

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge
Jocelyn Newman, 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

APPELLANTS' FINAL BRIEF OF APPELLANTS/RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AS TO APPELLANTS' AFFIRMATIVE DEFENSE OF RELEASE?
 - A. DID THE TRIAL COURT ERR IN CONSIDERING EXTRINSIC EVIDENCE IN CONSTRUING THE RELEASE?

STATEMENT OF THE CASE

Porthemos Curry (Respondent/Appellant) brought this action on July 28, 2014 against Scottsdale Insurance Company ("Scottsdale") and Appellants/Respondents, Carolina Insurance Group of SC, Inc. ("CIG") and its agent Maurice Derrick ("Derrick"). (R. p. 15). Curry set forth causes of action against Scottsdale for breach of Contract, statutory bad faith, and common law bad faith arising out fire damage to a house that Curry was building and that he alleged should have been covered by an insurance policy that he purchased from Scottsdale. (R. pp. 16-18). Curry also alleged that CIG and Derrick were agents of Scottsdale and were negligent in procuring the Scottsdale insurance policy on his behalf. (R. pp. 18-21). Curry sought damages from both Defendants for "unpaid losses established at trial, and all incidental, punitive, and consequential damages." (R. p. 21).

Scottsdale filed its answer on September 16, 2014 denying the allegations and asserting the position that the policy had expired as of the date of the loss. (R. p. 30). CIG and Derrick answered on September 22, 2014, denying the allegations and included the affirmative defenses of contributory negligence, set-off, and failure to mitigate, among others. (R. p. 26-28). Curry took Derrick's deposition on April 16, 2016 both individually and as the 30(b)(6) representative of CIG. (R. pp. 221-22). Curry then took the deposition of Joel Sauls, the principal of CIG on June 4, 2015. (R. pp. 223-26).

Curry amended his complaint on May 28 2015, adding a request for punitive damages in its prayer and still alleged that CIG and Derrick were agents of Scottsdale. (R. pp. 47-49). CIG and Derrick answered the Amended Complaint on June 4, 2015, and Scottsdale answered on June 8, 2015. Mediation was conducted on September 29, 2015 with John Cuttino, Esquire acting as the mediator. The mediation did not result in an immediate settlement with any party.

On October 1, 2015, Curry filed a second Amended Complaint, adding a cause of action for gross negligence against all defendants (R. pp. 72-75). Scottsdale filed its answer on October 26, 2015, and CIG and Derrick filed their answer on October 28, 2015. On December 10, 2015, Scottsdale and Curry settled Curry's claims against Scottsdale. (R. p. 426-27). Curry executed the Release, acknowledging payment to Curry by Scottsdale of \$85,000.00 for "full payment for all damages losses or injuries, whether known or unknown, developed or undeveloped, for policy benefits or consequential damages recoverable from Scottsdale Insurance Company which have resulted or may result from the loss aforesaid," in exchange for the release of Scottsdale, "its agents, servants, employees, successors and assigns . . ." (R. p. 426). A Stipulation of Dismissal with prejudice as to Scottsdale was entered on December 30, 2015. (R. p. 428).

The executed Release was not served upon counsel for CIG/Derrick, but upon request, Curry provided a copy of the executed Release on April 8, 2016. (R. p. 303, line 17 – p. 304, line 22). CIG/Derrick then filed a motion for summary judgment on April 15, 2016 stating that the Release of Scottsdale acted as a Release of CIG and Derrick because the Release was full compensation for Curry's losses and Curry insisted in its three

complaints that CIG/Derrick were agents of Scottsdale and the release discharged the agents of Scottsdale. (R. pp 95-97).

