

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2016-000986

Porthemos Curry.....Respondent/Appellant,

v.

Carolina Insurance Group of SC, Inc. and Maurice
Derrick,.....Appellants/Respondents.

RESPONDENT/APPELLANT'S INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

- I. Did the lower court abuse its discretion in granting Appellant Agency's Motion to Amend its answer at trial to assert the affirmative defense of release, where the Agency was on notice of Respondent Customer's settlement with Scottsdale Insurance Company for many months prior to trial and never asserted it was released until trial; there was no factual support for the granting of the amendment; such amendment was highly prejudicial; Customer had no notice of this new issue; and the lower court's granting of the Motion to Amend resulted in significant delay and expense, including the cancellation of two date certain trials?¹**

¹ In the event this Court finds that the lower court abused its discretion in granting the motion to amend the Agency's answer to assert the defense, the Respondent/Appellant respectfully contends that the Appellants' appeal from the granting of summary judgment in favor of Customer would be moot. See Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996) ("This [c]ourt will not pass on moot and academic questions or make an adjudication where there remains no actual controversy")

STATEMENT OF THE CASE

This is a cross-appeal by the Respondent/Appellant Porthemos Curry ("Mr. Curry") from the lower court's granting of Carolina Insurance Group and Maurice Derrick's (collectively "the Agency") motion to amend its answer, at trial, to assert the affirmative defense of release. The Agency has appealed the granting of summary judgment in favor of Mr. Curry as to this affirmative defense of release, which is addressed in a separate brief.

This lawsuit has been pending since July 2014. Compl. Customer asserts claims for negligence and gross negligence in the procurement of an insurance policy against Appellants/Respondents Carolina Insurance Group and its agent, Maurice Derrick (collectively "the Agency"), and claims for breach of contract and bad faith against Scottsdale Insurance Company, the issuer of the policy. See Second. Amend. Compl.

In November 2015, Customer settled with Scottsdale and executed a Release in exchange for the payment of \$85,000 by Scottsdale. See Release. On November 25, 2015, Scottsdale notified the Agency that it had settled with Customer by way of payment of \$85,000 and the execution of a release. See JR Murphy Ltr.; Tr. J. Hood Hrg. at p. 10, l. 1-14. On December 14, 2015, Attorney Murphy's office forward a copy of the Stipulation of Dismissal as to Scottsdale to Wesley Peel, Esq., the attorney for the Agency. See Stetson Ltr.; Tr. J. Hood Hrg. at p. 10, l. 15 – p. 11, l. 7. Attorneys for Customer and for the Agency executed a Stipulation of Dismissal as to Scottsdale Insurance Company, which was filed with the Richland County Clerk of Court in December 2015. See Stip. Of Dism.

On December 8, 2015, the Agency's attorney contacted the Honorable Alison R. Lee, Chief Administrative Judge for Richland County, to request a status conference and to confirm that the Agency still wanted a date certain trial in April 2016, due to various issues with expert witness availability. Peel Ltr. The case was ultimately set by Judge Lee for a date certain trial beginning on April 18, 2016.

On April 8, 2016, the Agency's counsel requested a copy of the Scottsdale Release, which was provided to him that same day. E-Mail of Atty. Peel; Tr. J. Newman Hrg. at p. 37, l. 17-19. On April 11, 2016, the parties deposed their respective expert witnesses in Charleston. On April 15, 2016, the Agency filed a motion for summary judgment, asserting that the Agency was released as a result of the Scottsdale Release and settlement. Def. Mot. for Summ. J. The Agency argued in its supporting memorandum that "the language of the [Scottsdale] release indicates that the Plaintiff intended to release Carolina Insurance Group and [Maurice] Derrick, in addition to Scottsdale." Amend. Mem. in Supp. of Summ. J. at p. 6. The Agency further alleged that "there is no limited (*sic*) language in the release as to any other claims, injuries, or parties, which could have easily been added if that was the intent." Id.

As this defense theory had never before been raised, on April 18, 2016 – the first day of the date certain trial before the Honorable Jocelyn Newman - the Agency filed a motion to amend their answer to assert the affirmative defense of release. Def. Mot. to Amend. Customer filed a cross-motion for summary judgment as to the affirmative defense of release. Pl. Mot. for Summ. J.

