

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

JUDGMENT IN A CIVIL CASE **RECEIVED**

CASE NUMBER: 2014CP4004661

MAY 11 2016

Porthemos Curry

Carolina Insurance Group of SC Inc

Maurice Derrick  
DEFENDANT(S)

**SC Court of Appeals**

PLAINTIFF(S)

Submitted by: \_\_\_\_\_

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 \_\_\_\_\_

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:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk : \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT 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
		\$
		\$
		\$

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.

Circuit Court Judge \_\_\_\_\_ Judge Code 2164 Date \_\_\_\_\_

**For Clerk of Court Office Use Only**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of May, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Rachel Gottlieb Peavy

John Robert Murphy

Wesley Dickinson Peel

ATTORNEY(S) FOR THE PLAINTIFF(S) \_\_\_\_\_

ATTORNEY(S) FOR THE DEFENDANT(S) \_\_\_\_\_

Court Reporter \_\_\_\_\_

Clerk of Court Jeanette W. McBride

**RECEIVED**

MAY 11 2016

SC Court of Appeals

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF RICHLAND )  
 )  
 Porthemos Curry, )  
 )  
 Plaintiff(s), )  
 )  
 vs. )  
 )  
 Carolina Insurance Group of SC, Inc. )  
 and Maurice Derrick, )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS

Civil Action No. 14-CP-40-04661

**ORDER**

JEANETTE  
 2016 MAY 29 AM 10:00  
 RICHLAND COUNTY  
 FILED

This matter came before the Court on Defendants' Motion for Summary Judgment, as amended, filed April 15, 2016, and the Plaintiff's cross-motion for summary judgment, as to the affirmative defense of release. A hearing was held on April 26, 2016, with Wesley R. Peel, Esq. appearing on behalf of the Defendants and Rachel G. Peavy, Esq. and T. Jeff Goodwyn, Jr., Esq. appearing on behalf of the Plaintiff.<sup>1</sup> Both parties waived 10 days' notice of hearing.

Oral argument was heard, and both parties submitted memorandum of law in support of their respective positions. Furthermore, the testimony of Plaintiff and Defendants was before the Court, along with affidavits of Plaintiff's counsel. The Court denied the Defendants' Motion from the bench, and took Plaintiff's cross-motion under advisement.

After careful review of the evidence and applicable law, the Court, as discussed in further detail below, hereby grants the Plaintiff's Cross-Motion for Summary Judgment as to the affirmative defense of release, finding that there was no genuine

<sup>1</sup> Defendants' counsel withdrew his Motion for Sanctions, filed April 25<sup>th</sup>, during the course of oral argument.

issue of material fact as to whether the Defendants were "released" from liability in this lawsuit by way of a settlement agreement entered into between Plaintiff and Scottsdale Insurance Company, a prior defendant in this same matter. The Court, having previously denied the Defendants' Motion from the bench, incorporates such denial into this Order, as outlined below.

#### **Undisputed Facts**

This lawsuit arises out of the alleged negligent failure to procure insurance coverage for a vacant structure. Initially, Plaintiff brought claims against Scottsdale Insurance Company, the issuer of the policy, for breach of contract; statutory bad faith; and common law bad faith. The Plaintiff brought claims against Carolina Insurance Group and Maurice Derrick for negligence, later amending the pleading to add claims for gross negligence as against Carolina Insurance Group and Mr. Derrick.

The Second Amended Complaint, filed October 1, 2015, alleges that "Defendants Maurice Derrick and Carolina Insurance are agents of Defendant Scottsdale." Amend. Compl. at ¶134.