Trial was set for April 18, 2016, before the Honorable Jocelyn Newman. Curry/CIG filed an amended motion for summary judgment that morning, more specifically outlining its grounds for the defense of release. (R. pp. 101-03). The parties selected a jury and pre-trial motions heard, including Curry/CIG's Motion to Amend their answer to add the defense of release. Judge Newman granted the motion to amend. (R. pp. 240-54). Judge Newman set further arguments regarding the Release for the morning of April 19, 2016. (R. pp. 258-64). On April 19, Curry filed a cross-motion for summary judgment as to CIG/Derrick's defense of Release. (R. pp. 116-19). Judge Newman then continued the trial to a subsequent term so that the cross-motions for summary judgment as to release could be heard. (R. pp. 277-78). CIG/Derrick filed and served an amended memorandum in support of summary judgment on April 26, 2016. (R. pp. 104-15). Curry also filed an amended memorandum in opposition to the motion for summary judgment and in support of its cross-motion for summary judgment on April 26, 2016. (R. pp. 162-201). On April 26, 2016 Judge Hood, heard oral arguments on the cross-motions for summary judgment. At the hearing, counsel for Plaintiff submitted affidavits of counsel and Mr. Curry over the objections of Curry/CIG's counsel. (R. pp. 323, line 24 – p. 325, line 20). Curry/CIG also presented the court with deposition excerpts of Mr. Curry and his expert. (R. p. 301, lines 12-15). Judge Hood denied Curry/CIG's motion for summary judgment from the bench and took Curry's motion under advisement. (R. p. 325, lines 13-15, p. 335, lines 4-6). Later the court informed the parties that he was granting Curry's motion and dismissing CIG/Derrick's defense of Release. (R. p. 1-13). The order was

signed by Judge Hood on May 6, 2016, and entered on May 9, 2016. (R. pp. 1, 13). CIG and Derrick filed and served the Notice of Appeal on May 11, 2016.

FACTS

Appellant/Respondent, CIG is an insurance agency doing business in Richland County, South Carolina. (R. p. 43). Mr. Derrick is a licensed insurance agent for CIG. (R. p. 47). Respondent/Appellant, Curry was building a house at 1001 Pineland Drive in Richland County, South Carolina. (R. p. 213, line 13 – p. 214, line 10). While finishing the construction of the home, Curry, purchased a ninety-two day vacant structure/builder's risk policy with a commercial generally liability coverage part from Scottsdale, through CIG/Derrick around August 21, 2013 with a limit of \$110,000.00 for the completed value of the structure. The policy was meant to provide protection from fire and other perils to Curry's home, along with general liability protection, while Curry completed construction of the home from August 21, 2013 through November 21, 2013. (R. p. 15).

Mr. Curry allowed the policy to expire prior to the home being completed. The property remained uninsured from November 21, 2013 through December 2, 2013. (R. pp. 69-70). On December 2, 2013, Derrick and Curry talked on the telephone and Curry informed Derrick that the home was not finished and that Curry still needed insurance. (R. p. 70). Mr. Derrick then procured a renewal policy, providing seamless coverage from November 22, for another three months, expiring on February 21, 2014, with the same completed value policy limit of \$110,000. (R. p. 70, p. 337).

Mr. Curry alleged the house was damaged on the night of February 21, 2014, after a car ran into the house, causing the house to catch fire. (R. p. 16). Curry submitted a claim for the fire damage to Scottsdale and Scottsdale denied the claim, asserting that the policy

expired at 12:01 AM on February 21, 2014. (R. p. 71.). Mr. Curry alleged that his understanding of the policy was that it was in effect on February 22, 2014. (R. pp. 15-21; pp. 43-49; pp. 69-75). It is undisputed that the house was between 90 and 95% complete at the time of the loss. (R. p. 216, line 24 – p. 217, line 22).

Curry brought this action against Scottsdale and CIG/Derrick seeking payment for fire damage to his home and any consequential damages resulting from the denial of coverage and non-payment of the claim. (R. p. 75). Mr. Curry claimed that Scottsdale should have paid the claim as the coverage form was not clear as to the expiration time of the policy. (R. p. 71). Mr. Curry alleged that CIG/Derrick should have provided a new policy dated from his call on December 2, 2014, which would have not expired until March 2, 2015, and also allowed the gap in fire and general liability coverage from November 22, though December 2, 2014. (R. pp. 72-74). Curry requests an award of damages for "unpaid losses established at trial, and all incidental, punitive, and consequential damages" against Scottsdale and CIG/Derrick in his prayer for relief. (R. p. 75).

Although the September 2015 mediation was initially unsuccessful, eventually Scottsdale and Curry, in October 2015, were able to reach a settlement agreement. (R. pp. 124-25). This agreement is memorialized by the Release. (R. pp. 426-27). On December 10, 2015, Scottsdale agreed to pay Curry \$85,000.00 which constituted "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." (R. p. 246-47). The Release

also releases Scottsdale's "agents, servants, employees, successors and assigns." (R. p. 246-27).

