

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
Jocelyn Newman, Circuit Court Judge

Case No. 2014-CP-40-04661

RECEIVED
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SC Court of Appeals

Porthemos Curry..... Respondent/Appellant

v.

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

APPELLANTS/RESPONDENTS' RETURN TO RESPONDENT/APPELLANT'S
REQUEST FOR LEAVE TO MAKE A MOTION FOR RELIEF PURSUANT TO
RULE 60(b), SCRCF

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INTRODUCTION

Respondent/Appellant, (hereinafter "Curry") has filed a motion for relief from the automatic stay to file a motion for Relief under South Carolina Rule 60(b)(2) and 60(b)(3) and a motion to amend his initial brief. Movant's argument in its simplest form is that notice of a settlement draft of a release is effective notice of the contents of a final and executed release. Curry's counsel asserts that counsel for the Appellants/Respondents, Carolina Insurance Group of SC, Inc. and Maurice Derrick, (hereinafter "Agency Defendants" or "Agency") told the court below "that he never had a chance to review the Scottsdale Release until he requested it from Mr. Curry's counsel on April 8, 2016." Curry's arguments and allegations are not supported by fact, law, or reason.

This accusation by Curry's counsel (also referred to herein as "Ms. Peavy" or Mr. Goodwyn"), as the record reveals, is unsupported by the documents and transcripts, inaccurate, misleading, unreasoned, and wholly fabricated. Curry's motions to this court are based upon his counsel's continuing misunderstanding of the importance of supplying copies of **executed** and final documents to the parties in the case, counsel's duty to continually update discovery, and that a defense of release will not arise until consideration for the release has been exchanged by the parties to that release.

Because counsel has now accused the Agency's counsel (also referred to herein as "Mr. Peel") of fraud, misrepresentation and misconduct, a detailed response is necessary to point how the only misrepresentation that has been made in this matter is by Curry's counsel. It is apparent that these motions are due to Mr. Curry's counsel's confusion of the facts, the law, and the record. Due to counsel's cherry-picking of the record in order to try and create an issue where none exists, it is unfortunately necessary to track Respondent/Appellant's counsels' misunderstanding and

confusion to the beginning of this issue. Such an accusation against counsel is a serious allegation and requires a serious and measured response. Defense counsel was not consulted by Movant's counsel prior to the filing of these motions. With the attorney's oath of civility in mind, I have attempted to provide such a response below.

FACTS

The appeal before this court arises from a fire that severely damaged a house that Mr. Curry was building. The house was insured under a 90-day fire and general liability policy issued by Scottsdale Insurance. Curry purchased the policy through the Agency Defendants. Curry submitted a claim to Scottsdale for his loss from the fire, but Scottsdale denied Curry's claim. In denying Curry's claim, Scottsdale alleged that the fire occurred the day after its policy expired. Since Scottsdale would not reimburse him for his alleged loss, Curry sued both Scottsdale and the Agency Defendants for negligence. Curry claimed that the policy should have covered his loss and that the Agency should have provided a different expiration date for the policy based upon his conversations with the agents. On December 10, 2015, Curry settled his claim against Scottsdale for \$85,000.00 and executed a Release in exchange for the payment. The operative and executed copy of which was not forwarded to Agency's counsel until April 8, 2016, when he requested a copy from Ms. Peavy by email. (See Exhibit A).

Prior to Curry executing the release, J.R. Murphy, counsel for Scottsdale sent a letter on November 25, 2015 to Ms. Peavy, counsel for Curry, transmitting "the settlement draft in the amount of \$85,000.00, Release and Stipulation of Dismissal" and requested that Ms. Peavy hold the funds in trust until the Release and Stipulation of Dismissal had been executed and returned. Mr. Murphy copied counsel for the Agency with the letter and attachments. (See Exhibit B).

Mr. Curry signed the final Release on December 10, 2015. (See Exhibit C). On December 14, 2015, Hannah Stetson, attorney for Scottsdale, sent a Stipulation of Dismissal as to Scottsdale Insurance Company for Mr. Peel's signature, but not the executed release. (See Exhibit D). Counsel for Curry communicated in writing to Mr. Peel two additional times in December 2015: (1) On December 14th regarding a settlement offer (See Exhibit E), and (2) on December 17, 2015, transmitting supplemental discovery responses (See Exhibit F). On December 28, 2015, counsel for the Agency Defendants returned the executed Stipulation of Dismissal to Ms. Stetson. (See Exhibit G). After the transmittal, neither counsel for Scottsdale nor counsel for Curry sent any further correspondence regarding their settlement negotiations or the finality of the release and dismissal of Scottsdale. At no time did Counsel for the Agency Defendants receive notice from either Scottsdale or Curry that the Dismissal was being filed, nor did either party serve Agency Defendants with a filed copy of the dismissal or an executed copy of the Release. On March 14, 2016, counsel for Curry served Agency Defendants with a supplemental response to the requests for production. (See Exhibit H). This supplementation did not contain a copy of the executed release or filed stipulation of dismissal.

The case was set to begin trial on April 18, 2016. In preparing for trial on April 8, 2016, counsel for the Agency Defendants realized that they had never been served with a copy of the executed Release, which was obviously important due to the setoff of the settlement against any potential verdict rendered against the Agency Defendants. Mr. Peel emailed Ms. Peavy that morning and requested a copy of the settlement agreement. Ms. Peavy's paralegal responded that afternoon. The release confirmed the settlement amount as \$85,000.00. (See Exhibit A).

However, in the weekend leading up to trial, the Agency Defendants reviewed the executed release more closely and it became apparent that Scottsdale's Release also acted to release the

Agency Defendants. Therefore, the Agency Defendants filed a Motion to Amend the Answer to assert a defense of Release on April 18, 2016, the morning of trial. The release defense was based upon the release executed by Mr. Curry on December 10, 2015, that was in Curry's counsel's possession since that month.

Judge Newman agreed to hear the motion to amend along with the motions in limine. After hearing arguments from both Curry's counsel and the Agency Defendant's counsel, Judge Newman granted the Motion to Amend. Thereafter, Judge Newman delayed the trial so that any arguments regarding the Release could be briefed, and cross-summary judgment motions could be heard by Judge Hood on April 26, 2016 and trial was set immediately for the week of May 9, 2016.

Judge Hood heard the cross-motions for Summary Judgment on April 26, 2016. Judge Hood denied the Agency Defendants' motion, but later granted Curry's motion and dismissed the defense of Release. Judge Hood had counsel for Curry draft the order, which he then signed, with no substantive changes. (See Exhibit I & J). On May 11, 2016, the Agency Defendants filed the Notice of Appeal of Judge Hood's order (Exhibit K).

On May 18, 2016, counsel for Curry then filed a Notice of Appeal from Judge Newman's order allowing the amendment of the Complaint. (See Exhibit L). This court then informed Curry's counsel that the appeal would require a written order. (See Exhibit M). On May 19, 2016, Ms. Peavy wrote Judge Newman and requested a written order. (See Exhibit N). Judge Newman issued that order on May 24, 2016 (Exhibit O). The order stated that "the basis of Defendants' proposed amendment which, despite earlier written requests for the same, was provided to Defendants by Plaintiff only ten days before trial." Of course, Judge Newman is referring to the **executed** Release. The court further found that the defense could have been anticipated the plaintiff. The court also found that the filing of the motion just prior to the start of trial was a

direct result of the Defendants not having provided the executed release to the Agency Defendants in a timely manner. (See Exhibit O). Since then, both parties have filed three briefs each in this case and counsel for the Agency Defendants have compiled the consolidated record on appeal with input from Curry's counsel.

ARGUMENTS

A. The Executed Release was the Only Document Ever in Issue

Curry's motions accuse Agency Defendant's counsel of representing to the court that he did not have a chance to review the Release between Curry and Scottsdale before April 8, 2016. Counsel for the Agency Defendants never made any such representation. Curry's counsel leaves out an important word: "Executed." Unexecuted draft agreements between Scottsdale and Curry are of no force and effect and are not evidence that the would-be signatories have released anyone. It is a ludicrous argument to state that because counsel was copied on draft agreements that he had knowledge of the settlement agreement in its final form, not to mention an impossibility. Further, it would have been impossible to mount a defense on an unsigned release between Scottsdale and Curry.

At all times, before all of the judges below, the Agency Defendant's counsel made it clear that he was never served with the "**executed** release," until April 8, 2016. This is the only document that would be relevant to asserting the defense of release. "Draft releases" between counsel are of no force and effect.

Counsel for Curry complains that Mr. Peel misrepresented that he did not receive a draft copy of the Release. Even though receiving a draft copy of the release would not be relevant to Agency's amendment of its answer, the only person that ever made stated that Mr. Peel did not receive a copy of the **draft** release was Curry's own counsel, as well be set forth below in detail.

Also counsel argued that the Agency Defendants had notice of the settlement prior to receiving the executed release in full before Judge Newman as the transcript reflects. (J. Newman Tr. pp: 56-57) (Exhibit P).

The exact statement regarding the attachments to the November 25, 2016, letter not being received by the Agency Defendants was not made by Mr. Peel, but were made by Ms. Peavy, presumably and hopefully due to a fundamental misunderstanding of the legal arguments before Judge Newman. Therefore, the supposed misrepresentations that are the subject of this motion, are nonexistent, as no such representation was ever made by the Agency Defendant's counsel. Presuming for a moment that the Agency Defendant's counsel was mistaken at some point, and claimed that he did not receive a copy of the draft settlement it would not matter anyway. Judge Newman's ruling was based solely upon the date that the executed settlement was served upon the defendants, as any unsigned draft documents would not constitute notice of any defense. The issue before this court revolves around whether or not Curry released the Agency through its executed Release with Scottsdale. The most material document to that issue is the executed release.

Ms. Peavy alleges in her motion that "Mr. Peel represented to the Court that he had only received the Scottsdale Release on April 8th; 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." These allegations are only partly true, as Ms. Peavy leaves out the operative part of Mr. Peel's arguments, where he told the court that he had not received an **"executed release"** from anyone prior to April 8, 2016. (J. Newman Tr. p.37:17-18) (Exhibit P). It is true that there was no prejudice to Mr. Curry, as these were his documents, and it is also true that Ms. Peavy failed to provide the Agency Defendants with an executed copy of the Release prior to April 8, 2016.

Curry's counsel alleges that the Record on Appeal indicates that Mr. Peel received a letter from J.R. Murphy, Esquire on November 30, 2015, which included an unexecuted copy of the Release (Exhibit B). That is true. However, Mr. Peel has never represented in any argument, brief, or otherwise to anyone that he did not receive this particular letter or its attachments. That is a representation made by Curry's counsel in their briefs and draft orders that must have arisen from a misunderstanding of the oral arguments. Mr. Peel informed Judge Newman that Curry's counsel failed to serve Agency Defendants with a copy of the executed Release until he requested on April 8, 2016.

"I did not see the executed releases until April 8th. Ms. Peavy gave it to me as soon as I asked for it, the same day. However, it was apparently signed in December. I would say that it should have been introduced to me under our discovery requests as communications between other parties."

(J. Newman Tr. p. 37; p.87:1-22) (Exhibit P).

Curry did not sign the Release until December 10, 2016. (See Exhibit C). Counsel cannot be charged with knowledge of the contents of the final Release until it was signed and served upon him. Hannah Stetson, Esq. of Mr. Murphy's firm, on December 14, 2016, mailed directly to Agency Counsel a Stipulation of Dismissal for Mr. Peel's signature, but it did not contain the executed Release. Despite supplementing discovery in March, Curry's counsel did not serve the Agency Defendants with any documents related to the settlement and dismissal of Scottsdale after they were completely executed, including filing the dismissal with the court. It is undisputed and is the law of the case that Agency Defendants were not given the executed release until April 8, 2016.

Assuming that Curry's counsel is correct and the Agency Defendants were on notice of the terms of the release, and had read and considered the terms of the unsigned Release, no defense could have been raised until the Release was executed and consideration had been exchanged

between Curry and Scottsdale. First, counsel for the Agency Defendants are under an ethical duty to preserve and protect any potential defenses available to their client. Raising the issue regarding the release defense prior to the final settlement between Scottsdale and Curry would violate that ethical duty because the Release could have been undone or edited. Second, and quite obviously, the defense did not arise until Scottsdale and Curry exchanged consideration – the payment of \$85,000 to Curry and the execution of the Release of Scottsdale and its agents by Curry.

Further, Mr. Peel made it clear to the court that he was only concerned about the executed release: “I just got this release, copy of release April 8th from – I did move this morning.” (J. Newman Tr. p.56:9-11) (Exhibit P). “But we just ask to be allowed to amend to assert the defense of release based solely on the release that we received April 8th.” (J. Newman Tr. p.56:16-19) (Exhibit P). Counsel for Curry then correctly argued that the Agency Defendants had been on notice of the settlement since December and that Agency Defendants signed the stipulation of dismissal, but not a release. (J. Newman Tr. pp. 56:2-57:15) (Exhibit P). (“They are moving on the day of trial on an issue that they had notice of five months ago.”) Therefore, the argument regarding the Agency’s notice of the settlement prior to April was heard and considered by Judge Newman.

Ms. Peavy admitted that failing to serve the executed and final release was a mistake: 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. He knew Scottsdale had been released because he signed off on the stipulation of dismissal as to Scottsdale.

(Peavy, J. Newman Tr. p. 58:13-17) (Exhibit P). Counsel failed to recognize that knowledge of the occurrence of a settlement and knowledge of its final terms are two completely different things.

Even prior to the argument before Judge Newman, counsel for Curry was aware that Mr. Peel was asserting that he never received the Executed Release. In an email to the Chief Administrative Judge on April 15, 2016, Mr. Peel informed Judge Lee’s clerk as follows: “Dear

Mr. Devlin: Please let the judge know that I was supplied with an **executed** copy of the release on April 8, 2016 by email.” (Emphasis added) (See Exhibit Q). Both Ms. Peavy and Mr. Goodwyn were copied on that email. Later, in correspondence to Judge Lee dated April 25, 2016, counsel for the agency informed Judge Lee: “The basis for the motion was that as a matter of law, the release operated as a release of all parties. I had never been served with the executed release o[r] the filed Stipulation of Dismissal until I requested it on April 8, 2016.” (See Exhibit R).

Therefore, at the time of her ruling granting the motion to amend, Judge Newman was aware that Curry was arguing that Agency Defendants were aware of a settlement and took that into consideration in making her ruling: “I know, but it seems to me that you are seeking to benefit from your failure to provide him with a copy of the document.” (J. Newman Tr. p. 58:19-20) (Exhibit P). The court then made it very clear that it was only considering the executed release:

“If it was something that he previously requested, you came into possession of it in December and did not provide a copy to him in December, January, February, or March, and he seeks to enforce it in April, I don’t know if you should benefit from your delay. . . . Or your failure to do that.”

(J. Newman Tr. pp. 58:24-59:5) (Exhibit P).

As Ms. Peavy had already mentioned it was her error if it was not provided, the court ruled “And he has just received a copy of it on April 8th. I am inclined to - -yes, I am going to grant the motion.” (J. Newman Tr. p.59:13-15) (Exhibit P). Unexecuted draft documents would not support a defense of Release at all because they do not demonstrate a meeting of the minds. Without an executed Release, there was nothing to support a defense of release or a Motion to Amend. The court went on to state that “Amendments are freely given when justice so requires and the opposing party is not significantly prejudiced. I find that is the case here, particularly in light of the fact that you had a copy and you knew what it said. Yes. And you were under a continued duty to disclose anyway. So I will allow the amendment.” (J. Newman Tr. pp. 59:18-60:1) (Exhibit P). The court

correctly pointed out that when Scottsdale and Curry finally completed their settlement, that Curry was under a continuing duty to disclose those communications. It is undisputed that they did not.

