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NOV 18 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Robert E. Hood, Circuit Court Judge  
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 REQUEST FOR LEAVE TO MAKE A MOTION  
FOR RELIEF PURSUANT TO RULE 60(b), SCRPC**

Respondent/Appellant Porthemos Curry (hereafter “Mr. Curry”) hereby requests leave to make a motion for relief from the order of the Honorable Jocelyn Newman, pursuant to Rule 60(b)(2) and Rule 60(b)(3), SCRPC.

On November 16, 2016, the consolidated Record on Appeal in this matter was filed with the Court. In reviewing the draft Record on November 14, 2016, counsel discovered that Appellants/Respondents’ counsel, Wesley R. Peel, Esq., had included in the Record a copy of correspondence, including enclosures, he received from Attorney JR Murphy on November 30, 2015, which reflected the receipt by Attorney Peel on November 30, 2015

of the Release between Scottsdale Insurance Company and Porthemos Curry. See **Exhibit A**. (See also R. at pp. 446-449)<sup>1</sup>

Prior to November 14, 2016, Agency's counsel Wesley Peel, Esq. had represented to the trial court – specifically, the Honorable Jocelyn Newman - and to opposing counsel that he had never had a chance to review the Scottsdale Release until he requested it from Mr. Curry's counsel on April 8, 2016.<sup>2</sup> As detailed below, the timing of when Attorney Peel had an opportunity to review the Scottsdale Release was a critical and determinative factor in the trial court's ruling on the Agency's motion to amend its answer, to assert the affirmative defense of release, at trial. Copies of the relevant transcript of hearing and Judge Newman's order are attached as **Exhibit B**. (See also R. at p. 14; R. p. 250, l. 4 – p. 254, l. 2; R. p. 231, l. 17 – p. 232, l. 2).

On April 18, 2016, this case was set for a date certain trial before the Honorable Jocelyn Newman. On April 18, 2016, the Agency filed a motion to amend its answer to assert the affirmative defense of release, alleging that the Scottsdale Release served to release the Agency as well. Over the objection of Mr. Curry's counsel, the Motion to Amend was granted. In support of his Motion to Amend, Mr. Peel represented to the Court that he had only received the Scottsdale Release on April 8<sup>th</sup>; that there was no prejudice to Mr. Curry; and that Mr. Curry's counsel had failed to produce the Scottsdale Release in 2015 when Mr. Curry settled his claim with Scottsdale.

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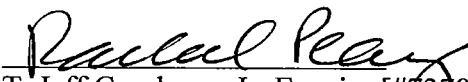
<sup>1</sup> Scottsdale Insurance Company was originally a defendant in the underlying lawsuit.

<sup>2</sup> The Scottsdale Release which Mr. Peel received from Attorney JR Murphy on November 30, 2015, and the executed Scottsdale Release that Mr. Curry's counsel forwarded to Mr. Peel on April 8, 2016, are identical.

The transcript from Judge Newman's hearing on the motion to amend, along with her formal order which followed, reflects that the trial court specifically relied upon the fact that Attorney Peel alleged he never had an opportunity to review the Scottsdale Release until April 8, 2016, and therefore the late amendment at trial was properly allowed. Given that the documents produced by counsel in the Record on Appeal reflect that the basis for the late motion to amend to assert the affirmative defense of release – to wit, that he hadn't been able to review the Scottsdale Release until Mr. Curry's counsel produced it to him on April 8<sup>th</sup> – was misleading, Mr. Curry should be able to move for relief from Judge Newman's order and Judge Newman should be allowed to consider this newly disclosed evidence. This issue is of critical important to both the parties and this Court, for if the motion to amend had never been granted in the first place, this appeal and cross- appeal would not be pending, as the denial of a motion to amend is not immediately appealable.

Mr. Curry respectfully requests that he be granted leave to file a motion for relief under Rule 60(b), SCRPC, for all the reasons stated above, and respectfully requests that the deadlines in the instant appeal be extended accordingly.

