

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2014-CP-40-04661

RECEIVED
OCT 11 2016
SC Court of Appeals

Porthemos Curry.....Respondent/Appellant

v.

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

RESPONDENTS' INITIAL BRIEF OF APPELLANTS RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Arguments

I. THE COURT BELOW PROPERLY GRANTED CIG’S MOTION TO AMEND BECAUSE CURRY SUFFERED NO PREJUDICE DUE TO THE AMENDMENT AND HAS NOT DESCRIBED ANY IN HIS BRIEF. 4

II. THE SUFFICIENCY OF CIG/DERRICK’S AMENDED DEFENSE OF RELEASE IS NOT APPROPRIATE TO CONSIDER WHEN GRANTING OR DENYING A MOTION TO AMEND A PLEADING. 6

III. CURRY’S ARGUMENT REGARDING THE TIMING OF THE PRODUCTION OF THE EXECUTED RELEASE TO CIG ARE WITHOUT MERIT AS CURRY HAS NOT SUFFERED ANY PREJUDICE AND CURRY’S COUNSEL ADMITTED THAT IT WAS AN ERROR NOT TO PROVIDE THE EXECUTED RELEASE. 7

Conclusion 8

TABLE OF AUTHORITIES

CASES

Duncan v. CRS Serrine Eng'rs, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 117-18 (Ct. App. 1999)4, 8
N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232-33, 599 S.E.2d 462, 465-66 (Ct. App. 2004)6
Pruitt v. Bowers, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998)4

RULES

South Carolina Rules of Civil Procedure 15(a)4
South Carolina Rules of Civil Procedure 565

STATEMENT OF ISSUES ON APPEAL

THE TRIAL COURT PROPERLY GRANTED CAROLINA INSURANCE GROUP AND MAURICE DERRICK'S MOTION TO AMEND THEIR ANSWER TO ASSERT THE DEFENSE OF RELEASE WHERE THE RELEASE WAS ENTERED INTO BETWEEN CURRY AND SCOTTSDALE ON DECEMBER 10, 2015, AN EXECUTED COPY OF THE RELEASE WAS NOT PROVIDED TO CIG/DERRICK UNTIL APRIL 8, 2016 DUE TO THE INADVERTENT MISTAKE OF COUNSEL, AFTER GRANTING THE MOTION THE COURT CONTINUED THE TRIAL SO THAT THE ISSUES REGARDING THE RELEASE DEFENSE COULD BE BRIEFED AND ARGUED AT SUMMARY JUDGMENT, AND WHERE A HEARING WAS HELD ON THE DEFENSE OF RELEASE WHEREIN JUDGE HOOD DISMISSED THE DEFENSE AND WHERE THE DISMISSAL OF THE RELEASE IS CURRENTLY BEFORE THIS COURT ON A CROSS-APPEAL.

STATEMENT OF THE CASE

Respondent/Appellant, Curry, filed this action on July 28, 2014, against Scottsdale Insurance Company and Appellants/Respondents, Carolina Insurance Group of SC, Inc. (CIG) and its agent Maurice Derrick (Derrick)(hereinafter collectively referred to as CIG). (Complaint p. 1). Curry sued Scottsdale for breach of contract, statutory bad faith, and common law bad faith arising out fire damage to a house that Curry was building and that he alleged should have been covered by an insurance policy that he purchased from Scottsdale through CIG. (Complaint pp. 2-4). Curry also alleged that CIG, Derrick, and Scottsdale were negligent in procuring the Scottsdale insurance policy for Curry in that he believed that the policy should have expired at a later date. (Complaint pp. 4-7). Curry sought damages from all three Defendants jointly for "unpaid losses established at trial, and all incidental, punitive, and consequential damages." (Complaint p. 7).

Scottsdale answered on September 16, 2014, denying the allegations and asserting that the policy was expired on the date of the loss. (Answer of Scottsdale p. 2). CIG and Derrick answered on September 22, 2014, denying the allegations and included the affirmative defenses of contributory negligence, set-off, and failure to mitigate, among others. (Answer pp. 3-5). Curry took Mr. Derrick's deposition on April 16, 2016, both individually and as the 30(b)(6)

representative of CIG. Curry then took the deposition of Joel Sauls, the principal of CIG on June 4, 2015.

Curry amended his complaint on May 28 2015, adding a request for punitive damages in his prayer, yet still alleged that CIG and Derrick were agents of Scottsdale and still sought to hold all three defendants liable for negligence. (Am. Com. pp. 5-7). CIG and Derrick answered the Amended Complaint on June 4, 2015, and Scottsdale answered on June 8, 2015.