Further, later in the record Mr. Peel discussed with the court the timeliness issue as to the filing of a motion for summary judgment and he makes it clear that he knew that the case had been settled, but that he had never been served with a transmittal of the stipulation of dismissal to the court, a filed copy of the stipulation of dismissal, or the executed release: "Now I know the case was settled. I was aware." (J. Newman Tr. p.87:1-10) (Exhibit P). Counsel for Curry then agrees that they have no objection to trial being continued. (J. Newman Tr. p.90:2-6) (Exhibit P).

Therefore, the matter complained of now by counsel, whether it be considered newly discovered evidence, misrepresentation, or fraud is not relevant to this appeal. Whether or not the Agency's counsel received a copy of a draft settlement agreement does not matter as the only relevant document would be the executed release. Therefore, even if at some point Mr. Peel mistakenly represented that he did not receive a draft agreement it would have no bearing on his knowledge of the final, executed release, which was undisputedly not provided to him until April 8, 2016.

B. The Issue as to the Receipt of the November 25, 2015 Letter and its Attachment were not Created by the Agency Defendants' Counsel, but by the Confusion of Counsel for Curry

Curry's counsels' motions before this court accuse Mr. Peel of fraud because the Record on Appeal contains Mr. Murphy's letter of November 25, 2016, with a proposed release attached, which was clearly received by the Agency Defendant's Counsel. As the record demonstrates, Mr. Peel never denied receiving the letter and the attachments, never represented that he had not received them, and admitted with candor to the court that he was aware of the settlement in December 2015.

After reviewing the record and correspondence closely in an effort to determine the source of Ms. Peavy's inaccurate and spurious allegations, it is apparent that Ms. Peavy is the individual that made this representation to the court, not Mr. Peel. Counsel for Agency Defendants cannot find from where movant's counsel got the notion that Mr. Peel represented to the court that the draft release was not attached to Mr. Murphy's November 25, 2015 letter which was copied to Mr. Peel. Counsel can only surmise that Ms. Peavy misunderstood counsel when he told the court that he had not received an executed copy of the release and understood him to say that he had not received a proposed copy. As set forth above, even if all counsel is confused regarding whether or not the draft settlement was received by Mr. Peel, it did not matter because the defense could not have been raised until the agency defendants were in possession of the final, executed release.

It has been movant's counsel that has consistently repeated throughout the case below that a copy of the draft release was not included in Mr. Murphy's November 25, 2016 letter. Additionally, all of these representations by movant's counsel were made after Judge Newman had ruled on the motion to amend. Counsel for the Agency Defendants had not previously noticed these representations of Curry's counsel, likely because they are not relevant to any of the motions that were before the court below. In fact, Counsel for the Agency Defendants remained consistent in addressing the courts by referring to the "executed release."

As best as can be determined, the history of Ms. Peavy's representations are set forth below. Judge Newman granted the Motion to Amend on April 18, 2016. On the morning of April 19, 2015, Plaintiff filed a Memorandum in Opposition to the Untimely Hearing of Defendants' Motion for Summary Judgment or, in the alternative, in opposition to Summary Judgment." (Exhibit S). On page 5 of that memo, counsel for Curry states:

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 in the amount

of \$85,000, along with a 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.

The footnote in the memo states that “It is undisputed that Mr. Peel did not receive a copy of the release until earlier this month, when he requested it from Plaintiff’s counsel.” Of course, it does not matter whether or not counsel received an unexecuted, draft release. However, the footnote is inaccurate in that Mr. Peel did not receive an **executed** copy of the release until April 8, 2015. This particular memo was handed to Judge Newman at oral argument that day regarding summary judgement timing issues. (J. Newman Tr. p. 83: 12-16) (Exhibit P). The memo was not reviewed by counsel for the agency defendants prior to oral arguments on April 19, or afterwards because Judge Newman continued the trial and the hearing in order for Curry’s counsel to be able to fully brief the issues regarding the defense of release.

Of course, the issue before the court was not the receipt of a proposed release, but an executed release, and clearly any copy of the release prior to December 10, 2015, was unexecuted. It is unclear why counsel for Curry made the statement about the November 25th letter. The letter and its attachments were never an issue before Judge Newman, either on April 18 or 19, nor was it argued in any memo or motion presented by the agency Defendants. The only explanation that counsel for the Agency Defendants can offer is that while arguing about not receiving the executed release, Curry’s counsel assumed that the Agency’s counsel was speaking of the draft settlement. Plaintiff’s counsel continues to conflate receiving a proposed release with serving a copy of the executed release.

It is not surprising that there is not any argument regarding draft copies of the Release being circulated among the parties. Those documents were notice of nothing but proposed intentions, and until Mr. Curry signed the Release, the “release” defense did not exist.

Therefore, it would appear that counsel for Plaintiff and counsel for the agency believed that they were arguing different points. Counsel for the agency made it clear that he did not receive the executed release until April 8, 2016. Curry's counsel agreed that it was her error in not providing it. The court based its ruling on the date of receipt of the executed release. Counsel for the agency argued before Judge Newman: "All that matters is what was going on at the time the release was entered." To which the court replied: "Right." (J. Newman Tr. p. 89:3-4) (Exhibit P).

Even after the matter was placed before Judge Hood to deal with the dispositive motions related to the executed Release, the agency's counsel continued to make it clear to the court that he was referring to the executed release and that they did not receive a copy of the executed release until April 8, 2016.

Your Honor, I should add that the reason we're here so late, I think this was glossed over, is that the Plaintiff did not give me the executed copy of the release as they were under a duty to do under the discovery until April 8th, the week before trial when I requested a copy of it. In fact I was never served with a signed and executed filed stipulation of dismissal. So that's why we're jammed up here at the end right before trial.

(J. Hood Tr. p.19:17-25) (Exhibit T).

There was never any question that the executed release was the basis of the defense: Mr. Peel: "As part of - - my motion in brief says that the release executed between Scottsdale and the plaintiff as a matter of law releases Carolina Insurance and Maurice Derrick . . ." (J. Hood Tr. pp. 3:23-4:1) (Exhibit T). Ms. Peavy claims that she was unable to present to the court the argument that Mr. Peel received a copy of the draft settlement on November 25, 2016. However, before Judge Hood Mr. Peavy argued:

The critical issue here, Your Honor, is that on November 25, the Defendants were notified by Scottsdale's attorney, J.R. Murphy, that Mr. Murphy had settled Scottsdale's case with the Plaintiff in exchange for the payment of \$85,000.00, the signing of a release that Mr. Curry was to execute and the execution by all the parties of a stipulation of dismissal as to Scottsdale Insurance Company only. So

that's November 25th. So on November 25th, Mr. Peel's client are on notice that the case against Scottsdale, which Mr. Curry brought separate claims, has been settled. There's a release. There's a stipulation of dismissal as to Scottsdale, and there's a check from Scottsdale alone in the amount of \$85,000.00.

(J. Hood Tr. p.10:1-14) (Exhibit T).

Ms. Peavy makes this same argument to Judge Hood again during the hearing. (J. Hood Tr. p.20:9-16) (Exhibit T). Ms. Peavy then accurately recites that Agency's counsel was forwarded a stipulation of dismissal from Mr. Murphy's firm on December 14, 2015 (without a copy of the execute release). (J. Hood Tr. p.10) (Exhibit T). Ms. Peavy states that the stipulation was filed on December 30th. (J. Hood Tr. p.11:8-9) (Exhibit T). However, Ms. Peavy fails to point out that neither she nor Scottsdale served a filed copy of the dismissal on the Agency Defendants prior to April 8, 2016.

To recap, on April 19, 2015, Curry's counsel submitted a brief to the court stating that it was not disputed that the Agency's counsel did not receive a copy of the draft release with Mr. Murphy's letter of November 25, 2016. (This was her own argument, not anything that counsel for the Agency argued). Then on April 26, 2016, before Judge Hood, Ms. Peavy argues that the Agency Defendants did receive the release with the November 25th letter and were on notice of a settlement. Clearly at that point Curry's counsel could have filed a Motion to Reconsider before Judge Newman if she believed that it mattered at all that the defendants were on notice of a draft settlement agreement.

Ms. Peavy continued to repeat her statement that the Agency Defendants did not receive a copy of the settlement draft. In Curry's amended memorandum in support of the defendants' motion for summary judgment and in support of Plaintiff's motion for summary judgment, Ms. Peavy argues that the Agency defendants received notice of the settlement by letter of J.R Murphy dated November 25, 2015, and never asserted that they were parties to the Release at that time.

(Curry Memo. p. 3, ¶ 2) (Exhibit U). In the same memo Curry argues “that if Defendants had believed that they were released by virtue of Scottsdale having been released – a fact which they were on notice of since November 2015, they failed to ever raise the issue until the eve of trial.” (Emphasis plaintiff’s) (Curry Memo. p. 3, ¶4) (Exhibit U). Counsel for Curry could have placed this argument before Judge Newman in a Motion for Reconsideration, but failed to do so.

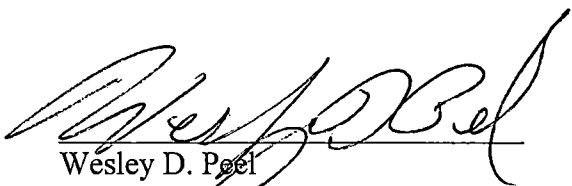
The above-quoted sentence demonstrates movant’s misapprehension that an unexecuted draft release is operative and binding. Scottsdale had not been released in November. Scottsdale was not released until December 10, 2015, when Mr. Curry signed the Release, which Ms. Peavy has admitted that she mistakenly failed to provide to Agency’s counsel and was not sent to him until April 8, 2016. However, on page 6 of the same memo, Ms. Peavy again curiously states that Mr. Peel did not receive a copy of the release with the November letter. In the same memo in footnote 5 of page 3, Ms. Peavy again asserts that Defendants’ counsel was aware of the release as of November 25th. (See Exhibit U). Again, movant’s counsel could have moved for reconsideration at this point. Counsel for Curry includes this statement as a finding when she drafted the order granting her summary judgment for Judge Hood. (See Exhibits I and J). The salient point here is that this issue was not brought up by counsel for the agency, because it was never relevant as it was not an executed copy of the release; and as her memo stated, all counsel was aware of a release as of November 25 (See Curry Memo., p. 3, FN 5) (Exhibit U); however, there was not a final release until December 10, 2015.

Conclusion

Therefore, Plaintiff’s motions should be denied, because her assertions as to the representations made by counsel for the Agency defendants are at best inaccurate, and moreover, the language Curry’s counsel complains of are in fact assertions that she made. Additionally, Ms.

Peavy made the exact arguments that she is attempting to rehash by accusing her fellow bar member of fraud. Ms. Peavy made these arguments below and they were given the weight that they deserved, as the only issue before the court below was the receipt of the executed release. More to the point, the question of whether or not counsel received copies of draft settlement agreements is not relevant to any issues on appeal.

November 23, 2016



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EXHIBIT A

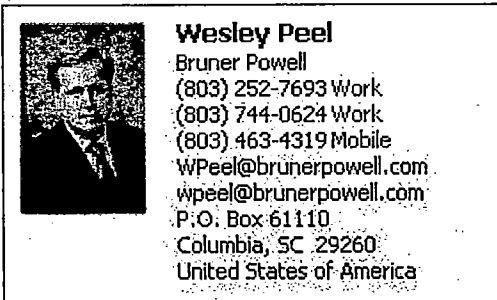
Wesley Peel

From: Wesley Peel
Sent: Friday, April 8, 2016 11:42 AM
To: 'RPeavy@Goodwynlaw.com'
Subject: RE: Motion Resolved - April 11th roster - Richland County Motions Roster
Attachments: Wesley Peel.vcf

Rachel:

Please provide me with a copy of the settlement agreement between Mr. Curry and Scottsdale. Thank you.

Wesley



From: Rachel Peavy [mailto:RPeavy@Goodwynlaw.com]
Sent: Thursday, April 07, 2016 12:15 PM
To: lverdinc@sccourts.org
Cc: Wesley Peel; 'Mary Bush'
Subject: Motion Resolved - April 11th roster - Richland County Motions Roster

Re: Case No. 14-CP-40-4661
Porthemos Curry v. Scottsdale et al.

Dear Judge Verdin:

I am writing to let you know that Plaintiff's Motion to Compel (#17) has been resolved. Accordingly, we will not go forward with the hearing set for Monday at 2:00 p.m.

Thank you for your courtesy in this matter. By copy of this email, I am notifying defense counsel of same.

Rachel Peavy

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Wesley Peel

From: Wesley Peel
Sent: Friday, April 8, 2016 3:27 PM
To: 'Mary Bush'
Subject: RE: Porthemos Curry v. Scottsdale, et. al.
Attachments: Wesley Peel.vcf

Thank you!



Wesley Peel

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From: Mary Bush [mailto:MBush@Goodwynlaw.com]
Sent: Friday, April 08, 2016 11:38 AM
To: Wesley Peel
Subject: Porthemos Curry v. Scottsdale, et. al.

Ms. Peavy asked that I forward the attached signed Release in regard to the above matter.

Mary Bush, paralegal
Goodwyn Law Firm, LLC
2519 Devine Street
Suite A
Columbia, S.C. 29205
Telephone: (803) 251-4517
Facsimile: (803) 251-4527
www.Goodwynlaw.com

CONFIDENTIAL & PRIVILEGED

Unless otherwise indicated or obvious from the nature of the following communication, the information contained herein is attorney-client privileged and confidential information/work product. The communication is intended for the use of the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

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 10 day of

December, 2015.

WITNESSES:

Rachel J. Peavy

Porthmos Curry (SEAL)
Porthmos Curry

EXHIBIT B

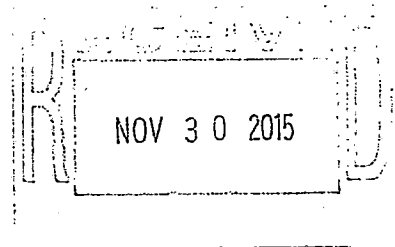


MURPHY & GRANTLAND, P.A.

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

J. R. Murphy John M. Grantland Ron B. Diegel* Brent M. Boyd E. Ray Moore, III Anthony W. Livoti Adam J. Neil Jeff C. Kull Peter E. Farr
Alice P. Adams Tim J. Newton Chris A. Majure J. Ryan Oates Wesley B. Sawyer Jason P. Luther Elliott B. Daniels Hannah D. Stetson Rogers E. Harrell, III

*Member-American Board of Trial Advocates

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
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205
803-251-4517
Attorney for Porthemos Curry

J.R. Murphy, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
803-782-4100
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

EXHIBIT C

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 10 day of

December, 2015.

WITNESSES:

Rachel J. Peavy

Porthmos Curry (SEAL)
Porthmos Curry

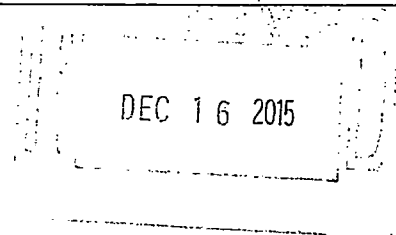
EXHIBIT D



MURPHY & GRANTLAND, P.A.