GOODWYN LAW FIRM, LLC

  
T. Jeff Goodwyn, Jr. Esquire [#73789]  
Rachel G. Peavy, Esquire [#69397]  
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Columbia, SC 29205  
(803) 251-4517  
[jgoodwyn@Goodwynlaw.com](mailto:jgoodwyn@Goodwynlaw.com)  
Attorneys for the Respondent/Appellant

Dated: 11/18/16

Other Counsel of Record:

Wesley R. Peel, Esq.

Bryan M.J. Triplett

PO Box 61110

Columbia, SC 29260-1110

Attorneys for Appellants/Respondents

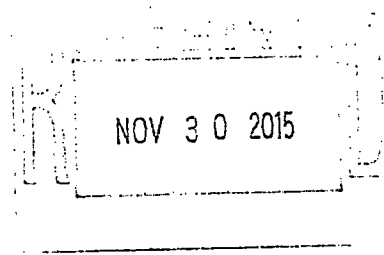


MURPHY & GRANTLAND, P.A.

J. R. Murphy  
Direct dial 803-454-1231  
jrmurphy@murphygrantland.com

November 25, 2015

Rachel G. Peavy, Esquire  
Goodwyn Law Firm, LLC  
2519 Devine Street, Suite A  
Columbia, SC 29205



Re: Porthemos Curry vs. Scottsdale Ins. Co., Carolina Ins. Group of SC, Inc. and Maurice Derrick  
Civil Action No.: 2014-CP-40-04661  
Claim No.: 1527747  
Date of Loss: 2/21/14  
Our File No.: 1500-0129

Dear Rachel:

Enclosed please find the settlement draft in the amount of \$85,000, Release and Stipulation of Dismissal in the above-referenced matter. I would appreciate your holding all settlement funds in trust until the Release and Stipulation of Dismissal have been properly executed and returned to me in the envelope provided.

With warm personal regards, I am

Sincerely yours,

  
J. R. Murphy

JRM/sb  
Enclosures

cc: Wesley D. Peel, Esquire  
Rob Fisher, Esquire (via email)



Telephone 803-782-4100 • Facsimile 803-782-4140  
4406-B Forest Drive, Columbia, South Carolina 29206 • Post Office Box 6648, Columbia, South Carolina 29260

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO: 2014-CP-40-04661

Porthemos Curry,

Plaintiff,

v.

Scottsdale Insurance Company, Carolina  
Insurance Group of SC, Inc. and Maurice  
Derrick,

Defendants.

**STIPULATION OF DISMISSAL**

The Plaintiff, by and through its undersigned counsel, having settled this case with the Defendant Scottsdale Insurance Company, hereby dismisses, with prejudice, the Complaint, and all subsequent amendments thereto, as to the Defendant Scottsdale Insurance Company. The Plaintiff's case against the remaining Defendants, shall not be affected by this Dismissal.

---

Rachel G. Peavy, Esquire  
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803-251-4517  
Attorney for Porthemos Curry

---

J.R. Murphy, Esquire  
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Attorney for Scottsdale Ins. Co.

---

Wesley D. Peel, Esquire  
Bruner, Powell, Robbins, Wall & Mullins  
1735 St. Julian Place  
P.O. Box 61110  
Columbia, SC 29260-1110  
803-252-7693  
Attorney for Carolina Ins. Group of SC, Inc.  
and Maurice Derrick

November 25, 2015

STATE OF SOUTH CAROLINA     )  
   )  
COUNTY OF RICHLAND            )     R E L E A S E

KNOW ALL MEN BY THESE PRESENTS that the undersigned, Porthemos Curry , in consideration of the sum of Eighty Five and 00/100 (\$85,000.00) Dollars, 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 action, demands and/or claims of whatsoever kind or nature prior to and including the date hereof growing out of any property coverage which may apply under policy number CPS1884774 issued by Scottsdale Insurance Company to Porthemos Curry, on account of or in any way growing out of a loss which occurred on or about February 21, 2014, when a vehicle ran into a vacant structure owned by Curry and located at 1001 Pineland Drive, Columbia, South Carolina, including any and all claims arising from the investigation, adjustment and handling of the loss by Scottsdale Insurance Company, and any claim which was or could have been asserted against Scottsdale Insurance Company in the case of Porthemos Curry v Scottsdale et. al., C.A. No. 2014-CP-40-04661, Court of Common Pleas, Richland County, South Carolina . The consideration expressed herein constitutes 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.