It is undisputed that the Defendants have consistently denied that they were agents of Scottsdale in both their Answer to the Second Amended Complaint, filed October 28, 2015, and in their Amended Answer filed April 18, 2016. See ¶14 of Answer and Amended Answer. Furthermore, the 30(b)(6) testimony of Carolina Insurance Group and Maurice Derrick is that there is no agency relationship, or any relationship, between Scottsdale Insurance and Carolina Insurance Group, as excerpted below:

Q. Okay. What's the relationship between Carolina Insurance and Scottsdale?

A. We don't have a relationship -

Q. Okay.

A. With them.

Q. So, you have no relationship with Scottsdale, no authority to bind Scottsdale, and any conduct of you or the agents on your behalf is not the conduct of Scottsdale, is it?

A. Correct.

Q. You have not relationship with Scottsdale Insurance Company?

A. Correct.

Dep. Tr. of Carolina Insurance Group at pp. 26 -27, pp. 76-77.

Q. Okay. Mr. Derrick, you're not employed by Scottsdale Insurance Company or any of its affiliates, are you?

A. Correct.

Q. In fact, you have no direct relationship with Scottsdale Insurance Company as a producing agent in this case?

A. I do not.

Q. You have no authority to issue a policy on behalf of Scottsdale?

A. I do not.

Q. You have no authority to bind Scottsdale to a policy?

A. I do not.

Q. . . . [I]n this transaction . . . you represented the interest of Mr. Curry?

A. Correct.

Q. And in doing this, you dealt with Tapco, who in turn represented the interest of Scottsdale?

A. Correct.

Derrick Dep. Tr. at pp. 90-91

In September 2015, the parties participated in a mediation conference. At that time, Scottsdale Insurance was still a defendant in the case. As a result of the mediation and subsequent negotiations, Plaintiff reached a settlement agreement with Scottsdale Insurance Company.

On November 25, 2015, counsel for Scottsdale, J.R. Murphy, wrote a letter to Plaintiff's counsel whereby he wrote that he was enclosing a check, along with a Release (hereafter "the Release") and Stipulation of Dismissal for signature. Wesley Peel, Esq. was copied on the letter; however, a copy of the Release and Stipulation were not provided to Mr. Peel at that time. Plaintiff did not receive a request for a copy of the Release from Mr. Peel until April 8, 2016. It is undisputed that the Defendants did not contribute any money to the Scottsdale settlement, and it is further undisputed that there is no mention of either Carolina Insurance Group of SC, Inc. or Maurice Derrick in the Release.

Plaintiff executed the Release. Counsel for Carolina Insurance Group and Maurice Derrick executed the Stipulation of Dismissal as to Defendant Scottsdale

Insurance Company. The Stipulation provided that *"the Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal."* The Stipulation was filed with the Court on December 30, 2015.

Discovery continued in the case following Scottsdale's dismissal. With a date certain trial set for April 18, 2016, Defendants' counsel contacted Plaintiff's counsel to explore a possible settlement of the matter.

The parties thereafter commenced settlement negotiations. On the morning of Friday, April 8<sup>th</sup>, Mr. Peel requested that Plaintiff's counsel provide him with a copy of the Release, which was promptly provided to him later that day. Thereafter, the parties continued their settlement negotiations; however, by the end of business Friday, they had apparently reached a stalemate. The parties proceeded to depose expert witnesses on April 11<sup>th</sup> and prepared for a date certain trial on April 18<sup>th</sup>. On April 15<sup>th</sup>, Defendants filed a motion for summary judgment, asserting the defense of release. On April 18<sup>th</sup>, Defendants moved to amend their answer to assert the affirmative defense of release; the motion to amend was granted by the Honorable Jocelyn Newman over Plaintiff's objection.

#### Legal Standard

"Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. 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." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009) (internal citations omitted).

**I. The Scottsdale Release Does Not Release These Defendants**

Defendants argue that they are entitled to summary judgment on two (2) separate grounds: first, that they were released in the Scottsdale release by virtue of language releasing Scottsdale "and its agents"; and, second that they were released under a joint tortfeasor theory of liability. In denying Defendants' motions under Rule 56, SCRPC, the Court addresses each of these arguments in turn.