Hannah D. Stetson
Direct dial 803-454-1208
hstetson@murphygrantland.com

December 14, 2015



Wesley D. Peel, Esquire
Bruner, Powell, Robbins, Wall & Mullins
1735 St. Julian Place
P.O. Box 61110
Columbia, SC 29260-1110

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 Wesley:

Enclosed please find a Stipulation of Dismissal as to Defendant Scottsdale Insurance Company in the above-referenced matter. If the Stipulation meets with your approval, please sign where indicated and return the original to our office. We will send it to the Clerk for filing.

If you have any questions, please feel free to contact me.

With kind regards, I am

Sincerely,


Hannah D. Stetson

HDS/kbd

Enclosure

cc: Rachel G. Peavy, Esquire

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

J. R. Murphy John M. Grantland Ron B. Diegel* Brent M. Boyd E. Ray Moore, III Anthony W. Livoti Adam J. Neil Jeff C. Kull Peter E. Farr
Alice P. Adams Tim J. Newton Chris A. Majure Robert M. Peele, III Wesley B. Sawyer Jason P. Luther Elliott B. Daniels Hannah D. Stetson Rogers E. Harrell, III
*Member-American Board of Trial Advocates

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Case No. 2014-CP-40-04661

Porthemos Curry,

Plaintiff,

vs.

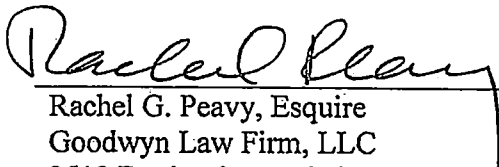
Scottsdale Insurance Company, Carolina
Insurance Group of SC, Inc. and Maurice
Derrick,

Defendant.

**STIPULATION OF DISMISSAL
AS TO DEFENDANT SCOTTSDALE
INSURANCE COMPANY**

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 only.

The Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal.



Rachel G. Peavy, Esquire
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205
(803) 251-4517
Attorney for Porthemos Curry

J.R. Murphy, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Scottsdale Ins. Co.

December 10, 2015

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

EXHIBIT E

GOODWYN LAW FIRM, LLC

T. Jeff Goodwyn, Jr.*
Christopher J. Archer

2519 Devine Street
Suite A
Columbia, South Carolina 29205

Tel. (803) 251-4517
Fax (803) 251-4527

Special Counsel:
Rachel G. Peavy

Email: JGoodwyn@Goodwynlaw.com
Web: www.GoodwynLaw.com

*Also Licensed in Georgia

December 14, 2015

VIA FACSIMILE ONLY (803) 254-5719

Wesley D. Peel, Esquire
Bruner, Powell, Wall & Mullins, LLC
PO Box 61110
Columbia, South Carolina 29260

**RE: *Porthemos Curry vs. Scottsdale Ins. Co., Carolina Insurance
Group of SC, Inc. and Maurice Derrick
Civil Action No.: 2014-CP-40-04661
Our File No.: 3000-0170***

Dear Wesley:

Please be advised that the Plaintiff's offer to settle this matter for \$110,000 will expire at noon tomorrow, December 15th.

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

Very truly yours,


Rachel G. Peavy

RGP/

EXHIBIT F

GOODWYN LAW FIRM, LLC

T. Jeff Goodwyn, Jr.*
Christopher J. Archer

2519 Devine Street
Suite A
Columbia, South Carolina 29205

Tel. (803) 251-4517
Fax (803) 251-4527

Special Counsel:
Rachel G. Peavy

Email: JGoodwyn@GoodwynLaw.com
Web: www.GoodwynLaw.com

*Also Licensed in Georgia

December 17, 2015

VIA US MAIL

Wesley D. Peel, Esquire
Bruner, Powell, Wall & Mullins, LLC
PO Box 61110
Columbia, South Carolina 29260

DEC 21 2015

**RE: Porthemos Curry vs. Scottsdale Ins. Co., Carolina Insurance
Group of SC, Inc. and Maurice Derrick**
Civil Action No.: 2014-CP-40-04661
Our File No.: 3000-0170

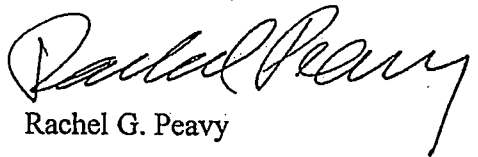
Dear Wesley:

Enclosed please find **Plaintiff's Supplemental Answers to Defendant Carolina Insurance Group of SC, Inc. and Maurice Derrick's First Interrogatories to Plaintiff** in regard to the above referenced matter.

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

With kind regards, I am

Very truly yours,


Rachel G. Peavy

RGP/msb
Enclosures

cc: Porthemos Curry

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Pursuant to Rules 26 and 33 of the South Carolina Rules of Civil Procedure, Plaintiff, by and through its undersigned attorney, hereby submit their supplemental responses to Defendant Carolina Insurance Group of SC, Inc. and Maurice Derrick's First Interrogatories to Plaintiff as follows:

4. List the names and addresses of any and all expert witnesses whom the party proposes to use as a witness at the trial of this case.

RESPONSE: John J. O'Brien JD CLU CPCU
4862 Marshwood. Drive
Hollywood, South Carolina 29449

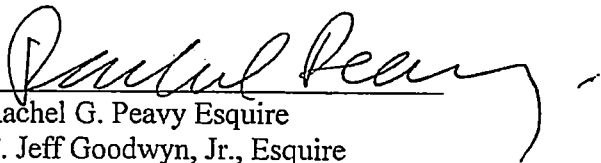
Mr. O'Brien is in the process of preparing a report and Plaintiff's counsel will provide same to defense counsel upon receipt of same.

DEC 21 2015

**Frank Mitchell
Orion Construction
1428 Cherokee Street, Suite A
Columbia, SC 29201**

Mr. Mitchell is a licensed contractor who has previously been deposed in this case. No report has been prepared; however, Plaintiff intends to call Mr. Mitchell to testify as an expert as to the rebuilding cost at trial.

GOODWYN LAW FIRM, LLC



Rachel G. Peavy Esquire
T. Jeff Goodwyn, Jr., Esquire
2519 Devine Street
Suite A
Columbia, S.C. 29205
(803) 251-4517
(803) 251-4527 (f)
JGoodwyn@Goodwynlaw.com
Attorneys for Plaintiff

Columbia, South Carolina

December 17, 2015

EXHIBIT G

BRUNER, POWELL, WALL & MULLINS, LLC

ATTORNEYS AND COUNSELORS AT LAW
1735 ST. JULIAN PLACE, SUITE 200
POST OFFICE BOX 61110
COLUMBIA, SOUTH CAROLINA 29260-1110
TELEPHONE: 803-252-7693
FAX: 803-254-5719
WWW.BRUNERPOWELL.COM

JAMES L. BRUNER, P.A.*
WARREN C. POWELL, JR., P.A.**
HENRY P. WALL
E. WADE MULLINS III, P.A.

BRIAN P. ROBINSON, P.A.
WESLEY D. PEEL, P.A.
JOEY R. FLOYD, P.A.
BENJAMIN C. BRUNER, P.A.

ANN ALLISON LEE
CAITLIN C. HEYWARD
ROBERT C. OSBORNE III

* Of Counsel

**Also Admitted in District of Columbia

AUTHOR'S E-MAIL: RDECARLIS@BRUNERPOWELL.COM

December 28, 2015

Hannah D. Stetson, Esquire
Murphy & Grantland PA
Post Office Box 6648
Columbia, SC 29260

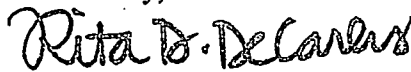
Re: Porthemos Curry vs. Scottsdale Insurance Company, Carolina
Insurance Group of SC, Inc. and Maurice Derrick
Case No.: 2014-CP-40-4661
Our File No.: 3-264-189.1

Dear Hannah:

Please find enclosed the Stipulation of Dismissal which has been executed by Wesley Peel on behalf of Carolina Insurance Group of SC, Inc. and Maurice Derrick. Should you have any questions relating to this matter, please do not hesitate to contact our office.

With kind regards, I am

Sincerely,



Rita D. DeCarlis

/rdd
Enclosures

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
Case No. 2014-CP-40-04661

Porthemos Curry,

Plaintiff,

vs.

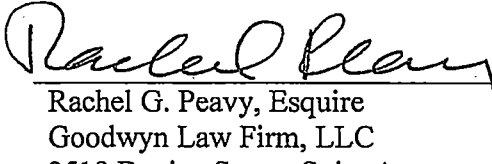
Scottsdale Insurance Company, Carolina
Insurance Group of SC, Inc. and Maurice
Derrick,

Defendant.

**STIPULATION OF DISMISSAL
AS TO DEFENDANT SCOTTSDALE
INSURANCE COMPANY**

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 only.

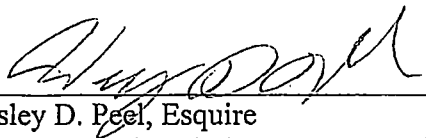
The Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal.



Rachel G. Peavy, Esquire
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205
(803) 251-4517
Attorney for Porthemos Curry

J.R. Murphy, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Scottsdale Ins. Co.

December 10, 2015



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

EXHIBIT H

T. Jeff Goodwyn, Jr.*
Christopher J. Archer

Special Counsel:
Rachel G. Peavy

Of Counsel:
E. Crosby Lewis

*Also Licensed in Georgia

GOODWYN LAW FIRM, LLC

Reply To:
2519 Devine Street
Suite A
Columbia, South Carolina 29205

111-B S. Congress Street
Winnsboro, South Carolina 29180

Tel. (803) 251-4517 (Columbia)
Fax (803) 251-4527

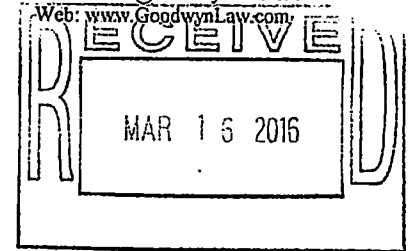
Tel. (803) 635-1920 (Winnsboro)
Fax (803) 635-2100

Email: Contact@Goodwynlaw.com

Web: www.GoodwynLaw.com

March 14, 2016

Wesley D. Peel, Esquire
Bruner, Powell, Wall & Mullins, LLC
PO Box 61110
Columbia, South Carolina 29260



RE: *Porthemos Curry vs. Scottsdale Ins. Co., Carolina Insurance Group of SC, Inc. and Maurice Derrick*
Civil Action No.: 2014-CP-40-04661
Our File No.: 3000-0170

Dear Wesley:

Enclosed please find **Plaintiff's Supplemental Responses to Defendant Carolina Insurance Group of SC, Inc. and Maurice Derrick's Request for Production of Documents to Plaintiff** in regard to the above referenced matter.

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

With kind regards, I am

Very truly yours,

Rachel G. Peavy

RGP/msb
Enclosures

cc: Porthemos Curry

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

)
) IN THE COURT OF COMMON PLEAS
)

Porthemos Curry,

Plaintiff,

vs.

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

Defendants.

) Civil Action No. 2014-CP-40-04661
)
)
)

**PLAINTIFF'S SUPPLEMENTAL
RESPONSES TO DEFENDANT
CAROLINA INSURANCE GROUP OF
SC, INC. AND MAURICE DERRICK'S
THIRD REQUESTS FOR
PRODUCTION TO PLAINTIFF**

TO: WESLEY D. PEEL, ESQUIRE, ATTORNEY FOR DEFENDANTS CAROLINA
INSURANCE GROUP OF SC, INC. AND MAURICE DERRICK:

Pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure,
Plaintiff, by and through its undersigned attorney, hereby submit their responses to
Defendant Carolina Insurance Group of SC, Inc. and Maurice Derrick's Third Requests
for Production of Documents as follows:

PRELIMINARY STATEMENT

1. The following Responses are based upon information presently available
to the Plaintiff, and which the Plaintiff believes to be correct. These Responses are made
without prejudice to its rights to utilize subsequently discovered facts.

2. No incidental or implied admissions of fact by Plaintiff are made by the
Responses below. The only admissions are express admissions. The fact that Plaintiff
has responded to any Requests herein may not be properly taken as an admission that
Plaintiff accepts or admits the existence of any facts set forth or assumed by such
Requests, or that such Responses constitute admissible evidence. The fact that Plaintiff
has responded to part or all of the Requests is not intended to be, and shall not be

construed to be, a waiver by Plaintiff of all or any part of any objections made by Plaintiff to any Request.

3. Plaintiff reserves the right to supplement these objections and Responses in the event that additional responsive information or documents are located at a later date.

4. This Preliminary Statement is hereby incorporated by reference into each of the Responses set forth below.

GENERAL OBJECTIONS

1. Plaintiff objects to Defendant's Interrogatories and Requests without waiver of, or prejudice to any objections Plaintiff may make.

2. All such objections are hereby expressly preserved, as is the right to move for a protective order.

3. Plaintiff reserves all objections as to the admissibility at trial of any information provided.

4. The supplying of any information does not constitute an admission by Plaintiff that such information is relevant in this lawsuit. All information provided by Plaintiff is for use in this litigation only and for no other purpose.

5. Plaintiff and his attorneys object to each and every interrogatory and request to the extent that any of the information requested, if any, was obtained and prepared in anticipation of litigation or for trial and Defendants have made no showing that she has substantial need for the materials in the preparation of her case and that she is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. Plaintiff and his attorneys further object to each and every interrogatory

and request to the extent that the information called for, if any, is privileged and it no discoverable under the South Carolina Rules of Civil Procedure.

6. Plaintiff and his attorneys object to each and every Interrogatory and Request to the extent that the information called for, if any, is protected from discovery by the attorney-client privilege.

7. Plaintiff and his attorneys object to each and every Interrogatory and Request to the extent that it seeks to vary the obligations imposed on Plaintiff under the South Carolina Rules of Civil Procedure.

8. Plaintiff and his attorneys object to each and every Interrogatory and Request to the extent that it seeks information that is equally available to Defendants and the burden on Defendants to obtain the requested information is no greater than the burden on Plaintiff.

9. Plaintiff and his attorneys object to each and every Interrogatory and Request to the extent that it is overly broad, oppressive, unduly burdensome and expansive and beyond that permissible scope of discovery under the South Carolina Rules of Civil Procedure.

10. Plaintiff and his attorney objects to each and every Interrogatory and Request to the extent it seeks an answer involving an opinion or contention that relates to fact or the application of law to fact before discovery has been completed.

11. Plaintiff reserves the right to supplement its responses to Defendant's Interrogatories and Requests upon completion of discovery.

12. Plaintiff objects to Defendant's use of the word "identify" in their Requests because it is multi-part and multiplies the number of Requests to an amount

exceeding the amount allowed by the South Carolina Rules of Civil Procedure.

13. Plaintiff objects to these Requests on the basis that it seeks documents that are proprietary and contain confidential trade secret, research, development or commercial information.

DEFINITIONS

1. "Unduly burdensome" means that the information sought is obtainable from some other source that is more convenient, less burdensome, or less expensive, or that it is unduly burdensome or expensive taking into account the needs of the case, that amount in controversy, limitations on Plaintiff's resources and the importance of the issues at stake in this litigation.