The undersigned expressly represent and warrants that he has consulted with his attorney and understands the effect of the things herein agreed to and that no statement or representations made by the persons released or by their agents, representatives and attorneys have influenced him or induced him to execute and deliver this Release.

I have read the foregoing Release and understand it to be a full, final and binding agreement.

IN WITNESS WHEREOF, U have hereunto set my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

WITNESSES:

\_\_\_\_\_

\_\_\_\_\_ (SEAL)  
Porthemos Curry

\_\_\_\_\_

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Porthemos Curry,

Plaintiff,

v.

Carolina Insurance Group of S.C., Inc.; and  
Maurice Derrick,

Defendants.

IN THE COURT OF COMMON PLEAS

FIFTH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-40-4661

**ORDER GRANTING DEFENDANTS' MOTION TO  
AMEND ANSWER**


This matter came before the Court on Defendants' Motion to Amend their Answer, which was filed on April 18, 2016 pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure. A hearing was conducted on the same day, immediately prior to the anticipated commencement of the "date certain" jury trial in this case.

After hearing the arguments of all parties, the Court found that the basis of Defendants' proposed amendment was a document which, despite earlier written requests for the same, was provided to Defendants by Plaintiff only ten days before trial. Further the proposed defense was one that Plaintiff could have anticipated.

Rule 15(a) of the South Carolina Rules of Civil Procedure provides that "...leave [to amend pleadings] shall be freely given when justice so requires and does not prejudice any other party." While Plaintiff argued that the amendment would be prejudicial, the Court found that the timing of Defendants' motion was a direct result of Plaintiff's delay in providing necessary documents to Defendants.

IT IS THEREFORE ORDERED that Defendants' Motion to Amend is GRANTED.

AND IT IS SO ORDERED.

  
The Honorable Jocelyn Newman

May 24, 2016  
Columbia, South Carolina.



R.014

1 to their --

2 MS. PEAVY: Okay.

3 THE COURT: I will hear Ms. Peavy first.

4 MR. PEEL: Your Honor, I think we filed -- if  
5 this is the proper time, we filed a motion to amend  
6 this morning to assert the defense of release.

7 As Your Honor knows, a motion to amend should  
8 be really granted, even can be granted during  
9 trial. As I said, I just got this release, copy of  
10 the release April 8th from -- I did move this  
11 morning. It was too late Friday to get everything  
12 done. Judge Lee may have already ruled on this.  
13 It is hard to tell from the one line that she sent  
14 us that it should be properly incorporated into the  
15 trial -- and I don't have the quote from the e-mail  
16 right now -- at directed verdict. But we just ask  
17 to be allowed to amend to assert the defense of  
18 release based solely on the release that we  
19 received April 8th.

20 THE COURT: Yes, ma'am?

21 MS. PEAVY: Your Honor, we would oppose their  
22 motion to amend at this late date. And the reason  
23 for that is that they were on notice that we  
24 settled with Scottsdale in December. And they  
25 signed off on the stipulation of dismissal as to

1           Scottsdale. They never signed any release. They  
2           were never dismissed on this case. We're here to  
3           try the case. And now they are trying to say that,  
4           oh, they were released from it at this late date  
5           when they have known that Scottsdale has been out  
6           presumably because we settled with Scottsdale since  
7           December.

8           So now to move to amend on the day of trial to  
9           assert this when they have known about it, it goes  
10          to their summary judgment motion, Your Honor, but,  
11          you know, I think it is -- I don't think it is  
12          proper. I would ask that the Court deny the  
13          motion. They are moving to amend the day of trial  
14          on an issue that they had notice of five months  
15          ago.

