone. I don't
23 remember specifically how we communicated.

24 Q All right, let's do some protocol here. Would you
25 have to have spoken with Mr. Ross Miller prior to talking

1 with Attorney Heitin in terms of protocol?

2 A Was I required to talk to Mr. Miller before talking
3 to Mr. Heitin?

4 Q Yes.

5 A Not necessarily.

6 Q So you had that leeway, discretion?

7 A Yes, sir.

8 Q Okay. Did Mr. Heitin review your entire file, or
9 did you give him the entire file?

10 A At one point he received a copy of the file.

11 Q Do you know from who?

12 A I would have sent it to him.

13 Q And along with -- Mr. Miller has a -- also has a
14 copy of the file, right?

15 A I don't know if Mr. Miller had a copy of the file.

16 Q So Mr. -- you just volunteered to give it to him,
17 or he told you to bring it to him and let him review it?

18 A Volunteered to give to who?

19 Q Mr. Heitin?

20 A When the file was assigned to him he gets a copy of
21 the file.

22 Q Okay. Do you know what date and time that was?

23 A No, sir, I don't remember.

24 Q But it's in your notes?

25 A Should be, yes, sir.

1 Q Okay, good. Have you ever attended, in terms of
2 your education at GEICO, or in your training at GEICO,
3 anything about how you handle a notice of non-spoliation of
4 evidence?

5 A I don't recall a specific training class on that
6 matter.

7 Q Have you ever had any meetings about that kind of
8 notice?

9 A I don't recall any meetings regarding that.

10 Q Okay. What have you been told by your supervisors
11 regarding this claim?

12 A Okay, could you be more specific? I'm not sure
13 what you --

14 Q Just in general, you have supervisors, right?

15 A I did at the time, yes, sir.

16 Q Yes, and I kind of move my hands when I talk; it's
17 not -- that's just mannerisms, okay?

18 A Uh-huh (affirmative).

19 Q Did you mention to any other supervisor, other than
20 Mr. Miller or Mr. Heitin, the contents of this file?

21 A Not that I recall, no, sir.

22 Q Have you talked to Ms. Booker about this file?

23 A Ms. Booker has that file now.

24 Q Have you spoken with her about the file?

25 A We spoke about it yesterday in a meeting Mr.

1 Griffith.

2 Q What did Ms. Booker tell you?

3 MR. GRIFFITH: I'm going to object to that. That's
4 part of attorney/client.

5 MR. BROWN: I said Ms. Booker. I didn't say --

6 MR. GRIFFITH: She's with GEICO.

7 MR. BROWN: But she's --

8 MR. GRIFFITH: She's with GEICO. GEICO is my
9 client.

10 MR. BROWN: I'd beg to differ, but --

11 MR. GRIFFITH: Well, who did you sue?

12 MR. BROWN: I'm suing GEICO.

13 MR. GRIFFITH: That's right. They're my client.

14 MR. BROWN: Okay. We'll take that up with the
15 judge, okay?

16 MR. GRIFFITH: That's fine.

17 MR. BROWN: Okay. Make a note on that for me, Mr.
18 Bush.

19 Q MR. BROWN: Tell me this, how are documents
20 received into your office? How are documents received into
21 your office, scanned, faxed?

22 A Either way. They can -- if -- they're received in
23 the mail, some of them were scanned, some of them were
24 delivered, some of them were faxed in to us.

25 Q Some e-mailed like today, this e-mail so?

1 A There wasn't -- at that time there wasn't a lot of
2 e-mail from outside sent into the office.

3 Q But today there are a lot of e-mails, right?

4 A I'm not sure to what extent, because I'm not in
5 that department anymore.

6 Q Let's review a few things here. You just happened
7 to be looking over the file in March or April of '07, and you
8 noticed that there was a non-spoliation letter in it, right?

9 A No, sir.

10 Q Tell me how that came about?

11 A As I mentioned earlier another attorney contacted
12 us regarding purchasing the salvage of the car.

13 Q And but for him having had -- made that phone call
14 GEICO wouldn't have never retrieved the salvage; is that
15 correct?

16 A Without that phone call wasn't aware that -- of
17 your letter to Mr. Abele regarding the vehicle, and I'm not
18 sure what would have happened at that point.

19 Q All right. What was your salary at GEICO in 2006?

20 A I honestly can't remember that.

21 Q What's your salary now?

22 A It's around 63,000.

23 Q Have you spoken with anyone outside of GEICO
24 regarding this claim?

25 A No, sir.

1 Q We're lawyers, we belong to -- not myself, trial
2 lawyers -- to all kind of organizations, ABA. In your
3 profession what associations, or club memberships, or
4 affiliations do you have, like I know sometimes, you know,
5 insurance people have PPC, IC behind their names?

6 A I don't have any of those.

7 Q Okay, but tell me what kind of licenses do you
8 have?

9 A What kind of licenses do I have?

10 Q Yeah, like a PNC, or life insurance, or an
11 adjuster's license?

12 A Currently I'm not sure what -- if I have any
13 licenses other than a Georgia adjuster license.

14 Q Tell me what the requirements for a Georgia
15 adjuster license is?

16 A To be a resident adjuster in the State of Georgia.

17 Q And you've got to be certified?

18 A No, sir.

19 Q Tell me how you get that certification?

20 A How do you get that certification?

21 Q Yes, to be an adjuster.

22 A Okay, I'm not sure I follow what your question is,
23 because --

24 Q Okay, let me clarify before you answer it. Do you
25 go to a school for "X" amount of weeks and you take an exam,

1 or?

2 A No, sir.

3 Q So what do you do?

4 A I'm employed as an adjuster in the State of
5 Georgia, and I'm a resident here.

6 Q Yes.

7 A So that entitles me to a Georgia resident adjuster
8 license.

9 Q Okay.

10 A There's no classes that you have to intend to get
11 that license.

12 Q Okay. Have you ever testified in court before?

13 A No, sir.

14 Q Have you ever dealt with a non-spoliation issue at
15 GEICO before 2006?

16 A Not that I recall.

17 Q Have you ever testified regarding a non-spoliation
18 issue?

19 A I've never testified in court before.

20 Q Okay. Tell me what your understanding of non-
21 spoliation is?

22 A That there is evidence that one party wants
23 protected to prevent any additional damages occurring to it.

24 Q Okay. When you saw that letter in the file, the
25 non-spoliation, and that the vehicle was sold, were you

1 alarmed?

2 A After the conversation that I had with you I was
3 concerned about it, because I wasn't aware of it at the time,
4 and that's why we started the process of recovering the
5 vehicle.

6 Q But Mr. Johnson or some lawyer called you that
7 actually kind of made you go through the file and look,
8 correct?

9 A It wasn't in the file.

10 Q Okay?

11 A Again, I just -- as I advised just a moment ago,
12 Mr. Johnson contacted us about purchasing the salvage of the
13 vehicle, so I spoke to Mr. Abele, who advised that another
14 attorney, yourself, had requested that the vehicle be shrink
15 wrapped, and that he had had a -- received a letter
16 concerning that and immediately called you, and you told me
17 what was going on, and so that's when we started the process
18 of getting that vehicle returned.

19 Q Do you believe you made a mistake selling that
20 vehicle?

21 A I didn't sell the vehicle.

22 Q Well, not you, but GEICO; I'm not saying you
23 specifically. Do you remember writing me a -- or calling my
24 office and telling me that you had sold the car, the vehicle?

25 A The notes reflected I had contacted your office to

1 let you know that it had been sold, and we were in the
2 process of trying to locate the car.

3 Q But you called me, though, right?

4 A I called your office, yes, sir.

5 MR. BROWN: Indulge me for one second. We have a
6 letter here I'd like for you and Mr. Griffith to take a
7 look at. It's dated March 20 of 2007. It's a follow up
8 to my conversation with Ms. Stone regarding the -- where
9 she advised me that she had sold the vehicle. This is
10 the document that I received from defense counsel, Mr.
11 Griffith, sir. Look at the top of the pages, what I
12 received from Attorney Griffith by way of the disc. I'd
13 like that marked as Plaintiff's Exhibit number 1,
14 please.

15 Q MR. BROWN: Ms. Stone, I have here in my
16 possession, in my hand a letter from Ms. Kelly Stone, claims
17 examiner, to Attorney Harry C. Brown, and I've gotten this by
18 way of defense counsel, in which you acknowledge receipt of
19 my letter of March 20th, '07. You advised me that the
20 vehicle had been recovered and intact, with the exception of
21 three tires and the wheels that were sold. That's for the
22 examination of you and Mr. Griffith. Have you reviewed it,
23 ma'am?

24 A Yes, sir.

25 Q Plaintiff's Exhibit number 2. Ms. Stone, was the

1 insurance coverage of Mr. Charles Williams and Mrs. Williams
2 in -- was it in effect during the time of the accident?

3 A Yes, sir.

4 Q Ms. Stone, do you know who Mona R. Cole is?

5 A She's another employee at GEICO.

6 Q Was she working for you?

7 A Was she working for me, no, sir.

8 Q In '06?

9 A No, sir.

10 Q Do you know what her status was? She was a claims
11 examiner I see here like you were; was she a supervisor, same
12 type, or?

13 A She was a claims examiner.

14 Q Do you know who her supervisor was?

15 A I have no idea.

16 Q Do you know whether she works at GEICO today?

17 A As far as I know she's still employed at GEICO.

18 Q Still employed at GEICO, okay. I'd like to show
19 you a document that I received from defense counsel, Mr.
20 Griffith, a letter from Ms. Cole to Attorney Griffith. Would
21 you acknowledge this as being a GEICO document? That has a
22 GEICO letterhead on it, doesn't it?

23 A Yes, sir.

24 Q And Ms. Kelly Stone is a claims adjuster, correct?

25 A I was a claims adjuster, but that's from Mona Cole.

1 Q I'm sorry, Ms. Mona Cole was a claims adjuster in
2 June 2009; is that correct, according to this letter?

3 A That's what that letter shows, yes, sir.

4 Q Okay. Plaintiff's Exhibit number 3. Ms. Stone,
5 why did you try to retrieve the vehicle? Was it based upon
6 the letter of non-spoliation of evidence? Why did you get
7 the vehicle back, why did you buy it back, why did GEICO buy
8 the vehicle back?

9 A Because of the conversation that I had with you
10 that you had requested the vehicle, and so we made attempts
11 to recover the vehicle back.

12 Q But you also read the letter, correct?

13 A Read which letter?

14 Q The letter of '06 regarding non-spoliation of
15 evidence, you said you saw it in the file, correct, in March?

16 A In February or March of 2007.

17 Q You saw that, my letter, in the file?

18 A Not in the file, no, sir. It was received around
19 February or March of 2007.

20 Q Received where?

21 A It was received to my attention.

22 Q From whom?

23 A I'm not sure who sent it to me.

24 Q But then you're A-Log system would tell you,
25 correct?

1 A Not necessarily who the letter came from, no, sir.

2 Q But you, based upon the receipt -- notice of a
3 letter in February or March of '07, began efforts to get the
4 vehicle back; that's according to your letters in the file,
5 correct?

6 A Okay, I'm sorry, will you do it --

7 Q You began efforts -- once you learned that the
8 vehicle was sold you talked to Mr. Martin about it; is that
9 correct?

10 A Mr. Miller.

11 Q Miller, I'm sorry, and you talked to Mr. Abele
12 about it, and then you talked to Attorney Barry Heitin about
13 it, correct?

14 A Yes, sir.

15 Q Then efforts were made to get the vehicle back,
16 correct?

17 A Yes, sir.

18 Q Okay. Why did you get the vehicle back?

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

21 Q Okay, good enough. As indicated in the letter,
22 which is Plaintiff's Exhibit number 2, it says here, a letter
23 from you to my office, that the vehicle is intact with the
24 exception of three tires and the wheels; is that correct?

25 A That's what I was told, yes, sir.

1 Q Do you know the exact date the vehicle was sold?

2 A That it was sold?

3 Q Yes.

4 A No, sir.

5 Q Do you know who it was sold to?

6 A No, sir.

7 Q Do you know who Mr. Buck Abele bought it back from?

8 A No, sir.

9 Q Would that be in your file?

10 A I have no idea. I'm not sure if it's in there or
11 not.

12 Q Do you know how much was paid to get the vehicle
13 retrieved?

14 A I'm not sure of the exact price.

15 Q Do you know who it was paid to?

16 A No, sir.

17 Q How could I get that information?

18 A I would assume that you could get the information
19 from our -- I don't know if our defense attorney would have
20 that to provide to you, or the claims handler who now has the
21 file.

22 Q Who is the claims handler who now has the file?

23 A Mrs. Booker.

24 Q Mrs. Booker, so Ms. Booker would give it to me, you
25 think?

1 A I have no idea.

2 Q Do you think the information that I was just asking
3 you is in Mrs. Booker's possession?

4 A I don't know.

5 Q I'll have to ask Ms. Booker then?

6 A Yes, sir. I don't know.

7 Q Do you know who from your office talked with a
8 gentleman by the name of William Roy Parks at Parks Auto
9 Salvage in Ravenal, South Carolina?

10 A I don't know who Mr. Parks is.

11 Q Do you know that the vehicle is now housed at Parks
12 Auto Salvage in Ravenal, South Carolina?

13 A I don't know where the vehicle is located at now.

14 Q Who would know?

15 A I don't know.

16 Q Do you think Ms. Booker would know where the
17 vehicle is?

18 A I would assume.

19 Q What's Mrs. Booker's title?

20 A I don't know her specific title.

21 Q She is not your boss?

22 A No, sir, she's not.

23 Q You think Mrs. Booker has a card?

24 A I don't know the answer to that question.

25 Q Ms. Stone, who told you that the tires and the

1 wheels were sold?

2 A I'm not sure who that conversation came from. I'm
3 assuming it would be Buck Abele.

4 Q Were you aware that the back glass was also sold
5 from the vehicle?

6 A No, sir.

7 Q The letter, which is Plaintiff's Exhibit number 2,
8 who else did you give a copy of that letter to?

9 A I don't know that I gave that letter -- a copy of
10 that letter to anyone else.

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

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

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

16 A I have no idea.

17 Q But he helped you draft that letter there?

18 A Yes, sir.

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

21 A Yes, sir.

22 Q Do you recognize that there was an error made?

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

24 Q Yes.

25 A What kind of error?

1 Q In the sale of the vehicle?

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

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

8 A Yes, sir.

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

10 A No, sir.

11 Q I'm assuming that since you sold the -- the vehicle
12 was sold you had -- somebody had to pay to get the vehicle
13 back, correct?

14 A Yes, sir.

15 Q Does GEICO have a procedure for correcting a non-
16 spoliation error? Is this the procedure that you use -- you
17 got a letter of non-spoliation, the vehicle had sold, is
18 GEICO's method or procedure then to re-contact the parties
19 involved, be it Buck Abele, Attorney Heitin, or Ross Miller,
20 and get the vehicle back?

21 A As I've stated earlier, I don't know of any
22 procedures specifically regarding non-spoliation.

23 Q So you don't have a standard that you go by when
24 this happens?

25 A I'm not aware of any specific procedures regarding

1 non-spoliation.

2 Q But you were alarmed when you found that it was
3 sold, correct?

4 A I was -- excuse me?

5 Q Were you alarmed?

6 A After the conversation with you, and you were upset
7 in that conversation, I discussed the situation to see what
8 needed to be done next.

9 Q Discussed it with who?

10 A Mr. Miller.

11 Q Okay.

12 MR. BROWN: Indulge me for one second. I'd like to
13 take a five-minute break, Mr. --

14 MR. GRIFFITH: Sure.

15 (OFF THE RECORD)

16 (ON THE RECORD)

17 Q MR. BROWN: We're back on the record, okay?

18 A Okay.

19 Q Now, do you know how long Ms. Booker has been
20 working with GEICO?

21 A No, sir, I have no idea.

22 Q How long have you been working with Ms. GEICO?

23 A I'm sorry?

24 Q How long have you been working with Ms. Booker, I'm
25 sorry?

1 A I'm not sure when she started, so I don't know.

2 Q A year, two years?

3 A It's been longer than that.

4 Q Five?

5 A It's been longer than that.

6 Q That you've been working with Ms. Booker?

7 A That she's been employed at GEICO?

8 Q Yes.

9 A Again, I don't know specifically, but it's been
10 more than five years.

11 Q Okay, but how long have you been working with Ms.
12 Booker?

13 A We're both employed at GEICO.

14 Q Yes.

15 A So I've been at GEICO for 26 years.

16 Q And during those years -- let's just say five years
17 -- have you been working with Ms. Booker for the last five
18 years?

19 A No, sir.

20 Q Four?

21 A No, sir.

22 Q Three?

23 A No, sir.

24 Q You've been working with her two years?

25 A No, sir.

1 Q Three years?

2 A No, sir.

3 Q You've only been working with Ms. Booker with
4 regard to this file, that's the extent of your working
5 relationship?

6 A She's a fellow employee at GEICO. I'm not sure
7 what you're referring to as working with her, but she's a
8 fellow employee at GEICO.

9 Q In your capacity as a GEICO employee would you have
10 at any point in time speak to her on any matter -- speak to
11 her on any matter regarding any file?

12 A Could you ask that again, please?

13 Q Okay. Let's make it a little slower. In your
14 capacity as a GEICO employee have you ever spoken to Ms.
15 Booker regarding a file?

16 A I'm sure I have from time to time.

17 Q Just yes or no.

18 A Yes.

19 Q Okay. In your employment with GEICO have you
20 spoken with Ms. Booker regarding this file?

21 A We've -- again, we discussed it yesterday.

22 Q Was that the first time that you spoke with Ms.
23 Booker regarding this file?

24 A I'm not sure if I discussed it with her previously
25 before that, other than she had mentioned the upcoming

1 deposition.

2 Q And what specifically did she say?

3 A That there were going to be some depositions.

4 Q And that she had the particular file; is that
5 correct?

6 A As far as I know she has the file.

7 Q And when you -- in preparation for this deposition
8 you got the files from Ms. Booker; is that correct?

9 A I don't have a copy of the file.

10 Q But Ms. Booker has a copy of the files today,
11 correct?

12 A Far as I know, yes, sir.

13 Q So what did you review?

14 A The adjuster notes.

15 Q All right, and Mrs. Booker has those adjuster
16 notes, correct?

17 A As far as I know, yes, sir.

18 Q And when you were reviewing those adjuster notes
19 where did you get them from?

20 A When I met with Mr. Griffith and Mrs. Booker
21 yesterday they had copies of those, and I reviewed the copies
22 that they had.