***Defendants Are Not "Agents" of Scottsdale***

The Release provides that "Porthemos Curry, in consideration of the sum of \$85,000, the receipt of which from Scottsdale Insurance Company is hereby acknowledged, does hereby release and forever discharge Scottsdale Insurance Company, its agents, servants, employees, successors and assigns of and from any and all actions, causes of actions, demands and/or claims of whatsoever kind . . ."

Defendants argue that because Plaintiff's complaints alleged that the Defendants were "agents" of Scottsdale, the language of the Release was intended to release not just Scottsdale, but these Defendants as well. As previously noted, it is undisputed that the Defendants denied this allegation in both their answers and their deposition testimony.

Defendants' argument fails as a matter of law because "[a]llegations in a complaint denied in answer are evidence of nothing." *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App. 1999). Only "facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the

action." *Elrod v. W.W. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964). Furthermore, "a party to an action is bound by the testimony of his own witnesses where he does not prove the facts to be otherwise than as such witnesses testified them to be." *Id.* (citing *Rakestraw v. Allstate Ins. Co.*, 238 S.C. 217, 119 S.E.2d 746 (1961)).

"Once a contract is before the court for interpretation, the paramount concern of the court is to give effect to the intention of the parties." *Middleborough Horizontal Property Regime v. Montedison S.p.A.*, 320 S.C. 470, 465 S.E.2d 765, 770 (Ct. App. 1995). "The purpose of all rules of contract construction is to ascertain the intention of the parties to the contract." *Parker v. Byrd*, 309 S.C. 189, 420 S.E.2d 850, 852 (1992); See also *Columbia East Associates vs. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989) (noting "the main concern of the court is to give effect to the intention of the parties.")

A party "cannot create ambiguity when it does not exist within the four corners....words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed." *Silver v. Abstract Pools*, 376 S.C. 585, 658 S.E.2d 539, 542 (Ct. App. 2008) (citing *McPherson v. J.E. Serrine & Co.*, 206 S.C. 183, 33 S.E.2d 501 (1945)) (emphasis added).

"It is a question of law for the court whether the language of a contract is ambiguous. In determining as a matter of law whether a contract is ambiguous, the court must consider the contract as a whole, rather than deciding whether phrases in isolation could be interpreted in various ways: [o]ne may not, by pointing out a single sentence or clause, create an ambiguity. Whether a contract is ambiguous is to be

determined from the entire contract and not from isolated portions of the contract.”

*Silver, supra.*

Looking at the Release as a whole, the Court finds that the plain language of the Release shows that it clearly and unambiguously releases only Scottsdale (and its agents and employees) and not these Defendants, and further finds that the intent of the parties was that it was to only encompass claims against Scottsdale. There is no mention of Carolina Insurance Group or Maurice Derrick in the Release.

Furthermore, there is no evidence in the record that Carolina Insurance Group or Maurice Derrick are “agents, servants, or employees” of Scottsdale. In fact, the testimony of both Defendants is that there was no agency relationship between Carolina Insurance and Scottsdale whatsoever. Finally, Defendants’ counsel executed a Stipulation of Dismissal in December 2015, upon receiving notice that Plaintiff had settled with Scottsdale, which specifically stated that “the Plaintiff’s case against the remaining Defendants shall not be affected by this Dismissal.” The Court finds that the intent of the parties to the Release, and the intent of the non-parties (here Carolina Insurance Group and Mr. Derrick), could not be more clear.

Defendants’ reliance upon the case of *Postal v. Mann*, 308 S.C. 385, 418 S.E.2d 322 (Ct. App. 1992) is unpersuasive, given that in that case, a party sought to offer testimony at trial that differed from his previous admission in his answer. There, the Court of Appeals held that the party was judicially bound by the admitted allegation.