The parties proceeded to qualify a jury. Judge Newman granted the Agency's motion to amend its answer to assert the additional defense of release, over the objections

of Customer's counsel. J. Newman Tr. at p. 56, l. 4 – p. 60, l.1. Judge Newman indicated that she was inclined to hear the Agency's motion for summary judgment as to the affirmative defense of release; however, Customer objected to the hearing of the Agency's motion without the requisite 10 days' notice under Rule 56, SCRCP. J. Newman Hrg. Tr. at p. 78, l. 18-23.

On April 19, 2016, Judge Newman determined that the Agency's summary judgment motion could not properly be heard by her without the required 10 days' notice under Rule 56. J. Newman Hrg. Tr. at p. 84, l. 19 -25. Accordingly, Judge Newman continued the trial and set the case for a new date certain trial on May 16, 2016. Id. at p. 99, l. 6-15. Judge Newman set the summary judgment motions for hearing on April 25, 2016 before the Honorable Robert E. Hood. Id. at p. 98, l. 1-25. The hearing was then moved to April 26th by the Clerk of Court's office.

Judge Hood denied the Agency's motion for summary judgment from the bench and took Customer's cross-motion under advisement, informing the parties that he would promptly issue a ruling, given that the new date certain trial was fast approaching. J. Hood Hrg. Tr. at p. 41, l. 14-15; p. 51, l. 4-6.

On May 6, 2016, Judge Hood issued his order granting Customer's cross-motion for summary judgment. J. Hood Order. On May 11, 2016, the Agency filed a Notice of Appeal, resulting in the cancellation of the second date certain trial.

STATEMENT OF FACTS

This lawsuit arises out of the alleged negligent failure to procure insurance coverage for a vacant structure. Customer brought claims against Scottsdale Insurance Company, the issuer of the policy, for breach of contract; statutory bad faith; and common law bad faith. Customer also brought claims against his insurance agents, Carolina Insurance Group and Maurice Derrick (collectively, “the Agency”) for negligence and gross negligence in the procurement of the Scottsdale insurance policy. Second Amen. Compl.

The *gravamen* of the complaint is that Customer believed that the Agency procured a vacant structures policy with a term of coverage that ran from December 2, 2013 to March 2, 2014. See Second Amend. Compl. The Agency contends that it properly procured a renewal policy that ran from November 21, 2013 to February 21, 2013. J. Hood Hrg. Tr. at p. 21, l. 16 – p. 22, l. 6. The term of coverage ultimately became important because the vacant structure – a modest home being built by Customer on his property off Monticello Road in Columbia – suffered severe damage when a stolen car ran into the house sometime before midnight on February 21, 2013 and caught fire. See Second Amend. Compl. Because Scottsdale Insurance Company, the issuer of the policy, contended that the policy expired at 12:01 a.m. on February 21st, Customer’s claim was denied as being outside the coverage period. Id.

The Second Amended Complaint, filed October 1, 2015, alleges that “Defendants Maurice Derrick and Carolina Insurance are agents of Defendant Scottsdale.” Amend. Compl. at ¶34. This was also alleged in prior complaints.

It is undisputed that the Agency has consistently denied that they were agents of Scottsdale - in both their Answer to the Amended Complaint, filed October 28, 2015, and in their Amended Answer filed April 18, 2016. See Ans. and Amend. Answer at ¶14.

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:

Questioning of Joel Sauls, 30(b)(6) designee for Carolina Insurance Group

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 no relationship with Scottsdale Insurance Company?

A. Correct.

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

Questioning of Maurice Derrick, agent with Carolina Insurance Group

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 Customer?

A. Correct.

Q. And in doing this, you dealt with TAPCO, who in turn represented the interest of Scottsdale?²

A. Correct.

Derrick Dep. Tr. at pp. 90-91.

In September 2014, the Agency served Customer with Requests for Production which sought "*all e-mails, correspondence, receipts, bills, invoices, statements, between you and your agents, or you and any other party, concerning this claim, including but not limited to: (a) Tapco Underwriters; (b) Scottsdale Insurance Company; (c) Carolina Insurance Group of SC, Inc.; and (d) Maurice Derrick both prior and subsequent to the execution of the Policy.*" See Def. Req. for Prod.

In September 2015, the parties participated in a mediation conference. As a result of the mediation and subsequent negotiations between Scottsdale and Customer's counsel with the assistance of the mediator, Customer reached a settlement agreement with

² TAPCO is a general agent for Scottsdale, an excess and surplus lines insurance company. TAPCO is authorized to handle certain underwriting and issue policies on behalf of Scottsdale. Independent agencies such as Carolina Insurance Group submit quote requests and applications to TAPCO, not to Scottsdale.