23 Q Is there any particular reason why you didn't bring
24 those notes with you today?

25 A I wasn't told to.

1 Q Was there ever a discussion between you and Ms.
2 Booker without Attorney Griffith being present about this
3 file?

4 A She's contacted me to let me know that you had
5 requested a deposition and that those were going to be
6 scheduled.

7 Q And that was the extent of it?

8 A Yes, sir.

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

12 A You deal directly with the attorney.

13 Q You deal directly with the attorney?

14 A Yes, sir.

15 Q Does that apply to every GEICO employee? Does that
16 apply to every GEICO employee, that when a lawyer is involved
17 you deal directly with the attorney?

18 A Yes, sir.

19 Q Did you or anyone for GEICO ever ask for monies for
20 storage of this vehicle, or for salvage of this vehicle, or
21 anything?

22 A Did we ever ask for monies, or --

23 Q Yes, for reimbursement for storage, or salvage, or
24 anything?

25 A I don't handle that portion of the claims; I don't

1 know.

2 Q Did you get a chance to read the notes you said,
3 correct, in the file?

4 A I read the notes that pertained to the activities
5 that I had on the file.

6 Q So in your reading of your file was there ever any
7 request for monies for reimbursing of salvage for the file,
8 or storage, or anything?

9 A There's notes regarding the settlement of the
10 vehicle in the adjuster notes.

11 Q But do you know of anyone who, from GEICO, who
12 would have requested money for the salvage of the vehicle --

13 A I don't --

14 Q -- or storage of the vehicle?

15 A To request money, I'm not sure what you're
16 referring to.

17 Q For example, it's my understanding now that the
18 vehicle is in Ravenal, correct?

19 A I don't know where the vehicle is located.

20 Q Specifically, did you ever request any money from
21 Attorney Tom Johnson regarding this vehicle?

22 A I've never requested any money from Mr. Johnson
23 regarding anything.

24 Q Have you ever requested any monies from Attorney
25 Harry Brown regarding this vehicle?

1 A I've sent letters to you asking if you were wanting
2 to purchase the vehicle.

3 Q But nothing regarding the storage of the vehicle,
4 correct, or salvage?

5 A Not that I'm aware of. I haven't sent any letter.

6 Q Are you aware of any such letter?

7 A I don't typically handle the salvage of the vehicle
8 or anything to do with the property damage of the car.

9 Q Okay.

10 MR. BROWN: Just indulge me one more second. I may
11 be about to wrap this up.

12 THE WITNESS: Okay.

13 Q MR. BROWN: Did you send a letter to me, directly
14 to me after you got the vehicle back, correct?

15 A In response to your correspondence I sent a letter
16 to you stating that the vehicle had been recovered, and I had
17 been instructed that it was intact with the exception of
18 three tires and wheels.

19 Q Okay.

20 MR. BROWN: Mitch, we need one little small two
21 minute recess?

22 MR. GRIFFITH: Yes, sir.

23 (OFF THE RECORD)

24 (ON THE RECORD)

25 MR. BROWN: Ms. Stone, thank you very much for

1 coming to the deposition today. I've talked to you
2 several times over the years, and I'm glad to put a name
3 with the face, and thank you very much.

4 THE WITNESS: Thank you.

5 MR. GRIFFITH: Kelly, I've got, maybe, one or two
6 questions.

7 DIRECT EXAMINATION

8 BY MR. GRIFFITH:

9 Q You were asked about the process that GEICO has
10 where there's an attorney involved; is that correct?

11 A Yes, sir.

12 Q And you said that you -- when there's an attorney
13 involved you deal with the attorney; is that correct?

14 A Yes, sir.

15 Q What do you do; is there any prohibition from
16 talking to the claimant if the attorney tells you it's all
17 right to talk to the claimant?

18 A No, if he tells you it's okay, then it's okay.

19 MR. GRIFFITH: That's all the questions I've got.

20 Thank you.

21 MR. BROWN: One second, please.

22 RECROSS EXAMINATION

23 BY MR. BROWN:

24 Q Did anyone -- or did I tell you that it was okay to
25 talk to any of my clients in this particular case?

1 A I don't recall having a conversation with you
2 concerning that.

3 Q Thank you. What about Tom Johnson?

4 A I don't --

5 Q What about --

6 A Did he tell me I could talk to his client?

7 Q Yes.

8 A I don't recall having that conversation with him
9 either.

10 MR. BROWN: Okay.

11 (Deposition concluded: 2:40 p.m.)

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Deposition of Buck Abele

6

1 Q. Bear in mind that if any time point in
2 time you and your attorney, Mr. Griffith, have a
3 conversation regarding anything that's involved
4 here today, that you'll have to come back and let
5 me know what it is.

6 A. Yes.

7 Q. One other thing. The court reporter
8 can't pick up a nod. It has to be a "yes" or a
9 "no."

10 A. Yes.

11 Q. Are you ready, sir?

12 A. Yes.

13 Q. What is your name?

14 A. William Buck Abele.

15 Q. What is your address?

16 A. 6 Coventry Court, Bluffton, South
17 Carolina.

18 Q. What is your age and citizenship?

19 A. My age is 52. Citizen is United States,
20 American.

21 Q. Are you now employed?

22 A. Yes.

23 Q. Who are you employed with?

24 A. GEICO Insurance.

25 Q. How long have you been employed with

1 GEICO?

2 A. A little over eight-and-a-half years.

3 Q. In what capacity are you employed?

4 A. I'm an auto damage adjuster.

5 Q. What is your date of hire?

6 A. November 17, 2003.

7 Q. The next couple of questions are going to
8 center around your training. What kind of
9 training did GEICO give you? What was the
10 application process in terms of getting this job?

11 A. They require prior knowledge of writing
12 estimates on vehicles, and also I had to get a
13 state license to be licensed as an adjuster and
14 appraiser.

15 Q. So prior to your being employed by GEICO,
16 who did you work for?

17 A. I worked for Advanced Auto Body.

18 Q. Advanced Auto Body?

19 A. Yes.

20 Q. Where are they located at?

21 A. Hilton Head.

22 Q. What was your job there?

23 A. I was an estimator.

24 Q. How long did you work there?

25 A. I think two-and-a-half years.

1 Q. Prior to that, did you have any other
2 kind of experience as it relates to estimating
3 damage to a vehicle?

4 A. Yes. Worked for another body shop called
5 Island Ford.

6 Q. And that's in Bluffton?

7 A. Yes.

8 Q. You were an estimator there?

9 A. Yes.

10 Q. In these two prior jobs, Advanced Auto
11 Body and Island Ford in Bluffton, what kind of
12 training did you get for those to be an estimator?

13 A. It was more or less on-the-job training.

14 Q. You mentioned a few minutes ago that once
15 employed by GEICO, you received a state
16 certification?

17 A. Yes. You can't write estimates in South
18 Carolina without a state license. You have to be
19 licensed prior to being accepted.

20 Q. What kind of training do you go through?
21 Do you go to a school?

22 A. For the license?

23 Q. Yes, sir.

24 A. Yeah, they actually sent me to a school
25 or a class.

1 Q. Who sent you to the class?

2 A. GEICO.

3 Q. And, of course, that class was a class
4 that they sponsored or the state sponsored it, or
5 who sponsored it?

6 A. It wasn't GEICO. I'm not sure. It was
7 just a woman that gave classes for -- I can't
8 remember her name.

9 Q. What does your certification say?

10 A. Licensed insurance adjuster/appraiser.

11 Q. That's on the physical body of an auto?

12 A. Right.

13 Q. What is your title with GEICO?

14 A. Auto Damage Adjuster.

15 Q. Tell me a little bit about your
16 educational background, if you may, please.

17 A. I'm a college graduate.

18 Q. Okay.

19 A. Went to a school called Baldwin Wallace
20 in Cleveland, Ohio. I have a degree in Business
21 Administration.

22 Q. When did you receive that degree, sir?

23 A. 1984.

24 Q. Where did you go to high school at?

25 A. Went to Orange High School which is a

1 suburb of Cleveland, Ohio.

2 Q. I may have asked this before. Your
3 employment period for GEICO began at 11/17/2003,
4 right?

5 A. Yes.

6 Q. When you began to work for GEICO, what
7 were your daily duties at GEICO?

8 A. Initially?

9 Q. Yes.

10 A. Going out and doing estimates on cars,
11 getting assignments and writing estimates on cars
12 and customer service, contacting customers and so
13 forth.

14 Q. Who was your supervisor back in October
15 of 2006?

16 A. Steve Burdett.

17 Q. Steve Burdett?

18 A. Yes.

19 Q. Can you spell that for me, please.

20 A. B-u-r-d-e-t-t.

21 Q. Basically, if you would, and take your
22 time with this, tell me how claims are assigned
23 when they come into GEICO.

24 A. Back at that time, they would --
25 basically, somebody would call in a claim, to

11
1 report a claim. They would assign it by zip code
2 to the specific adjuster that works in that zip
3 code.

4 They would assign it through -- I think
5 back then, they would do it through phone calls.
6 They would call you and tell you you have an
7 assignment, and it would be downloaded into your
8 computer where you would gather the information
9 for the claim at that point.

10 Q. And if you can remember specifically this
11 accident, were you assigned to this particular
12 claim by way of a zip code?

13 A. They assigned it to me, yes. Where the
14 truck was at at the time was in the area where I
15 worked, so it was assigned to me.

16 Q. And what area was that?

17 A. In Ridgeland.

18 Q. Can you remember when this claim was
19 assigned to you?

20 A. I believe it was assigned October 3.

21 Q. October 3 of 2006?

22 A. Yes.

23 Q. Were you the only person that was
24 assigned this claim or was it a team approved?
25 Tell me how that worked.

1 A. I was the only one assigned to it as far
2 as going out and inspecting the vehicle. But they
3 have different adjusters that handle different
4 aspects of a claim. My aspect as an auto damage
5 adjuster was to inspect the vehicle.

6 Q. With reference to the damage to this
7 particular car, was there anyone else assigned to
8 the claim other than you?

9 A. Not to inspect it, no.

10 Q. So you just basically did the inspection?

11 A. Right.

12 Q. When you inspected the vehicle, did you
13 send your report to Steve Burdett?

14 A. No.

15 Q. Upon inspection of the vehicle, what did
16 you do with the damage that you had got?

17 A. Well, we write an estimate. In this
18 case, the car was totaled. The claim is uploaded
19 through the system, and it's labeled as a total
20 loss.

21 Q. Your inspection of the vehicle, tell me
22 what you looked for to determine that it was lost.

23 A. Well, we are required to write an
24 estimate, even if it's obviously totaled. Either
25 way, we have to write an estimate based on, you

166

1 know, what is required to fix the car part by
2 part.

3 Q. So basically, you have a check-off sheet
4 that you have like lights gone, railing gone,
5 basically something that --

6 A. No. We go into our computer and the
7 claim is assigned to us. We enter the VIN number
8 of a vehicle. And we have a data base that pops
9 the VIN number and comes up with the particular
10 vehicle that we're looking at. It gives you all
11 the information on that vehicle.

12 You go down the list of basically what
13 needs to be repaired or replaced and put it on the
14 estimate. It has a threshold. When it hits the
15 threshold of what the computer approximates the
16 vehicle to be worth, that's when it's declared a
17 total.

18 Q. Do you take pictures as part of your
19 inspection of the vehicle?

20 A. Yes.

21 Q. And, of course, those are always
22 forwarded to your home office or kept on your
23 computer?

24 A. They're uploaded, yeah, and on file.

25 Q. Tell me when you upload that on the

1 computer, sir.

2 A. Any time we write an estimate, pictures
3 and so forth, like I say, it's downloaded to us.
4 When we are completed with it, we can send it back
5 up or it's uploaded where anybody -- it goes into
6 an electronic file where anybody with GEICO that's
7 associated with that file can bring up the
8 estimate or look at the pictures.

9 Q. In this particular case, did you upload
10 everything back as you normally do and went back
11 to your home office?

12 A. Yes.

13 Q. That's the way all of them are forwarded
14 to you?

15 A. Right, yes, sir.

16 Q. Can you tell me approximately how many
17 claims you were assigned during this period?

18 A. Over what kind of basis? What time?

19 Q. During the year.

20 A. I was assigned per year?

21 Q. No. During the period of, say, from
22 October 1 through October 31 of that year.

23 A. I don't honestly remember how many I did
24 that month. I really couldn't tell you. You
25 know, average-wise, it's probably eighty to a

1 hundred.

2 Q. Per month?

3 A. Including supplements that we look at,
4 yes, and drive-ins and so forth. So everything
5 together, yes.

6 Q. You have a pretty big, important job,
7 right?

8 A. Somewhat, yes.

9 Q. Normally, you handled about eighty claims
10 per month back during 2006?

11 A. Yes.

12 Q. GEICO, your supervisor, would know how
13 many claims you handle at all times, correct?

14 A. Yes.

15 Q. How many claims are you handling right
16 now per month?

17 A. Total-wise, it's about the same.

18 Q. Can you tell me what the term "adjuster"
19 means?

20 A. Adjuster is basically adjusting the claim
21 as far as working on the claim, as far as
22 determining what needs to be done, as far as my
23 portion would be repair-wise on the vehicle, what
24 repairs need to be done and adjusting costs and so
25 forth.

1 Q. Can you tell me which GEICO office you
2 work in or did you work in back in October 2006?

3 A. I'm a field adjuster. I work pretty much
4 out in the field. I work on my own. I work in
5 the region. I work in the Southeast Region.

6 Q. And, of course, during the time of
7 October 2006, Mr. Steve Burdett was your
8 supervisor?

9 A. Yes.

10 Q. Is he still your supervisor?

11 A. No.

12 Q. Who is your supervisor right now?

13 A. Chris Stutt.

14 Q. Chris. Spell his last name for me.

15 A. S-t-u-t-t.

16 Q. Okay.

17 A. That's it.

18 Q. When was Steve Burdett no longer your
19 supervisor?

20 A. I don't remember the exact date.

21 Q. Was it six or eight months after October
22 of '06, or a year after?

23 MR. GRIFFITH: Object to the form.

24 A. Actually, I had had another supervisor in
25 between there, and then I went back to Steve.

1 BY MR. BROWN:

2 Q. Who was that supervisor?

3 A. The other one?

4 Q. Yes.

5 A. Frank Cesario.

6 Q. Frank. Spell his last name.

7 A. I believe it's C-e-s-a-r-i-o.

8 Q. But during the month of October 2006,
9 Steve was your boss?

10 A. Yes.

11 Q. Supervisor?

12 A. Yes.

13 Q. And then Frank became your supervisor?

14 A. At some point after that, yeah. I don't
15 remember when.

16 Q. Is Steve still with GEICO?

17 A. Yes.

18 Q. What capacity?

19 A. He's a supervisor.

20 Q. Doing the same kind of work?

21 A. Yes.

22 Q. And, of course, you reported in 2006 to
23 Steve Burdett, your supervisor, correct?

24 A. Yes.

25 Q. Once the claim is assigned, what is the

1 next process that you engage in?

2 A. Contacting the owner of the vehicle, the
3 policyholder, the claimant, letting them know we
4 received the claim and when they should expect us
5 to be out to look at it.

6 Q. Do you know how many people were listed
7 as claimants for the automobile accident of
8 October 2006?

9 A. No. I have no idea.

10 Q. Do you know what type of vehicle was
11 involved in this wreck?

12 A. It's a Ford Explorer.

13 Q. Do you know what year?

14 A. Not offhand, no.

15 Q. Okay.

16 A. When I did that, I don't know.

17 Q. Can you tell me what kind of facts did
18 you ascertain regarding the accident?

19 A. What type of facts did I ascertain?

20 Q. Yes. Was it a flip-over? Rollover?
21 Just a head-on? What?

22 A. I don't ask that because they don't give
23 me that information. My job is basically to go
24 out and look at the vehicle and do the appraisal
25 on the damages.

1 Q. What do you think?

2 MR. GRIFFITH: Object to the form.

3 BY MR. BROWN:

4 Q. You can still answer.

5 A. What do I think about what?

6 Q. What do you think happened to the car?

7 Was it pretty much --

8 A. It appeared that it rolled over because
9 the roof was caved in.

10 Q. And you have pictures of the entire
11 vehicle?

12 A. Yes.

13 Q. What else do you remember about the
14 accident?

15 A. Well, other than just looking at the
16 vehicle and determining it was a total, you know,
17 that's pretty much my job.

18 Q. You took photos of the rear, the back,
19 the sides, the top?

20 A. All angles.

21 Q. Tell me what you mean by "all angles."

22 A. Front left, front right, right rear, left
23 rear and the interior.

24 Q. When you were in adjusting school, they
25 tell you what kind of photos and what angles to

1 look at, correct?

2 A. That's GEICO's procedure that they want
3 us to take all angles.

4 Q. So GEICO's procedure is they -- help me.
5 I'm trying to learn here. They have a standard
6 form that says left, right angle. I used to be in
7 the PMC business and we used to value houses, left
8 exposure, right exposure, that kind of situation.

9 A. Well, if it's a total loss, yes, we're
10 supposed to get all the angles of the vehicle, so
11 the entire vehicle is shown in the images.

12 Q. Do you know who the named insureds were
13 at that time?

14 A. Of the policyholder?

15 Q. Yes.

16 A. Charles Williams.

17 Q. Have you ever met Mr. Williams?

18 A. I believe he was there when I looked at
19 the vehicle.

20 Q. Did you call him at his house to come
21 meet you?

22 A. I don't remember exactly how we set up
23 the arrangement. I told him I was coming out. He
24 showed up when I was there, I believe.

25 Q. So the arrangements were made between you

1 and Mr. Williams?

2 A. Yes.

3 Q. Question for you now. This is going to
4 take you way back this question. See if you can
5 remember. I have it here that my office addressed
6 you by way of fax. It says here, "October 6,
7 2006." It has already been copied to the
8 courthouse. I want you take a look at this along
9 with your attorney and then I will ask you some
10 questions about it, okay.

11 (Document handed to witness.)

12 A. I am ready.

13 MR. BROWN: Mitch, are you ready?

14 MR. GRIFFITH: Yes. I would like to talk
15 to him about it since we haven't had it produced
16 to us before.

17 MR. BROWN: No problem. Go ahead.

18 MR. GRIFFITH: You have to give it to us
19 two days before the deposition.

20 MR. RIVERS: It's in the record.

21 MR. BROWN: That's good.

22 (A short recess was taken.)