On April 8th, 2016, Curry provided counsel for CIG/Derrick with an executed copy of the release. (R. p. 231, lines 13-19). As set forth in the Statement of the Case, CIG/Derrick then amended their Answer to assert a defense of Release and the cross-motions for summary judgment as to that defense were filed by both parties.

The cross-motions for summary judgment as to CIG/Derrick's defense of release were presented to the court through memoranda, exhibits, and oral argument. CIG/Derrick's defense of Release was supported by two separate facts and issues of law. First, the settlement with Scottsdale amounted to Curry receiving "full compensation, amounting to a satisfaction." Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App. 2007) and Bartholomew v. McCartha, 255 S.C. 489, 492, 179 S.E.2d 912, 914 (1971).

Second, that the Release releases Scottsdale and its agents, and due to Curry's Complaints, CIG and Derrick are included in that release. Curry insisted that CIG and Derrick were agents of Scottsdale in its Complaint and continued with that allegation through two amendments. (R. pp. 18-19; p. 47; p.73). The last amendment of the complaint was filed after all parties' depositions had been taken and less than two months prior to executing the release which used the language "Scottsdale and its agents." (R. p. 426). To date, the Respondent has made no effort to amend its pleadings regarding this factual allegation.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this Court applies the same standard that governs the trial court under Rule 56(c), SCRPC, which provides that summary judgment is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Helms Realty, Inc. v. Gibson Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (when reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court). Summary judgment should be granted when plain, palpable and indisputable facts exist on which reasonable minds cannot differ. Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004). However, summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of law. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

The interpretation of a contract is a matter of law for the court. Watson v. Underwood, 407 S.C. 443, 449, 756 S.E.2d 155, 158 (Ct. App. 2014). The arguments regarding the release are matters of law and may be decided by this court with "no particular deference to the circuit court" and therefore the review is *de novo*. N. Am. Rescue Prods. v. Richardson, 396 S.C. 124, 132, 720 S.E.2d 53, 58 (Ct. App. 2011).

Arguments

- I. BECAUSE THE RELEASE ON ITS FACE OPERATED AS FULL COMPENSATION AMOUNTING TO A SATISFACTION OF CURRY'S DAMAGES THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT "THERE WAS NO ISSUE OF MATERIAL FACT AS TO WHETHER THE DEFENDANTS WERE 'RELEASED' FROM LIABILITY BY WAY OF A SETTLEMENT AGREEMENT ENTERED INTO BETWEEN PLAINTIFF AND SCOTTSDALE INSURANCE COMPANY".

The Release entered into between Curry and Defendant Scottsdale and signed by the Plaintiff, states that "[t]he 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 my result from this loss aforesaid. (R. p. 426-27). By accepting "full payment for all damages, losses or injuries", the Plaintiff received "full compensation amounting to a satisfaction." See Bartholomew, 255 S.C. at 492, 179 S.E.2d at 914. Because the funds due under the policy benefits is the only measure of damages against either the carrier or the agent, there are no other damages or losses in this case besides funds that were due or should have been due under the policy in question.

The Release released CIG and Derrick because the language of the release amounted to a full satisfaction of Curry's damages therefore releasing any remaining tortfeasors, whether joint, concurrent, successive or separate. Any other finding would allow Curry a double recovery of his damages. The general rule is that the release of one tortfeasor does not release another who wrongfully contributed to a plaintiff's injuries. However, a release will release the other tortfeasors if (1) that was the intention of the parties, or (2) the plaintiff "received full compensation amounting to a satisfaction." Id.

The court incorrectly stated that CIG/Derrick argued that they were "released under a joint tortfeasor theory of liability." (R. p. 6). This was incorrect, as the argument was that Curry had received full compensation amounting to a satisfaction of his claim. The court addressed the argument of full compensation in its order and found that the argument was "without merit." (R. p. 10). The court found that CIG/Derrick argued that Curry had