16          MR. PEEL: I did not have notice of it. You  
17          did not serve me with a copy of the release and I  
18          distinctly requested copies of any correspondence,  
19          e-mails, anything like that, any documents between  
20          the Plaintiff and any Co-Defendants, any Defendants  
21          in the case, and y'all did not provide it to me.

22          MS. PEAVY: He had notice that the release  
23          would have existed because he signed off on the  
24          stipulation of dismissal as to Scottsdale in  
25          December.

1 THE COURT: So because he didn't move to  
2 enforce or file a motion to compel to enforce --

3 MS. PEAVY: He didn't ask me for it.

4 THE COURT: I haven't finished my question.

5 MS. PEAVY: I'm sorry.

6 THE COURT: -- to compel you to comply with  
7 your continuing duty to disclose -- or provide  
8 documents under the Rules of Evidence, then he  
9 should be foreclosed from being able to do that  
10 now? Is that your position?

11 MS. PEAVY: Your Honor, my position is he was  
12 on actual notice that a settlement agreement had  
13 been executed. If I failed to provide that to him  
14 in December, that is my error, but it is not that  
15 he didn't have notice that it existed. He knew  
16 Scottsdale had been released because he signed off  
17 on the stipulation of dismissal as to Scottsdale.

18 THE COURT: I know, but it seems to me that  
19 you are seeking to benefit from your failure to  
20 provide him with a copy of the document. You have  
21 a continuing duty under the Rules of Civil  
22 Procedure to --

23 MS. PEAVY: Uh-huh.

24 THE COURT: -- provide copies of documents.  
25 If it was something that he previously requested,

1           you came into possession of it in December and did  
2           not provide a copy to him in December, January,  
3           February, or March, and he seeks to enforce it in  
4           April, I don't know that you should benefit from  
5           your delay.

6           MS. PEAVY: Thank you, Your Honor.

7           THE COURT: Or your failure to do that.

8           MR. PEEL: Your Honor, may I add one thing?

9           THE COURT: Sure.

10          MR. PEEL: I'm sorry. There is absolutely no  
11          prejudice because it is their document. They know  
12          what is in it.

13          THE COURT: And he has just received a copy of  
14          it on April 8th. I am inclined to -- yes, I am  
15          going to grant the motion. I know it ties into the  
16          motion for summary judgment really.

17          MS. PEAVY: Okay.

18          THE COURT: But, yes, you know, Rule 15(a) --  
19          is it? I don't know. Rule 15 allows amendment of  
20          the pleadings. Amendments are freely given when  
21          justice so requires and the opposing party is not  
22          significantly prejudiced. I find that is the case  
23          here, particularly in light of the fact that you  
24          had a copy and you knew what it said. Yes. And  
25          you were under a continued duty to disclose anyway.

1           So I will allow that amendment.

2           MR. PEEL: Thank you, Your Honor.

3           THE COURT: What is next? And before you even  
4 get to the next motion, I see before me Defendant's  
5 motion in limine to disqualify the Plaintiff's  
6 expert witness and disregard purported expert's  
7 affidavit.

8           Just reading the face of this motion, the  
9 basis is that Mr. Hesse will testify about matters  
10 within common knowledge of the jury and he is not  
11 qualified to testify as an expert. Without having  
12 heard his testimony, I mean --

13          MR. GOODWYN: And we would suggest we take  
14 that up when we produce him.

15          THE COURT: Right. I can't rule on that now.  
16 Certainly there will be an opportunity for you to  
17 lay a foundation for him as an expert and the need  
18 for his expert testimony. There will be an  
19 opportunity for voir dire from the Plaintiff of his  
20 qualifications. But I will not make a ruling on  
21 that matter at this time.

22          MR. PEEL: Okay. Thank you very much. I'm  
23 sorry, I misplaced my notes I made during lunch so  
24 I could get through this quickly.