23 MR. BROWN: Back on the record. I think
24 it's required by the rules that you tell us --

25 MR. GRIFFITH: No, it's not.

1 MR. BROWN: We will put on record that I
2 requested Attorney Griffith --

3 MR. RIVERS: It's right here.

4 MR. GRIFFITH: If there is a document
5 that you're going to use, it has to be provided to
6 us, I think, two days in advance or twenty-four
7 hours.

8 MR. BROWN: That's okay. We're good. I
9 will go ahead and put it on record. We can raise
10 the issue later on if we have to.

11 Let the record reflect that I have
12 requested Attorney Griffith to advise Attorney
13 Rivers and I what he and the Deponent Abele talked
14 about regarding a letter that was ordered from my
15 office on October 6, 2006, to Mr. Abele which we
16 will ask that it be marked Plaintiff's Exhibit No.
17 1. Off the record.

18 (Discussion off the record.)

19 MR. BROWN: Back on the record.

20 MR. GRIFFITH: Pursuant to Rule 30(j)(8),
21 these weren't provided to me two days before the
22 deposition.

23 MR. RIVERS: Just to be picky and protect
24 the record, they were provided to him attached to
25 our memorandum on opposition to motion for summary

1 judgment filed January of this year.

2 MR. GRIFFITH: There is no doubt that I
3 have documents that you've provided; however, I
4 think it requires that if you're going to ask
5 about specific documents, you can't just say, hey,
6 we're doing it.

7 MR. BROWN: We're good.

8 BY MR. BROWN:

9 Q. Mr. Abele, do you remember receiving this
10 letter from me?

11 A. I remember receiving a letter. I don't
12 know if it was the exact letter or not.

13 Q. You remember receiving a letter from me
14 directly after --

15 A. Yes.

16 Q. Okay. You don't remember receiving this
17 specific letter is what you are saying?

18 A. Saving it or seeing it?

19 Q. Seeing it or getting it from me.

20 A. I remember getting a letter.

21 Q. From?

22 A. Yes, it's from you.

23 Q. Do you know what date you got it from me?

24 A. It was shortly right afterwards. I don't
25 remember the exact date. It was probably, you

1 know, a day or two after I looked at the vehicle.

2 Q. "Shortly afterwards" meaning shortly
3 after the accident or shortly afterwards when?

4 A. After I inspected the vehicle.

5 Q. Shortly after you inspected the vehicle,
6 it's your recollection that you received a letter
7 from my office?

8 A. Yes.

9 Q. Did you meet with Charles during your
10 inspection of the vehicle or after your inspection
11 of the vehicle, or when did you meet with Charles?

12 A. Best I recall, he was there when I was
13 finishing up when I was looking at it at the tow
14 yard.

15 Q. Tow yard where?

16 A. In Ridgeland.

17 Q. Do you know what date that was?

18 A. I believe it was October 5.

19 Q. And you spoke with Charles Williams then?

20 A. Him and an attorney, I believe, showed up
21 right when I was finishing up. I don't remember
22 who the attorney was.

23 Q. Do you think it was me?

24 A. Possibly.

25 Q. Possibly?

1 A. I honestly couldn't say. I do remember
2 an attorney showing up though.

3 Q. Do you recall the conversation you had
4 with the attorney?

5 A. No.

6 Q. But it was an attorney who came with
7 Charles Williams?

8 A. Yes, I believe so.

9 Q. On the 5th?

10 A. Yes.

11 Q. So you were finishing up with Charles
12 Williams on the 5th, correct, that's your
13 recollection?

14 A. Yes.

15 Q. And he showed up there with an attorney
16 is your recollection?

17 A. I believe so.

18 Q. That was on the 5th?

19 A. Yes.

20 Q. Did he tell you that attorney represented
21 him?

22 A. I don't remember that.

23 Q. But an attorney showed up with Charles
24 Williams at the salvage yard in Ridgeland, your
25 recollection, on October 5, 2006?

1 A. I believe so.

2 Q. Would your notes show exactly when you
3 received this letter? We're going to call it,
4 "Notice Of Non-Spoliation Of Evidence." That's
5 what we're going to call this letter here today.
6 Do you know exactly when you received it into your
7 office?

8 MR. GRIFFITH: Why don't we call it
9 Exhibit 1.

10 MR. BROWN: Okay.

11 MR. GRIFFITH: That way, if there's
12 another one marked --

13 MR. BROWN: Thank you. Okay.

14 (Whereupon, Deposition Exhibit No. 1 was
15 marked for identification.)

16 A. I don't remember exactly. But it was
17 within probably a couple days after I inspected
18 the vehicle.

19 BY MR. BROWN:

20 Q. And upon receiving this Exhibit 1, what
21 did you do?

22 MR. GRIFFITH: Object to the form.

23 A. Well, it was -- I do remember the
24 attorney requested that the vehicle not be moved
25 from the tow yard to the salvage yard until the

1 9th.

2 Then when it was moved over there, I
3 requested that they wrap the vehicle as per the
4 request that I was -- on the letter.

5 BY MR. BROWN:

6 Q. So when the vehicle was removed from -- I
7 think it was Cleland there in Ridgeland?

8 A. Yes.

9 Q. And you remember an attorney telling you
10 or you all discussed that the vehicle was going to
11 remain at Cleland's until the 9th, is that
12 correct?

13 A. The attorney requested not to have it
14 picked up until then, yes.

15 Q. And once it was picked up, where did the
16 vehicle go?

17 A. It went to International Auto Auction, or
18 IAA, in Ravenel.

19 Q. Are they still in business, do you know?

20 A. Yes.

21 Q. And did you give them any instructions
22 regarding the vehicle?

23 A. Yes. I told them that there is a case
24 pending on it and they needed to have the vehicle
25 wrapped, which is what we call "secured." They

1 put a wrap on it.

2 Q. Wrap as in foil or wrap as in --

3 A. I believe it's like a Saran wrap.

4 Q. Is that the standard procedure?

5 A. As far as I know.

6 Q. Tell me what GEICO's procedure is when
7 there is notice that there is a possibility of
8 pending litigation. What does that tell you?

9 MR. GRIFFITH: Object to the form.

10 A. What does that tell me?

11 BY MR. BROWN:

12 Q. Yes, sir, as an adjuster.

13 A. I'm not sure what you mean.

14 Q. All right. If you get a letter from
15 anyone, an attorney or anyone that says there's
16 going to be possible litigation on this, as you
17 testified to earlier that it's wrapped.

18 A. Yes.

19 Q. Is it GEICO's standard procedure to wrap
20 it or what do they do? They put it off into a
21 shed? Some insurance companies have a warehouse
22 that they put vehicles in if there's going to be
23 some litigation involved. What is GEICO's
24 procedure?

25 MR. GRIFFITH: Object to the form.

1 A. We contact IAA and request that they wrap
2 it. They're the ones that do the wrapping, and I
3 believe they put it in a secure area.

4 BY MR. BROWN:

5 Q. GEICO has a contract once you adjust the
6 vehicle and there's a possibility of pending
7 litigation. Then IAA is instructed and IAA wraps
8 the car. So IAA in this case picked the car up?

9 A. Yes.

10 MR. GRIFFITH: Object to the form.

11 BY MR. BROWN:

12 Q. Knowing that there was pending
13 litigation?

14 MR. GRIFFITH: Object to the form.

15 A. Yes.

16 BY MR. BROWN:

17 Q. Or possible pending litigation?

18 A. (Witness nodded head affirmatively.)

19 Q. Did you write them a letter about pending
20 litigation or did you give them a copy of my
21 letter?

22 A. I don't remember.

23 Q. Well, it is your testimony that you
24 instructed them that there was a possibility of
25 litigation?

1 MR. GRIFFITH: Object to the form.

2 A. Yes.

3 BY MR. BROWN:

4 Q. Did you do it by way of correspondence or
5 letter or e-mail?

6 A. Telephone.

7 Q. Do you know who you talked with?

8 A. Cathy.

9 Q. Cathy is a dispatcher there?

10 A. I'm not sure what her position is. She's
11 a rep at the salvage facility.

12 Q. This IAA, they buy the vehicles from
13 GEICO?

14 A. I don't know. I'm not sure what they do
15 with them.

16 Q. Do you know what the relationship GEICO
17 has with IAA?

18 A. That's where we have total losses moved.
19 And they're held there until, you know, the --
20 basically, they become GEICO's property, and it's
21 at that point they can be sold at an auction.

22 Q. Once it becomes GEICO's property, then
23 it's sold at an auction, right?

24 A. Yes, sir.

25 Q. How does it become GEICO's property?

1 A. Once we receive the title and pay the
2 vehicle off.

3 Q. At any point in time, did you notify your
4 supervisor of this Exhibit 1?

5 A. I don't remember.

6 Q. And, of course, when receiving such a
7 notice as Exhibit 1 here, is it your testimony
8 that you -- did you tell your supervisor, first of
9 all?

10 A. Did I tell him what?

11 Q. What is GEICO's procedure when they
12 receive a letter such as Exhibit 1 here?

13 A. Well, we're required to notify IAA that
14 the vehicle has pending litigation and would need
15 to be secured, wrapped, if requested.

16 Q. So you don't notify your supervisor? You
17 notify IAA?

18 A. We notify IAA and it's noted in our file.
19 I documented it in our system that it was
20 requested, so it's documented through GEICO.

21 Q. Documented through GEICO?

22 A. Yes.

23 Q. Do you know what date it was documented
24 through GEICO?

25 A. I'm not sure of the exact date. It had

1 to be somewhere. Possibly the 5th or the 6th.

2 Q. When you documented it through GEICO by
3 way of being an adjuster, is this that same form
4 that you normally use? Is it all in that same
5 form?

6 A. It's done through the computer system.

7 Q. There's a checklist or questionnaire?

8 A. No.

9 Q. For clarification, when clients come into
10 my office, we have an intake sheet: name; address;
11 Social Security number; whether you're on
12 Medicaid, Medicare, BlueCross BlueShield; whether
13 it was a one-vehicle accident, two-vehicle
14 accident; how many people in the car, so forth and
15 so on. We have what we call a standard intake
16 sheet.

17 My question to you is this. When you are
18 at an inspection and appraising a vehicle, is
19 there a standard printout in the computer or a
20 form in the computer that you go through?

21 A. I'm not sure what you're --

22 Q. To come to an appraisal of what the
23 vehicle is worth?

24 A. It's all in our computer. There is an
25 estimate written.

1 Q. What's that called?

2 A. An estimate.

3 Q. An estimate?

4 A. (Witness nodded head affirmatively.)

5 Q. You have an estimate form?

6 A. It's an estimate in the computer. There
7 is no checklist or anything though.

8 Q. All forms have Form 101 estimate or at
9 the bottom of the Form 101. Does that form have a
10 number?

11 A. No.

12 Q. You know it as being an estimate form?
13 What do you call it?

14 A. I call it an estimate.

15 Q. Do you use it all the time?

16 A. That's how we write estimates on repairs.
17 Now as far as documenting as a total loss, that's
18 different. It has to be -- there's indications on
19 the estimate form that you have to show that it is
20 a total.

21 Q. Back in 2006 if you had a vehicle in the
22 same condition as this vehicle and you had another
23 one that's in the Ridgeland area, in your
24 evaluation, would you use the same form?

25 A. Yes.

1 Q. And that's called an estimate form?

2 A. It's not a form. It's an estimate.

3 Q. An estimate?

4 A. (Witness nodded head affirmatively.)

5 Q. I'm just trying to figure out what you
6 call it, okay.

7 A. (Witness nodded head affirmatively.)

8 Q. And it's computer driven, correct?

9 A. Yes.

10 Q. And, again, to beat a dead horse, your
11 procedure is you don't advise your supervisor when
12 you receive a letter as --

13 A. I didn't say that. I don't remember if I
14 did or not.

15 Q. Well, tell me what your procedure is.

16 A. If I received this letter?

17 Q. If you receive a letter like Exhibit 1,
18 what is your standard procedure with GEICO?

19 A. We're supposed to document that in our
20 A-LOG system which goes into the main notes of the
21 system that you required the vehicle to be, in
22 this case, secured. And we're supposed to contact
23 IAA and notify them that they have the vehicle
24 secured.

25 Q. You say it's called an "A-LOG system"?

1 A. That's what we call it, yes.

2 Q. Spell it for me.

3 A. A-L-O-G.

4 Q. Do you still use that system?

5 A. Yes.

6 Q. Did you do that in this particular case?

7 A. Yes.

8 Q. Do you all have any books dealing with
9 instances which is the same as Exhibit 1 here?

10 A. Any books?

11 Q. Yes, that tell you -- as lawyers, we have
12 all kinds of books we that deal with. We have
13 DUI. We have got those manuals. We have basic
14 books, but there's also printed out other little
15 manuals. Quick reference for DUI law, quick
16 reference for criminal law.

17 Do you have little books that you carry
18 around with you as to how to deal with this kind
19 of situation, or do you deal with it from memory
20 or what?

21 A. I don't have any books, no.

22 Q. Do you have any guidelines that you go
23 by? Or not you, does GEICO have any books do you
24 know of?

25 A. I have no idea.

1 Q. Does GEICO have any guidelines with
2 regard to issues that are raised in this Exhibit 1
3 here?

4 A. That's not something I deal with, so I
5 don't know.

6 Q. The question for you is this. Before
7 October 2006, had you ever inspected a vehicle and
8 been advised that there was possible litigation?

9 A. Yes.

10 Q. And what did you do?

11 A. Same procedure. Request to have the
12 vehicle secured, wrapped with IAA or whoever we
13 were using at that point.

14 Q. And, of course, it goes into your A-LOG
15 system, right?

16 A. It's documented in there, yes.

17 Q. When it's documented in that system, does
18 your supervisor get it right away?

19 A. If he reads the note system, he could.
20 It's not sent directly to him.

21 Q. But it's in the system. Who is it sent
22 directly to? Just GEICO?

23 A. Just GEICO in general. I mean it's part
24 of the file.

25 Q. Did you get a copy of the accident report

1 in this case?

2 A. No.

3 Q. In 2006, in your area, down here in the
4 Southeast Region -- or Ridgeland is your area
5 specifically, correct?

6 A. It's part of my territory.

7 Q. How many people do you work with at GEICO
8 in this particular area?

9 A. In Ridgeland?

10 Q. Yes, your territory.

11 A. Just myself. I just have my own
12 territory. Each adjuster has their own specific
13 area.

14 Q. And this is drawing on your memory, okay,
15 and mine is not too good. Can you tell me every
16 person in GEICO itself and their title that you
17 discussed this claim with, this particular claim
18 here?

19 MR. GRIFFITH: Object to the form.

20 A. I can't really remember exactly. I'm
21 sure it was with my supervisor and the liability
22 adjuster.

23 BY MR. BROWN:

24 Q. Supervisor then was who now?

25 A. Steve Burdett.

1 Q. Your liability adjuster, correct?

2 A. Yes.

3 Q. Do you know who that was?

4 A. I believe it was Kelly Stone, but I can't
5 be --

6 Q. Okay. I've talked to her on the phone a
7 couple times myself. I'm anxious to meet her.

8 Do you know when GEICO's legal department
9 was notified or if they were notified to get a
10 copy of this Exhibit 1 here?

11 A. If they were notified?

12 Q. Yes.

13 A. I have no idea.

14 Q. You don't know when they were notified,
15 GEICO's legal department?

16 A. I don't know if they were.

17 MR. GRIFFITH: Object to the form.

18 BY MR. BROWN:

19 Q. Do you have a file or did you have a file
20 regarding this particular wreck?

21 A. I had a file.

22 Q. You had a file?

23 A. (Witness nodded head affirmatively.)

24 Q. What would the file be called? "Charles
25 Williams 2006"? What would that file be called?

39
1 A. I didn't call it anything. I just had
2 the information from my assignment sheet, the
3 estimate and whatever information went with it.
4 Q. I tell you what, Mr. Abele. If I told
5 you I'd like to see that file, how would you go
6 get it?
7 A. I would pull it out through the computer.
8 That's where it's all pretty much...
9 Q. Would you go under the name of the
10 insured?
11 A. Go by the claim number.
12 Q. The claim number would do it?
13 A. (Witness nodded head affirmatively.)
14 Q. Have you ever had any meetings within
15 GEICO regarding this particular Exhibit 1?
16 A. No.
17 Q. Has your supervisor or liability
18 adjuster, Kelly Stone, talked to you about this
19 claim?
20 A. Yes.
21 Q. Tell me specifically if you can remember
22 what Mr. Steve Burdett said.
23 A. I don't remember. It was probably months
24 later.
25 Q. "Months later" as in 2006?

1 A. We're not required to notify our
2 supervisor of every car we look at.

3 Q. Okay, no problem. But you recall talking
4 to him about this particular car?

5 A. At one point, I believe I did, yes, and
6 not at the beginning of this. I don't remember
7 talking to him. I couldn't say yes or no.

8 Q. Do you remember talking to him at all?

9 A. At some point later on, months later.

10 Q. Do you know what you all talked about?

11 A. The salvage on the vehicle.

12 Q. Tell me what you mean by "the salvage on
13 the vehicle."

14 A. The vehicle itself.

15 Q. Tell me what the conversation was.

16 A. I don't remember.

17 Q. But you remember it was about the
18 salvage?

19 A. Yes.

20 Q. And you talked to Steve Burdett?

21 A. I believe so, yes.

22 Q. And Ms. Kelly Stone?

23 A. Yes.

24 Q. Do you remember when you talked to her
25 about this?

1 A. Not specifically. I would say March
2 maybe.

3 Q. March of 2007?

4 A. Yes.

5 Q. And do you know what y'all talked about?

6 A. I believe it was trying to locate the
7 salvage of the vehicle.

8 Q. You assisted her in doing it? When she
9 called you, she said, I'm trying to locate this
10 vehicle? Do you recall?

11 A. Recall what?

12 Q. Did she say, I am trying to locate this
13 vehicle? Is that what she was trying to say? Did
14 she ask that specifically?

15 A. No, I don't recall.

16 Q. But she could have used the claim number
17 and found it, correct?

18 MR. GRIFFITH: Object to the form.

19 A. I'm not sure what you're asking.

20 MR. GRIFFITH: I'm sorry. I just didn't
21 understand the question.

22 MR. BROWN: Do you want to ask him --

23 MR. GRIFFITH: I'm simply objecting to
24 the form.

25 MR. BROWN: Thank you. Can I go ahead?

1 MR. GRIFFITH: Absolutely.

2 BY MR. BROWN:

3 Q. What did you and Ms. Stone talk about,
4 can you remember?

5 A. The only thing I remember talking to her
6 about was that the vehicle was no longer at IAA
7 and they were trying to figure out where it was
8 and to relocate it.