Scottsdale Insurance Company. See Release; Stip. of Dism.; J.R. Murphy Letter; Stetson Letter.

On November 25, 2015, the attorney for Scottsdale, J.R. Murphy, wrote a letter to Customer's counsel whereby he wrote that he was enclosing a check in the amount of \$85,000, along with a Release (hereafter "the Scottsdale Release") and Stipulation of Dismissal for signature. The Agency's attorney, Wesley Peel, was copied on the letter. Murphy Ltr.

Customer executed the Scottsdale Release, which contains no mention of either Carolina Insurance Group or Maurice Derrick (collectively "the Agency"). The Release states that "the consideration expressed herein constitutes full payment for all damages . . . recoverable from Scottsdale Insurance Company" – there is no mention of damages recoverable from other parties. Like most releases of corporations, the Release also releases the agents, employees and servants of Scottsdale Insurance Company. See Release.

On December 14, 2015, J.R. Murphy's associate, Hannah D. Stetson, wrote Mr. Peel to forward him a Stipulation of Dismissal as to Scottsdale for Mr. Peel's signature. See Stetson Ltr. The Stipulation provided that "*the Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal.*" Stip. Of Dism. The Stipulation was signed by Mr. Peel and filed with the Richland County Clerk of Court on December 30, 2015.

On April 8, 2016, Mr. Peel requested a copy of the Scottsdale Release, which was promptly provided to him. Peel E-mail; J. Newman Hrg. Tr. at p. 56, l. 9-10. The parties

proceeded to depose expert witnesses on April 11th and prepared for the date certain trial on April 18th before the Honorable Jocelyn Newman.

On April 18th, the parties qualified a jury and Judge Newman took up various pre-trial matters, including several motions *in limine*, after the lunch break. See J. Newman Hrg. Tr. On this same day, the Agency moved to amend their answer to assert the affirmative defense of release; the motion to amend was granted by Judge Newman, over Customer's objection. J. Newman Hrg. Tr. at p. 56, l. 4 – p. 60, l. 1; Def. Mot. to Amend.

The Agency's attorney alleged that Customer's counsel had failed to produce a copy of the Scottsdale Release, in response to Agency's Request for Production for copies of correspondence, e-mails, etc., but that he believed that such failure was inadvertent. Id. at p. 57, l. 16-25; p. 92, l. 7-11; p. 37, l. 17- p. 38, l. 2³ It is undisputed that Mr. Peel never requested a copy of the Scottsdale Release until April 8, 2016. J. Newman Hrg. Tr. at p. 37, l. 17-19. At the hearing on the Motion, Agency's counsel never identified the discovery request that he alluded to as applicable, nor was the discovery request before the Court or provided to counsel. See Id. at pp. 37-38; p. 56-60.

³ The issue of whether the Request for Production which Agency relied upon in this argument to Judge Newman actually serve as a request for the Scottsdale Release is addressed later in the Brief.

ARGUMENT

I. The Granting of the Agency's Motion To Amend Its Answer at Trial Was An Abuse of Discretion

This matter was set for a date certain trial, beginning on April 18, 2016, by the Honorable Alison R. Lee, in order to accommodate the schedule of the Agency's expert witness. See E-mails; Peel Ltr.⁴ On the first day of trial, the Agency moved to amend its answer to assert the additional defense of release and the motion was argued that same day. Def. Mot. to Amend.; J. Newman Tr. Hrg. at p. 56, l. 4 – p. 60, l. 1. The Agency asserted that it had no knowledge of the language contained in the Scottsdale Release until it received a copy of the Release from Mr. Curry's attorney on April 8, 2016, and that counsel had failed to produce the Release by way of a supplemental response to an unidentified discovery request. Id. at pp. 37-38; pp. 56-60.

Rule 15(a), SCRCF provides that when more than thirty days have passed since a responsive pleading is served, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and **does not prejudice any other party**". While the matter of allowing amendments is left to the sound discretion of the trial judge, this power should not be exercised indiscriminately or to surprise or prejudice an opposing party. See Hale v. Finn, 388 S.C. 79, 87-88, 694 S.E.2d 51, 56 (Ct. App. 2010); See also Collins Entertainment v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005) (finding denial of

⁴ Because the motion was filed by the Agency, served upon Mr. Curry's counsel, and heard by the lower court within a matter of hours on the first day of trial, and the parties qualified a jury and took up various motions *in limine*, counsel could not brief the issue prior to the lower court's hearing on the motion. Accordingly, counsel relies upon correspondence to the Chief Administrative Judge, Alison R. Lee, to evidence the amount of time that went into scheduling the first date certain trial of this matter.

motion to amend proper because the prejudice that the civil procedure rules envision, as would warrant denial of a motion to amend the pleadings, is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it); See also Hood v. Sec. Ins. Co. of New Haven, 247 S.C. 71, 145 S.E.2d 526 (1965) (denial of motion to amend where the amendment was unrelated to the act originally pleaded).