“received ‘full payment’ for all damages recoverable in this lawsuit” through the Scottsdale settlement (R. p. 9). This was incorrect; the argument is that Curry received full compensation amounting to a satisfaction based upon the plain language of the release. The court reasons that the claims against Scottsdale were distinct from those pending against Curry/CIG and could result in different damages, such as attorney's fees. (R. p. 10, FN 4). This ignores the negligence claim and the prayer for relief, which requests the same damages as to all defendants. (R. p. 75). The fact that under any theory, the only damages that could be awarded against Curry/CIG were the amount that should have been paid under the policy for Curry's losses, and consequential damages, which are the same base damages that could be awarded and were requested jointly and severally against Scottsdale. (R. p. 75). The fact that Scottsdale could have been assessed additional damages over and above the amount due under the policy has nothing to do with CIG/Derrick, especially given the plain language of the release. Curry sought to recover for the same damages from all of the parties to its suit and requested a joint and several award of damages from the defendants: "As against all Defendants, judgment in the amount of the Plaintiff's unpaid losses as established at trial, and all incidental, punitive and consequential damages as may be shown at trial." (R. p. 75).

Curry set forth a bad faith tort claim and a breach of contract claim against Scottsdale. (R. pp. 70-72). In its fourth cause of action, Plaintiff brought a negligence and gross negligence claim jointly against CIG, Derrick and Scottsdale:

In permitting the Policy to be "shortened" in essence, without informing Plaintiff of this material limitation, Defendants failed to exercise the duty of ordinary care applicable to insurance carriers and professionals and such failure was, in fact, grossly negligent, reckless, and in contravention of the

duties and standards imposed upon insurance professional in similar situations.

(R. p. 74)

Curry goes on to request judgment "as against all Defendants in the amount of Plaintiffs unpaid losses as established at trial, and all incidental, punitive, and consequential damages. (R. p. 75). Counsel for CIG/Derrick informed the court at oral argument that Scottsdale and Derrick and CIG were joint tortfeasors by the way the action was pled. (R. p. 315, lines 2-18).

Under the negligence cause of action, the Plaintiff is entitled to the amount that would have been due under the policy had the desired coverage been issued, as well as any consequential damages due to non-payment that the Plaintiff can prove at trial. See Republic Textile Equipment Co. of South Carolina, Inc. v. Aetna Insurance Company, 293 S.C. 381, 389, 360 S.E.2d 540, 544-45 (Ct. App. 1987). As to the bad-faith failure to pay, Curry is entitled to the policy benefits and consequential damages stemming from the insurer's failure to pay. Nichols v. State Farm Mutl. Auto. Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). Under both negligence and bad-faith failure to pay, the Plaintiff is entitled to the same damages and may not recover them twice. In this case, there is one house, one fire, one policy of insurance and one injury. Curry cannot recover twice.

Therefore, Curry is precluded from arguing that he can seek additional damages from Carolina Insurance and Derrick. By accepting "full payment . . . for policy benefits or consequential damage . . ." from Scottsdale, the Plaintiff received "full compensation" for all damages to which he is entitled. An award of additional damages would constitute an impermissible double recovery. The Plaintiff, as a matter of law, cannot recover any

additional damages after accepting an amount agreed to be “full payment for all damages losses or injuries.”

Curry's argument that the Plaintiff did not receive “full compensation amounting to a satisfaction” because the settlement did not cover his damages is without merit. First, the plain language of the agreement makes it plain that Curry received all funds due under the policy and as discussed further below, the consideration of extrinsic evidence was improper. Additionally, there is no limiting language in the Release which restricts the settlement to Scottsdale or reserves rights against CIG and Derrick. But as this court has found that “[t]he issue is not determining the exact amount (assuming liability) a jury would award. Instead, the issue is “*full compensation amounting to a satisfaction.*” Ecclesiastes Prod. Ministries, 374 S.C. at 496, 649 S.E.2d at 500 (emphasis added).

A "satisfaction" is "the performance of a substituted obligation in return for the discharge of the original obligation. Ecclesiastes Prod. Ministries, 374 S.C. at 496, 649 S.E.2d at 501. In cases where the amount owed to a party is in dispute, “the parties will reach an ‘accord’ whereby one of the parties agrees to accept as ‘satisfaction’ of the disputed claim some performance or undertaking different from that which he considers himself entitled.” Id. Curry entered into a Release with Scottsdale whereby he expressly agreed that the amount he received from Scottsdale constituted "full payment for all damages, losses or injuries." (See R. p.426-27). In doing so, the Plaintiff accepted that amount as “satisfaction” for all damages, as there are no other damages incurred by Curry “Where, as here, a party accepts a full and final compromise adjustment and settlement of any and all claims, such amounts to a Bartholomew satisfaction thereby extending the

preclusive effect of the release to nonparties to the instrument.” Id. at 496-97, 649 S.E.2d at 501.