9 Q. That's good enough. That's the gist of
10 it. She was trying to get you to help her locate
11 the vehicle, is that correct, basically?

12 A. I don't know if she's trying -- I think
13 we were just trying to determine where it was and,
14 you know, find out what happened to it.

15 Q. Were you able to assist her?

16 A. Yes.

17 Q. Tell me what you did when she called you
18 in terms of assisting her and helping locate the
19 vehicle.

20 A. I just found out where the vehicle was
21 and contacted the source that had it and spoke to
22 my supervisor about it. That's the best I know.
23 They were able to get it back.

24 Q. So what was your starting point in terms
25 of locating the vehicle? What was your starting

1 point?

2 A. Well, find out who had purchased it and
3 contacted them.

4 Q. Who had purchased it?

5 A. I believe it was Parks Auto or something.

6 Q. Where are they at?

7 A. Ravenel.

8 Q. And since this was back October,
9 November, December, January, February, March,
10 about five months since the actual incident, what
11 you did you then was, correct me if I'm wrong, you
12 went into your computer and put in your claim
13 number? That was your starting point, correct?

14 A. Possibly.

15 Q. Well, how did you start? How would you
16 start locating the vehicle?

17 A. I remember the name, so I remember what
18 car they were talking about.

19 Q. Did the name --

20 A. Well, you don't get too many claims that
21 have fatalities, so I remember the car.

22 Q. Good.

23 A. And as far as -- the car was -- after the
24 first couple days, I didn't hear from the claim
25 again for four months.

1 Q. After the first --

2 A. I had the car put on hold and wrapped at
3 the salvage yard, and that's the last I heard
4 about it.

5 Q. So you weren't the person who issued the
6 draft to Mr. Williams regarding the vehicle?

7 A. No.

8 Q. And, of course, when you assisted Ms.
9 Stone in locating the vehicle, was she happy?

10 MR. GRIFFITH: Object to the form.

11 A. I have no idea.

12 BY MR. BROWN:

13 Q. How long did it take you to locate the
14 vehicle?

15 A. I'm not sure. A day or two.

16 Q. A day or two?

17 A. (Witness nodded head affirmatively.)

18 Q. And once you located the vehicle, you
19 called Ms. Stone back, or did you call your
20 supervisor?

21 A. I was actually on vacation at this time,
22 so I was kind of on vacation. So they were kind
23 of calling me and I was trying to help them, but I
24 was actually off.

25 My supervisor was -- basically took it

1 over, and I believe he's the one that kind of
2 finalized everything.

3 Q. And who was that, Mr. Steve Burdett?

4 A. Yes.

5 Q. And, of course, documents come to you.
6 Are they scanned in your computer? Do they come
7 by e-mail? You said you get your information from
8 GEICO by way of your computer, right?

9 A. Yes.

10 Q. So you work in the field?

11 A. Yes.

12 Q. You get up in the morning, go get your
13 computer. I go to my office every morning. You
14 get your computer?

15 A. Yes.

16 Q. That's how you start your day with your
17 computer?

18 A. Correct.

19 Q. Can you tell me what your salary was in
20 2006 with GEICO?

21 A. I couldn't tell you the exact amount, no.

22 Q. Generally?

23 A. 49,000.

24 Q. What is your salary today?

25 A. 59,800.

1 Q. To whom have you spoken outside of GEICO
2 about this claim or about this wreck?

3 A. Just my wife.

4 Q. Your wife?

5 A. Just briefly.

6 Q. What did you tell your wife?

7 A. I told her I had to go give a deposition.
8 I told her basically just the information on what
9 it was about. That was pretty much it. She
10 didn't ask too many questions.

11 Q. Specifically outside of GEICO meaning Mr.
12 Griffith, did you talk to him about this?

13 A. Yes, I've talked to him.

14 Q. You talked also to IAA, right?

15 A. Not since 2006 or '07.

16 Q. You also talked to Parks Auto?

17 A. At the time we were trying to locate the
18 vehicle, yes.

19 Q. Anybody else that you can think of?

20 A. Outside of GEICO?

21 Q. Yes.

22 A. No.

23 Q. Are you a member of any kind of -- like
24 we lawyers, Mr. Griffith and Mr. Rivers, they're
25 members of the Trial Lawyers Association and

1 things of that nature. Are you a member of any
2 kind of club or association or affiliation?

3 MR. GRIFFITH: I'll object to the form of
4 that one on the record.

5 A. No.

6 MR. GRIFFITH: I'm Defense Trial
7 Attorneys Association. I think y'all call
8 yourself something different now, don't you,
9 Thayer? Lawyers for Justice or something like
10 that?

11 MR. RIVERS: The Georgia Trial Lawyers
12 Association, which I know is still known as Trial
13 Lawyers. South Carolina is the Association of
14 Justice, and the former ATLA is the American
15 Association of Justice.

16 BY MR. BROWN:

17 Q. Tell me what kind of license you have
18 other than your driver's license.

19 A. I have adjuster's -- an appraiser's
20 license.

21 Q. And, of course, you told me before that
22 you have to be licensed to be a claims adjuster in
23 South Carolina, correct?

24 A. Yes.

25 Q. How often is your certification updated?

1 A. I believe it's every two years.

2 Q. Is yours current?

3 A. Yes.

4 Q. Have you ever testified in court before?

5 A. No.

6 Q. Have you ever dealt with an issue like
7 this before as outlined in Exhibit 1?

8 A. About a request to have a vehicle
9 wrapped?

10 Q. Yes.

11 A. Yes.

12 Q. When was the last time you had one?

13 A. May have been this one. I don't
14 remember.

15 Q. Tell me basically what's your
16 understanding of it when someone tells you to
17 protect this vehicle because there's a possibility
18 of a case. What's your understanding of that?

19 A. That they have a litigation case, that
20 they want the vehicle protected. So we request
21 to, like you said, have IAA put the vehicle in
22 protection as far as being the wrapped and so
23 forth. And at that point, it should be put on
24 hold.

25 Q. Did you bring a file here today with you?

1 A. No.

2 Q. Were you, in this particular case, ever
3 reprimanded about this particular situation?

4 A. No.

5 Q. Boss didn't say, you messed up?

6 A. No.

7 Q. Said you made a mistake?

8 A. No.

9 Q. Did he ever say you didn't follow the
10 correct procedure or anything?

11 A. No.

12 Q. Do you know how many offices GEICO has?

13 A. I know what an office is. What do you
14 mean by "how many"?

15 Q. How many they have.

16 A. They have regional claims locations.

17 Q. Okay.

18 A. I don't know how many they have. Don't
19 know.

20 Q. Question for you. Who authorized or
21 directed the removal of the vehicle from Cleland's
22 to IAA?

23 A. Mr. Williams.

24 Q. Mr. Williams did. How did he do that?

25 A. Mr. Williams and the attorney that was

1 there.

2 Q. They told you to go ahead and move it?

3 A. I explained to them that it was a total
4 loss. And then we'd like to have it moved to a
5 salvage facility.

6 At that point, they asked me hold off
7 until the 9th, and then I did. They also wanted
8 me to have the -- I think it was you actually that
9 asked me to contact you with the information where
10 it was going and the information on the vehicle
11 like the stock number where it was listed at IAA,
12 which I did.

13 Q. So you remember me now? You remember I'm
14 the --

15 A. I remember getting that letter from you.
16 I don't remember so much this one.

17 Q. You remember another letter?

18 A. Yeah. I remember getting the letter
19 stating that, you know, to call you and notify you
20 with all the information on the vehicle.

21 Q. Would that letter still been in your
22 file?

23 A. Probably.

24 Q. Do you know Attorney Tom Johnson?

25 A. No.

1 Q. Never met him?

2 A. Not that I recall.

3 Q. And you've discussed this case with Kelly
4 Stone, correct?

5 MR. GRIFFITH: Object to the form. Go
6 ahead.

7 BY MR. BROWN:

8 Q. Did you discuss this claim with Kelly
9 Stone?

10 A. No, other than just the time about the --
11 trying to locate the vehicle. That's all I
12 discussed with her.

13 Q. And, of course, to my understanding, you
14 said she is the liability adjuster?

15 A. I believe she's the liability adjuster.
16 At the time, she was. I don't know what she is
17 now.

18 Q. Once the vehicle was located, did you go
19 down and inspect the vehicle?

20 A. At the tow yard in Ridgeland?

21 Q. No, in Ravenel.

22 A. No.

23 Q. You didn't go down?

24 A. I'm not required to.

25 Q. Once the vehicle left Cleland, you didn't

1 see the vehicle again?

2 A. No. Once it left and once I made the
3 offer to Mr. Williams, I was pretty much finished
4 with the claim.

5 Q. Tell me on what date you made an offer to
6 Mr. Williams.

7 A. I believe it was on October 7.

8 Q. Did you make it to him by phone?

9 A. I believe it was.

10 Q. What did he say?

11 A. He accepted the offer.

12 Q. And what happened then?

13 A. He was going to contact me back with his
14 lienholder information because we require that.

15 Q. And what else?

16 A. I believe I spoke to him on Monday about
17 -- he called me back with that information. And I
18 submitted it to our total loss department who
19 would take the claim up from that point because he
20 has a lien on that vehicle, so they handle that
21 type of claim.

22 Q. Okay.

23 A. And they would settle the claim from that
24 point as far as the monetary on the vehicle.

25 Q. All right.

1 A. And put the lienholder and the
2 policyholder.

3 Q. Once Exhibit 1 here got into the system,
4 you don't know who else saw it? Who else could
5 possibly see this?

6 A. I don't remember this letter, to be
7 honest with you. I remember getting one stating
8 that you requested me to have the vehicle -- to
9 contact you with the information where the vehicle
10 was.

11 Q. Okay.

12 A. I'm not saying I didn't get this. I just
13 don't specifically remember it.

14 MR. BROWN: Give me one second, okay.

15 (A short recess was taken.)

16 MR. BROWN: Back on the record.

17 BY MR. BROWN:

18 Q. Just a couple more questions here from
19 me.

20 A. Sure.

21 Q. When you inspected this Ford Explorer,
22 what do you think it would have cost to repair it?

23 A. What did I think?

24 Q. What would you think?

25 A. I wasn't really thinking in those terms.

1 I was thinking pretty much that it was an obvious
2 total.

3 Q. And, of course, you assigned a value as
4 to what the salvage was worth, and that's what you
5 paid Mr. Williams, or that's what Mr. Williams was
6 paid, is that correct?

7 MR. GRIFFITH: Object to the form.

8 A. It was -- well, the value is determined
9 on the condition the vehicle was in prior to the
10 accident the best we could tell in a situation
11 like that. It's factored in, the options, mileage
12 and so forth.

13 BY MR. BROWN:

14 Q. Based upon your recollection, you said
15 you shot all angles of the vehicle. Do you know
16 whether or not any of the parts of the vehicle
17 were missing, like the tires or anything of that
18 nature?

19 A. I remember the tires were off the vehicle
20 I mean as far as off the rims.

21 Q. But there were four of them, do you
22 remember?

23 A. I don't remember.

24 Q. But if it were there, they would be
25 captured in your photos?

1 A. Yes.

2 Q. Did you notify IAA that Mr. Williams had
3 an attorney?

4 A. I don't remember.

5 Q. Don't remember?

6 A. The fact that I asked them to have it
7 wrapped was probably so.

8 Q. That was what now?

9 A. Probably that vehicle was to be wrapped
10 was the fact, yes, it was going to have attorneys
11 involved.

12 Q. So that's an indication to IAA that
13 someone had made that request?

14 A. I believe so.

15 Q. And the reason that you had it wrapped
16 was because you were aware of the fact that he had
17 a lawyer, correct, he had an attorney?

18 A. You requested it.

19 Q. Do you know whether or not once it's
20 wrapped, and that's your language, "wrapped" and
21 preserved, does IAA notify you that it's wrapped
22 or preserved?

23 A. Not that I recall.

24 Q. Is it GEICO's procedure to follow up to
25 see whether or not it's wrapped and preserved or

1 who it goes to next when you turn it over to IAA?
2 Do you tell them to wrap and preserve and to
3 contact John Dow or Mary Rohr, or what do you tell
4 them?

5 A. After it's wrapped, it's not -- I mean I
6 don't know if they -- GEICO goes any further than
7 that. That's not something I deal with.

8 Q. Does GEICO allow you to deal directly
9 with policyholders once they have an attorney?

10 A. It depends on if the attorney -- it's
11 basically up to the attorney. If their attorney
12 -- we're not supposed to contact the policyholder
13 unless the attorney states yes or no.

14 Q. And, of course, you offered Mr. Williams
15 a settlement October 7 or thereabouts, correct?

16 A. Right. But the attorney that came out to
17 look at the vehicle, I explained all that about
18 the total loss valuation and everything in front
19 of him.

20 Q. Okay.

21 A. And he didn't say anything about not
22 contacting Mr. Williams.

23 Q. Do you remember who that lawyer was?

24 A. Not off the top of my head, no. I don't
25 remember.

1 MR. BROWN: We thank you.

2 A. Okay.

3 MR. GRIFFITH: I have one thing.

4 CROSS EXAMINATION BY MR. GRIFFITH:

5 Q. You said you offered Mr. Williams a
6 settlement on October 7. Could that have been
7 October 6 you made that offer? Would your A-LOG
8 show it?

9 A. Possibly. I mean I don't remember the
10 exact dates.

11 MR. GRIFFITH: Okay.

12 MR. BROWN: No other questions for Mr.
13 Abele.

14 (Deposition concluded at 11:20 a.m.)

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STATE OF SOUTH CAROLINA
14TH JUDICIAL CIRCUIT
COUNTY OF JASPER
COURT OF COMMON PLEAS
CASE NO. 2009-CP-27-00639

TONIA D. WILLIAMS; MARION B.
SMALLS; T [REDACTED] W [REDACTED], BY
HIS GUARDIANS AD LITEM, TONIA
D. WILLIAMS AND CHARLES WILLIAMS;
S [REDACTED] S [REDACTED], BY HER
GUARDIAN AD LITEM, RITA SHAW

PLAINTIFFS

VERSUS

ORIGINAL

JANUARY 4, 2012

TRANSCRIPT OF HEARING

JASPER, SOUTH CAROLINA

GEICO CASUALTY COMPANY,
GEICO INDEMNITY COMPANY,
GOVERNMENT EMPLOYEES
INSURANCE COMPANY, GEICO
GENERAL INSURANCE COMPANY

DEFENDANTS

B E F O R E:

HON. CARMEN T. MULLEN, JUDGE

WANDA H. ROWE, CVR-M
OFFICIAL COURT REPORTER

APPEARANCES

ON BEHALF OF PLAINTIFFS:

HON. HARRY C. BROWN, SR.
POST OFFICE BOX 824
RIDGELAND, SOUTH CAROLINA 29936-0824
TELEPHONE 843-726-7920

AND

HON. R. THAYER RIVERS
252 RUSSELL STREET
COURTHOUSE SQUARE
POST OFFICE BOX 688
RIDGELAND, SOUTH CAROLINA 29936-0668
TELEPHONE 843-726-8136

ON BEHALF OF DEFENDANT:

HON. HON. MATTHEW D. CAVENDER
HON. E. MITCHELL GRIFFITH
GRIFFITH, SADLER & SHARP
600 MONSON STREET
POST OFFICE BOX 570
BEAUFORT, SOUTH CAROLINA 29901-0570
TELEPHONE 843-521-4242

214

ON BEHALF OF DEFENDANT:

HON. TREVOR A. CANGELOSI
CLAWSON & STAUBES, LLC
127 SEVEN FARMS DRIVE
SUITE 200
CHARLESTON, SOUTH CAROLINA 29492
TELEPHONE 803-557-2026

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EXHIBITS

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BEGINNING 10:35 A.M.

BY THE COURT:

THE COURT: This is Geico's motion for summary judgment?

MR. CAVENDER: That's correct, your Honor.

THE COURT: Just Geico's? Oh, it's all Geico. Never mind. Okay. Whenever you're ready.

MR. CAVENDER: Judge, may it please the Court? I'm Matt Cavender here for here Geico, and we had filed a motion in our memo. I don't know if you have a copy of it.

THE COURT: I have a copy of it.

MR. CAVENDER: Briefly, this case started with a car accident that occurred on October 2nd of 2006. It was a t-bone accident, and the plaintiff's vehicle rolled over several times, and there were some injuries as a result of that.

Plaintiff Tonya Williams was the driver and the owner of the vehicle, and the other plaintiffs were passengers.

After the accident, the vehicle was a total loss. Several days after the accident, on October 6th, Attorney Harry Brown sends to Geico a letter that they referred to as a notice of non-spoliation of evidence, basically asking Geico to hang onto the vehicle.

1 Several days after that, approximately a week or so
2 later, Ms. Williams conveyed the title to Geico and
3 accepted the collision coverage. And at that point,
4 Geico took possession of the vehicle, and they held onto
5 it. And there's some dispute about exactly what
6 happened with it, but it was sold either in the end of
7 2006 or the beginning of 2007.

8 And then, a couple months later, they purchased it
9 back, and it's in the same condition it was, with the
10 exception of what we believe was three tires and a wheel
11 missing. The plaintiffs believe three tires and wheels
12 and the black glass, so. But either way, that's -- it
13 doesn't -- it's not relevant to this issue here.

14 THE COURT: Okay. Okay.

15 MR. CAVENDER: And Geico is still in possession of
16 the vehicle today.

17 One of the other passengers in the vehicle, a Betty
18 Mitchell Clark, she brought a products liability action
19 against Ford from the accident, and represented by Tom
20 Johnson. And that case went forward and settled shortly
21 before trial in August of 2008.

22 In this case, it was filed less than a week until
23 the statute of limitations ran on September 29, 2009,
24 and it was a -- it was brought against the other driver
25 for his negligence, and against Geico for cause of

1 action, for breach of contract, unfair trade practices,
2 negligence, and gross negligence as a result of the
3 sale, and then the re-purchase of the vehicle.

4 There's a bit of a tortured procedural history; two
5 trips to federal court and back; one trip to Columbia,
6 the Court of Appeals. But after all that, what we're
7 left with is the four plaintiffs were consolidated into
8 one lawsuit, and the actions against the defendant
9 driver and against Geico were severed.