Again, the only “evidence” that Defendants rely upon in making this argument is a denied allegation in the Plaintiff’s pleadings. Defendants’ reliance upon a theory of

"judicial admission" espoused by the Federal courts of appeals in the Second, Fifth, Seventh, and Eighth circuits is unpersuasive.<sup>2</sup>

The Court of Appeals in *Vermeer* succinctly stated the law of South Carolina. Plaintiff made a mere allegation in his complaint; the Defendants denied it. If the Defendants had admitted the allegation, that arguably could be deemed a "judicial admission"; however, the Defendants denied it repeatedly. The Court is mindful that "[a]ll pleadings shall be so construed as to do substantial justice to all parties." Rule 8(f), SCRPC. Here, there is a mere allegation denied by the Defendants - accordingly, I find no "admission" under South Carolina law and hereby deny Defendants' Motion for Summary Judgment.

***Defendants are Not Discharged Under a Joint Tortfeasor Theory***

Defendants argue that they are entitled to summary judgment as "joint tortfeasors" of Scottsdale Insurance Company. In support of this position, they rely upon the language of the Release, wherein Plaintiff acknowledged that **"the consideration expressed herein constitutes full payment for all damages, losses, or injuries . . . for policy benefits or consequential damages recoverable from Scottsdale Insurance Company which have resulted or may result from the loss aforesaid."** (emphasis added).

According to the position advanced by the Defendants, this language means that Mr. Curry received "full payment" for all damages recoverable in this lawsuit when he settled with only Scottsdale, and therefore cannot recover any additional damages - on his

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<sup>2</sup> The Court has taken notice of the Federal opinions submitted by Defendants' counsel at the hearing, as well as those cited in Defendants' Amended Memorandum of Law.

separate negligence claims – against Carolina Insurance Group and/or Maurice Derrick.<sup>3</sup> The Court finds this argument without merit. The Plaintiff's claims against Scottsdale were distinct from those pending against these Defendants, and could result in an award of different types of damages.<sup>4</sup> Defendants' belief that the amount recovered by Plaintiff from Scottsdale represents the exact same damages Plaintiff seeks from them, and thereby entitles them to judgment in their favor, is not supported by the common law and fails as a matter of law under the *South Carolina Contribution Among Tortfeasors Act*, S.C. Code Ann. §15-38-10, et seq., which provides a mechanism for "set-off", not discharge.

In 1988, the Legislature codified the equitable principles of joint tortfeasor set-offs by passing the South Carolina Contribution Among Tortfeasors Act (the "Act"), S.C. Code Ann. §15-38-10 -70.

Specifically, Section 15-38-50 provides: "When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or same wrongful death: (1) **it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide**, but it reduces the claim against the other to the extent of any amount stipulated by the release or the covenant or in the amount of consideration paid for it, whichever is greater, and (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." (emphasis added)

The Supreme Court recently held that ". . . the Act represents the Legislature's determination of the proper balance between preventing double-recovery and South

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<sup>3</sup> The *gravamen* of Defendants' arguments appears to be that they are the fortunate, if unintended, beneficiary of Scottsdale's settlement agreement, in that they are entitled to reap the rewards of Scottsdale's settlement (i.e. a complete release) without having paid any monies towards such settlement.

<sup>4</sup> For instance, a claim for statutory bad faith, under S.C. Code Ann. 38-59-40, provides for an award of attorney's fees in an amount not to exceed one-third the amount of any judgment.

Carolina's 'strong public policy favoring the settlement of disputes.'" *Riley v. Ford Motor Co.*, 414 S.C. 185, 195; 777 S.E. 2d 824, 830 (2015) (citing *Chester v. S.C. Dep't of Pub. Safety*, 338 S.C. 343, 698 S.E.2d 559 (2010)).

Defendants rely upon the case of *Bartholomew v. McCartha*, 255 S.C. 489, 179 S.E.2d 912 (1971) for the proposition that the release of one tortfeasor releases others who wrongfully contributed to the plaintiff's injuries where the release "reflects the intention of the parties or unless plaintiff has, in fact, received full compensation amounting to a satisfaction." *Id.* at 914.