The court recognizes that the Release specifically stated that it was for “full payment for all damages, losses or injuries, whether known or unknown, developed or undeveloped, for policy benefits or consequential damages recoverable from Scottsdale Insurance Company which have resulted of may result from the loss aforesaid.” (R. p. 9). The court incorrectly states in a footnote that the “gravamen” of CIG/Derrick's arguments is that they are the fortunate beneficiaries of Curry's settlement with Scottsdale despite having not contributed to the settlement. (R. p. 10, FN 3). CIG/Derrick's argument, set forth precisely in their memo in support of the motion for summary judgment and argued extensively at the hearing is that the only damages that Curry is entitled to under any theory are the policy benefits that should have been paid under the policy despite the expiration date, and any consequential damages due to nonpayment. (R. pp. 107-08; p. 315, line 19 – p. 316, line 14). Neither Curry nor the court suggests any other possible damages that Curry is able to obtain from CIG or Derrick.

The court ruled that there is “no evidence that the Plaintiff received full compensation amounting to a satisfaction”, without addressing the language of the Release. (R. p. 11). Or course, under Bartholomew and Ecclesiastes, CIG/Derrick have no duty to provide evidence of full compensation. First, the question is whether the Release is clear on its face. CIG/Derrick continually argued that there was no ambiguity in the document and to go beyond the four corners, the court would need to find an ambiguity. (R. p. 12, lines 12-21; p. 324, lines 6-17; p. 325, lines 10-12).

However, the court did find the Release to be unambiguous in one, very obvious matter—that the Release explicitly released Scottsdale and that it is a contract only between Scottsdale and Curry. (R. p. 12). Of course, CIG/Derrick has never argued any differently; but yet, the court based its grant of summary judgment on this finding, which was never an issue to begin with. (R. p. 12). If this finding was necessary, there would be no need for the Bartholomew rule. Bartholomew and its progeny all deal with releases or settlement agreements with an unnamed third-party seeking a determination that the Plaintiff has received full compensation for his injuries.

The question of "full compensation" has nothing to do with the intent of the parties, which is the first and alternate prong of the Bartholomew test and is not argued in this matter. Even if the court found the language to be ambiguous, an examination of the evidence would have demonstrated at a minimum that there is a question of material fact as to the questions of full compensation. The policy's limit was \$110,000 for a completed home. There is no dispute that the home was not completed at the time of the fire. Mr. Curry testified that he believed the home was 90-95% complete at the time of the fire (R. p. 217, lines 1-6). Therefore it is without question that he was not entitled to the policy limits. Mr. Curry's own expert Mr. Mitchell, testified that the entire house could be rebuilt and completed for between \$88,000.00 and \$96,000.00. (R. p. 219, line 5 – p. 220, line 1). All of this testimony was submitted to the court, yet it found that there was no question of material fact. (R. p. 301- p. 304, line 7). Therefore, the evidence would likely show that Mr. Curry has been fully compensated for his loss by his insurance carrier, as was proper under the policy procured by Derrick and CIG or at least there is a question of fact. In doing so, the Plaintiff accepted that amount as "satisfaction" for all damages, as

there are no other damages than payment under the insurance policy and consequential damages resulting from not receiving the policy benefits. The fact that the settlement amount is less than the policy limits is irrelevant.

The court noted that a Stipulation of Dismissal was executed by all parties as to Scottsdale (R. pp. 4-5). The court notes that the Dismissal stated that "the Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal. (See R. p. 428). Of course that language is redundant. A Rule 41, SCRC, stipulation of dismissal of a party does not have any affect on the remaining parties. To the extent the court was suggesting that by signing the requested Stipulation that CIG/Derrick were waiving defenses against the Plaintiff, such ruling is error. Such a finding would mean that the non-settling parties would not be entitled to a set-off or any other defense available due to settlement with another Defendant. Of course, CIG/Derrick has not argued that the Stipulation of Dismissal affected the case against the remaining Defendants. The argument is that the Release with Scottsdale has affected Curry's case.