10 THE COURT: Okay.

11 MR. CAVENDER: Now, there was some question in
12 South Carolina after the *Austin versus Beaufort County*
13 *Sheriffs* case whether the Court was going to eventually
14 adopt the tort of negligent spoliation of evidence. And
15 last year, the summer of last year, the Court issued its
16 opinion in *Cole Vision Corporation versus Hobbs*. The
17 citation for that is 394 South Carolina 144, 714
18 Southeast 2nd, 537, and I have a copy of that case.

19 THE COURT: That'd be great. Thank you.

20 MR. CAVENDER: Judge, this case -- the facts of
21 *Cole Vision*, plaintiff sued a doctor and the doctor --
22 the landlord of the doctor's office, for malpractice.
23 The landlord filed a declaratory judgment against the
24 doctor for indemnity, and the doctor counter-claimed for
25 spoliation of evidence based on the landlord losing the

1 patient's medical records.

2 THE COURT: Okay.

3 MR. CAVENDER: The landlord moved to dismiss, and
4 the Circuit Court granted, finding that there was no
5 cause of action for spoliation of evidence.

6 The Court of Appeals reversed that, looking, and
7 they analyzed it as a standard negligence claim, and
8 they found that the facts constituted a negligence cause
9 of action. The appeal went up to the Supreme Court, and
10 the Supreme Court reversed.

11 They found, quote:

12 *The Circuit Court properly held that*
13 *South Carolina does not recognize an*
14 *independent tort for negligent spoliation*
15 *of evidence, third party or otherwise.*

16 And a couple of reasons that they gave for that
17 were the speculative nature of damages associated with
18 the spoliation case, --

19 THE COURT: Okay.

20 MR. CAVENDER: -- and that it essentially involved
21 -- would involve a trial within a trial.

22 THE COURT: Okay.

23 MR. CAVENDER: Just thinking about it in this case,
24 the plaintiffs would have to allege that their damages
25 against Ford would have been X, if the vehicle had been

1 completely intact. But now, with the missing various
2 pieces, the value of the case against Ford is Y, and
3 then, you can understand how that would be incredibly
4 complicated and difficult to try. And so, those are
5 some of the reasons why the Court didn't adopt it.

6 Now, the plaintiffs in this case have -- they
7 didn't allege a direct tort for spoliation of evidence.
8 They have, like I said, the breach of contract, unfair
9 trade practices, and negligence causes of action. And
10 that question was actually also addressed in *Cole*
11 *Vision*.

12 THE COURT: I'm reading it.

13 MR. CAVENDER: The doctor tried to claim that it
14 was negligence, and the Court disagreed.

15 THE COURT: Right.

16 MR. CAVENDER: So, regardless of how this counter-
17 claim is labeled, we analyze it under the same, *Rupert*,
18 as a claim based on spoliation of evidence.

19 THE COURT: And they quote Shakespeare.

20 MR. CAVENDER: Quote Shakespeare. And so, that's
21 what we have here. Regardless of how the plaintiffs
22 want to couch their claims, it's a spoliation claim.
23 And in fact, the plaintiffs have referred to it as a
24 spoliation claim. In their motion to reconsider one of
25 Judge Buckner's prior orders, they refer to the

1 spoliation case. Judge Buckner referred to the
2 spoliation case in his order denying the motion. And in
3 their memo that they just filed, the plaintiffs also
4 refer to that letter as a notice of non-spoliation of
5 evidence.

6 But regardless of how plaintiffs couch this action,
7 it is a claim for spoliation of evidence.

8 And additionally, your Honor, as additional
9 standing grounds, even if the -- excuse me -- Geico's
10 entitled to summary judgment on the individual causes of
11 action.

12 The breach of contract cause of action, Blackwater
13 contract law, a contract requires consideration, and all
14 the parties must have an obligation under the contract.
15 Here, there was nothing more than Geico's demand, or
16 rather, Attorney Brown's demand to Geico that they
17 retain possession of the vehicle, even though they had
18 conveyed the title to Geico and accepted the settlement.

19 THE COURT: Just so I understand, Ms. Williams, the
20 driver, actually signed over the title to the car.

21 MR. CAVENDER: Yes.

22 THE COURT: And is this her claim, or is this the
23 other passengers' in the car's lawsuit? It's her claim,
24 as well, correct?

25 MR. CAVENDER: It's her claim, as well.

1 THE COURT: Just so I'm clear. And is there any
2 differencial? I mean, she clearly signed the title
3 over. So, my question is, how does that apply to Smalls
4 and -- I see the other people are Williams. So,
5 apparently, those are all her minor children or children
6 in the case. Is that correct?

7 MR. CAVENDER: I'm not sure of the relation.

8 THE COURT: If they're minors or not, but they're
9 all Williams. And then -- okay. Okay. Just so I'm
10 clear. Okay.

11 MR. CAVENDER: There's no contractual relationship
12 between the other passengers. Ms. Williams and her
13 husband were the insured. There's no insurance
14 relationship with the other passengers.

15 THE COURT: Okay. Okay.

16 MR. CAVENDER: As far as the unfair trade practices
17 cause of action, I have a copy of this section, too.
18 *Section 39-5-40(c)*, as well.

19 THE COURT: Okay.

20 MR. CAVENDER: *Section 39-5-40(c)* says:

21 *This article does not supercede or*
22 *require the unfair trade practices covered*
23 *or regulated under Title 38, Chapter 57,*
24 *Sections 38-57-10 through 38-55-320.*

25 That's just a scribner's error there. It should

1 have been 38-57-320. But and that section *Title 38,*
2 *Chapter 37,* that is the regulation of trade practices in
3 the business of insurance. The specific purpose of that
4 statute -- sorry, I should pass this up at the same
5 time.

6 THE COURT: Okay.

7 MR. CAVENDER: But as your Honor can see, the
8 purpose of that chapter is to regulate trade practices
9 in the business of insurance by defining and providing
10 for the determination -- your Honor can read that.

11 THE COURT: You need to make that argument. Okay.

12 MR. CAVENDER: And so, under -- for that reason,
13 this is a --

14 THE COURT: So, those are the only two causes of
15 action they brought, was for negligent spoliation and
16 for *Unfair Trade Practices Act*?

17 MR. CAVENDER: They brought breach of contract,
18 unfair trade practices, and negligence.

19 THE COURT: Breach of contract. Sorry. Okay.
20 Okay. Okay.

21 MR. CAVENDER: And then, for the negligence cause
22 of action, if there's no duty, there's no negligence.
23 And here, there's no duty; there was only the
24 plaintiffs' demand that Geico retain the vehicle
25 indefinitely, even though they had already signed the

1 title over and accepted coverage.

2 THE COURT: Okay.

3 MR. CAVENDER: And I can leave it there.

4 THE COURT: Okay.

5 MR. CAVENDER: Thank you, Judge.

6 THE COURT: Gentlemen.

7 MR. RIVERS: Your Honor, I think at the outset, we
8 need to go back and re-visit the time line you were just
9 given, because, quite frankly, it's wrong. This
10 accident happened October 2nd. October the 6th, Ms.
11 Brown sent by fax a letter to the adjustor and notified
12 the adjustor he represented Mr. Williams and Mrs.
13 Williams. And they agreed verbally by telephone. This
14 letter's confirming that Geico agreed not to get rid of
15 the vehicle, change, or alter the vehicle until further
16 notice to Attorney Brown. This was done before there
17 was any discussion of settling the vehicle.

18 We just got our discovery from them just a couple
19 weeks ago, but this is the log from the adjustor
20 handling the case. And you'll note that I've underlined
21 on October the 7th, he then instigated a negotiation
22 with the owner, Mr. Williams, about conveying the
23 vehicle.

24 At that time, there was a contract; the contract
25 between Geico and Mr. Williams as owner of the vehicle.

1 And he had an adjustor that agreed with Attorney Brown,
2 who is the lawyer for Mr. Williams, who had put him on
3 notice that they were not to dispose of the vehicle
4 without notice to counsel for the plaintiff.

5 So, this is not a case where they got rid of the
6 car and later on Harry said, how about keep track of the
7 car for me, because they said there's no consideration
8 for that, and I wouldn't disagree.

9 THE COURT: Now, in this case, it was Mr. Brown
10 said don't get rid of the car. And then, it looks that
11 the client -- it says Mr. Williams called and accepted
12 the offer. So, the client then called the adjustor and
13 said, I'll accept the offer; I'll sign over the title.

14 MR. RIVERS: Well, after Mr. Brown's notice, which
15 is October 6th, the log shows that Mr. Williams was
16 contacted by the adjustor and made an offer the day
17 after that, which, after their own notice and after
18 they've agreed to hold the vehicle, then, and only then,
19 did they then turn it loose.

20 THE COURT: Well, sounds like the client and the
21 attorney are not communicating to each other or with
22 each other.

23 MR. RIVERS: Well, the problem is, the adjustor's
24 already assured the attorney that he, in fact, is not
25 going to get rid of the car without giving him notice,

1 and they kept it for many, many months.

2 THE COURT: Okay.

3 MR. RIVERS: I'm pointing this out because of the
4 issue of whether or not there was any legal obligation
5 to do this without raising contract issues, that, in
6 fact, where there was a contractual relationship legally
7 between the owner of the car and Geico, the attorney for
8 the owner contacted Geico and said, do not get rid of
9 the car. And the adjustor notified him back, I agree
10 not to get rid of the car.

11 And it was only a good bit of time after that, we
12 gained the documents. It's like, October the 31st,
13 which was some three weeks after Mr. Brown's letter
14 saying, please don't get rid of the car, and the
15 adjustor telling Mr. Brown, we won't get rid of the car.

16 Only then do they get the odometer saying they get
17 the little power of attorney, so that's three-and-a-half
18 weeks after that. And the whole time, Mr. Brown's been
19 given to believe by the adjustor, we're not getting rid
20 of the car. This becomes of great importance, because,
21 in our exhibit, it led us from Turner Padget, who is
22 defending Ford against Mr. Johnson's claim saying, hey,
23 we looked at the car; it's been altered; in fact, your
24 own expert said it had been altered; our expert said
25 it's been altered.

1 Thereafter, Mr. Brown's expert further said it's
2 been altered; the wheels are gone.

3 I cannot reconstruct anything to do with this case
4 because what's missing off the vehicle.

5 And again, as I said, we only got our discovery
6 like December the 14th, and part of that showed that
7 there was damage to the wheels. And so, by the time --
8 well, we just got that a couple weeks ago. But that was
9 part of what the expert for both Mr. Johnson, and also
10 the expert for Mr. Brown was saying, that, because of
11 what's gone off the car, I can't put Humpty Dumpty back
12 together and give an opinion to a reasonable degree of
13 certainty.

14 Thereafter, Mr. Brown was notified by Geico, and a
15 number of months after they got rid of the car, oh, we
16 got rid of the car. He wrote them back saying, hi, I
17 asked you not to do that. The next day they got the car
18 back.

19 So, Mr. Brown then goes to Ravenel, South Carolina
20 to see the salvage yard and go look for the man that
21 owns the salvage yard, and says, hi, I'm here about this
22 car. And the salvage yard owner, who has an affidavit
23 we gave them and you, it says, yeah, I got a call from
24 Geico this morning; they said don't talk to you about
25 this.

1 We've got a kind of situation here where, all of a
2 sudden, the coverup starts to get greater than the
3 crime. And then, the salvage yard man said, oh, I sold
4 some more stuff beside what's on that list they gave
5 you.

6 So, now we're dealing with a situation where they
7 agreed to keep the car, keep the car intact. They sold
8 the car, not notifying Mr. Brown of having sold the car.
9 After notifying many months later, they then say that
10 all they got rid of was these few items. Turned out,
11 that wasn't true. Then, they called the owner of the
12 salvage yard and say don't talk to Lawyer Brown if he
13 comes to see you about what's going on with this car.

14 So, now they have raised -- and the reason both us
15 and Judge Buckner and them in the early days called it a
16 spoliation case was because, based on *Austin versus*
17 *Beaufort*, it looked like that was in play in South
18 Carolina. So, Judge Buckner, in his order, called it a
19 spoliation case.

20 Actually, in *Cole*, they very carefully said there's
21 no such thing as a negative spoliation case; there's no
22 such thing as spoliation; you call it negligence; you
23 call it spoliation. That's what they said in. Fine.

24 What they didn't say is, you don't have breach of
25 contract there. And, in fact, in that case, they

1 allowed the plaintiff to defend a counter-claim on
2 spoliation, saying that, well, Hobbs claimed that Cole
3 Vision breached a contracts review to maintain the
4 document, and that issue remains a valid defense to this
5 action. It's just saying report spoliation.

6 So, what we've done is, in our third cause of
7 action is ask for breach of contract. We had a viable
8 insurance contact with Geico. We notified them of our
9 desire to hold the vehicle. They acknowledged they
10 would do so. They then did not do that. They got rid
11 of it. Didn't notify for many, many months. Once their
12 hand was called, they got it back the next day. But at
13 that time, there were many items missing off of it.

14 THE COURT: Thayer, let me ask you, and of course,
15 it's been five-and-a-half years since I've practiced
16 law, but typically, when a lawyer says I'm representing
17 someone in an automobile wreck, some attorneys' offices
18 handle the property damage claim, and some of them have
19 the client handle it themselves. A lot of firms will
20 have investigators that take care of the property damage
21 portion of it.

22 My question is, is what is the insurance company
23 supposed to do when Mr. Brown says don't get rid of the
24 car, and the client calls back the next day and says,
25 who they have their contract with, says, yeah, I want to

1 take the money, and yeah, I'll sign the title over to
2 you.

3 What are they supposed to do? Is it the insurance
4 company's job to say, no, I got a letter from an
5 attorney, and I can't speak to you anymore? I mean,
6 that's what my question becomes.

7 MR. RIVERS: Once they are put on notice by the
8 attorney -- and he made a direct offer to the client,
9 not to Mr. Brown. The client called back the next day
10 and said --

11 THE COURT: Which I'm assuming was the day before,
12 probably, Mr. Brown got involved, correct?

13 MR. RIVERS: The offer was made after Mr. Brown put
14 them on notice of my representation.

15 THE COURT: The offer.

16 MR. RIVERS: The offer to the client, we'll give
17 you X dollars for your wrecked car.

18 THE COURT: But that's not what this -- this says,
19 the day after Mr. Brown sent his letter, it says
20 Williams called. So, Williams called the adjustor. So,
21 the offer either had to come earlier that morning, the
22 day before, or the day before.

23 MR. RIVERS: Well, October the 6th, made an offer
24 to Charles Williams on the car. October the 7th --

25 THE COURT: October the 7th, Harry sends the letter

1 and --

2 MR. RIVERS: On October the 6th --

3 THE COURT: -- and October the 8th --

4 MR. RIVERS: October the 6th, Harry sends the
5 letter. Same date.

6 THE COURT: I'm just not so sure what the insurance
7 company is supposed to do. And again, someone help me
8 out. It's been awhile since I've practiced, but --

9 MR. RIVERS: Well, for one thing we've got --

10 THE COURT: -- typically -- didn't you do some
11 plaintiffs work? I mean, I've done it both ways. I did
12 it when I practiced that I let -- my client wanted to
13 handle the property damage, I let him do it. And I've
14 done it where I'm at a firm where we have investigators
15 that take care of all that, and we tell them not to talk
16 to anybody, and let them handle it. So, how does it
17 work now?

18 MR. GRIFFITH: Judge, it still works both ways.
19 But if you want to preserve the evidence, you buy it;
20 you don't sell it.

21 THE COURT: And that's what I don't understand,
22 because, typically, you could just say, give me minus
23 the 250 or 500, whatever it costs these days, and you
24 get to keep your car.

25 MR. GRIFFITH: Or, if you think you've got a

1 products case, you don't sell the car, and then say, I'm
2 selling it to you, but hang onto it for me.

3 THE COURT: No.

4 MR. GRIFFITH: What you do is, you buy the car; you
5 move it to the storage yard so the plaintiffs can look
6 at it, the defendants can look at it. But the third-
7 party insurance company, oh, by the way, you hang onto
8 it; I'm creating a duty by writing you a letter telling
9 you to hang onto it. And that's what this spoliation
10 issue's all about --

11 THE COURT: Okay.

12 MR. GRIFFITH: -- is, we can't get into that.

13 THE COURT: Okay.

14 MR. GRIFFITH: If you've got a products case,
15 you've got to get your product. You've got to -- you've
16 got to get it in some fashion; and basically, it's
17 buying the car. They didn't have to buy the car; they
18 owned it. Instead, they sold it.

19 Now, so, he's in the proverbial Catch 22. The
20 letter written on October the 6th, and an insurer
21 calling on October 6th, saying, you know, one says keep
22 the car; the other says, you know, I'm going to sell the
23 car. Then, actually, then it says -- the letter says:

24 *On yesterday, we spoke and agreed not*
25 *to move the vehicle until Monday, October*

1 the 9th. You agreed not to move it until then.

2 So, I mean, then, we kept it at least until the end
3 of the year, and then -- or, the first of the next year,
4 2006-2007. What are they supposed to do? Continue to
5 hang onto it?

6 I just think that we have, basically, you know,
7 we're getting into facts that, what should be done. But
8 what we've got is the law that says there is no third-
9 party spoliation. Even if we got the letter and we made
10 a mistake and said, oops, we sold it; we ran and got it
11 back in the best condition we got, even though the suit
12 was brought about.

13 So far, you know -- it's a frustrating case, I
14 think, from both sides. But I think that, basically,
15 somebody should have held onto the car and not sold it.
16 The owner should have said, you know, my wife's hurt; I
17 might have a case; I got a lawyer; the lawyer tells you
18 -- should explain to the client, don't sell the car;
19 we've got to get it looked at.

20 THE COURT: I mean, someone died as a result of
21 this, correct? In this wreck, someone died in this
22 wreck.

23 MR. GRIFFITH: Yes, ma'am.

24 THE COURT: Okay. I mean, Ms. Clark did.

25 MR. RIVERS: Someone died, and everybody was

1 Medivaced out.

2 THE COURT: Okay.

3 MR. RIVERS: And there was some grievous injuries.

4 MR. GRIFFITH: It's the only -- seriously, they
5 were serious injuries. Geico had a lot of UIM money.
6 We've paid that money. We got drug into a lawsuit here
7 on spoliation, and obviously, the tortured procedural
8 history --

9 THE COURT: Okay. Right.

10 MR. GRIFFITH: -- in whether they were the proper
11 party, the driver of the car. I mean, we've got a
12 t-bone accident. It's not really -- what I understand,
13 the Thomas claim was a very interesting claim, but it
14 was one of those glass claims where the person was
15 ejected out the side window, not out the back window.