On October 1, 2015, Curry filed a second Amended Complaint, adding a cause of action for gross negligence against all Defendants. (Second Am. Com. pp. 4-7). Despite having completed the depositions of all of the parties, Curry still alleged that CIG and Derrick were Scottsdale's agents and sought a judgment against all of the defendants for negligence and gross negligence. Scottsdale filed its answer on October 26, 2015, and CIG and Derrick filed their answer on October 28, 2015.

Ninety days later, on December 10, 2015, Scottsdale and Curry entered into the Release that is the subject of this appeal and cross-appeal. (See Release). Curry executed the Release, acknowledging payment to Curry by Scottsdale of \$85,000.00 for "full payment for all damages losses or injuries, whether known or unknown, developed or undeveloped, for policy benefits or consequential damages recoverable from Scottsdale Insurance Company which have resulted or may result from the loss aforesaid," in exchange for the release of Scottsdale, "its agents, servants, employees, successors and assigns . . ." (See Release). A Stipulation of Dismissal with prejudice as to Scottsdale was entered on December 30, 2015. (See Stipulation of Dismissal).

The executed Release was not served upon counsel for CIG/Derrick despite having continuing Requests for Production asking for communications between the parties. (Transcript of Record April 18-19, pp. 37:17-23, 57:16-21). Counsel for Curry admitted that this failure was her inadvertent error. (Transcript of Record April 18-19. P. 58: lines 13-15.) Upon request from

CIG's counsel, Curry provided a copy of the executed Release on April 8, 2016, the same day it was requested. CIG/Derrick then filed a motion for summary judgment on April 15, 2016, stating that the Release of Scottsdale acted as a Release of CIG and Derrick because the Release was full compensation for Curry's losses and Curry insisted in its three complaints that CIG/Derrick were agents of Scottsdale and the release discharged the agents of Scottsdale. (See Appellants' Motion for Summary Judgment). CIG and Derrick also filed a motion to amend their answer to assert the defense of Release on April 18, prior to the start of trial.

The parties selected a jury and pre-trial motions heard, including CIG/Derrick's Motion to Amend their answer. Judge Newman heard argument on the Motion to amend and granted the motion to amend finding that under SCRPC 15, amendments are freely given when justice requires, that the Release should have been provided to the Defendants earlier, and the defense was one that could have been anticipated by the Plaintiff. (Order Granting Motion to Amend). (Transcript of Record, April 18-19 pp. 46-60). Judge Newman set further arguments regarding the Release for the morning of April 19, 2016. (Transcript of Record April 18-19 pp. 74-80). On April 19, Curry filed a cross-motion for summary judgment as to CIG/Derrick's defense of Release. (See Respondent's Cross Motion for Summary Judgment). On the morning of April 19, Judge Newman continued the trial to a subsequent term so that the cross-motions for summary judgment as to the newly added defense of release could be heard. (Transcript of Record April 18-19, pp. 93-94). CIG/Derrick filed and served an amended memo in support of summary judgment on April 26, 2016. (See Appellants' Memo. SJ). Curry also file a memo an amended memo in opposition to the motion for summary judgment and in support of its cross motion for summary judgment on April 26, 2016.

On April 26, 2016 Judge Hood, heard oral arguments on the cross-motions for summary judgment related to the added defense of release. Judge Hood denied Curry/CIG's motion for

summary judgment from the bench and took Curry's motion under advisement. (Hearing Transcript (Hood, J.) pp. 41, 51). Judge Hood later granted Curry's motion dismissing the defense of release on May 6, 2016. (Hood Order).

Arguments

- I. THE COURT BELOW PROPERLY GRANTED CIG'S MOTION TO AMEND BECAUSE CURRY SUFFERED NO PREJUDICE DUE TO THE AMENDMENT AND HAS NOT DESCRIBED ANY IN HIS BRIEF.

The standard of review for the grant of a motion to amend a pleading is an abuse of discretion standard.

"It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." *Pruitt v. Bowers*, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). Courts have wide latitude in amending pleadings and "while this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Id.*

Duncan v. CRS Serrine Eng'rs, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 117-18 (Ct. App. 1999).

South Carolina Rule of Civil Procedure 15(a) allows parties to amend their pleading by leave of court and states that such leave should be freely given when justice requires and the amendment does not result in prejudice to another party. "It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." *Pruitt v. Bowers*, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Duncan v. CRS Serrine Eng'rs, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 117-18 (Ct. App. 1999)(citations omitted).