2. "Not relevant" means not relevant to the subject matter involved in this action, not admissible in evidence, and/or not reasonably calculated to lead to the discovery of admissible evidence.

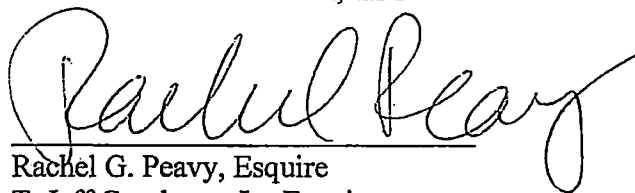
3. "Overly broad" means that the discovery sought includes much more information or many more documents than is reasonably related to the subject matter or the action or likely to lead to the discovery of admissible evidence.

RESPONSES

1. All documents in the care, custody or control of the Plaintiff related to the events alleged in the Complaint.

RESPONSE: See attached Affidavit of Thomas H. Hesse bearing Bates Stamp Nos. Curry 00256 through Curry 00257.

GOODWYN LAW FIRM, LLC

A handwritten signature in cursive script, reading "Rachel G. Peavy". The signature is written in black ink and is positioned above a horizontal line.

Rachel G. Peavy, Esquire

T. Jeff Goodwyn, Jr., Esquire

2519 Devine Street

Suite A

Columbia, SC 29205

(803) 251-4517

Attorney for Plaintiff

Columbia, South Carolina

March 14, 2016

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

AFFIDAVIT

Personally appeared before me, Thomas H. Hesse, who being first duly sworn, deposes and says:

1. The following affidavit is based upon the review of the documents provided to me. The opinions expressed are those of an expert in the field of insurance. They are based on my knowledge of insurance agency operations, agent practices, insurance coverage, and claims practice common to the insurance industry.

2. Prior to entering the practice law in 1992, I spent 20 years of my professional life in the insurance industry, including positions as Claims Manager with Atlanta Casualty Insurance Company and Litigation Manager with American Mutual Fire Insurance Company. I am a member of the Society of Chartered Property and Casualty Underwriters and have been since 1982. As part of my decades of experience in the insurance industry, I handled numerous issues regarding proper agency actions concerning procurement and renewal of policies; explanation of coverage; and the duties of individual agents as it concerns communications with, and to, retail agency clients.

3. I have been qualified as an expert witness in insurance matters in both state and federal courts.

4. A retail agent has many duties when interacting with members of the public concerning the procurement and/or renewal of insurance policies similar to the one at issue here. Chief among those duties is that the insurance agent has a duty to gather information from the customer in a timely and accurate manner and convey accurate and truthful information to the customer about the terms and conditions of coverage which the customer is seeking to obtain. Chief among the duties of an agent are to accurately represent the policy term and the policy limits. If an agent or broker fails, because of his fault or neglect, to procure insurance, or does not follow instructions, or if the policy is

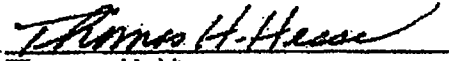
deemed void or materially deficient, or does not provide the coverage the agent undertook to supply, the agent has breached the duty of care. As part of those duties, the agent must act in good faith towards the customer and all information contained in any application for coverage should be reviewed with the customer to ensure that the application is accurate and in accordance with the customer's requirements.

5. In the instant case, Mr. Curry has testified that when he spoke to the agent, Mr. Derrick, regarding insurance coverage, he informed Mr. Derrick that he wanted another three month vacant structures policy because construction was not yet complete. This type of policy is also known as a builder's risk policy. The agent, Maurice Derrick, never reviewed the application for coverage with him when they spoke in December 2013 and, further, Mr. Derrick never informed Mr. Curry that he was submitting an application which would reflect a "backdated" term of coverage. The testimony reflects that Mr. Curry further informed Mr. Derrick that there were no known or unknown losses on the policy beginning from the expiration date of his first policy on November 21, 2013 through the date of the application for the second policy on December 2, 2013.

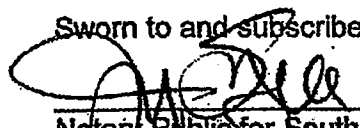
6. By backdating the policy and failing to inform the customer of his action, Mr. Derrick breached the standard of care of a retail agent and breached the duty of good faith and fair dealing, given that Mr. Curry was effectively paying for 10 days of coverage for which there was no known or unknown loss on the policy. The argument that there should have been "no lapse" due to the prospect of unknown possible claims is unpersuasive given that this was a small, residential construction site where Mr. Curry was overseeing all work and was in the final stages of completion; in short, this was not a large construction site with numerous individuals going in and out on a daily basis.

7. Finally, in further support of my opinion, I rely upon the testimony of Scottsdale Insurance Company as further evidence of the negligence and failure to use due care by Mr. Derrick and Carolina Insurance Group. Scottsdale Insurance Group testified that the subject policy should never have been issued due to the backdating of the term of coverage. Scottsdale testified that upon receipt of such a backdated application, TAPCO, its underwriter, should have "flagged" the application and sent it to Scottsdale's internal underwriting department for review. Upon receipt, Scottsdale testified that it would have rejected the application as submitted and, instead, offered to write the policy for a term beginning on December 2, 2013, as Mr. Curry had intended.

THE AFFIANT FURTHER SAYETH NAUGHT.


Thomas H. Hesse

Sworn to and subscribed before me this 10th day of March, 2016.


Notary Public for South Carolina

My commission expires: 7/23/2023

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EXHIBIT I

Bryan Triplett

From: Wesley Peel
Sent: Saturday, November 19, 2016 1:03 PM
To: Bryan Triplett
Subject: FW: Curry v. Carolina Insurance Group
Attachments: PROPOSED SJ ORDER.docx

Follow Up Flag: Follow up
Flag Status: Flagged

From: Rachel Peavy [mailto:RPeavy@Goodwynlaw.com]
Sent: Wednesday, May 4, 2016 6:01 PM
To: 'Hood, Robert E. Law Clerk (James B. Robey)' <rhoodlc@sccourts.org>
Cc: Wesley Peel <WPeel@brunerpowell.com>; 'Jeff Goodwyn' <JGoodwyn@Goodwynlaw.com>
Subject: Curry v. Carolina Insurance Group

Re: Summary Judgment Hearing of April 26th
Case No. 14-CP-40-4661

Dear Mr. Robey:

As requested, attached please find a proposed order in the above-referenced matter.

Should you have any questions, or require any further information, please do not hesitate to contact me. By copy of this email, I am serving same upon defense counsel.

Thank you again for your courtesy in this matter.

Rachel G. Peavy
Special Counsel
Goodwyn Law Firm, LLC
2519 Devine Street
Suite A
Columbia, S.C. 29205
Telephone: (803) 251-4517
Facsimile: (803) 251-4527
www.Goodwynlaw.com

CONFIDENTIAL & PRIVILEGED

Unless otherwise indicated or obvious from the nature of the following communication, the information contained herein is attorney-client privileged and confidential information/work product. The communication is intended for the use of the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.

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

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.¹ 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

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

to the affirmative defense of release, finding that there was no genuine 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 ¶34.

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 8th, 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 11th and prepared for a date certain trial on April 18th. On April 15th, Defendants filed a motion for summary judgment, asserting the defense of release. On April 18th, 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, SCRCP, 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. Sirrine & 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.²

² 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.

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 separate negligence claims – against Carolina Insurance Group and/or Maurice Derrick.³ 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

³ 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.

different types of damages.⁴ 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 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)).

⁴ 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.

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 ¶6.

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.⁵ For these reasons, the Defendants' Motion is denied.

⁵ 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*.

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 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.

The Honorable Robert E. Hood

Dated: _____

At: _____

EXHIBIT J

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2014CP4004661

Porthemos Curry

Carolina Insurance Group of SC Inc

PLAINTIFF(S)

Maurice Derrick

DEFENDANT(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

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

RICHLAND COUNTY
FILED
2016 MAY 29 AM 10:00
JENNIFER L. COLE, CLERK

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.¹ 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

¹ Defendants' counsel withdrew his Motion for Sanctions, filed April 25th, 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 ¶34.

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 8th, 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 11th and prepared for a date certain trial on April 18th. On April 15th, Defendants filed a motion for summary judgment, asserting the defense of release. On April 18th, 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. Sirrine & 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.²

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

² 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.³ 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.⁴ 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

³ 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.

⁴ 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 ¶6.

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.⁵ 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

⁵ 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.

Robert E. Hood

The Honorable Robert E. Hood

Dated: 5/6/16

At: Columbia

EXHIBIT K

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

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SC Court of Appeals

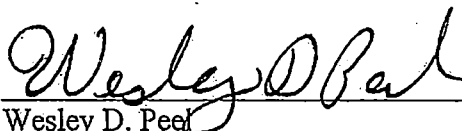
Porthemos Curry.....Respondent

v.

Carolina Insurance Group of SC, Inc. and Maurice Derrick.....Appellant

NOTICE OF APPEAL

Carolina Insurance Group of SC, Inc. and Maurice Derrick appeal the Order of The Honorable Robert E. Hood, Granting Plaintiff's Motion for Summary Judgment as to the Defendants' affirmative defense of release dated May 6, 2016 and filed on May 9, 2016. Appellant received written notice of entry of this order on May 9, 2016.



Wesley D. Peel
Bryan M. J. Triplett
Bruner Powell Wall & Mullins, LLC
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P: 803-252-7693
F: 803-254-5719
Attorneys for Appellant

Columbia, South Carolina
May 11, 2016

EXHIBIT L

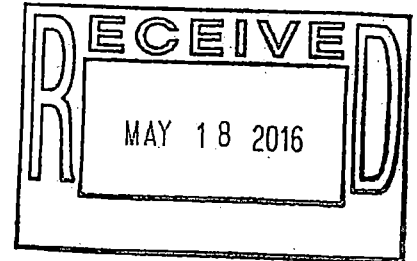
IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

Jocelyn Newman, Circuit Court Judge

Case No. 14- CP-40-04661

Appellate Case No. 2016-000986



Porthemos Curry Respondent

v.

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

NOTICE OF APPEAL

The Respondent, Porthemos Curry, appeals the order from the bench of the Honorable Jocelyn Newman granting Defendants' Motion to Amend their answer to assert the affirmative defense of release. Respondents received verbal notice of this ruling on April 18, 2016, the same day the motion to amend was filed by the Appellants.

While generally the granting of a motion to amend is interlocutory in nature and not immediately appealable, the Respondent submits that because the appeal of the Order granting Respondent's Motion for Summary Judgment as to the affirmative defense of release is before the Court, it is proper for the Court to determine the issue of whether the granting of the motion to amend to assert this defense was proper. "Courts have made a practice of accepting appeals . . .

of interlocutory orders not ordinarily appealable when these appeals are companion to issues that are reviewable.” Brown v. County of Berkeley, 366 S.C. 354, 622 S.E.2d 533 (2005); See also Tanner v. Florence City-County Bldg. Comm'n, 333 S.C. 549, 511 S.E.2d 369 (Ct. App. 1999); Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001).

GOODWYN LAW FIRM, LLC


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T. Jeff Goodwyn, Jr. Esquire [#73789]

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Attorneys for Respondent

Dated: May 16, 2016

Other Counsel of Record:

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Columbia, SC 29260-1110

Attorneys for Appellants

EXHIBIT M



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

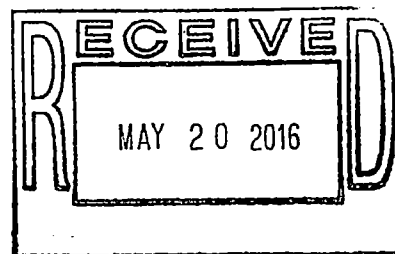
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May 18, 2016

Mr. Thomas Jefferson Goodwyn, Jr., Esquire
2519 Devine St.
Suite A
Columbia SC 29205

Ms. Rachel Gottlieb Peavy, Esquire
2519 Devine Street
Suite A
Columbia SC 29205



Re: Porthemos Curry v. Carolina Ins. Group of SC
Appellate Case No. 2016-000986

Dear Counsel:

Upon reviewing your notice of appeal, the following deficiency has been noted under the South Carolina Appellate Court Rules (SCACR), and must be corrected within ten (10) days of the date of this letter or your appeal will be dismissed:

- The notice of appeal is not accompanied by the order(s) and/or judgment(s) challenged on appeal.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Wesley Dickinson Peel, Esquire
Bryan Michael James Triplett, Esquire

EXHIBIT N

Rachel Peavy

From: Newman, Jocelyn Law Clerk (Christopher Campbell) <jnewmanlc@sccourts.org>
Sent: Tuesday, May 24, 2016 9:33 AM
To: Wesley Peel; 'RPeavy@Goodwynlaw.com'
Cc: jgoodwyn@goodwynlaw.com
Subject: RE: Curry v. Carolina Insurance Group
Attachments: Court of Appeals Order.pdf

Good morning Wesley and Rachel,

I apologize for the delay in response. Please find attached the order submitted to the clerk's office. Do let me know if there is anything further I may do for you regarding this matter. Have a great day.

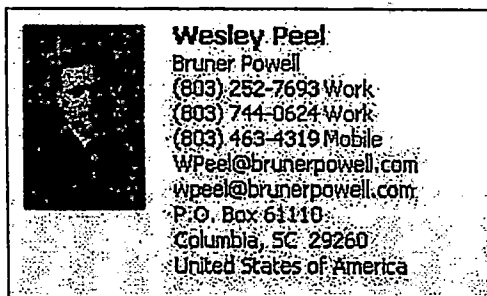
Warmest regards,

Chris

From: Wesley Peel [mailto:WPeel@brunerpowell.com]
Sent: Thursday, May 19, 2016 1:14 PM
To: 'RPeavy@Goodwynlaw.com'; Newman, Jocelyn Law Clerk (Christopher Campbell)
Cc: jgoodwyn@goodwynlaw.com
Subject: RE: Curry v. Carolina Insurance Group

Although it is probably not necessary, I certainly consent to Ms. Peavy's request.

Wesley.D. Peel



From: Rachel Peavy [mailto:RPeavy@Goodwynlaw.com]
Sent: Thursday, May 19, 2016 12:39 PM
To: 'Newman, Jocelyn Law Clerk (Christopher Campbell)'
Cc: Wesley Peel; jgoodwyn@goodwynlaw.com
Subject: Curry v. Carolina Insurance Group

Re: Trial Term – April 18th – Richland County – Porthemos Curry v. Carolina Insurance Group
Case No. 14- CP-40 –4661

Good morning Mr. Campbell:

We represent the Plaintiff in the above-referenced matter.

As you may recall, the Defendants filed a motion to amend their answer to assert the defense of release, as well as a motion for summary judgment on the grounds of release, on the eve of trial.

Judge Newman granted the motion to amend from the bench on April 18th, and continued the trial to allow Judge Hood to hear the summary judgment motion within the 10 day period required under the Rules of Civil Procedure. Judge Hood subsequently denied the Defendants' motion, and granted the Plaintiff's cross-motion for summary judgment as to the affirmative defense of release.

The Defendants have appealed Judge Hood's order granting summary judgment to the Court of Appeals, (Appellate Case No. 2016-000986). In order to preserve Plaintiff's grounds for appeal, the Court of Appeals requires a written order from Judge Newman reflecting her ruling from the bench granting the Defendants' motion to amend. Accordingly, I would respectfully request that Judge Newman issue an order as to the motion to amend. I have attached a proposed order for her signature or, in the alternative, would request that she issue a Form 4 order.