The court stated that any ruling denying Curry's motion for summary judgment as to this affirmative defense would produce "an absurd result." (R. p. 13). The "absurd result" produced is that Curry is allowed to seek a double recovery for the only damages to which he would have ever been entitled to in this action, which are the amounts due under the policy because of the fire loss and any consequential damages. Therefore, the court erred as a matter of law in dismissing the defense of Release, where the Scottsdale Release on its face stated that Curry had received full compensation amount to a satisfaction and where if the court in error considered extrinsic evidence, that evidence would present a question of material fact. Therefore, this court should reverse the circuit court's dismissal of the

defense of release and additionally find that the Release on its face amounts to a full compensation thereby releasing CIG and Derrick.

II. BECAUSE THE PLAINTIFF THROUGH THREE VERSIONS OF ITS COMPLAINT INSISTED THAT THE APPELLANT/RESPONDENTS WERE AGENTS OF SCOTTSDALE, THE PLAINTIFF CANNOT CLAIM THAT THE RELEASE OF SCOTTSDALE AND ITS AGENTS DID NOT RELEASE APPELLANTS/RESPONDENTS.

The Scottsdale Release releases Scottsdale and its agents (among others). (R. p. 426). The Release states that the Plaintiff "does hereby release and forever discharge Scottsdale Insurance Company, its agents, servants, employees, successors and assigns of and from any and all actions cause of action demands and/or claims of whatsoever kind or nature... growing out of any property coverage which may apply under policy number CPS1884774" (emphasis added). The court addressed this argument on pages 6-8 of its Order finding that "there is no evidence in the record that Carolina Insurance Group or Maurice Derrick are 'agents servants, or employees' of Scottsdale and that the Plaintiff's consistent allegation of CIG and Derrick's agency was not a judicial admission to be held against them. In Curry's negligence/gross negligence action against Scottsdale, CIG and Derrick, Curry alleged that that CIG and Derrick were Scottsdale's agents. (R. pp. 18-19; p. 47; R. p. 73). If Curry did not intend to release CIG and Derrick as agents, he could have specifically reserved those claims in the Release.

It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.

Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct.App. 1992); see also, Towles v. United Healthcare Corp., 338 S.C. 29, 524 S.E.2d 839, fn.1 (Ct.App. 1999) (finding that the Plaintiff was bound by the allegation of who he was employed by in his Complaint, despite submitting an affidavit stating that he was hired by another employer.) (citing Postal)

Curry consistently pled in his negligence/gross negligence cause of action, which named all defendants as joint tortfeasors, that CIG/Derrick were agents of Scottsdale, there can be no doubt as to their intention. Curry made this statement in all three of his Complaints in Paragraph 34: "Defendants Maurice Derrick and Carolina Insurance are agents of Defendant Scottsdale." (R. pp. 18-19; p. 47; p. 73). Curry notably continued to make this assertion after all of the party witnesses had been deposed and through the execution of the release. Curry settled his case with Scottsdale with this allegation still in the pleading, which would provide Scottsdale with an indemnity claim against CIG/Derrick for the settlement under the Joint Tortfeasors Act.

In its Order, the court erred by looking to CIG/Derrick's Answer and testimony to determine the intent of the release and to extrinsic evidence where there is no ambiguity. (R. pp. 2-4, pp. 6-9). As stated in Postal, facts set forth in the pleadings are taken as true against the pleader for the purpose of the action." Curry had every opportunity to amend his complaint to remove this allegation. If he did not intend to try and prove the allegation and make Scottsdale and CIG/Derrick jointly and severally liable for his losses, he could have specifically excluded Derrick and CIG from the Release. Curry did neither and continued to assert that CIG and Derrick were agents of Scottsdale and sought a joint recover under the negligence action even after the close of discovery.

Normally, factual assertions in pleadings and pretrial orders are considered to be judicial admissions conclusively binding on the party who made them. Myers v. Manchester Insurance & Indemnity Co., 572 F.2d 134 (5th Cir.1978); State Farm Mutual