25                 Next would be the Carolina Insurance Group's

1 Defendants and what was alleged against Scottsdale.

2 I would like to hand up to Your Honor the two  
3 cases that I cited, as I believe they are  
4 instructive in support of my motion.

5 THE COURT: All right.

6 MS. PEAVY: And if Your Honor will give me one  
7 minute.

8 THE COURT: Sure. While you are looking for  
9 that, let me hear from you Mr. Peel.

10 MR. PEEL: I was looking for a copy of the  
11 release, and I've got such a stack of papers I  
12 can't find it.

13 Your Honor, normally I would completely agree  
14 with Ms. Peavy -- normally. We have had a little  
15 bit of a different situation. We talked beforehand  
16 a little bit about how to deal with this.

17 I did not see the executed releases until  
18 April 8th. Ms. Peavy gave it to me as soon as I  
19 asked for it, the same day. However, it was  
20 apparently signed in December. I would say it  
21 should have been introduced to me under our  
22 discovery requests as communications between other  
23 parties. When they served the release on me, not  
24 just the stipulation of dismissal, I had signed it,  
25 I did not get -- I went back and checked -- I did

1 not get anything but the stipulation. So I didn't  
2 see it. So this relates to another motion that we  
3 have in front of -- Judge Lee has dealt with some  
4 of this also, so it is a little complicated.

5 Once I examined the release, I believe there  
6 are arguments that that release operates to release  
7 my clients completely. So, based upon that, we  
8 filed a motion this morning to amend to add a  
9 defense of release based upon the information we  
10 got from April 8th. See, actually reading the  
11 copy.

12 So, like I said, normally -- everything they  
13 say generally is correct, especially if it is under  
14 the contribution of the tortfeasors act, that would  
15 normally exclude setoffs for the province of the  
16 judge only for the trial. However, this  
17 situation -- this goes to -- we told you earlier  
18 about our motion for summary judgment -- and Judge  
19 Lee had partially instructed some procedure --  
20 moved for summary judgment on two grounds. We move  
21 this morning, one, the release on its face as it is  
22 a full satisfaction of everything due under the  
23 policy for consequential damages, which would  
24 operate as a matter of law to release these  
25 parties. And it also states that it releases all

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THE STATE OF SOUTH CAROLINA  
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Appellate Case No.: 2016-0006986

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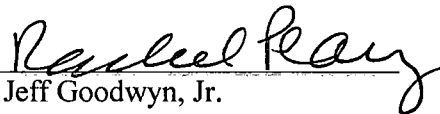
v.

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

**PROOF OF SERVICE**

I certify that I have served the **Respondent/Appellant's Request for Leave to File Motion for Relief Pursuant to Rule 60(b) SCRCF** upon Wesley D. Peel, Esquire and Bryan M. J. Triplett, Esquire, Attorneys for the Appellants/Respondents, at the address listed below by delivering a copy of same via Hand Delivery via Hand Delivery, on November 18, 2016.

Wesley D. Peel, Esquire  
Bryan M. J. Triplett, Esquire  
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1735 St. Julian Place  
Columbia, SC 29204

  
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Attorneys for Respondent

November 18, 2016

# GOODWYN LAW FIRM, LLC

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November 18, 2016

## VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings  
Clerk of Court, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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

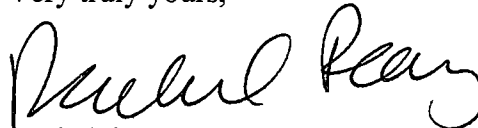
Dear Ms. Kitchings:

Please find enclosed for filing the original and eight (8) copies of the **Respondent/Appellant's Request for Leave to File Motion for Relief Pursuant to Rule 60(b) SCRPC** 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 same upon Wesley D. Peel, Esquire, and Bryan M. J. Triplett, Esquire, attorneys for the Appellants/Respondents.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Rachel G. Peavy

RGP/msb  
Enclosures

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

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