Please let me know if you have any questions or require additional information. I attach a copy of Judge Hood's order for your reference.

Thank you in advance for your attention to this matter.

Rachel Peavy

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# EXHIBIT O

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.

## EXHIBIT P

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 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. PEAUVY: 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. PEAUVY: 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           As to timeliness, I feel like I've got to  
2 address that, because I reviewed all the  
3 correspondence in the file last night. I was never  
4 served, ever, under Rule 5 with a file copy or even  
5 a transmitted copy to the court of the stipulation  
6 of dismissal. I never received that. In addition  
7 to not receiving the release, I never even got the  
8 stipulation. Now, I know the case was settled. I  
9 was aware. They asked me to sign the stipulation  
10 and I sent it back.

11           THE COURT: Go ahead.

12           MR. PEEL: But I was never served with it. So  
13 until I realized I didn't have any of this,  
14 April 8th is the first day I got it, so April 8th  
15 it is impossible for me to comply with Rule 56(c)  
16 and file a motion for summary judgment, because  
17 that puts -- I think ten days is still like  
18 tomorrow or the next day, before I could file it.  
19 So it clearly was included in my request for  
20 production that all e-mail correspondence, notice  
21 statements between the parties, and it was not  
22 supplemented.

23           So a party should not be able to profit from  
24 their own wrongdoing by putting me in this  
25 position, but I do agree with Ms. Peavy, because I

1 the complaint -- I feel like I need to address  
2 that -- don't matter. All that matters is what was  
3 going on at the time the release was entered.

4 THE COURT: Right.

5 MR. PEEL: But, Your Honor, I think it is the  
6 exact reason of Rule 16 is to prevent situations  
7 like that. And, like I said, it is not fair to  
8 prejudice my client because we didn't get this  
9 until the week before trial.

10 MR. GOODWYN: And, again, we're fine --

11 THE COURT: Mr. Peel, the motion for summary  
12 judgment filed on yesterday morning was an amended  
13 motion. When was the original motion filed?

14 MR. PEEL: Friday.

15 THE COURT: Do you have a copy of that that I  
16 can look at? We're having trouble locating it.

17 MR. GOODWYN: I think we do.

18 THE COURT: And it may not have made it to the  
19 court's file because it was not on the shelf in  
20 preparing for this trial. I don't know.

21 MR. PEEL: Your Honor, that is the danger of  
22 keeping everything electronically.

23 MR. GOODWYN: This is my copy here.

24 (Hands to Court.)

25 THE COURT: Thank you, sir.

1 MS. PEAVY: Your Honor --

2 MR. GOODWYN: Now that he has kind of said  
3 what he said, I mean, we don't have objection to  
4 the trial being continued so all this issue about  
5 the release and whether the Defense -- the release  
6 is valid can be determined.

7 MS. PEAVY: The reality, Your Honor, is that  
8 if either side gets an adverse -- and we believe  
9 they are moving obviously for a motion for summary  
10 judgment as to their affirmative defense of  
11 release. And so there will be rulings issued on  
12 the motions for summary judgment. The parties will  
13 presumably want to submit affidavit testimony or  
14 further testimony in response. And so we believe  
15 the proper thing is to continue this trial so that  
16 these motions can be heard, and then any appeal  
17 from the granting or denial of such motions can  
18 work its way through the system. Because, really,  
19 this issue is now becoming the crux of the case.

20 THE COURT: Well, I tell you, I considered --  
21 and that is where I was yesterday afternoon --  
22 continuing the trial. My concern is that this was  
23 set for a day certain.

24 MR. GOODWYN: Only because of the expert's  
25 schedule.

# EXHIBIT Q

---

## Wesley Peel

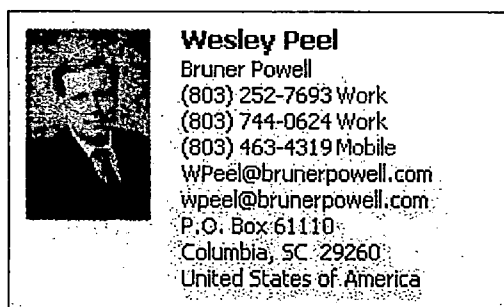
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**From:** Wesley Peel  
**Sent:** Friday, April 15, 2016 5:09 PM  
**To:** 'RPeavy@Goodwynlaw.com'; 'Lee, Alison Renee Law Clerk (Chadwick Devlin)'  
**Cc:** 'Jeff Goodwyn'  
**Subject:** RE: Curry vs. Carolina Insurance Group of SC, Inc. et al 2014-CP-40-04661  
**Attachments:** Wesley Peel.vcf

Mr. Devlin:

Please let the judge know that I was supplied with an executed copy of the release on April 8, 2016 by email.

Wesley Peel



---

**From:** Rachel Peavy [mailto:RPeavy@Goodwynlaw.com]  
**Sent:** Friday, April 15, 2016 4:06 PM  
**To:** 'Lee, Alison Renee Law Clerk (Chadwick Devlin)'; aleej@sccourts.org  
**Cc:** Wesley Peel; 'Jeff Goodwyn'  
**Subject:** Curry vs. Carolina Insurance Group of SC, Inc. et al 2014-CP-40-04661

**Re: Curry v. Carolina Insurance Group – Date Certain April 18, 2016**

**Case No. 14-CP-40-4661**

Dear Judge Lee:

I was served with the attached *Motion for Summary Judgment* by defense counsel a few moments ago.

The Motion asserts that the remaining defendants in the case, Carolina Insurance Group and its agent Maurice Derrick, are entitled to summary judgment on the negligence claims pending against them because Plaintiff previously entered into a settlement agreement with a former defendant, Scottsdale Insurance Company, in December 2015 as to his claims for breach of contract, statutory bad faith, and common law bad faith which were pending against Scottsdale. A stipulation of dismissal as to Scottsdale was filed that same month.

## EXHIBIT R

# BRUNER, POWELL, WALL & MULLINS, LLC

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BRYAN M.J. TRIPLETT

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\* Of Counsel  
\*\* Also Admitted in District of Columbia

AUTHOR'S E-MAIL: [WPEEL@BRUNERPOWELL.COM](mailto:WPEEL@BRUNERPOWELL.COM)

April 25, 2016

## VIA EMAIL AND HAND-DELIVERY

[aleej@sccourts.org](mailto:aleej@sccourts.org)

[aleelc@sccourts.org](mailto:aleelc@sccourts.org)

The Honorable Alison Renee Lee  
Chief Judge for Administrative Purposes  
Richland County Judicial Center  
1701 Main Street, Room 324  
Columbia, South Carolina 29202

**Re: Porthemos Curry vs. Scottsdale Insurance Company, Carolina  
Insurance Group of SC, Inc. and Maurice Derrick  
Case No.: 2014-CP-40-4661  
Our File No.: 3-264-189.1**

Dear: Judge Lee:

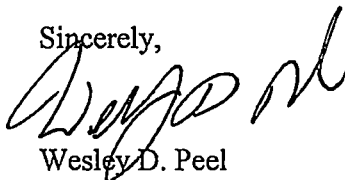
I sincerely apologize for troubling you once again with this matter. However, due to the incomprehensible actions of the Plaintiff's counsel, I am forced this morning to file an emergency motion before you pursuant to the South Carolina Alternative Resolution Rule 23. As your honor knows, this matter was scheduled for trial last week before Judge Newman. The Friday before trial, I filed a Motion for Summary Judgment based upon the Release entered between the Plaintiff and the former Co-Defendant Scottsdale Insurance. The basis for the motion was that as a matter of law, the release operated as a release of all parties. I had never been served with the executed release of the filed Stipulation of Dismissal until I requested it on April 8, 2016. Judge Newman continued the case and set the summary judgment motion for hearing this Tuesday, mostly based upon the evidentiary issues that having the motion unresolved would create and the fairness related to hearing the motion without ten days notice. Therefore, she set the motion to be heard before Judge Hood this week, which has now been scheduled for tomorrow at 2PM. Prior to Judge Newman continuing the case, Plaintiff's counsel handed up a memo of law with exhibits. At the time, Plaintiff's counsel did not have a complete copy with exhibits for the Defense. In any event, the motion was continued.

Unfortunately, on Friday April 22, 2016, I finally had an opportunity to review the memorandum and exhibits. In the memorandum and exhibits, Plaintiff's counsel has set forth and attached as exhibits, communication between the mediator and Plaintiff's counsel conveying offers and positions on settlement. Plaintiff's counsel has also included emails from me to them discussing settlement, all in violation of ADR Rule 10. I emailed Plaintiff's counsel Friday afternoon and requested that they withdraw these disclosures in the email attached. MR. Goodwyn replied by email and continued his nonsensical position that I was attempting to argue about the outcome of mediation. This is completely fabricated. The Defendants' motion is based upon the language of the Release between Plaintiff and Scottsdale and nothing more. My belief of my client's belief has nothing to do with my motion and any extrinsic evidence is improper regardless.

Continuing their complete disregarding and contempt for the ADR Rules and our mediation agreement, the Plaintiff then served me with affidavits completed by Mr. Goodwyn, Ms. Peavy, and their client Mr. Curry. These affidavits set forth in detail everything that occurred at the mediation between the parties. I am sorry that we once again have to involve your honor in a dispute in this case, but I cannot take likely counsel's cavalier disregard of the rules and our agreement.

In conclusion, our motion requests sanctions and to the extent that Judge Hood has read any of the privileged submissions, we would request assignment of the motion to another judge. I will make myself available for a hearing at the court's command.

Sincerely,

A handwritten signature in black ink, appearing to read 'Wesley D. Peel', is written over the typed name.

Wesley D. Peel

cc: T. Jeff Goodwyn, Jr Esq.  
Rachel Peavy, Esq.

# EXHIBIT S

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Porthemos Curry,

Plaintiff(s),

vs.

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

Defendant(s).

IN THE COURT OF COMMON PLEAS

Civil Action No. 14-CP-40-04661

**MEMORANDUM IN OPPOSITION TO  
UNTIMELY HEARING OF  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT OR, IN THE  
ALTERNATIVE, IN OPPOSITION TO  
SUMMARY JUDGMENT**

TO: THE HONORABLE JOCELYN NEWMAN, AND WESLEY PEEL, ESQUIRE,  
COUNSEL FOR DEFENDANTS:

The Plaintiff hereby submits this Memorandum in opposition to an untimely hearing being held on Defendants' Motion for Summary Judgment, filed April 15, 2016. In the event the Court rules that a hearing may go forward, Plaintiff submits that because the settlement agreement and release relied upon by Defendants solely concerns the release of claims between Plaintiff and Scottsdale Insurance Company, Defendants' Motion should be denied. In the alternative, Plaintiff would submit that the wording of the contract is susceptible to more than one construction and therefore summary judgment is not appropriate.

**Preliminary Matter As to Whether Motion Should Be Heard**

Plaintiff objects to a hearing being held on this late-filed summary judgment motion, without being given the requisite ten (10) days of notice under the Rule 56(c), SCRPC, which provides that "the motion shall be served at least 10 days before the time fixed for the hearing." See Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153,

156 (that granting summary judgment without the requisite 10 days notice violates the notice provision and noting that "the prejudice in doing so is obvious" where the non-moving party is unable to produce evidence in support of his claim.)

Accordingly, because the provisions of Rule 56 are mandatory – Plaintiff notes the use of the word "shall" - Plaintiff respectfully requests that a hearing on the Motion be denied as premature and outside the rules; that the Defendants' Motion for Summary Judgment be added to the motions roster by the Clerk of Court and set for hearing by the Chief Administrative Judge; and that a mistrial be declared in the instant trial and the case be re-set for a term of court after the summary judgment motion has been properly noticed and heard.

Plaintiff further objects to a hearing of this matter prior to the mandated ten (10) days notice, which Plaintiff submits conflicts with the decision of Judge Alison R. Lee, evidenced by the email attached hereto as **Exhibit K**, as it related to a hearing on this matter on the eve of trial.<sup>1</sup>

Finally, the grounds for summary judgment as asserted by defense counsel in open court on April 18<sup>th</sup> were not the same grounds which were raised in the written motion for summary judgment filed 3 days prior; in fact, defense counsel asserted entirely new grounds for its summary judgment motion during the argument in support of whether a hearing should be held on whether the motion should be entertained to direct verdict.

Specifically, the written motion filed on April 15<sup>th</sup> alleges that the release as to Scottsdale actually releases these Defendants from all liability under a joint tortfeasor

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<sup>1</sup> See, e.g., Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979); Sheppard v. Kimbrough, 282 S.C. 348, 318 S.E.2d 573 (Ct. App. 1984); State ex. rel. Medlock v. Love Shop Ltd., 286 S.C. 487, 334 S.E.2d 528 (Ct. App. 1985).

theory. However, at Monday's trial, defense counsel asserted that the release actually barred any recovery from these defendants because the release purported to release "Scottsdale Insurance Company and its agents . . ." and, since Plaintiff had alleged that these Defendants were agents of Scottsdale in his complaint, it was evidence that the Release actually released Carolina Insurance Group and Maurice Derrick. This position was outlined in Defendants' Motion to Amend the Complaint to add the affirmative defense of release.

These changing positions, along with an entirely new defense theory, further supports Plaintiff's contention that the Motion should not be heard without the requisite ten (10) days notice.

In the event the Court determines that the Defendants' Motion will be heard, Plaintiff respectfully submits that he should be entitled to a concurrent hearing on a motion for summary judgment as to the affirmative defense of release.

#### **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 ¶34. See **Exhibit A**.

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. Copies of the answers are attached as **Exhibit B**. Furthermore, the 30(b)(6) testimony of Carolina Insurance Group, attached hereto as **Exhibit C**, 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.

In September 2015, the parties participated in a mediation conference with John Cuttino, Esq. serving as the mediator. At that time, Scottsdale Insurance was still a named defendant in the case.

As a result of the mediation and subsequent negotiations, Plaintiff reached a settlement agreement with Scottsdale Insurance Company in November 2015. 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 in the amount of \$85,000, along with a 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.<sup>2</sup> A copy of Mr. Murphy's letter is attached as **Exhibit D**.

Plaintiff executed the Release, attached as **Exhibit E**. Counsel for Carolina Insurance Group and Maurice Derrick executed the Stipulation of Dismissal as to Defendant Scottsdale Insurance Company, a copy of which is attached as **Exhibit F**. The Stipulation specifically provided that ***"the Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal."***

Discovery continued in the case following Scottsdale's dismissal. With trial approaching, Defendants' counsel contacted Plaintiff's counsel on March 30, 2015 to explore a possible settlement of the matter. See E-Mail of Wesley Peel, attached as **Exhibit G**. In the e-mail, Mr. Peel notes that "given the settlement with Scottsdale and the upcoming expert depositions, I thought we should take another try at settlement."

The parties thereafter commenced settlement negotiations, with John Cuttino, Esq. again serving in a mediator role. On April 8<sup>th</sup>, Mr. Peel requested that Plaintiff's counsel provide him with a copy of the Release. At 11:38 a.m., Plaintiff's counsel forwarded a copy of the Release to Mr. Peel. See E-Mail attached as **Exhibit H**. At 4:04 p.m., Mr. Peel conveyed another offer of settlement – a best and final offer – in the amount

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<sup>2</sup> It is undisputed that Mr. Peel did not receive a copy of the release until earlier this month, when he requested it from Plaintiff's counsel.

of \$30,000. See E-Mail, attached as **Exhibit I**. Plaintiff's counsel thereafter conveyed their final demand at 4:49 p.m., to which the mediator thereafter responded that the parties were at a stalemate as of 5:35 p.m. on April 8, 2016. See **Exhibit J**.