The Agency contended that Mr. Curry's claims for negligence and gross negligence in the procurement of the policy were barred because 1.) Mr. Curry alleged that the Agency was an agent of Scottsdale in his pleadings (which was always denied) and since the Release released Scottsdale and its agents, employees, and servants, they were included in the Release and 2.) the Release constituted a "full compensation amounting to a satisfaction" of Mr. Curry's claims under a theory of joint tortfeasor liability because the Release stated 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." See Release; Mot. to Amend; Amend. Mem. in Supp. of Summ.

At the hearing, the Agency argued that its discovery requests to Customer would have encompassed the Scottsdale Release, and alluded to, but never produced to the lower court or opposing counsel, Agency's Request for Production No. 6, which, in September 2014, had requested the following information from Customer:

"All emails, correspondence, receipts, bills, invoices, statements, between you and your agents, or you and any other party, concerning this claim, including but not limited to: (a) Tapco Underwriters; (b) Scottsdale Insurance Company; (c) Carolina Insurance Group of SC, Inc.; and (d) Maurice Derrick both prior and subsequent to the execution of the Policy."

See Def. Req. for Prod. (Served Sept. 2014)

Looking at the plain language of the Request, it clearly does not request releases or covenants not to execute or settlement agreements; it asks for financial records (i.e. receipts, bills, invoices, statements) and emails and correspondence. The Release is not an “email” and it is not “correspondence”. “Correspondence” is defined as “communication by means of letters or email: the letters or e-mail exchanged.” Merriam-Webster Dictionary. Black’s Law Dictionary defines a “correspondent” as “a writer of letter or letters.” Black’s Law Dictionary.

It is undisputed that the Agency’s attorney never requested a copy of the Release until April 8, 2016. It is further undisputed that the Agency was on notice of the Scottsdale Release and settlement as of November 2015 when it received JR Murphy’s letter. Because the Agency never asserted that it was, or could be, a party to the Scottsdale Release – as further evidenced by the Agency’s execution of the Stipulation of Dismissal which specifically reserved Mr. Curry’s claims against the Agency – the Agency’s motion to amend at trial to assert this new and novel defense should have been denied and the lower court’s granting of the motion was an abuse of discretion, as the shock, surprise, and prejudice to Mr. Curry was substantial. The lower court erred because it found that there were “earlier written requests for [the Release]”; however, the undisputed fact is that the Agency only requested the Scottsdale Release once – on April 8, 2016, - and never sent a letter to Customer’s attorneys, after receiving notice of the Release and settlement in November 2015, that it considered the Release to be responsive to discovery requests.

Furthermore, the lower court abused its discretion because the Agency actually never offered into evidence or produced a copy of the discovery request it referred to at oral argument; accordingly, the lower court erred in “taking its word” that the discovery request that Agency’s counsel was referencing actually requested a settlement agreement or release. By failing to review the actual discovery request that Agency alluded to (but never produced at the hearing), the lower court abused its discretion when it found that the delay in Agency’s filing of a motion to amend its answer “was a direct result of Plaintiff’s delay in providing necessary documents to Defendants.” J. Newman Order; See State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006) (“an abuse of discretion occurs when the trial court’s ruling is based upon an error of law . . . or, when based upon factual conclusions, the ruling is without evidentiary support . . .”); See also Rish v. Rish 296 S.C. 14, 370 S.E.2d 102 (Ct. App. 1988) (an abuse of discretion may be found if the conclusions reached by the lower court are without reasonable factual support.)⁵

To allow the Agency, at trial, to assert this affirmative defense – in contravention of its sworn testimony - was an abuse of discretion and this Court should find that the granting of the motion to amend was an abuse of discretion, given the lack of factual support; the lack of notice to the Customer; and a lack of opportunity to refute it.