16 THE COURT: Okay. Okay.

17 MR. GRIFFITH: Not a tire defect where the tire
18 blew going down the highway. It was a t-bone. Trevor's
19 client pulled right out.

20 THE COURT: But the car rolled, correct?

21 MR. GRIFFITH: Yeah.

22 THE COURT: And so, maybe that's where the issue of
23 the tires came in. I mean, that's, I guess, logical.

24 MR. GRIFFITH: Could be. I mean, --

25 THE COURT: Based on weights and whatever. Okay.

1 MR. RIVERS: Do I get my turn back?

2 THE COURT: Okay. Yep. You can now. Sure.

3 MR. RIVERS: Again, I hate to belabor this, but
4 October the 6th is when Mr. Brown sent him this fax.
5 Now, they had a conversation the day before, and Mr.
6 Brown says, in our conversation the day before, you
7 agreed you would hold onto the vehicle; you further
8 agreed that, if you got rid of it, you'd let me know
9 where, when, how, so I could keep track of it.

10 THE COURT: But the problem is, the owner of the
11 vehicle and Mr. Brown's client is the one calling the
12 adjustor telling him, I'm taking it, and I'm signing it
13 over to you.

14 MR. RIVERS: No, that's not right. I beg to
15 differ, your Honor. On October the 6th -- the
16 conversation on the 5th, where he agreed to keep track
17 of it; on October 6th, Mr. Brown confirmed it by a
18 letter. Then, that day, the adjustor called the client
19 and said, I'm going to give you X number of dollars; do
20 you want it, yes or no? The next day, the client comes
21 back and says, I'll take the money.

22 Now, all during this time, the adjustor's giving
23 Mr. Brown continued assurance that he will (a) keep the
24 car, or (b) at least let him know he's going to get rid
25 of it. Nether of which took place.

1 Now, I'm in a scentilla situation for summary
2 judgment, but the adjustor's put it to Mr. Brown, but
3 you're going to be protected; we're going to either keep
4 the car, or, if we get rid of the car, we're going to
5 tell you, which they didn't do. They admitted they
6 didn't do it. When he called their hand, the next day,
7 they got it back and said, oh, yeah, here; here's the
8 car back, but it's missing some stuff.

9 THE COURT: But didn't your client still have to
10 sign the title over? Is that not still required these
11 days?

12 MR. GRIFFITH: Yes, ma'am.

13 MR. RIVERS: That is required, but the problem
14 you've got is this: he doesn't tell Mr. Brown, by the
15 way, I'm talking independent now with your clients;
16 everything I have promised you is off the board.

17 You can't do it when a lawyer's involved in a case.
18 I'm not saying you can't decide we're going to settle
19 the property damage privately. He's made an agreement
20 with the lawyer that I need to protect the car or tell
21 you where the car's going so you can protect it. You
22 can't just wash that away, which is what he did. And
23 the proof of that is, Thomas Brown called their hand the
24 next day. They got on the phone, got the car, and got
25 it sent back.

1 Again, I'm in a scintilla situation. I haven't got
2 to do a slam dunk. They've spent this -- they've spent
3 two-and-a-half years trying to get it out of Jasper
4 County. They were all safer here in Jasper County. And
5 that's why this case is so old and it's just now at this
6 stage.

7 But that's what the procedural history is, and the
8 various attempts to get it into federal court, which
9 they lost for various reasons on every turn. Well, now
10 we're here.

11 THE COURT: And in that time period, we've had the
12 *Cole Vision* case come down.

13 MR. RIVERS: Yes.

14 THE COURT: Okay. Just so I understand. Okay.

15 MR. RIVERS: And the opinion on the question of the
16 unfair trade practices, if you open up the unfair trade
17 practice section of the code, there's about 70 annotated
18 cases after that. Not a single one of them that said
19 this doesn't apply to insurance. In fact, they've
20 admitted, the plain reading of the statute says it
21 doesn't. It's a scribner's error.

22 Well, having spent six years in the legislature, I
23 don't recall spending much time clearing up scribner's
24 error. But there's nothing in the record showing any
25 time the legislature went back and said, we actually

1 meant for insurance to be accepted.

2 Because right now, the way the thing plainly reads,
3 insurance trade practice not exempted from unfair trade
4 practice law.

5 And you could call it scribner error as to why it's
6 not exempted, but it's not exempted. And they admit
7 that. They're the ones said it's a scribner's error;
8 that's why it's not exempt.

9 THE COURT: Okay. Yes?

10 MR. CAVENDER: Judge, I have a case. Mr. Rivers is
11 correct. There's no South Carolina appellate law on it,
12 because, typically, these cases end up in federal court
13 where there is federal law on it. There's this case
14 here from Judge Currie in 1994. And there's also
15 another case cited in this opinion from Judge Shedd.
16 And they specifically looked at this exact issue and
17 said -- looking on Page 4 of the case I handed you:

18 *Chapter 57 clearly is intended to*
19 *define and regulate all unfair trade practices*
20 *in the business of insurance.*

21 And it goes on, it's clear, that:

22 *Therefore, all unfair trade practices*
23 *regarding the insurance business are regulated*
24 *by the 'Insurance Trade Practice Act,' and are*
25 *exempt from coverage of the 'South Carolina*

1 *Unfair Trade Practices Act.*'

2 And re-entering the scribner's error, I addressed
3 it in detail in a footnote in my brief. I think it's
4 very clear exactly what happened.

5 Just a second, your Honor. The *Insurance Trade*
6 *Practices Act*, what's now 38-57-10 to 320, was
7 originally codified in Chapter 58. And then, it looks
8 like the section that I'm referring to, 39-05-40(c),
9 wasn't reflected, wasn't amended to reflect that change
10 to Chapter 57.

11 And then, it looks like, in response to this
12 *Trustees of Grace* case, the legislature tried to fix it,
13 and the code of commissioners note states that Chapter
14 57 -- excuse me -- 38-57-10 through 38-57-320 was
15 substituted for 38-55-10 through 38-55-410, except in
16 the text of the actual statute; they haven't made the
17 change to one of those sections; and now the statute
18 reads 38-57-10 through 38-55-320.

19 I think it's clear that that's just scriber's
20 error, and it's supposed to be 38-57-320. Because 38-
21 55-320, in brief, involves undertakers, so I think it's
22 clear that that doesn't apply.

23 MR. RIVERS: Your Honor, I'll add one more thing.
24 This case is, as we said, quite old, but we filed
25 discovery in this thing quite a while back, and didn't

1 get it, and didn't get it, and didn't get it. Finally,
2 filed a motion to compel, which, usually, they're
3 compelling me. Because, usually, I'm the one slack
4 about producing it. And they said we'll get it to you.

5 So, finally, I think November the -- they filed
6 their motion for summary judgment November the 16th.
7 December the 14th, we finally got their discovery.
8 Well, it's a funny thing about December, by the time you
9 figure about when the courthouse was shut down, -- and
10 you girls work hard and I'm sure you deserved it -- But
11 you all shut down like Friday, Monday, and Tuesday; New
12 Year's it was closed down Friday and Monday again.
13 There were only like four working days by the time we
14 got the discovery. And here, we stand in front of you
15 today.

16 And I think, frankly, we're entitled to a little
17 bit more time than that, too. Everything's gone, but we
18 just got it and took a look at it, and said, well, gee,
19 I see already there are problems with the tires that had
20 been sold. They're sold and gone.

21 There are like, seven or eight recalls on this
22 particular vehicle. I haven't had time yet to look them
23 up and see what they affect. And we just got our paws
24 on it a working week about ago.

25 THE COURT: How does that affect the summary

1 judgment motion and their basis for their summary
2 judgment motion? I mean, they're basing it on that
3 there is no cause of action for spoliation of evidence,
4 that there is -- that it's not appropriate for the
5 *Unfair Trade Practices Act*. I don't think anything you
6 do changes what their argument is. And did we address
7 breach of contract? Did we ever address breach of
8 contract, even?

9 MR. CAVENDER: There was no consideration, your
10 Honor. You need consideration. All there was was the
11 demand by Attorney Brown for Geico to indefinitely
12 retain the vehicle, even though the plaintiff signed the
13 title over and accepted the collision coverage.

14 THE COURT: Okay.

15 MR. CAVENDER: That's where we are.

16 THE COURT: So, it's the contract between Harry
17 Brown and Geico, not the plaintiff and Geico. Is that
18 what you're saying?

19 MR. CAVENDER: No. I'm saying --

20 THE COURT: And I'm sorry, it's not Geico coverage,
21 correct? I apologize. Never mind. Is Geico the
22 insurer of Williams?

23 MR. CAVENDER: Yes.

24 THE COURT: Or is that the other car? Geico is the
25 insurer of Williams.

1 MR. CAVENDER: Yes, ma'am.

2 THE COURT: Okay. Okay.

3 MR. RIVERS: I thought I had addressed that,
4 because I got into that right off the bat, showing the
5 time table of he having contacted the adjustor first:

6 *I represent the owners of the vehicle,*
7 *plus, most of the injured parties. I'd like*
8 *you to hold the vehicle.*

9 He then followed up with a letter the next day,
10 because the adjustor agreed to do that. And then, the
11 next day, he follows up with a letter saying you agreed
12 to do that, plus, you've agreed to let me know if you
13 get rid of it, so I can follow it and keep track of it
14 and keep possession of it.

15 Then, after that, the adjustor makes an offer to
16 the insured, who accepts the offer. And a week or two
17 after that, the very document is done. And then, a
18 month or two after that, the vehicle is gotten rid of,
19 and no notice to Mr. Brown.

20 At the time, they --

21 THE COURT: So, basically, you're talking about the
22 breach of contract, the damage is to Tonya Williams as a
23 third-party beneficiary of the contract between Mr.
24 Brown and Geico. Is that what you're saying?

25 MR. RIVERS: And the other passengers in this.

1 THE COURT: And the other passengers. Okay.

2 MR. CAVENDER: Judge, we don't really disagree with
3 that time frame, but Attorney Brown sending that letter
4 doesn't provide any consideration to Geico. There's
5 just the demand by Attorney Brown that --

6 THE COURT: You say there's an agreement, but there
7 was no consideration for the agreement.

8 MR. CAVENDER: Therefore, no contract.

9 THE COURT: Therefore, no contract.

10 MR. RIVERS: Our problem is, they said they'd do
11 it. And I agree -- I agree with Mitchell. If they
12 didn't want to do it, fine, fine; for the adjustor to
13 tell us that they're going to get rid of the car; and he
14 got rid of the car and didn't tell us. Months went by.
15 We found out he had got rid of the car.

16 THE COURT: Okay.

17 MR. RIVERS: We find out on the 28th and called his
18 hand; he's got to car back on the 29th.

19 MR. CAVENDER: Just one more real quick thing, your
20 Honor.

21 THE COURT: Sure.

22 MR. CAVENDER: The letter from Attorney Brown
23 specifically -- and this is filed as part of their memo
24 as Exhibit A. It says:

25 *On yesterday, we spoke, and you agreed*

1 not to move this vehicle until Monday, October
2 9th.

3 They didn't move it until well after that, and
4 there's no dispute about that.

5 THE COURT: I thought they'd gotten rid of it by
6 then.

7 MR. CAVENDER: Not October 9th. They only --
8 Attorney Brown sent this letter on October 6th.

9 THE COURT: Right.

10 MR. CAVENDER: They didn't get rid of the vehicle
11 until either December of 2006 or January of 2007.

12 MR. RIVERS: And the letter further goes on:

13 *Almost immediately prior to moving the*
14 *vehicle, you agree to notify me of the address*
15 *where the vehicle be stored. It's imperative*
16 *this vehicle not be salvaged or sold until I*
17 *have a chance to conduct a thorough*
18 *investigation.*

19 THE COURT: Okay.

20 MR. RIVERS: And the adjustor agreed to that.

21 THE COURT: Okay.

22 MR. RIVERS: And again, I'm sitting in summary
23 judgment. I haven't got to do a slam dunk. I've just
24 got to show I've got something.

25 THE COURT: Okay. All right. Anything else, you

1 all? No?

2 MR. GRIFFITH: I'm not trying to step on Matt's
3 toes, but the one document that Thayer did hand up from
4 our claims file simply documents the phone call of
5 October 5th, 2006.

6 *Advised policyholder of total loss*
7 *procedure and value determination; received*
8 *permission to move the vehicle; will not*
9 *move until 9 -- excuse me -- 10/9/06 per*
10 *policyholder/attorney request.*

11 And then, it has Marlin Kemp's name and number
12 down there. So, but there has been no attempt to find
13 out, you know, anything about that. So, clearly, they
14 talked about not moving the vehicle, but they told them
15 what the policy and procedure was. I don't want to get
16 too far into the facts, because the facts -- if you
17 accept --

18 THE COURT: All their facts.

19 MR. GRIFFITH: -- that this letter says what it
20 says and that was clearly the conversation, there's
21 still got to be some consideration.

22 THE COURT: Okay.

23 MR. GRIFFITH: And there's no consideration there.

24 MR. RIVERS: Your Honor, at that time, Mr. Brown
25 represented the owners of the vehicle. There's a

1 contract between Geico, the insurance carrier, and the
2 owner's of the vehicle. In addition to which, having
3 just gotten the discovery a couple weeks ago, there's
4 been zero opportunity to depose all these people as to
5 what was your contract; what was your agreement; what
6 was the basis for it; why did you -- why did you tell
7 Mr. Brown you'd do this if you weren't going to do it;
8 and when you promised us you would do it and didn't do
9 it, why not?

10 THE COURT: Okay. All right. Let me think about
11 it, you all. I'll ask someone for a proposed order.
12 Okay?

13 MR. GRIFFITH: I'm sorry. Ma'am?

14 THE COURT: I said, let me think about it. I'll
15 ask someone for a proposed order. Okay?

16 MR. GRIFFITH: Okay.

17 THE COURT: Okay.

18 MR. CAVENDER: Thank you, Judge.

19 MR. RIVERS: Thank you, your Honor.

20 THE COURT: Thank you.

21 END PROCEEDING 11:10 A.M.

CERTIFICATE OF REPORTER

JANUARY 4, 2012 TRANSCRIPT OF HEARING

STATE OF SOUTH CAROLINA

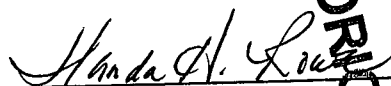
COUNTY OF JASPER

I, Wanda H. Rowe, CVR-M, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing January 4, 2012 Transcript of Hearing, is a true, accurate, and complete record of the proceedings had on said date in the case of Tonia D. Williams, et al versus Geico Casualty Company, et al, Jasper County, South Carolina, Court of Common Pleas, Case Number 2009-CP-27-00639; that no exhibits were admitted.

I further certify that I am of neither kin, counsel, nor interest to any party hereto.

The original of this transcript, nor any copy of same, is not certified, nor authorized for use by me, to be true, accurate, and complete without my original signature and stamp affixed hereto.

Witness my signature July 9, 2014.


Wanda H. Rowe, CVR-M
Official Court Reporter

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

COURT OR COMMON PLEAS
2009-CP-27-00639

MARION B. SMALLS, et al.,
Plaintiffs,

v.

EARL MARTIN, et al.,
Defendants.

TRANSCRIPT OF RECORD

April 24, 2012
Charleston, South Carolina

B E F O R E:

THE HONORABLE CARMEN MULLEN, JUDGE

A P P E A R A N C E S:

MR. THAYER R. RIVERS, ESQUIRE
MR. HARRY CLAYTON BROWN, SR., ESQUIRE
Representing the Plaintiffs

MR. MATTHEW D. CAVENDER, ESQUIRE
Representing Defendant Geico

MR. CHRISTOPHER W. NICKELS, ESQUIRE
Representing Defendant Earl Martin

Anne Bouley Meyer, RPR
Circuit Court Reporter

1 THE COURT: This is your motion to reconsider.
2 I do remember this case well. This was the car that
3 had been disposed of by Geico.

4 MR. RIVERS: Did my brilliant staff not send you
5 -- if I remember -- actually tied into the motion
6 itself. I don't know if you had an opportunity to look
7 at it.

8 THE COURT: I have.

9 MR. RIVERS: Okay. Your Honor, what I did was
10 put a timeline on this which was if you look on page 2,
11 basically we filed a case in September of 2009. The
12 next two years were spent with very hard working, hard
13 fought, very ethical maneuvers to get the case out of
14 Jasper County into the federal court.

15 And it was almost exactly two years when it
16 finally came back from federal court, back to this
17 courtroom.

18 THE COURT: Okay.

19 MR. RIVERS: Well, we filed discovery a long
20 time ago, which defendants have vastly ignored. Also
21 attached to my brief, we corresponded with Mitch, who
22 was the lead counsel, saying, where is our discovery?
23 We don't hear anything.

24 A year later, we do another letter. Dear Mitch,
25 please give us our discovery.

250

250

1 THE COURT: Didn't you do any discovery in
2 federal court before that? No?

3 MR. RIVERS: No. It was always a fight, or
4 always a proffer to remove. And I won every time.

5 THE COURT: Okay. And you just kept going on
6 and on and on.

7 MR. RIVERS: We kept going on and on. So
8 finally in November, they filed a motion for summary
9 judgment. At that time, not only had they not replied
10 and given us the discovery, there is a motion to compel
11 outstanding.

12 I've got to say, in 25 years of dealing with
13 this law firm, that's the first one I ever filed. This
14 is after correspondence saying, please send us the
15 stuff.

16 THE COURT: Okay.

17 MR. RIVERS: So we get it about two weeks before
18 the motion for summary judgment is heard. And as I
19 pointed out, this happened to be in late December which
20 has Christmas, New Years, courthouse closed, staff off.
21 We had almost no working time to actually get the stuff
22 to use to respond to the summary judgment motion.

23 And as I further pointed out, we were there --
24 and it wasn't anything intentional or anything
25 malicious or anything evil, they don't practice law

1 this way. But we're there having not responded, I have
2 got a long list of stuff we normally would you done
3 once we got discovery, including deposing the adjuster.

4 Because you, from the bench, said, you know, did
5 the adjuster settle the case with Mr. Brown's consent
6 or not? We have actually shown, through what's
7 attached to our brief, that it was October the 6th that
8 Attorney Brown contacted the adjuster and reminded him
9 of their conversation October the 5th, that he was the
10 lawyer representing all the people, what he wanted
11 done.

12 And what we did get from them is on the next
13 day, after knowing of Mr. Brown's representation of the
14 people, he contacted the person individually to settle
15 the property damage case.