Curry was given notice of the issue of the release and was given an opportunity to fully refute it. Curry was in possession of the release beginning on December 10, 2015, when he signed it. The court continued the trial so that Curry could brief and argue the issue of Release. Curry was unable to demonstrate prejudice to the trial and cannot now. Curry, without explanation, states in his brief that granting the motion to amend was error because “the shock, surprise, and prejudice to Mr. Curry was substantial.” (Respondent/Appellant’s Initial Appellant’s Brief p. 12, ¶ 2). However, nowhere in his brief does Mr. Curry describe what prejudiced he suffered.

There is no prejudice or surprise because Judge Newman continued the trial so that the issue of Release could be fully briefed and argued pursuant to SCRCP 56. The court scheduled a motions hearing for April 25th and moved the trial to May 16, 2016. (Transcript of Record April 18-19, p. 93:17-94:3, 98:1-100:16). Counsel for Curry agreed with the reasonableness of continuing the trial so that the issue related to the release could be dealt with. “[W]e don’t have objection to the trial being continued so all this issue about the release and whether the Defense – the release is valid can be determined.” (Transcript of Record April 18-19. P. 90:2-6). In fact, Curry’s counsel agreed the continuance was proper and anticipated these appeals: “And so we believe the proper thing is to continue this trial so that these motions can be heard, and then any appeal from the granting or denial of such motions can work its way through the system. Because, really, this issue is now becoming the crux of the case.” (Transcript of Record April 18-19, p. 90:14-19).

Therefore, Curry has failed to carry his burden by establishing prejudice. The trial court properly granted the amended and took the proper steps to avoid any prejudice to Curry even where Curry held the executed Release.

II. THE SUFFICIENCY OF CIG/DERRICK'S AMENDED DEFENSE OF RELEASE IS NOT APPROPRIATE TO CONSIDER WHEN GRANTING OR DENYING A MOTION TO AMEND A PLEADING.

Appellant's Initial Brief of Respondent Appellant spends a significant portion of the brief arguing whether or not the defense of Release as styled is sufficient. Curry rehashes his agency arguments at length. (Respondent/Appellant's Initial Appellant's Brief pp. 6-7, 13-14.). The strength or merits of a defense is not relevant when a court considers whether or not to grant a motion to amend.

A motion to amend an Answer should be contested primarily by procedural arguments, not arguments concerning the substance and merits of the counterclaims and/or defenses proposed. For example, one might argue that it is too late in the case to allow an amendment, and that prejudice would result from such an amendment. Arguments going to the legal merits of a proposed defense or counterclaim are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56 motion for summary judgment. It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage.

City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232-33, 599 S.E.2d 462, 465-66 (Ct. App. 2004).

Therefore, Curry's claims of abuse of discretion related to the issue of "agency" has nothing to do with the grant of the Motion to Amend and were properly argued at the Summary Judgement hearing before Judge Hood. Curry's repeated mistaken assertion that the Agency's belief as to the scope of the Release affects its enforceability against CIG also is improper for the trial court to consider when granting a motion to amend, as it goes to the merits of the defense and not to prejudice.

III. CURRY'S ARGUMENT REGARDING THE TIMING OF THE PRODUCTION OF THE EXECUTED RELEASE TO CIG ARE WITHOUT MERIT AS CURRY HAS NOT SUFFERED ANY PREJUDICE AND CURRY'S COUNSEL ADMITTED THAT IT WAS AN ERROR NOT TO PROVIDE THE EXECUTED RELEASE.

Curry asserts that because CIG's counsel did not request a copy of the release until April 8, 2015, a week before trial, the court somehow abused its discretion in allowing CIG to amend. As cited by Curry, at the hearing on the Motion to Amend, CIG's counsel noted that it was not provided the executed Scottsdale/Curry release despite requesting copies of all correspondence between Scottsdale and Curry in a request for production. Curry now claims it was error for the court to rely on this representation by counsel without CIG handing up its discovery requests. To prove this, Curry in his brief has made the Requests part of the record and quoted the relevant request. The quote matches the representation to the court, which found that the Release should have been provided. (Initial Appellant's Brief of Respondent/Appellant p. 11-12). Counsel then goes on to argue that a Release between the parties somehow was not correspondence and apparently she did not believe she had to provide CIG with a copy of the Release absent a specific request.

This argument is disingenuous at best. Counsel clearly understood that she needed to provide a copy of the Release as she stated during the hearing before Judge Newman: "Your Honor, my position is he was on actual notice that a settlement agreement had been executed. If I failed to provide that to him in December, that is my error, but it is not that he didn't have notice that it existed." (Transcript of Record April 18-19 p. 58:11-15). Because counsel rightfully recognized that it was a mistake not to send it, the court had no choice but find that due to the late service of the document a motion to amend was proper. However, to the extent the motion to amend could or should have been filed earlier, any prejudice was cured by the trial being continued and motions set to address the Release issue and both parties were given equal opportunity to brief them. "The prejudice Rule 15 envisions is a lack of notice that the new issue

is going to be tried, and a lack of opportunity to refute it." Duncan v. CRS Serrine Eng'rs, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 117-18 (Ct. App. 1999)(citations omitted).