Again, there is no evidence that the Plaintiff received "full compensation amounting to a satisfaction"; in fact, Plaintiff's own testimony is that "the amount I received from Scottsdale did not cover all of my damages in the case". See Affidavit of Porthemos Curry at 16.

Defendants argue that the Release constitutes a "full compensation amounting to a satisfaction" under *Ecclesiastes Prod. Ministries v. Outparcel Assoc. LLC*, 374 S.C. 483, 649 S.E.2d 494, 496 (2007). However, the Court in *Ecclesiastes* clearly stated that a "satisfaction is generally defined as the discharge of an obligation by *paying a party what is due to him*", and as noted by the Court, it is undisputed that the Defendants here have not paid any monies to the Plaintiff.

Accordingly, the Court finds that the Release, and the Uniform Contribution Among Tortfeasors Act, does not serve to discharge these Defendants, but merely provides for a means for the Defendants to assert a "set-off" argument at the post-

verdict stage of trial in the event they are successful in asserting that they are "joint tortfeasors" under the Act.<sup>5</sup> For these reasons, the Defendants' Motion is denied.

***There is No Genuine Issue of Material Fact as to the Defense of Release***

After careful review, I hereby find as a matter of law that the Release is neither ambiguous nor capable of any construction other than the one apparent on its face – that it explicitly releases Scottsdale Insurance Company and solely Scottsdale Insurance Company, and that it is a contract clearly and solely between Porthemos Curry and Scottsdale Insurance Company. Accordingly, the Court finds that the Plaintiff is entitled to summary judgment as to the affirmative defense of release. See Middleborough Horiz. Prop. Regime, supra ("Once a contract is before the court for interpretation, the paramount concern of the court is to give effect to the intention of the parties.")

"Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *McCune v. Myrtle Beach Indoor*, 364 S.C. 242, 612 S.E.2d 462, 464 (Ct. App. 2005) (internal citations omitted).

"Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result. Where one construction would make a contract unusual or extraordinary and another, equally

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<sup>5</sup> The Court makes no ruling as to whether the Defendants are "joint tortfeasors" with Scottsdale; however, the Court specifically holds that, having ruled in favor of the Plaintiff on his cross-motion, these Defendants cannot rely upon the Release, at the post-verdict stage, in an attempt to argue that their liability was resolved under a joint tortfeasor theory of liability by way of language contained in the Release. The Court makes no finding as to whether Defendants are entitled to a "set-off" in light of the Supreme Court's ruling in *Riley v. Ford Motor Company*.

consistent, would make the contract reasonable, fair and just, the latter construction will prevail." *Id.* at 465. (citing *Georgetown Mfg. v. S.C. Dept. of Agric.*, 301 S.C. 514, 392 S.E.2d 801 (Ct. App. 1990) (citing *C.A.N. Enters., Inc. v. S.C. Health & Human Servs.*, 296 S.C. 373, 373 S.E.2d 584 (1988)). "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 607 S.E.2d 362 (Ct. App. 2004).

The language of the Release clearly and unambiguously provide for a settlement agreement between Mr. Curry and Scottsdale Insurance Company. The evidence before the Court, outlined above, overwhelming indicates that both the Plaintiff and these Defendants did not intend for the Scottsdale Release to encompass the pending claims; the opposing party has presented no specific facts that show a genuine issue of fact for trial as to this affirmative defense. The Court finds that any ruling denying summary judgment as to this affirmative defense would produce "an absurd result" in contravention of longstanding South Carolina law.

ACCORDINGLY, the Court hereby DENIES the Defendants' Motion for Summary Judgment, as amended, and GRANTS the Plaintiff's cross-motion for summary judgment as to the affirmative defense of release.

AND IT IS SO ORDERED.

*Retrod*

The Honorable Robert E. Hood

Dated:

5/6/16

At:

COLUMBIA