16 Because there was a big question about where is
17 the contract? And I said, well, if he is the lawyer
18 for the injured people and he has notified the
19 adjuster, and there is a still contract between his
20 clients, the insured's, and Geico, if the adjuster goes
21 behind his back after that and settles the property
22 damage, then --

23 THE COURT: Let me just ask you. I am looking
24 at obviously the memoranda from the adjuster. And do
25 you have any evidence of any ill will or any intent to

1 do it?

2 I mean, I can see how this can happen. I think
3 that's what I said. My biggest problem, Mr. Rivers,
4 with this case was that your client did talk to him,
5 did negotiate a settlement, did sign the title waiver
6 and did accept the money. That was my biggest problem
7 with all of this.

8 Now, if you are telling me that there is ill
9 will that this adjuster spoke to Harry Brown the day
10 before, and then turned around and said, well, let me
11 go ahead and see if I can get rid of this car.

12 MR. RIVERS: Well, since we -- excuse me.

13 THE COURT: Yeah, go ahead.

14 MR. RIVERS: Since we didn't get back to them by
15 five working days before the summary judgment motion
16 hearing, we had no time to depose that adjuster and
17 ask.

18 But having done personal injury work for 39
19 years and 6 months, the adjuster can't just be put on
20 notice by an attorney and say, well, I went ahead and
21 settled the personal injury, because there is no
22 difference between settling the property damage or the
23 personal injury.

24 THE COURT: I can tell you, though, Mr. Rivers
25 there is a difference. Because some lawyers settle the

1 property damage for their client. I think it's the
2 better practice, which it sounds like exactly what you
3 do. But a lot of attorneys say, we aren't dealing with
4 the property damage. You go handle that yourself, just
5 don't admit anything.

6 That's just how lawyers handle it. Some do. I
7 mean, I don't want to go on the record as saying
8 they're lazy, but they do that. So again --

9 MR. RIVERS: Well, since we never got to depose
10 the adjuster, we don't know. Since we never got a
11 chance to be produced Geico's file, we don't know.

12 THE COURT: Can I just see -- did Mr. Brown call
13 the adjuster or did Mr. Brown -- I thought he sent a
14 letter. I thought his office sent a letter. And I
15 don't see that letter.

16 MR. RIVERS: The letter is attached to our
17 motion.

18 THE COURT: Okay.

19 MR. RIVERS: And it references the telephone
20 call the day before. The letter is dated October 6th,
21 the date that the adjuster notes he contacted the
22 insured.

23 On the second paragraph, on this letter dated
24 October the 6th: On yesterday, October the 5th, we
25 spoke, you agreed not to move the vehicle, et cetera.

1 So the adjuster had been on notice by Attorney
2 Brown as to his representation prior to contacting the
3 people individually. My point is this, we never had
4 the opportunity to do discovery to depose the adjuster,
5 to get the adjuster's file, to see what is going on as
6 far as that thought pattern goes.

7 Because if he has gone behind the attorney's
8 back and settled the case, then you got a different
9 situation. But we are entitled to discover that. You
10 can't just stonewall us for two years, and then give us
11 the stuff basically a working week prior to summary
12 judgment motion.

13 And I think what they said in their memorandum
14 of opposition was, well, you should have been harder on
15 us. You should have held us by the nose and kicked us
16 in the butt. Well, I'm sorry, I'm not used to doing
17 that.

18 THE COURT: Well, I can tell you now, looking at
19 this, my biggest concern is this. I see a letter from
20 Harry Brown to this adjuster on October 6th that not
21 just says, I represent these people, but I represent
22 these people, don't do anything with the car, I think
23 there may be a manufacturing defect.

24 I mean, he lays it out. It's not just a, I
25 represented this woman. It is a, listen, there may be

1 other problems. Don't do anything. This is your
2 non-spoliation notice.

3 And then it appears from the notes that the very
4 next day -- now, on the same day it says, they made an
5 offer to Mr. Williams. On October -- it says, the same
6 day that Mr. Brown sent -- the lawyer, Mr. Brown, sent
7 a note to the adjuster, the adjuster makes an offer to
8 the client, Mr. Williams. And then Mr. Williams, the
9 next day, calls back.

10 Unfortunately, it sounds like the client was not
11 talking with his lawyer. I mean, that's not
12 appropriate.

13 MR. RIVERS: Well, we don't know that, Judge,
14 because there has been no discovery. We are trying to
15 extrapolate a whole pile of facts on one letter that
16 represents a phone call the day before.

17 I'm just saying right now in the record, the
18 adjuster is on notice the day before. We contacted the
19 client, Mr. Brown was the attorney. I need to depose
20 the adjuster.

21 THE COURT: No, it's the day of. It looks like
22 it's the same day.

23 MR. RIVERS: Well, the letter of October the 6th
24 references the telephone call the day before, which
25 would have been the 5th.

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1 I am just saying based on the record I've got,
2 I'm missing most of Noah's Arc. I have almost nothing
3 to work with. And it wasn't done mean, deliberate,
4 evil, but that's what happened. They give us the stuff
5 like one working week before the summary judgment
6 motion.

7 And I'm missing, as listed on the bottom of page
8 3 -- just off the top of my head when I dictated this
9 -- I'm missing the deposition of the adjuster, the
10 30(B)(6) of the Geico person most knowledgeable, the
11 Geico file. I mean, I want to go into a whole lot of
12 things about their settlement practices. What do they
13 do when they're notified by --

14 THE COURT: Let me ask you this. Did you have
15 an opportunity to depose ever the adjuster prior to me
16 granting this motion?

17 MR. RIVERS: Your Honor, my normal practice is I
18 don't depose an important witness like that without the
19 discovery first. I want to see the documents.

20 THE COURT: Okay.

21 MR. RIVERS: I mean, that's almost malpractice,
22 to be dancing in the dark with a key witness and you
23 don't have what he's got.

24 THE COURT: My concern is is that me hearing a
25 summary judgment and you don't even have that

1 deposition. I mean, to me it would mean it was not
2 timely.

3 MR. RIVERS: Well, I --

4 THE COURT: Or it's like if I grant a motion to
5 dismiss. I'm sorry, I need to understand what I grant
6 it on. It was a summary judgment motion.

7 I mean, did you all not raise that you had not
8 had an opportunity?

9 MR. RIVERS: I did, long, loud and often. In
10 fact, as I said, you mused from the bench about what
11 was the conversation being had, just like you just did
12 a minute ago. What does it mean? What was said? I
13 said, well, we don't know. We have no deposition of
14 the adjuster.

15 I filed what I thought was, for me, a fairly
16 comprehensive brief attached to this. I think the
17 whole point of it is it was premature to hear the
18 summary judgment motion.

19 And the case I cited you where it says it's
20 inappropriate to grant summary judgment motion with
21 discovery, in that case the plaintiff admitted being
22 dilatory and doing it. We don't admit that at all.

23 We fought two hard years to be in this court in
24 front of this judge. And then another year goes by and
25 we get our discovery right before it's time to hear a

1 summary judgment motion.

2 THE COURT: I guess what concerns me,
3 Mr. Rivers, is -- and again, I'm having a hard time rec
4 -- I remember the motion, that hearing, because
5 typically, and I would say 99.9 percent of the time,
6 you all have been in front of me enough, if I have the
7 plaintiff saying they haven't done enough discovery,
8 and I think I may grant summary judgment, I give them
9 that opportunity.

10 So I want to make sure, you are saying you said
11 it loud and said it often, but -- and the other truth
12 behind this as well, and this is maybe not going to
13 sound so favorable for judges, but the simple fact is
14 you realize I have a heavy docket, and if I have a
15 heavy docket and I can get rid of one case to give
16 someone a greater opportunity to do some discovery to
17 at least defend something, I do.

18 So if you raised this, it would be very unusual
19 for me not to have given you your continuance. Unless
20 they said that it has been continued five times and
21 nothing has been done, on and on and on.

22 MR. RIVERS: Well, I didn't get the court
23 reporter to type the transcript. But trust me, when I
24 get the stuff on December the 16th for a summary
25 judgment held January 4th, I am going to say early on,

1 I just got this stuff. I'm entitled to do some
2 discovery.

3 THE COURT: Who was my court reporter then?
4 We're going to look it up. Okay.

5 So basically your argument is is that you would
6 want to have taken -- I understand you are talking
7 about the 30(B)(6), but we all think -- at least I
8 think the crux of what happened here has to do with
9 this adjuster, quite frankly, what they knew, when they
10 knew it.

11 And when they were making the phone calls to the
12 client, versus when he received the facsimile from
13 Harry Brown, the lawyer. I mean, that's really what
14 this whole case is about.

15 Was there any ill intent to dispose of this
16 vehicle. I mean, quite frankly, to me he has no
17 motivation in this case to dispose of the vehicle.
18 Because what you are saying is, at least in Harry
19 Brown's letter, is there may be a manufacturing defect;
20 which isn't going to cost him anything.

21 And he would prefer for it to be a manufacturing
22 defect as opposed to a human defect that he is going to
23 have to pay out. So --

24 MR. RIVERS: Well, in addition to that, Your
25 Honor, we also want to get into their practice of doing

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1 this. Because we have been told by former Geico
2 agents, they're under enormous pressure to settle the
3 property damage almost immediately because in storage
4 they got all kinds of costs.

5 And, frankly, if that is a policy of them, if
6 those adjusters are under the gun to do that, and as
7 part of taking his deposition, I want to see what their
8 claims policy is.

9 THE COURT: So That would be their 30(B)(6) on
10 that issue? Is that what you're --

11 MR. RIVERS: Yes, ma'am. I also put in there
12 that we would like to see what their training manuals
13 are, what their videos are, what their policies are. I
14 need to know, is this adjuster being ordered to -- if
15 all things being equal, settle this property damage
16 within 24 or 48 hours. Because that's going to be a
17 factor in whether or not he dealt in good faith with
18 Mr. Brown.

19 THE COURT: Okay. All right. Let me hear from
20 one of you all. Whoever wants to talk.

21 MR. CAVENDER: Good morning, Judge. Matt
22 Cavender here for Geico. Now, the discovery issue, it
23 doesn't really make any difference because we
24 understand what the basic facts are.

25 The problem that Mr. Rivers runs into is that

1 this is a pure spoliation case, and the Cole Vision
2 case says it's not a cause of action. That's where we
3 are.

4 And that was essentially what our argument was
5 at summary judgment motion. Thayer said he needed more
6 discovery. We said, it doesn't make a bit of
7 difference because we agree with the basic facts. And
8 the basic facts set up a spoliation cause of action.

9 THE COURT: Let me ask you this, though. Let's
10 just say this adjuster says that I intentionally -- you
11 know, I knew this, I did it, I intentionally did it, I
12 was going to get rid of it. Doesn't that take that out
13 of case law?

14 And again, my concern was that there is no
15 spoliation cause of action. But I'm assuming he would
16 have another cause of action. I wouldn't call it
17 necessarily a spoliation, but I would call it fraud or
18 something else.

19 MR. CAVENDER: The case law was negligent
20 spoliation of the evidence. So if there was something
21 intentional, that might be different, but that hasn't
22 been pled.

23 The only things that they pled were breach of
24 contract, and that's presumably what they're asserting
25 is the contract between Mr. Brown and Geico arising

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1 from this conversation around October 6th.

2 THE COURT: And I dismissed the whole thing,
3 correct?

4 MR. CAVENDER: I'm sorry?

5 THE COURT: Did I dismiss the whole case or just
6 that cause action?

7 MR. CAVENDER: You dismissed everything.

8 THE COURT: The whole case? Okay.

9 MR. CAVENDER: Because that quote that arises
10 from that opinion, a rose by any other name. That's
11 what we have here.

12 THE COURT: Got you, okay.

13 MR. CAVENDER: They didn't, you know, have a
14 specific spoliation cause of action. They have breach
15 of contract, unfair trade practices and negligence.

16 Now, with the discovery issue, first of all, if
17 a party is opposing summary judgment based on
18 insufficient discovery, they're required to file an
19 affidavit stating to that effect. And I have a case
20 here for that you that says just that.

21 THE COURT: That's fine. But I can tell you, I
22 have forever listened to them. And if they say they
23 haven't done discovery, they're officers of the Court.
24 While I appreciate and understand that, I've always
25 acknowledged that if a lawyer is telling me they need

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1 more discovery and if they tell me why, then that's
2 good enough for me. So, okay.

3 MR. CAVENDER: But then we get back to the
4 point, the breach of contract is, I think, essentially
5 where we are. I don't think the unfair trade practices
6 and negligence actions they're really pursuing as far
7 as --

8 THE COURT: Because the negligence was the whole
9 a rose by any other name.

10 MR. CAVENDER: Exactly. And the breach of
11 contract, the contract requires consideration. There
12 has been no consideration. And there has been no
13 allegation of consideration.

14 Harry Brown didn't provide any consideration to
15 Geico to hold on to this vehicle. And Geico is not
16 required to hold on to a vehicle indefinitely.

17 THE COURT: Even as a third-party beneficiary
18 to, the contract? I mean, obviously it's a contract
19 between the defendant and Geico, but even if possibly
20 as a third-party recipient or third-party beneficiary?

21 MR. CAVENDER: I don't believe so, Judge. And
22 Mr. Brown and Mr. Rivers could have avoided this. All
23 they had to do is buy the salvage, or tell their
24 client, don't sell the vehicle. But that's exactly
25 what they did.

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1 And I don't like to put Mr. Brown in this
2 position, but I think it was just simply he just didn't
3 communicate with his client enough, and didn't tell his
4 client, don't sell this car.

5 And Mr. Rivers has talked about whether it's
6 proper for --

7 THE COURT: Correct me if I'm wrong, didn't at
8 the end, didn't you get the car back?

9 MR. CAVENDER: We got it back. It was missing
10 -- we believe it was missing three, I believe, three
11 tires. And they believe that in addition to that, it
12 was also missing the back glass.

13 But assuming that they are correct, it was
14 missing three tires and the back glass.

15 THE COURT: Let me ask you this, Mr. Brown and
16 Mr. Rivers. What is your theory of what could be wrong
17 as far as what was wrong with the car?

18 MR. RIVERS: Well, Your Honor, first of all,
19 they sent it back to us saying, it's missing three
20 tires. Well, when we finally got the NHTSA report from
21 them, which we got, again it's one working week,
22 issuing all tire defects, we don't have tires.

23 THE COURT: So it's a tire defect case.

24 MR. RIVERS: And we're missing the back glass.
25 Well, the significance -- and they didn't tell us it

1 was missing the back glass. The significance of that
2 is Tom Johnson brought a glass defect case against Ford
3 Motor Company in the same wreck. And we attached his
4 letter from the defendant there, who questioned the
5 chain of custody of the vehicle, and the defended the
6 case on chain of custody the whole way through.

7 The other thing is, when Mr. Brown went to go
8 look at the vehicle, they say it's over here, we put an
9 affidavit to the guy that owns the salvage yard. He
10 says the day Mr. Brown arrived, I got a call from Geico
11 that said, don't talk to Harry Brown.

12 I argued one time this is a Water Gate case, you
13 got a cover up bigger than the crime. Well, they in
14 fact did not tell him, we are going to get rid of it.
15 They let him rely on their assurance they're not going
16 to get rid of it.

17 He could have done other things had they said,
18 you know, we have been nice, we kept it around for two
19 weeks, either you're going to pay us for it, you're
20 going to pay storage or something. They never said a
21 word. He was relying on them saying they'll preserve
22 the car.

23 And then all of a sudden it's gone, without them
24 saying, well, pay us -- buy the salvage, give us some
25 money, do something. They never said a word to him.

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1 off it goes. It goes for months. And whenever he
2 finally gets his hands on it, the adjuster is calling
3 the salvage yard people telling them, don't talk to
4 Harry Brown.

5 Inquiring minds want to know. I mean, is that
6 the same adjuster or is that another adjuster? I got
7 to know all that to know what the heck they're doing.
8 I have never heard of such.

9 We got it in the record, the affidavit from the
10 guy that owns the salvage yard. He got a call from
11 Geico as Mr. Brown is walking in the room saying, don't
12 talk to him, don't tell him what is going on.

13 There's too much smell out here.

14 THE COURT: Okay.

15 MR. RIVERS: Additionally of which we plead
16 negligence, we did plead breach of contract. And we
17 did that a long time before spoliation came up and then
18 disappeared.

19 I think we have shown enough as far as a
20 scintilla at this point, we at least are entitled to
21 have done what we normally would do had we gotten our
22 discovery 18 months earlier. We would depose the Geico
23 people, would have gotten the Geico files.

24 They're entitled to pull us out of court, we go
25 out of court. But we shouldn't have to fight with both

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1 hands behind our back and then be told we didn't pull
2 any punches. That's where we are.

3 THE COURT: Okay.

4 Yes, sir.

5 MR. CAVENDER: Judge, as far as the contractual
6 issue, that was an also issue in the Cole Vision case.
7 There was a contract between -- it was -- the facts of
8 the Cole Vision which was leased the office to the
9 optometrist, and they had a contract where the Cole
10 Vision was required to maintain the records. They
11 didn't do so.

12 So, and the Court looked at it again, a rose by
13 any other name; it's a spoliation case. The case in
14 there, Cole Vision should have hung on to the records.
15 They didn't do so.

16 Here Geico probably should have hung on to the
17 vehicle. They didn't do so. It's negligence. That's
18 all it was. And that's that case. It's directly on
19 point. That's where we are.

20 THE COURT: Anything else?

21 MR. RIVERS: Just briefly, Your Honor. As noted
22 Cole involves negligence, negligent spoliation. Our
23 second cause of action is breach of contract. We have
24 another action for negligence, but we understand Cole
25 will grab that.

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1 Our action for breach of contract is not what's
2 in Cole. And in Cole the court says, we're not going
3 to adopt the new tort of negligent spoliation.

4 But our second cause of action is breach of
5 contract. And I submit that there was a contract
6 between the owners of the vehicle and Geico at the time
7 Attorney Brown said, I want you to save the vehicle.

8 THE COURT: And again, your argument was no
9 consideration was given.

10 Anything else from anyone?

11 MR. NICKELS: Not specifically to this motion,
12 but after we conclude whatever is happening here, can
13 we talk about procedurally some stuff?

14 THE COURT: On this case?

15 MR. NICKELS: Yeah. I'm lost in the midst of
16 appeals, federal court actions, previous orders of
17 consolidation, case numbers, et cetera. I have
18 Mr. Martin. And I don't even know where we are at.