The new defense of the Agency – which has continuously denied it was an agent of Scottsdale –was totally unrelated to any position taken by the Agency leading up to April 18th and the lower court abused its discretion in granting the motion. Dep. Tr. of Carolina Insurance Group at pp. 26 -27, pp. 76-77; Derrick Dep. Tr. at pp. 90-91.

⁵At the hearing, Customer’s counsel was also not provided with a copy of the discovery request that Agency’s counsel was alluding to but acknowledged that if the request did seek settlement documents such as the Release, it would have been error for her to fail to provide it. J. Newman Hrg. Tr. at p. 58, l. 1-17. However, after reviewing the discovery request alluded to by Agency’s counsel following the hearing, Agency’s counsel submits that the Release is not responsive to the RFP No. 6.

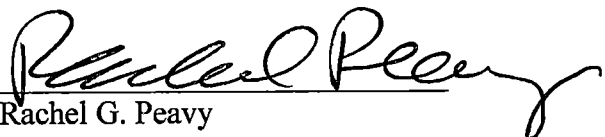
If the Agency actually believed it was subject to the Release, then it would never have executed a stipulation of dismissal as to Scottsdale which specifically mandated that Mr. Curry's claims against the Agency would go forward. See Stip. Of Dism. If the Agency actually believed it was subject to the Release, it would never have communicated with the lower court time and time again after November 2015 regarding the scheduling of the date certain trial. See Peel Ltr. To J. Lee; E-mail to J. Lee. The Agency received notice on November 25, 2015 that there was a settlement; a payment of \$85,000; and a release to be executed by Mr. Curry. It did nothing. Ltr. J.R. Murphy. As a result, this Court should find that the lower court abused its discretion in granting the Motion to Amend.

Conclusion

Mr. Curry respectfully request that this Court issue an order finding that the lower court abused its discretion in granting the Agency's Motion to Amend at trial; strike the defense; dismiss the appeal of the Agency as moot; and remand the case to the circuit court for immediate trial. The prejudice is severe, the surprise great. As a result of this new defense, not one, but two date certain trials have been cancelled.

Respectfully submitted,

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September 7, 2016

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APPEAL FROM RICHLAND COUNTY
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Jocelyn Newman, Circuit Court Judge

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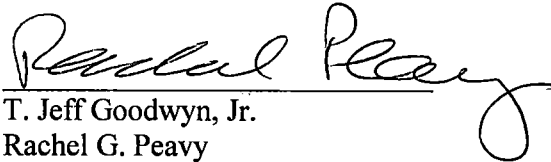
v.

Carolina Insurance Group of SC, Inc. and Maurice
Derrick.....Appellants/Respondents.

PROOF OF SERVICE

I certify that I have served the **Respondent/Appellant's Initial Brief of Appellant** along with **Respondent/Appellant's Designation of Matter to be Included in the Record on Appeal** on Wesley D. Peel, Esquire and Bryan M. J. Triplett, Esquire, Attorneys for the Appellants/Respondents, at the address listed below by depositing a copy of same in the United States Mail, postage prepaid, on September 7, 2016.

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September 7, 2016

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
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SEP 07 2016

SC Court of Appeals

RE: *Porthemos Curry v. Carolina Insurance Group of SC, Inc. and Maurice Derrick*
Appellate Case No.: 2016-000986
Our File No.: 3000-0106

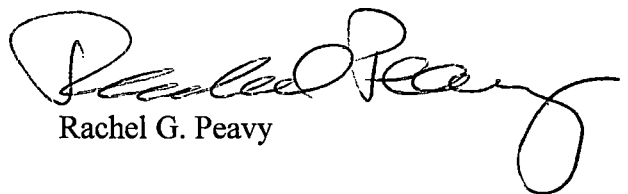
Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the **Respondent/Appellant's Initial Brief of Appellant and Designation of Matter to Be Included in the Record on Appeal**, along with the Proof of Service, in regard to the above-referenced matter.

By copy of this letter and as evidenced by the attached Proof of Service, I am serving a copy of the Respondent/Appellant's Initial Brief of Appellant and Designation of Matter upon Wesley D. Peel, Esquire, and Bryan M. J. Triplett, Esquire, attorneys for the Appellants/Respondents.

Please accept my highest regards.

Very truly yours,



Rachel G. Peavy

RGP/msb
Enclosures

cc: Wesley D. Peel, Esquire (w/encl.) (via US Mail)
Bryan M. J. Triplett, Esquire (w/encl.) (via US Mail)
Porthemos Curry (w/encl.) (via US Mail)