### **Legal Standard**

"[B]ecause summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues." Lord v. D&J Enterprises, 407 S.C. 544, 757 S.E.2d 695 (2014). "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 Terms of the Release are Unambiguous**

At oral argument of the motions *in limine*, the Defendants argued that it was entitled to summary judgment on the grounds that the Release unambiguously provides for the release of Carolina Insurance Group and Mr. Derrick as "agents" of Scottsdale. Plaintiff responds to this oral argument as follows:

"In determining whether to grant summary judgment, pleadings and documents on file must be liberally construed in favor of [the] nonmoving party who must be given [the] benefit of all favorable inferences that might reasonably be drawn from [the] record."

McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488,493 (Ct. Ap. 1998) (internal citations omitted).

"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 v. Abstract Pools, 376 S.C. 585, 658 S.E.2d 539 (Ct. App. 2008).

In Silver, the Court of Appeals considered whether a homeowner had breached a contract for construction where homeowner alleged that the payment terms were ambiguous. The Court disagreed, noting that 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." Id. at 542 (citing McPherson v. J.E. Serrine & Co., 206 S.C. 183, 33 S.E.2d 501 (1945)). Finding that the contract was "clear, explicit, unambiguous, and capable of only one reasonable interpretation", the court found that it was error for the master to have held that the payment terms were ambiguous."

Similarly, here the Release clearly and specifically releases only Scottsdale Insurance Company, its agents, servants, employees, successors and assigns and therefore summary judgment should be denied. 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 Joel Sauls, the 30(b)(6) designee of Carolina Insurance Group and the president of Carolina Insurance Group, was that there was no agency relationship between Carolina Insurance and Scottsdale whatsoever. See Exhibit C. The only "evidence" that Defendants rely upon in making this argument are the pleadings in the case, previously attached as Exhibits A and B. Defendants' reliance upon the pleadings in the case is unpersuasive, as "allegations 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).<sup>3</sup>

As noted in Footnote 3, Plaintiff will stipulate to Defendants' position – as asserted in its pleadings and in its testimony in this case - that Carolina Insurance and Maurice Derrick are not agents of Scottsdale. With this stipulation, any other evidence in the case on whether Carolina Insurance or Maurice Derrick were agents of Scottsdale is irrelevant – the fact has been conclusively established in the case. See Crossmann Cmty. Of N.C. v. Harleysville Mut. Ins. Co., 411 S.C. 506, 769 S.E.2d 453 (Ct. App. 2015) (and cases cited therein) (noting that when there is an agreed stipulation of fact, the court will not go beyond such stipulation to determine the facts upon which the case is to be decided.)

Finally, counsel for Carolina Insurance Group and Mr. Derrick executed a legally binding Stipulation of Dismissal as to Scottsdale – filed with this Court on December 30, 2015 - which expressly stated that "the Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal." Viewed in the light most favorable to the Plaintiff, Plaintiff's motion should be denied and an order entered finding that the Release is capable

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<sup>3</sup> It is undisputed that Plaintiff alleged that the Defendants were agents of Scottsdale in his complaint; it is further undisputed that the Defendants denied they were agents of Scottsdale in their answer. Plaintiff stipulates that the Defendants are not agents of Scottsdale.

of only one reasonable interpretation – that it releases Scottsdale Insurance and only Scottsdale Insurance.

**II. Defendants are not “Joint Tortfeasors” with Scottsdale.**

Responding to the arguments raised in Defendants' written motion for summary judgment dated April 15, 2016, Plaintiff would show that Scottsdale and the remaining Defendants are not joint tortfeasors under South Carolina law and that even if they were, the effect of the release with Scottsdae is not the dismissal of the remaining defendants. In addition, any set off must be from a settlement for the same cause of action against both the settled defendant and the remaining defendant.

Defendants rely upon Bartholomew v. McCartha, 255 S.C. 489, 492, 179 S.E.2d 912, 914 (1971) in support of their position that all other tortfeasors are released from liability when a party releases one joint tortfeasor and receives full compensation amounting to a satisfaction. Plaintiff would point out that Scottsdale cannot be a joint tortfeasor with Carolina Insurance Group and Maurice Derrick for multiple reasons. First, Scottsdale was never alleged to have committed a tort, and can therefore not be a tortfeasor, much less a joint tortfeasor. Plaintiff only alleged Breach of Contract, Statutory Bad Faith, and Common Law Bad Faith claims against Scottsdale. The only tort claims Plaintiff alleged were against Carolina Insurance Group and Mr. Derrick for negligent procurement of an insurance policy and gross negligence. See Plaintiff's Amended Complaint filed October 1, 2015.

Second, in 1988, the Legislature codified the equitable principles of joint tortfeasor set-offs by passing the South Caorlina 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." "Thus, the Act represents the Legislature's determination of the proper balance between preventing double-recovery and South 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)). Accordingly, even if Scottsdale was a joint tortfeasor with Carolina Insurance Group and Mr. Derrick, they would not be dismissed, but rather would only be entitled to request a set-off.

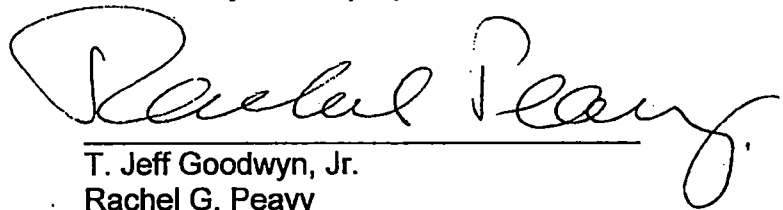
It is clear, however, that Scottsdale is not considered a joint tortfeasor and not entitled to a set off for the settlement of different causes of action. "Despite a defendant's entitlement to setoff, whether at common law or under §15-38-50, any reduction in the judgment must be from a settlement for the same cause of action." Riley v. Ford Motor Co., 414 S.C. 185, 195; 777 S.E. 2d 824, 830 (2015). This case did not involve any common causes of action between Scottsdale and Carolina Insurance Group and Mr. Derrick. See Plaintiff's Amended Complaint filed October 1, 2015. As a result, the entire settlement amount is not available for set off pursuant to the Supreme Court's decision in

Riley. However, as previously stated in Plaintiff's Motion in Limine, Plaintiff agrees that arguments as to set-off are properly considered by the Court at the post-verdict stage.

For all of the reasons stated above, Defendants' Motion for Summary Judgment based on the basis that the release of one party acts a release on the remaining defendants under a joint tortfeasor theory should be denied.

**Conclusion**

In the event the Court rules that a hearing on Defendants' Motion for Summary Judgment should be conducted, Plaintiff respectfully requests that the Court deny the motion, issue an order finding that the terms of the Release are unambiguous, and make such other and further findings as the Court deems just and proper.



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Attorneys for Plaintiff

April 19, 2016

# EXHIBIT T

P R O C E E D I N G S

1  
2 THE COURT: All right. So we're on the record  
3 in 2014-CP-40-4661, Porthemos Curry vs. Scottsdale  
4 Insurance and others. Ms. Peavy and Mr. Goodwin are here  
5 on behalf of the Plaintiffs. Mr. Peel and Mr. Floyd are  
6 here on behalf of the Defendants.

7 I didn't read anything any of you submitted because,  
8 apparently, there was some letter that went to Judge Lee,  
9 said something about somebody recusing themselves. I read  
10 absolutely nothing. So somebody tell me what's going on.

11 MR. PEEL: Your Honor, first, there are three motions  
12 before you today. They're cross motions for summary  
13 judgment on a finite issue, finite defense in this  
14 underlying case of whether a release affecting Scottsdale  
15 Insurance Company also released my clients, Carolina  
16 Insurance and Maurice Derrick.

17 And this was all -- this case was set for trial  
18 last week. Issues arose with the date of the filing my  
19 motion for summary judgment release and so the case was  
20 continued until May with the stipulation that this motion  
21 be heard by Your Honor today.

22 THE COURT: Okay.

23 MR. PEEL: As part of -- my motion in brief says that  
24 the release executed between Scottsdale and the Plaintiff  
25 as a matter of law releases Carolina Insurance and Maurice

1       Derrick because it operated as a full release and it  
2       purported full compensation of the claim and it purported  
3       to release the agency of Scottsdale.

4             In response to that, Plaintiff's counsel handed up a  
5       memorandum of law to Judge Newman Tuesday morning. I did  
6       not read it that morning in full. She sent us on home. I  
7       read it Friday, and in that motion were communications  
8       communicating settlement offers from the mediator, John  
9       Cuttino, to the Plaintiffs from me, some e-mails from me  
10      regarding settlement. And then delivered to my office  
11      Friday, which I understand were not filed, were detailed  
12      affidavits detailing mediation. I think the Plaintiff is  
13      trying to argue that I never believed the case was  
14      settled, which I don't. I've got a strict legal defense  
15      that I'm arguing today. So I filed immediately pursuant  
16      to ADR Rule 10 a motion for sanctions that says Rule 23,  
17      Rule 23 says directed to the chief administrative judge.

18             Judge Lee said I'm here and don't have a court  
19      reporter, I'll send to it Judge Hood and you can argue  
20      that today. I don't really need a ruling on that motion  
21      for sanctions if Your Honor has not read anything that's  
22      in that file.

23             MR. GOODWIN: I just --

24             THE COURT: Whoa.

25             MR. GOODWIN: We have withdrawn that motion.

1           The critical issue here, Your Honor, is that on  
2 November 25th, the Defendants were notified by  
3 Scottsdale's attorney, J.R. Murphy, that Mr. Murphy had  
4 settled Scottsdale's case with the Plaintiff in exchange  
5 for the payment of \$85,000, the signing of a release that  
6 Mr. Curry was to execute, and the execution by all the  
7 parties of a stipulation of dismissal as to Scottsdale  
8 Insurance Company only. So that's November 25th.

9           So on November 25th, Mr. Peel's clients are on notice  
10 that the case against Scottsdale, which Mr. Curry brought  
11 separate claims, has been settled. There's a release.  
12 There's a stipulation of dismissal as to Scottsdale, and  
13 there's a check from Scottsdale and Scottsdale alone in  
14 the amount of \$85,000.

15           On December 10th, Mr. Peel is forwarded a copy of the  
16 stipulation of dismissal for his signature, Your Honor.  
17 And this is attached as Exhibit C to my memorandum in  
18 opposition to sanctions. You'll see it tabbed up there.

19           On that date, December 14th, J.R. Murphy's firm is  
20 enclosing a stipulation of dismissal as to Defendant  
21 Scottsdale Insurance Company in the above-referenced  
22 matter. And the stipulation of dismissal clearly states  
23 that the Plaintiff by and through its undersigned counsel  
24 having settled this case with the Defendant Scottsdale  
25 Insurance Company hereby dismisses with prejudice the

1 complaint and all subsequent amendments thereto as to the  
2 Defendant Scottsdale Insurance Company only. And then it  
3 states in bold the Plaintiff's case against the remaining  
4 Defendants, meaning Mr. Peel's clients, shall not be  
5 affected by this dismissal. Mr. Peel presumably reviewed  
6 the stipulation of dismissal, signed it and it was filed  
7 with the Court.

8 Now, the stipulation of dismissal was filed on  
9 December 30th. And following the notification that  
10 Mr. Curry had settled out with Scottsdale, this becomes  
11 critical. The Plaintiff and the Defendants moved forward  
12 with the case. They communicated with Judge Lee,  
13 specifically, advising Judge Lee, Mr. Peel in his letter  
14 of December 2015, that the case against Scottsdale had  
15 been settled and that the parties needed the Court's  
16 guidance in setting the case for a date certain. And I  
17 can hand that up, Your Honor. But the parties proceeded  
18 with the case as would be expected because our contention  
19 is that we did not settle with Mr. Peel's clients when we  
20 released Scottsdale Insurance Company in exchange for the  
21 payment of Scottsdale's check in the amount of \$85,000.

22 Now, prior to taking the depositions of the expert  
23 witnesses in this case -- and both sides have retained  
24 expert witnesses to opine as to the duties of an  
25 independent insurance agent, Mr. Peel again initiated

1 three at all. It was just a reference for square footage  
2 for the house. Everything else -- I mean, these are  
3 depositions of their own client and their own expert and I  
4 merely included them because of the illustration of value  
5 is important in this case -- or in this motion. There  
6 should be no surprise about that because I've been arguing  
7 it constantly.

8 MS. PEAVY: Your Honor, Mr. Peel alleged in a motion  
9 to amend his answer on April 18th that he wished to amend  
10 his answer to assert the affirmative defense of relief.  
11 Judge Newman heard that motion and granted it over the  
12 Plaintiff's objection. There was nothing at that hearing  
13 that related to what the value of the house was or the  
14 Plaintiff's damages in this case. It's just we're here  
15 because he contends the Scottsdale release releases his  
16 clients.

17 MR. PEEL: Your Honor, I should add that the reason  
18 we're here so late, I think this was glossed over, is that  
19 the Plaintiff did not give me the executed copy of the  
20 release as they were under a duty to do under the  
21 discovery until April 8th, the week before trial when I  
22 requested a copy of it. In fact, I was never served with  
23 a signed and executed filed stipulation of dismissal. So  
24 that's why we're jammed up here at the end right before  
25 trial.

1           The fact of the matter is Judge Newman did grant my  
2 motion to amend and I'd like the opportunity to argue the  
3 release. I've presented no documents before the Court  
4 that have not been identified in discovery and, in fact,  
5 identified in deposition of almost every party to the  
6 case.

7           MS. PEAVY: Your Honor.

8           THE COURT: Yes, ma'am.

9           MS. PEAVY: I understand that Mr. Peel did not  
10 request a copy of the release from me until April 8th, but  
11 as of November 25th, he was on notice that there was a  
12 release and he signed the stipulation of dismissal, which  
13 contains very specific language as to the fact that the  
14 Plaintiff's claims against the remaining Defendants,  
15 Carolina Insurance Group and Mr. Derrick, remain active  
16 and alive. I mean, there's just no way around it.

17           If he didn't request it from me, if he didn't send a  
18 Rule 11 letter towards me, I didn't produce it to him. He  
19 was on notice of it. He happened to ask me for it on  
20 April 8th, a week before trial. I gave to it him  
21 promptly. He then waited a week to file his motion for  
22 summary judgment.

23           And I'll note, Your Honor, again, this goes to the  
24 issue in the -- what evidence can be before the Court in  
25 hearing this motion, that intent of the parties is

# EXHIBIT U

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Porthemos Curry,

Plaintiff(s),

vs.

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

Defendant(s).