19 THE COURT: Okay.

20 MR. CAVENDER: Judge, if I may.

21 THE COURT: Yes.

22 MR. CAVENDER: One of the reasons why Cole
23 Vision decided the case the way it did is they looked
24 at the speculative nature of the damages. And because
25 you can imagine what a trial in this case would be,

1 they would have to prove that there was a defect based
2 on the tires and the glass against Ford. So nobody is
3 here defending Ford. So I don't know if we somehow
4 have to defend Ford to say -- to minimize that claim.

5 And then, on top of that, then they have to
6 figure out, well, this is what the claim would have
7 been worth with all the tires and the wheels. Now,
8 here's what the case is worth without all the tires and
9 the wheels, and presumably Geico is responsible for
10 that difference.

11 I mean, that confuses the heck out of me just
12 talking about it. I can't imagine trying to explain
13 that to 12 jurors. And that's one of the main reasons
14 -- it seems to me, that's probably one of the biggest
15 reasons why spoliation evidence is not a cause action
16 in South Carolina is because of that issue.

17 That's an issue that the courts -- as the court
18 cited in this case, courts all over the country have
19 recognized that problem. And I think that's a real
20 issue here.

21 And as far as the distinction between contract
22 and negligence, again in Cole Vision, the cause of
23 action that they pled was negligence, but it was
24 negligence arising from a contractual duty. And that's
25 essentially what we have here. They could have just

1 easily, Cole Vision, pled breach of contract instead of
2 negligence.

3 On page 5 of the printed opinion, Hobbs
4 allegation that Cole Vision lost a key piece of
5 evidence which it was contractually obligated to
6 maintain, while not illegally, cognizable counterclaim
7 remains a viable defense.

8 It's a little bit different case because it was
9 the first part of the case. But it's the same idea, it
10 was a contractual obligation. There they asserted that
11 the contractual obligation resulted in negligence.
12 Here they are saying that the contractual obligation
13 results in breach of contract and negligence. But a
14 rose by any other name.

15 MR. RIVERS: I feel like a Jack-in-the-box. If
16 the supreme court wanted to say that Cole is going to
17 bar contractual action, they would have said it's going
18 to bar contractual action. They say, we are barring
19 negligent actions.

20 I mean, he's trying to say it was both of them.
21 But I know all of those justices personally. They read
22 and write and speak English very well.

23 What I'm saying is this question has not been
24 answered.

25 THE COURT: I think clearly in the Cole case the

1 court did say that obviously we are not going to adopt
2 a spoliation of evidence cause of action, nor are we
3 going to allow you to bootstrap it under negligence.

4 But I guess the question becomes a breach of
5 contract issue, which you are arguing that there was no
6 contract between the third party and Geico.

7 MR. CAVENDER: That's right. And I also don't
8 think the opinion should be read that narrowly as only
9 getting rid of negligence.

10 THE COURT: Show me anywhere where it says that
11 it gets rid of the breach of contract cause of action,
12 does it?

13 MR. CAVENDER: No. Because that wasn't an issue
14 directly in that. What they said is, the substance of
15 the requested relief in matters regardless as a form in
16 which the requested relief is framed. I think it's
17 making that clear.

18 THE COURT: Have y'all done any research on
19 breach of contract actions between an insurance company
20 and a third-party beneficiary?

21 I mean, I'm seeing -- I've seen where our
22 supreme court has cited case law in other
23 jurisdictions.

24 MR. CAVENDER: Judge, I haven't done any
25 research specifically on that. But I don't see how

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1 they could be a third-party beneficiary to an insurance
2 contract. The insurance contract doesn't deal with
3 this issue of maintaining a vehicle after the accident.

4 So even if they were beneficiaries of that
5 insurance contract, somehow that still doesn't get us
6 to the issue here. We still have the breach of
7 contract basically between Mr. Brown and Geico, is the
8 allegation.

9 And again, the plaintiff accepted Geico's money
10 for the vehicle. They settled it.

11 MR. RIVERS: Well, with the lack of deposition
12 we don't know what, why, how, what was driving that
13 train.

14 THE COURT: Let me do this, then. Let me do a
15 little research. I'm going to do research. I'm going
16 to take it under advisement. I will let you guys know.

17 All right. I will let you know, okay? Thank
18 you.

19 MR. CAVENDER: Thank you, Judge.

20 MR. RIVERS: Thank you, Your Honor.

21 MR. NICKELS: Your Honor, may I ask for some
22 guidance?

23 THE COURT: So where are we from here after this
24 is what you need to know.

25 MR. NICKELS: May I briefly address you, and

1 then I'll --

2 THE COURT: Sure.

3 MR. NICKELS: Okay. I'm Chris Nickels and I
4 represent Earl Martin. And Mr. Martin was the driver
5 of the other vehicle involved in this horrible wreck.

6 And I am unclear of actually whether Mr. Martin
7 and the Geico defendants are on the same side of the
8 pleadings; in some they are. For instance, I took a
9 look at the form order that was prepared, and plaintiff
10 one -- and there is a number of them -- versus Earl
11 Martin and Geico folks.

12 And so I went back and it does appear that there
13 was an order of consolidation entered a couple of years
14 ago, I think you may have signed that, consolidating
15 for discovery and trial purposes all the suits. I have
16 that here, if anyone wants to see that.

17 But, frankly, I'm just lost and confused at what
18 the proper case number is, whether there is four
19 lawsuits or one or eight lawsuits, if in fact we have
20 been severed from Geico. I talked to counsel
21 beforehand and I think we all agree that we weren't 100
22 percent positive where we are at.

23 In the meantime, I do have a client out there.
24 I'm worried about time lapsing. And it's a serious
25 case against him.

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1 THE COURT: Okay. Well, where are we? Have I
2 consolidated all the cases, and is there one case
3 number? I don't know the answer to that.

4 MR. CAVENDER: My understanding, Judge, the
5 order that proceeded was the plaintiffs filed
6 individual actions, plaintiff one versus Martin and
7 Geico, plaintiff two versus Martin and Geico, and I
8 think four plaintiffs eventually.

9 First we consolidated everybody together. So
10 plaintiffs one through four versus Martin and Geico.
11 Then we severed the two defendants. So we have
12 plaintiffs one through four versus Martin, plaintiffs
13 one through four versus Geico.

14 And plaintiffs one through four versus Geico,
15 obviously my case, is 639 is the number that we have
16 been using at least.

17 THE COURT: Okay. What about the other cases?

18 MR. CAVENDER: I'm not sure what the number of
19 that is.

20 THE COURT: Patty, can you tell me? I mean, I
21 have no way of knowing.

22 I would normally say, you know, take the newest
23 number obviously. So that's typically -- and I'm
24 assuming four cases, they were probably all filed at
25 the same time.

1 MR. BROWN: Yes, there were.

2 THE COURT: So it really doesn't matter. Let's
3 just take the last number and consolidate them and give
4 them that. Okay.

5 MR. CAVENDER: Then we still have the Martin
6 defendants separate from Geico defendants. Two
7 separate cases, aren't they?

8 THE COURT: Yes. That's what I understand.

9 MR. NICKELS: I don't think the computer knows
10 that yet.

11 THE COURT: Okay, Patty.

12 MR. NICKELS: I just want show here there is a
13 similar.

14 THE CLERK: There was never an order actually
15 assigning any case number.

16 THE COURT: Well, let's choose. Out of the
17 four, let's just choose one of them and I will sign it.

18 MR. NICKELS: 647 is the last one.

19 THE COURT: 647, that's fine.

20 MR. NICKELS: I just want to make sure these
21 guys are in agreement, your client versus Mr. Martin is
22 a separate lawsuit than your clients versus Geico?

23 MR. RIVERS: It is.

24 THE COURT: Yes. So let's just use 647 Martin.
25 And then what are we going to do with Geico? What

1 number is that one?

2 MR. CAVENDER: We have been using 639.

3 THE COURT: Percent. Okay.

4 MR. RIVERS: One other small housecleaning
5 matter. I believe we can all agree that Mr. Halio, who
6 was once involved, can be --

7 THE COURT: Stricken from the records. Take
8 Mr. Halio off. Was it Andy or was it his father?

9 MR. NICKELS: It was Andy. And then I'd like to
10 state in open court that the combined cases complied
11 with the Court's mandatory mediation rule. So both 647
12 and 639 had a combined mediation a couple weeks ago.

13 THE COURT: And did someone submit the proper
14 documentation? Who did it?

15 MR. RIVERS: John Tiller, the mediator.

16 THE COURT: Patty says she does not have it.

17 MR. NICKELS: Well, I will call Mr. Tiller.

18 THE COURT: And, Patty, you'll note that it is
19 for all the cases, okay?

20 Okay. Anything else, Mr. Nickels?

21 MR. NICKELS: Just since this is probably the
22 oldest case that I'm still working on, and I imagine
23 that when it comes up on your systems it may show that.
24 And may be I'm going to work with these guys, I hope
25 for some sort of scheduling order because we have

1 done --

2 THE COURT: No discovery, obviously.

3 MR. NICKELS: Well, I have. I have met with his
4 clients, but he's done none, kind of been caught up
5 with all this procedural stuff with Geico I think has
6 taken most of y'all's attention.

7 THE COURT: Okay.

8 MR. NICKELS: Thank you.

9 THE COURT: So even as it stands, as it is right
10 now, this would be relieving Geico of all four of those
11 claims, but not as against Martin, correct?

12 MR. NICKELS: Yeah. Mr. Martin is a good old --

13 THE COURT: He's defendant driver.

14 MR. NICKELS: Driver.

15 MR. RIVERS: Jurisdictional defendant actually.

16 THE COURT: Okay.

17 MR. NICKELS: Thank you for your help with that.

18 THE COURT: I'm inviting, if anyone wants to do
19 any kind of research on breach of contact with the
20 third party beneficiary, between Geico and third party
21 beneficiary, I welcome it. Just e-mail it to me if you
22 find anything. There are some cases, but I don't know
23 any with insurance companies, but let me go ahead and
24 take a look at it.

25 MR. CAVENDER: Thank you, Judge.

1 THE COURT: E-mail it to Allison and we will do
2 our own as well.

3 MR. RIVERS: Thank you, Your Honor.

4 (Whereupon, the proceedings in this matter
5 before the Court were adjourned.)
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C E R T I F I C A T E

I, the undersigned, ANNE BOULEY MEYER, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and PARTIAL transcript of record, and of all the proceedings had and evidence introduced in the above captioned case, relative to appeal, in the Circuit Court for South Carolina, on the indicated date.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Anne Bouley Meyer

Anne Bouley Meyer, RPR
Circuit Court Reporter

Plaintiffs Exhibit A

Harry Brown, Esquire
P. O. Box 824
Ridgeland, SC 29936
(843) 762-7920

October 6, 2006

Via/Facsimile: 703-343-0429
Buck Abele
GEICO
P. O. Box 962
Bluffton, SC 29910

Re: **NOTICE OF NON-SPOLIATION OF EVIDENCE**
Automobile/1998 Ford Explorer/Tag 506-TNM
Insurance Policy Number: 1010633004

Dear Buck:

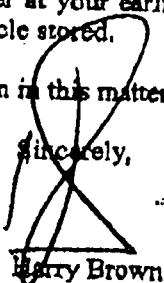
This letter is to confirm that I am the attorney for Tonya Williams/Charles Williams. Please accept this letter as a non-spoliation notice regarding the automobile that Tonya Williams was driving on October 2, 2006, a 1998 Ford Explorer, South Carolina tag number 506-TNM, which is titled to Tonya Williams/Charles Williams.

10-5
There is concern that the vehicle referenced above has a manufacturing defect that led to several personal injuries and one death. On yesterday we spoke and you agreed not to move this vehicle until Monday, October 9, 2006, and we discussed the importance of not altering this vehicle in any way, including seat belts, until my investigators have had a chance to perform a thorough inspection. Also, immediately prior to moving the vehicle, you agreed to notify me of the address of where the vehicle will be stored. It is imperative that this vehicle not be salvaged or sold until we have had a chance to conduct a thorough investigation.

Please call me at the above number at your earliest convenience to let me know the exact address of where you plan to have the vehicle stored.

Thank you for your prompt attention in this matter. I look forward to hearing from you.

Sincerely,


Harry Brown

HB/pf

VEAR

Plaintiff Exhibit H

October 13, 2009

Attorney Harry C. Brown, Sr.
P. O. Box 824
Ridgeland, South Carolina 29936

Re: October 2, 2006, Accident of Ms. Sonya Williams

Dear Mr. Brown:

During our initial telephone conversation, we discussed the possibility of proving or disproving the existence of factors which would indicate product liability in the design or manufacture of Ms. Williams' 1998 Ford Explorer. Thank you for promptly furnishing the needed materials to make the determination.

The tires and wheels have been removed from the vehicle and are unavailable for examination and testing. Therefore, it is my professional opinion that it is impossible for any qualified, impartial accident reconstructionist to make a valid determination of the presence or absence of defects which would constitute product liability. Obviously, the integrity and proper function of the tires and wheels are major factors in the analyses of vehicle roll-over accidents. In this case, their contribution to the cause of the accident or their effect on the severity of the accident cannot be determined.

In reaching this conclusion, I have relied on my over thirty-five years experience as a consultant in problems of applied physics and vehicular accident

Vear Inc.
1500 First Avenue No. Ste R127
Birmingham, Alabama 35203
tollfree: 1.888.323.VEAR
205.307.6543 fax: 205.307.6543
www.vearexperts.com

The driving force in accident reconstruction

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APPENDIX

Items From the Office of Attorney Harry Brown, Sr.

1. South Carolina Traffic Collision Report (TR-310)
2. Copy of Deposition Transcript of Sonya Williams
3. Copy of Deposition Transcript of Marion Smalls
4. Photos provided by Atty. Brown of the Ford Explorer directly after the accident.
5. Letter of Non-Spoliation of Evidence
6. March 29, 2007, letter from GEICO
7. Statement from Parks Auto Salvage Co. regarding sale of rear glass from Williams' Ford Explorer
8. Photos provided by Atty. Brown of Williams' Ford Explorer at Parks Salvage Co.
9. PDF files of photos of Williams' Ford Explorer
10. PDF files of photos of accident site
11. July 17, 2007, letter from David C. Marshall to Darrell T. Johnson, Jr.
12. 8.5" x 11" glossy photos of Williams' Ford Explorer provided by Atty. Brown

Additional Items Obtained and Perused

13. Expert VIN Decoder® output for Williams' Ford Explorer (used to correct errors/misprints in vehicle identification numbers, VIN, on accident reports.)
14. VinPOWER® VIN analysis output for Williams' Ford Explorer
15. Expert AutoStats® output of vehicle specifications for 1998 Ford Explorers
16. CARFAX® Vehicle History Report™ for Williams' Ford Explorer
17. NHTSA (National Highway Traffic Safety Administration) recalls for 1998 Ford Explorers
18. ExpertVIN Decoder for Martin's 1997 Mercury Sable
19. VinPower VIN analysis output for Martin's vehicle
20. Expert AutoStats output of vehicle specifications for 1997 Mercury Sables
21. CARFAX Vehicle History Report for Martin's vehicle
22. NHTSA recalls for 1997 Mercury Sables
23. DeLorme® maps locating accident site and identifying latitude and longitude of the site
24. Google Earth® satellite photos of the accident site
25. Surface-level photos of accident site area from Google Earth

Plaintiff Exhibit H

reconstruction, including many roll-over accidents, and have carefully examined and studied the materials provided by your office. I have also obtained and carefully considered additional vehicle and accident site data from various sources. A list of the materials considered are attached as an appendix.

Sincerely,

Edward L. Robinson

Edward L. Robinson, Ph.D
{Prof. of Physics, & Adj. Prof. of Criminal Justice}
(Forensic Science Graduate Div.)
U.A.B. (Retired)
{ACTAR Accreditation #399}
VEAR Inc.
1500 First Avenue North
Suite R127
Birmingham, AL 35203

Inc: Appendix
lgr

Plaintiff Exhibit H

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, Presiding Judge

RECEIVED

JUN 17 2015

SC Court of Appeals

TONIA D. WILLIAMS, MARION B.)
SMALLS, TYAWUAN WILLIAMS,)
By his Guardians ad Litem, TONIA D.)
WILLIAMS and CHARLES WILLIAMS,)
And SHAQUILLA SHAW, by her)
Guardian ad Litem, RITA SHAW,)

Appellants.)

v.)

GEICO CASUALTY COMPANY,)
GEICO INDEMNITY COMPANY,)
GOVERNMENT EMPLOYEES)
INSURANCE COMPANY, GEICO)
GENERAL INSURANCE COMPANY,)

Respondents.)

Case Number: 09-CP-27-00639

APPELLATE CASE NUMBER
2013-002645

CERTIFICATE OF COUNSEL

This is to certify that the Amended Record on Appeal complies with Rule 21(b), SCACR.

Law Office of R. Thayer Rivers, Jr.



R. Thayer Rivers, Jr.
Post Office Box 668
Ridgeland, South Carolina 29936
(843) 726-8136

Attorney for the Appellant

Ridgeland, South Carolina,
June 15, 2015.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, Presiding Judge

RECEIVED

JUN 17 2015

SC Court of Appeals

TONIA D. WILLIAMS, MARION B.)
SMALLS, T.W. by his Guardians)
Ad Lite, TONIA D. WILLIAMS and)
CHARLES WILLIAMS and S.S. by)
Her Guardian ad Litem,)
RITA SHAW,)

Appellants.)

v.)

GEICO CASUALTY COMPANY,)
GEICO INDEMNITY COMPANY,)
GOVERNMENT EMPLOYEES)
INSURANCE COMPANY, GEICO)
GENERAL INSURANCE COMPANY,)

Respondents.)

Case Number: 09-CP-27-00639

APPELLATE CASE NUMBER
2013-002645

PROOF OF SERVICE

I certify that I have served the Amended Record on Appeal on the Respondents, by depositing a copy of same in the United States Mail, postage prepaid, on June 15, 2015, addressed to their attorney of record, E. Mitchell Griffith, Esquire and Kelly D. Dean, Esquire, Griffith, Sharp & Liipfert, LLC, Post Office Drawer, Beaufort, South Carolina 29901-0570.

June 15, 2015.

Law Office of R. Thayer Rivers, Jr.

A handwritten signature in black ink, appearing to read "R. Thayer Rivers, Jr.", written over a horizontal line.

R. THAYER RIVERS, JR.
Post Office Box 668
Ridgeland, South Carolina 29936
(843) 726-8136

Attorney for the Appellants