CONCLUSION

Therefore, because Curry is unable to demonstrate any prejudice or surprise regarding the court allowing the amendment of the Answer to assert the defense of release, this Court should uphold the ruling of the Circuit Court.

Respectfully submitted,



October 6, 2016

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APPELLANTS/RESPONDENTS DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

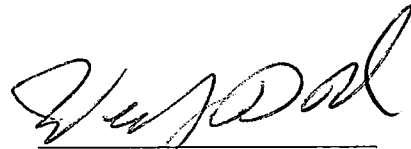
Appellant proposes the following be included in the Record on Appeal which includes the items previously designated in the consolidated appeal:

1. Order of Judge Newman dated June 23, 2016
2. Order of Judge Hood dated May 9, 2016
3. Complaint
4. Answer of Appellants/Respondents
5. Amended Complaint
6. Answer of Appellants/Respondents to Amended Complaint
7. Second Amended Complaint
8. Answer of Appellants/Respondents to Second Amended Complaint
9. Amended Answer of Appellants Respondents to Second Amended Complaint 4/19/16
10. Answer of Scottsdale to Second Amended Complaint
11. Appellants/Respondents' Motion for Summary Judgment
12. Appellants/Respondents' Amended Motion for Summary Judgment
13. Appellant/Respondents' Amended Memo in Support of Motion for Summary Judgment
14. Respondent/Appellant's Cross-Motion for Summary Judgment
15. Respondent/Appellant's Memorandum In Support of Cross-Motion for Summary Judgment
16. Respondent/Appellant's Amended Memorandum in Support of Cross-Motion for Summary Judgment

17. Transcript of Record of April 18-19, 2016, pp.37, 46-60, 74-80, 90, 93-94, 98-100
18. Transcript of Record from April 26, 2016 pp. 1-51
19. Policy of Insurance, Tab 2, April 26, 2016 Hearing documents
20. Scottsdale Release, December 10, 2015
21. Stipulation of Dismissal as to Scottsdale Insurance Company
22. Affidavit of Curry
23. Affidavit of Peavy
24. Affidavit of Goodwyn
25. Deposition of Porthemos Curry (Vol. 1) pp. 4-5, 12-13
26. Deposition of Porthemos Curry (Vol. 2) pp. 4-5, 19
27. Deposition of Mitchell p. 35:5-36:5

I certify that this designation contains no matter which is irrelevant to this consolidated appeal.

October 6, 2016



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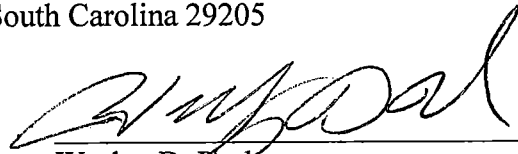
Carolina Insurance Group of SC, Inc. and Maurice Derrick.....Appellants/Respondents

PROOF OF SERVICE

I, Wesley D. Peel, counsel for the Appellants/Respondents, hereby certify that one copy of the Respondents' Initial Brief of Appellants/Respondents and Designation of Matter to be Included in the Record on Appeal was served on the Respondent/Appellant, via United States Mail to their attorneys at the following addresses:

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October 6, 2016

The Honorable Jenny Abbott Kitchings
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**Re: Porthemos Curry vs. Scottsdale Insurance Company, Carolina Insurance Group of SC, Inc. and Maurice Derrick
Appellate Case No.: 2016-000986
Case No.: 2014-CP-40-4661
Our File No.: 3-264-189.1**

Dear Ms. Kitchings:

On behalf of the Appellants/Respondents, Carolina Insurance Group of SC, Inc. and Maurice Derrick, please find enclosed the original RESPONDENTS' INITIAL BRIEF OF APPELLANTS/RESPONDENTS and DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL as well as a Proof of Service evidencing that the same was served upon counsel for the Respondent/Appellant.

With my best regards, I am

Sincerely,

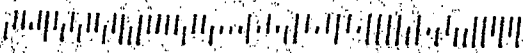



Wesley D. Peel

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Enclosures

cc: Rachel G. Peavy, Esquire (via Email & U.S. Mail)
T. Jeff Goodwyn, Jr., Esquire (via Email & U.S. Mail)



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