IN THE COURT OF COMMON PLEAS

Civil Action No. 14-CP-40-04661

**AMENDED MEMORANDUM IN  
OPPOSITION TO  
DEFENDANTS' MOTION  
FOR  
SUMMARY JUDGMENT  
AND IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT  
(REDACTED VERSION)**

TO: THE HONORABLE ROBERT E. HOOD, AND WESLEY PEEL, ESQUIRE,  
COUNSEL FOR DEFENDANTS:

The Plaintiff hereby submits this Memorandum in opposition to Defendants' Motion for Summary Judgment, filed April 15, 2016, and in support of Plaintiff's responsive cross-motion for summary judgment as to the affirmative defenses of release and accord and satisfaction.<sup>1</sup>

The *gravamen* of Defendants' Motion is that a November 2015 settlement agreement between Plaintiff and Scottsdale Insurance Company, a former defendant, somehow encompasses Plaintiff's separate claims against these Defendants. A copy of the Release is attached as **Exhibit A**.

Defendants take this position despite their attorney, Wesley Peel, having executed a Stipulation of Dismissal as to Scottsdale, which specifically provides that "Plaintiff's case

<sup>1</sup> Defendants moved to amend their answer to assert the affirmative defense of release on the first day of trial, April 18<sup>th</sup>, which the Court granted over Plaintiff's objection. Plaintiff reserves its objection to this late and prejudicial amendment. Defendants have argued the defense of accord and satisfaction as further grounds for their motion; however, the defense has not been asserted in any answer and Plaintiff objects to any late amendment.

against the remaining Defendants shall not be affected by this Dismissal." See Exhibit B. Defendants assert that they are parties to the Release despite having paid not a single dime towards settlement,<sup>2</sup> and despite having engaged in settlement negotiations up to the eve of trial, despite having participated in discovery, and despite having communicated extensively with the Court regarding the scheduling of the trial.

Defendants' Motion for Summary judgment should be denied – and Plaintiff's cross-motion should be granted – because, as a matter of law, the Release clearly and unambiguously does not encompass Plaintiff's claims against these Defendants, or reflect an intent by these parties to settle the Plaintiff's claims against them, as detailed below:

1. The Release clearly releases only Scottsdale Insurance Company and its agents and employees; there is no mention of Defendants Carolina Insurance Group and Maurice Derrick, nor did these Defendants contribute any money to the settlement, or participate in the drafting of the Release, which was handled by Attorney JR Murphy and Plaintiff's counsel. The Defendants have denied consistently throughout the course of this action that they were agents of Scottsdale, and have testified to same. See Dep. Tr. attached as Exhibit C, and answers to complaints. The Release further 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.<sup>3</sup>

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<sup>2</sup> There is no evidence in the record that Scottsdale Insurance Company intended to "foot the bill" for Carolina Insurance Group and Mr. Derrick when Scottsdale settled with Plaintiff, nor is there any evidence that the Defendants communicated with Scottsdale, or its attorney JR Murphy, regarding the terms and conditions of the Release. There is no evidence in the record that Defendants ever made a joint offer of settlement with Scottsdale and the parties always had their own attorneys.

<sup>3</sup> As previously noted, the causes of action against Scottsdale and these Defendants did not, and do not, overlap. In the event Defendants' motion is denied, and Plaintiff's motion is granted, Plaintiff anticipates that Defendants could make a post-verdict motion for set-off; however, under the South Carolina Supreme Court's recent ruling in Riley v. Ford Motor Co., Plaintiff contends that such motion would be denied.

2. By letter dated November 25, 2015 and attached as **Exhibit D**, Defendants received notice of the Plaintiff's settlement with Scottsdale, and never asserted that they were parties to the Release at that time, or any time, up until April 15, 2016.

3. The Defendants' counsel, in executing the Stipulation of Dismissal dismissing Scottsdale, expressly agreed that "the Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal".

4. Following Scottsdale's dismissal, the Defendants continued to participate in discovery; engage in settlement negotiations;<sup>4</sup> and communicate with the Court regarding the scheduling of this matter for a date certain trial. If Defendants had believed that they were released by virtue of Scottsdale having been released – a fact which they were on notice of since November 2015, they failed to ever raise this issue until the eve of trial.<sup>5</sup>

#### **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 also brought claims against Carolina Insurance Group and Maurice Derrick for negligence, later amending the complaint to add claims for gross negligence as against Carolina Insurance Group and Mr. Derrick.

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<sup>4</sup> Plaintiff's counsel is aware of the confidentiality provisions contained in Rule 8 of the South Carolina ADR Rules; however, under Rule 8(b)(5), counsel believes that disclosure of such continuing settlement negotiations is required by law in order to show the intent of the parties, and is further required under the Rules of Professional Conduct, which require zealous advocacy. Plaintiff has requested that the Court issue a ruling, in response to the Defendants' motion for sanctions, that evidence of settlement negotiations – in this case, copies of e-mail correspondence – are relevant and properly for the Court to consider in its construction of the Release.

<sup>5</sup> It is undisputed that while Defendants' counsel was aware of the release as of November 25th, he never requested a copy from the Plaintiff until April 8<sup>th</sup>. Furthermore, Defendants' counsel never served Plaintiff with a Rule 11 letter requesting that discovery responses be supplemented.

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. 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 deposition testimony of Carolina Insurance Group and Maurice Derrick, attached hereto as **Exhibit C**, is that there is no agency relationship, or any relationship, between Scottsdale Insurance and 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.

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 with John Cuttino, Esq. serving as the mediator. At that time, Scottsdale Insurance was still a party to the case.

As a result of the mediation conference and subsequent negotiations, Plaintiff reached a settlement agreement with Scottsdale Insurance Company in October 2015. On November 25, 2015, Scottsdale's attorney, J.R. Murphy, wrote a letter to Plaintiff's counsel, attached as **Exhibit D**, whereby he wrote that he was enclosing a check in the

amount of \$85,000, along with a 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. On December 14, Scottsdale's attorney wrote to Mr. Peel, enclosing a copy of the Stipulation of Dismissal as to Scottsdale only. See Exhibit E. Mr. Peel executed the Stipulation of Dismissal and it was filed with the Court. The Stipulation specifically provided that ***"the Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal."***

Until April 8<sup>th</sup>, at no time had Mr. Peel ever requested a copy of the Release. The Release makes no mention of Carolina Insurance Group or Maurice Derrick.

Discovery continued in the case following Scottsdale's dismissal. With trial approaching, Defendants' counsel contacted Plaintiff's counsel on March 30, 2015 to explore a possible settlement of the matter.

The parties thereafter commenced settlement negotiations; however, the parties were unable to settle the matter as of the end of business on April 8<sup>th</sup>. Accordingly, the parties proceeded with the previously scheduled expert depositions.

On April 15, 2015, Defendants filed the instant summary judgment motion, asserting it was entitled to judgment in its favor on the affirmative defense of release under a joint tortfeasor theory. The date certain trial commenced on April 18<sup>th</sup> and a jury was qualified and picked.

At the oral argument of pre-trial matters before The Honorable Jocelyn Newman, Defendants stated that they would also assert that they were entitled to summary

judgment because Plaintiff's amended complaint alleged that Defendants were "agents" of Scottsdale and therefore they were subject to the Release.<sup>6</sup>

### Legal Standard

"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. Sirrine & Co.*, 206 S.C. 183, 33 S.E.2d 501 (1945)).

"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

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<sup>6</sup> Upon hearing of this new theory, the Plaintiff filed a Stipulation with the Court attesting that Defendants, as stated in their answers and deposition testimony, were not agents. Defendants have also denied they are agents of Scottsdale in their responses to Requests to Admit.

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*.

"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). Finally, "[a]ll pleadings shall be so construed as to do substantial justice to all parties." Rule 8(f), SCRPC

**I. The Terms of the Release, and the Intent of the Parties, are Unambiguous**

Defendants argue that they are entitled to summary judgment on the grounds that the Release unambiguously provides for the release of Carolina Insurance Group and Mr. Derrick because "Scottsdale and its agents" are released. In support of this argument, Defendants point to the Plaintiff's complaints, which allege that the Defendants are agents of Scottsdale. It is undisputed that the Defendants denied this allegation.

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).<sup>7</sup> Only "facts which are

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<sup>7</sup> It is undisputed that the Defendants denied they were agents of Scottsdale in their answers and their deposition testimony; it is further undisputed that Scottsdale denied that Defendants were agents in its pleadings. Upon receiving notice on April 18<sup>th</sup> that defense counsel intended to advance this argument, Plaintiff filed a Stipulation that Defendants are not agents of Scottsdale. See *Crossmann Cmty. Of N.C. v. Harleysville Mut. Ins. Co.*, 411 S.C. 506,

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) (emphasis added). 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)).

The Release clearly releases only Scottsdale Insurance Company, its agents, servants, employees, successors and assigns and therefore summary judgment should be denied. 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.

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 are unpersuasive and do not state the law of South Carolina.

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769 S.E.2d 453 (Ct. App. 2015) (noting that when there is an agreed stipulation of fact, the court will not go beyond such stipulation to determine the facts upon which the case is to be decided.)

The Court of Appeals in Vermeer succinctly and accurately stated the law; Defendants simply cannot avoid it by relying upon Federal law from other circuits. 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. As this Court is well aware, "[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 that was denied by the Defendants - accordingly, there is no "admission" under South Carolina law.

Finally, the attorney for Carolina Insurance Group and Mr. Derrick executed a legally binding Stipulation of Dismissal as to Scottsdale - filed with this Court on December 30, 2015 - which expressly stated that "the Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal."

Viewed in the light most favorable to the Plaintiff, Defendants' motion should be denied and an order entered finding that the Release is capable of only one reasonable interpretation - that the parties intended for the Release to release Scottsdale and only Scottsdale and that the Release does not encompass Plaintiff's separate claims against these Defendants.

In further support of this argument, Plaintiff relies upon his own affidavit, along with the affidavits of his attorneys Rachel G. Peavy and T. Jeff Goodwyn, Jr., to further show the intent of the parties. These affidavits have been served upon defense counsel; however, they have not been filed with the Court pending the Court's ruling on whether it will consider evidence of settlement negotiations - namely correspondence between the parties and with the mediator - in the weeks leading up to the date certain trial of this matter.

Noting that "the paramount concern of the court is to give effect to the intention of the parties", Plaintiff submits that the evidence taken together and viewed as a whole, shows that there is no genuine issue as to material fact and Plaintiff's cross-motion as to the affirmative defenses of release and accord and satisfaction should be granted and an order issued that the Release between Scottsdale and Plaintiff applies only to Scottsdale and the Plaintiff. See Middleborough Horizontal Property Regime v. Montedison S.p.A., 320 S.C. 470, 465 S.E.2d 765, 770 (Ct. App. 1995).

**II. Defendants are not "Joint Tortfeasors" with Scottsdale.**

There is no evidence in the record to support a finding that Scottsdale and the remaining Defendants are joint tortfeasors under South Carolina law. Even if they were, the effect of the release with Scottsdale is not the automatic dismissal of the remaining Defendants.

First, Scottsdale was never alleged to have committed a tort, and can therefore not be a "tortfeasor", much less a "joint tortfeasor." Plaintiff only alleged Breach of Contract, Statutory Bad Faith, and Common Law Bad Faith claims against Scottsdale. The only tort claims Plaintiff alleged were against Carolina Insurance Group and Mr. Derrick for negligent procurement of an insurance policy and gross negligence. See Plaintiff's second Amended Complaint filed October 1, 2015.

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."

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

Accordingly, even if Scottsdale was a joint tortfeasor with Carolina Insurance Group and Mr. Derrick, which is denied, or if the damages sought were the same (also denied), the Defendants would never be dismissed, but rather would only be entitled to request a set-off at the post-verdict stage.

However, given that the causes of action against Scottsdale did not overlap with the pending claims against these Defendants, Carolina Insurance Group and Mr. Derrick are not entitled to a set-off for the settlement of different causes of action under *Riley*. As the Supreme Court succinctly stated, "[d]espite a defendant's entitlement to setoff, whether at common law or under §15-38-50, any reduction in the judgment must be from a settlement for the same cause of action." *Riley v. Ford Motor Co.*, 414 S.C. 185, 195; 777 S.E. 2d 824, 830 (2015) (emphasis added).

This case did not involve any common causes of action between Scottsdale and Carolina Insurance Group and Mr. Derrick. See Plaintiff's Amended Complaint filed October 1, 2015. As a result, the entire settlement amount is not available for set off pursuant to the Supreme Court's decision in Riley.

Defendants rely upon *Bartholomew v. McCartha*, 255 S.C. 489, 492, 179 S.E.2d 912, 914 (1971) in support of their position that all other tortfeasors are released from liability when a party releases one joint tortfeasor and receives full compensation amounting to a satisfaction. This opinion – 17 years prior to the passing of the South Carolina Contribution Among Tortfeasors Act – is unpersuasive as it does not state the current law, as codified, and expressly contradicts the Court's opinion in *Riley*.

For all of the reasons stated above, Defendants' Motion for Summary Judgment based on the basis that the release of one party acts as a release on the remaining defendants under a joint tortfeasor theory should be denied. Any arguments as to set-off are properly for the Court at the post-verdict stage.

### **III. Defendants Waived The Defense of Accord and Satisfaction**

Defendants never asserted the affirmative defense of *accord and satisfaction* in their pleadings, and therefore the defense is waived under rule 8(c), SCRPC. See *SC Farm Bureau Mut. Ins. Co. v. Kelly*, 345 S.C. 232, 547 S.E.2d 871 (Ct. App. 2001) (and cases cited therein) (finding that where a party fails to plead accord and satisfaction as a defense in his answer, the defense is waived.)

In the event that the Court were to consider the Defendants' argument on this issue, and allow Defendants to amend their answer, Plaintiff submits that there is no evidence to support a finding of an *accord and satisfaction* between the parties.

"An accord and satisfaction occurs when there is: (1) an agreement to accept in discharge of an obligation something different from that which the creditor is claiming or entitled to receive; and (2) the payment of the consideration expressed in the new agreement. **Like any contract, an accord and satisfaction requires a meeting of the minds . . .** Without an agreement to discharge the obligation there can be no accord, and without an accord there can be no satisfaction." *Linda Mc Company, Inc. v. Shore*, 375 S.C. 432, 653 S.E.2d 279, 284 (Ct. App. 2007) (*affirmed as modified* ) (emphasis added).

Here, there is simply no evidence in the record that the parties ever agreed to discharge the Defendants' obligation, nor is there any evidence that the Defendants paid the Plaintiff any money.

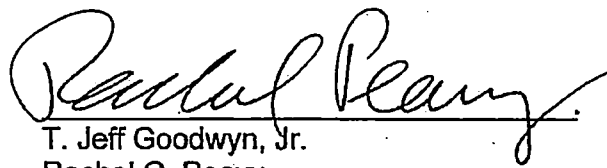
In fact, as argued extensively in the preceding paragraphs, the evidence is the opposite: the parties never entered into any agreement, the Plaintiff never thought he was settling with the Defendants, and the Defendants never paid a dime towards the satisfaction of the pending negligence claims. Accordingly, Defendants' summary judgment motion on this ground should be denied, and an order granting summary judgment to the Plaintiff as to the affirmative defense of *accord and satisfaction* should be entered.

### **Conclusion**

Wherefore, Plaintiff respectfully requests that this Court:

1. Deny Defendants' Motion for Summary Judgment;
2. Enter an order finding the Release is unambiguous as a matter of law and applies only to Scottsdale and the Plaintiff;

3. Enter summary judgment in favor of the Plaintiff on the affirmative defenses of release and accord and satisfaction;
4. Issue an order that any arguments as to damages – specifically set-off – are properly for the trial judge at the post-verdict stage; and
5. Award any such further relief as the Court deems just and proper.



T. Jeff Goodwyn, Jr.  
Rachel G. Peavy  
Goodwyn Law Firm, LLC  
2519 Devine Street, Suite A  
Columbia, SC 29205  
(803) 251-4517  
Attorneys for Plaintiff

April 25, 2016

STATE OF SOUTH CAROLINA     )  
                                          )  
COUNTY OF RICHLAND         )     RELEASE

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 10 day of

December, 2015.

WITNESSES:

Laetel G. Peavy  
\_\_\_\_\_

Porthemes Curry (SEAL)  
Porthemes Curry

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
Case No. 2014-CP-40-04661

Porthemos Curry,

Plaintiff,

vs.

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

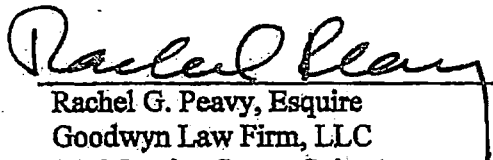
Defendant.

STIPULATION OF DISMISSAL  
AS TO DEFENDANT SCOTSDALE  
INSURANCE COMPANY

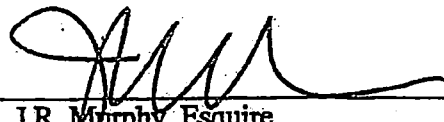
2015 DEC 30 PM 2:07

RICHLAND COUNTY  
FILED

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 only. The Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal.

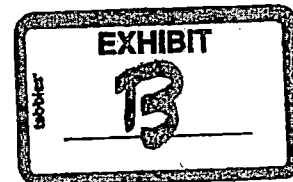


Rachel G. Peavy, Esquire  
Goodwyn Law Firm, LLC  
2519 Devine Street, Suite A  
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(803) 251-4517  
Attorney for Porthemos Curry



J.R. Murphy, Esquire  
Murphy & Grantland, P.A.  
P.O. Box 6648  
Columbia, SC 29260  
(803) 782-4100  
Attorney for Scottsdale Ins. Co.

December 10, 2015



R.179



---

Wesley D. Pesi, 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

|                         |   |                              |
|-------------------------|---|------------------------------|
| State of South Carolina | ) | In The Court of Common Pleas |
|                         | ) | Fifth Judicial Circuit       |
| County of Richland      | ) |                              |
|                         | ) | File No.: 2014-CP-40-04661   |
| Porthemos Curry,        | ) |                              |
|                         | ) | 30(b)(6) Deposition          |
| Plaintiff,              | ) |                              |
|                         | ) | of                           |
| vs.                     | ) |                              |
|                         | ) | Carolina Insurance Group     |
| Scottsdale Insurance    | ) | of SC, Inc.                  |
| Company, Carolina       | ) |                              |
| Insurance Group of SC,  | ) | by                           |
| Inc., and Maurice       | ) |                              |
| Derrick,                | ) | Joel Sauls                   |
|                         | ) |                              |
| Defendants.             | ) |                              |

Deposition of Joel Sauls, taken pursuant to the South Carolina Rules of Civil Procedure, commencing at the hour of 9:08 a.m., Thursday, June 4, 2015, at Bruner, Powell, Wall & Mullins, LLC, 1735 St. Julian Place, Suite 200, Columbia, South Carolina.

**COPY**

Reported by  
Janni S. Gaskins



SCOTT REPORTING SERVICE  
P.O. Box 290482, Columbia, SC 29229 ♦ (803) 7  
www.scottreporting.com ♦ bscott@scottreporting.com

- 1 Q Okay. Is that typical, that you would be copied on  
2 that?
- 3 A Typical? I couldn't promise you it's typical.
- 4 Q Okay.
- 5 A Maurice is very thorough what he does.
- 6 Q Okay.
- 7 A So, he does -- he did notify me in this case.
- 8 Q Okay. And that reflects that he's -- Mr. Curry is  
9 -- Mr. Derrick -- sorry -- is letting Tapco know  
10 that there is a claim on the property for damage on  
11 February 21, 2014; is that correct?
- 12 A Correct.
- 13 Q Okay. All right. What is the relationship between  
14 Carolina Insurance Group and Tapco?
- 15 A Tapco is a surplus lines broker.
- 16 Q Okay. Explain that to me, what that means.
- 17 A They represent multiple insurance companies and we  
18 place business with Tapco, and then they select the  
19 insurance company to put the business with.
- 20 Q Okay. So, they're a middleman, essentially?
- 21 A Sure.
- 22 Q Okay. What's the relationship between Carolina  
23 Insurance and Scottsdale?
- 24 A We don't have a relationship --
- 25 Q Okay.

1 A -- with them.

2 Q Who pays the commissions to Carolina Insurance when  
3 a Scottsdale policy is issued?

4 A Tapco.

5 Q Okay. Does Scottsdale own Lloyds of London, to  
6 your knowledge?

7 A I couldn't tell you.

8 Q Does Lloyds of London own Scottsdale? Do you know?

9 A I do not know.

10 Q Okay. All right. I'm going to show you what was  
11 produced via subpoena sent to -- sent by Scottsdale  
12 to Tapco. It bears Bates stamp number Tapco 56,  
13 57, and 58.

14 Ms. Peavy: If you could, mark that as  
15 Exhibit 3.

16 Marked as Plaintiff's Exhibit 3; Deposition of  
17 Joel Sauls; copy of Tapco Underwriters, Inc.  
18 Agency Agreement; three pages.

19 Q Can you take a look at that for me. Look through  
20 it and identify it.

21 A It's an agency agreement with Tapco.

22 Q Okay. Is this your agent -- Is this Carolina  
23 Insurance Group? I didn't see a signature page or  
24 any -- It seemed sort of generic, so I was just  
25 wondering. Do you recognize this as being

|                                |   |                        |
|--------------------------------|---|------------------------|
| STATE OF SOUTH CAROLINA        | ) | IN THE COURT           |
|                                | ) | OF COMMON PLEAS        |
| COUNTY OF RICHLAND             | ) | FIFTH JUDICIAL CIRCUIT |
|                                | ) |                        |
| Porthemos Curry,               | ) | Case: 2014-CP-40-04661 |
|                                | ) |                        |
| Plaintiff,                     | ) |                        |
|                                | ) | DEPOSITION             |
| vs.                            | ) |                        |
|                                | ) | OF                     |
| Scottsdale Insurance Company,  | ) |                        |
| Carolina Insurance Group of    | ) | Maurice Derrick        |
| SC, Inc., and Maurice Derrick, | ) |                        |
|                                | ) |                        |
| Defendants.                    | ) |                        |

Deposition of Maurice Derrick, taken pursuant to the South Carolina Rules of Civil Procedure, commencing at the hour of 9:05 a.m., Thursday, April 16, 2015, at Bruner, Powell, Wall & Mullins, 1735 St. Julian Place, Suite 200, Columbia, South Carolina.

**COPY**

Reported by  
Janni S. Gaskins

SCOTT REPORTING SERVICE  
P.O. Box 290482, Columbia, SC 29229 ♦ (803) 736-2408  
www.scottreporting.com ♦ hscott@scottreporting.com

1 questions for you.

2 The Deponent: Okay.

3 Examination

4 By Ms. Stetson:

5 Q Mr. Derrick, my name is Hannah Stetson. We met  
6 briefly before the deposition, and I represent  
7 Scottsdale. I have just a few questions for you.  
8 Do you need to take a break before we get started,  
9 or I can get going?

10 A I'm okay.

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

14 A Correct.

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

18 A I do not.

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

21 A I do not.

22 Q You have no authority to bind Scottsdale to a  
23 policy?

24 A I do not.

25 Q So, essentially, you are acting as an independent

1 insurance agent here in Columbia, and in this  
2 transaction involving the builders/risk policy  
3 issued by Scottsdale, you represented the interest  
4 of Mr. Curry, correct?

5 A Correct.

6 Q And in doing this, you dealt with Tapco, who in  
7 turn represented the interest of Scottsdale,  
8 correct?

9 A Correct.

10 Q Generally the way the excess and surplus lines  
11 carriers operate, is it the same process for  
12 various carriers? Are you aware of that?

13 Ms. Peavy: Object to the form.

14 A Repeat the question, please.

15 Q Generally the way the excess and surplus line  
16 companies operate, is it generally the same  
17 process, that they will operate through a general  
18 agent and then the general agent will operate  
19 through the independent sales agent?

20 A Correct.

21 Q And you don't have any authority to procure policy  
22 directly from an excess and surplus lines insurance  
23 carrier, do you?

24 A No, I do not.

25 Q So, in this case, you did not directly procure a

1 policy from Scottsdale, correct?

2 A Correct.

3 Q And you did not represent the interest of

4 Scottsdale in this case, correct?

5 A Correct.

6 Q The policy that's at issue here was issued in the

7 name of Porthemos Curry with effective dates from

8 November 21, 2013 to February 21, 2014; is that

9 correct?

10 A Repeat.

11 Q Yeah.

12 A Repeat that again.

13 Q The policy was issued in the name of Porthemos

14 Curry, and the effective dates were November 21,

15 2013 to February 21, 2014?

16 A Correct.

17 Mr. Peel: Object to the form.

18 Q Is that correct?

19 A Correct.

20 Q And this policy was a vacant/builders risk policy?

21 A Correct.

22 Q And you acted as an agent on behalf of Mr. Curry

23 and signed the application that was submitted for

24 the policy that would then be submitted to Tapco,

25 correct?



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.

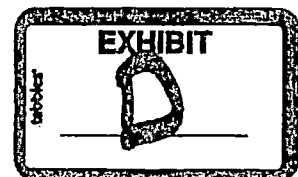
With warm personal regards, I am

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

J. R. Murphy John M. Grantland Ron B. Diegel\* Brent M. Boyd E. Ray Moore, III Anthony W. Livoti Adam J. Neil Jeff C. Kull Peter E. Farr  
Alice P. Adams Tim J. Newton Chris A. Majure J. Ryan Oates Wesley B. Sawyer Jason P. Luther Elliott B. Daniels Hannah D. Stetson Rogers E. Harrell, III  
\*Member-American Board of Trial Advocates

R.188



MURPHY & GRANTLAND, P.A.

Hannah D. Stetson  
Direct dial 803-454-1208  
hstetson@murphygrantland.com

December 14, 2015

Wesley D. Peel, Esquire  
Bruner, Powell, Robbins, Wall & Mullins  
1735 St. Julian Place  
P.O. Box 61110  
Columbia, SC 29260-1110

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

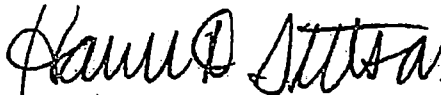
Dear Wesley:

Enclosed please find a Stipulation of Dismissal as to Defendant Scottsdale Insurance Company in the above-referenced matter. If the Stipulation meets with your approval, please sign where indicated and return the original to our office. We will send it to the Clerk for filing.

If you have any questions, please feel free to contact me.

With kind regards, I am

Sincerely,

  
Hannah D. Stetson

HDS/kbd

Enclosure

cc: Rachel G. Peavy, Esquire



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

J. R. Murphy John M. Grantland Ron B. Diegel\* Brent M. Boyd E. Ray Moore, III Anthony W. Livoti Adam J. Neil Jeff C. Kull Peter E. Farr  
Alice P. Adams Tim J. Newton Chris A. Majure Robert M. Peele, III Wesley B. Sawyer Jason P. Luther Elliott B. Daniels Hannah D. Stetson Rogers E. Harrell, III  
\*Member-American Board of Trial Advocates

R.189

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Porthemos Curry,

Plaintiff,

vs.

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

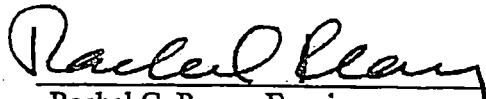
Defendant.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
Case No. 2014-CP-40-04661

**STIPULATION OF DISMISSAL  
AS TO DEFENDANT SCOTTSDALE  
INSURANCE COMPANY**

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 only.

The Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal.

  
Rachel G. Peavy, Esquire  
Goodwyn Law Firm, LLC  
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Attorney for Porthemos Curry

J.R. Murphy, Esquire  
Murphy & Grantland, P.A.  
P.O. Box 6648  
Columbia, SC 29260  
(803) 782-4100  
Attorney for Scottsdale Ins. Co.

December 10, 2015

---

Wesley D. Peel, Esquire  
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Columbia, SC 29260-1110  
803-252-7693  
Attorney for Carolina Ins. Group of SC, Inc. and Maurice Derrick

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

NOV 23 2016

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

SC Court of Appeals

Robert E. Hood, Circuit Court Judge

Case No. 2014-CP-40-04661

Porthemos Curry.....Respondent/Appellant

v.

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, on this 23<sup>rd</sup> day of November, 2016 I served one copy of the **Appellants/Respondents' Return to Respondent/Appellant's Request for Leave to File Motion for Relief Pursuant to Rule 60(b)** on the Respondent/Appellant, via U.S. Mail with proper postage affixed, to their attorneys at the following addresses:

Thomas Jefferson Goodwyn, Jr., Esquire  
Rachel G. Peavy, Esquire  
2519 Devine Street, Suite A  
Columbia, South Carolina 29205

November 23, 2016



Wesley D. Peel  
Bryan M. J. Triplett  
Bruner Powell Wall & Mullins, LLC  
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Columbia, South Carolina 29260-1110  
P: 803-252-7693  
*Attorneys for Appellants*

BRUNER, POWELL, WALL & MULLINS, LLC

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[WWW.BRUNERPOWELL.COM](http://WWW.BRUNERPOWELL.COM)

JAMES L. BRUNER, P.A.  
OF COUNSEL

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CAITLIN C. HEYWARD  
ROBERT C. OSBORNE III  
BRYAN M.J. TRIPLETT

WARREN C. POWELL, JR., P.A.\*\*  
HENRY P. WALL  
E. WADE MULLINS III, P.A.  
BRIAN P. ROBINSON, P.A.  
WESLEY D. PEEL, P.A.  
JOEY R. FLOYD, P.A.  
BENJAMIN C. BRUNER, P.A.

\*\* Also Admitted in District of Columbia

AUTHOR'S E-MAIL: [WPEEL@BRUNERPOWELL.COM](mailto:WPEEL@BRUNERPOWELL.COM)

November 23, 2016

**VIA HAND-DELIVERY**

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

**RECEIVED**

NOV 23 2016

SC Court of Appeals

**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:

Please find enclosed for filing with the Court, the original and six (6) copies of the **Appellants/Respondents' Return to Respondent/Appellant's Motion to Amend Initial Briefs and Appellants/Respondents' Return to Respondent/Appellant's Request for Leave to File Motion for Relief Pursuant to Rule 60(b)** as well as **Proofs of Service** evidencing that the same was served upon counsel for the Respondent/Appellant.

In an effort to cut down on the amount of paper/documents filed with the Court and due to the fact that the enclosed responses are in law and fact are both the same, we have modified the Appellants/Respondents' Return to Respondent/Appellant's Motion to Amend Initial Briefs and wish to incorporate verbatim the documents and exhibits in the Appellants/Respondents' Return to Respondent/Appellant's Request for Leave to File Motion for Relief Pursuant to Rule 60(b). If the Court wishes for us to file the multiple exhibits again, please let us know. Thank you.

With my best regards, I am

Sincerely,

*Rita D. DeCarlis*

Rita D. DeCarlis

WDP/rdd

Enclosures

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