Auto Insurance Co. v. Worthington, 405 F.2d 683, 686 (8th Cir.1968); Mull v. Ford Motor Co., 368 F.2d 713, 716 (2d Cir.1966). Factual admissions made by an attorney in pleadings are judicial admissions binding that party. See Davis v. A.G. Edwards and Sons, Inc., 823 F.2d 105, 108 (5th Cir. 1987) (stating that litigants may plead themselves out of court by alleging facts that establish defendants' entitlement to prevail); Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir.1998); Soo Line R.R. Co. v. St. Louis S.W.Ry. Co., 125 F.3d 481, 483 (7th Cir.1997) (concluding that a "plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts"). The court is not "obliged to ignore any facts set forth in the complaint or its attached exhibits, see R. 10(c), FRCP, that undermine the plaintiffs claim." Hamilton v. O'Leary, 976 F.2d 341, 343 (7th Cir.1992) (quoting R.J.R. Services, Inc. v. Aetna Casualty & Surety Co., 895 F.2d 279, 281 (7th Cir.1989)). "[J]udicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible." Soo Line R. Co., 125 F.3d at 483.

"Judicial admissions" are formal concessions in pleadings, or stipulations by party and its counsel, that are binding upon party making them; judicial admissions may not be controverted at trial or on appeal, and are not evidence at all but rather have effect of withdrawing fact from contention. Keller v. United States, 58 F.3d 1194 (7th Cir. 1995). The court inaccurately cites a parenthetical citation from Vermeer Carolina's Inc v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 301, 307 (Ct. App.1999) as a holding from Vermeer, that "[a]llegations in a Complaint denied are evidence of nothing". This was not the holding of the case, but that "the allegations of the complaint are not determinative of whether a party has the right to indemnity." Id. CIG/Derrick does not

argue that Curry's allegations of agency are evidence, but a judicial admission that Curry cannot retract only when it suits him and then otherwise attempt to use the allegations to his advantage by establishing joint and several liability.

Curry's allegations against Carolina Insurance and Derrick are based upon principles of agency law. The Complaint alleges that Carolina Insurance and Derrick, acting on behalf of and as agents for Scottsdale, caused the Plaintiff to suffer damages. There is no dispute that the Plaintiff has stated that Carolina Insurance and Derrick to be "agents" of Scottsdale. The Plaintiff had the opportunity to recant that allegation when he filed the Amended Complaint on October 1, 2015, but failed to do so. Rule 8(e), SCRCP, states that all statements made in pleadings are subject to the obligations set forth in Rule 11, SCRCP. Pursuant to Rule 11, the signature of an attorney on any document filed with the court is an affirmative representation that there is "good ground" to support the allegations or statements in the documents. See Rule 11, SCRCP.

Curry's belief that Carolina Insurance and Derrick were agents of Scottsdale along with the plain language of the Release demonstrates that the Plaintiff, in releasing Scottsdale's "agents", also intended to release Defendants Carolina Insurance and Derrick from liability. The Plaintiff cannot label Carolina Insurance and Derrick as agents of Scottsdale when it is beneficial to his case and then make an entirely different argument when that characterization hurts his case. Any argument that Carolina Insurance and Derrick are not agents of Scottsdale directly contradicts the allegations plead in the Second Amended Complaint.

Therefore the trial court erred in dismissing the defense of release where Curry plead through three Complaints that CIG/Derrick were Scottsdale's agents and the release

specifically releases Agents of Scottsdale. The question is what was the intent based upon the four corners of the release and the allegations of the Complaint. There is no question of material fact as to either and the circuit court should be reversed and the issue remanded for a proper determination as a matter of law based upon the clear intent of the Release.

III. THE COURT ERRED IN CONSIDERING EXTRINSIC EVIDENCE, INCLUDING CONFIDENTIAL MEDIATION AND SETTLEMENT COMMUNICATIONS IN DISMISSING THE APPELLANTS/ RESPONDENTS' DEFENSE OF RELEASE

To determine whether or not the payment under the release was in fact full compensation for Curry's loss or whether CIG Derrick were released as agents of Scottsdale, the court should have first looked to the four corners of the Release. "A release is a contract and contract principles of law should be used to determine what the parties intended." Ecclesiastes Prod. Ministries, 374 S.C. at 497, 649 S.E.2d at 501. The contract should be reviewed to discern the intent of the parties and the language of the contract should control. Id. If the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions. Id. (citations omitted).

The court should review the entire agreement and not just portions of the agreement. "If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect." Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); Blakeley v. Rabon, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976). "Where an agreement is clear and capable of legal interpretation, the courts only function

is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.” Ecclesiastes Prod. Ministries, 374 S.C. at 499, 649 S.E.2d at 502.

The circuit court improperly considered extrinsic evidence in dismissing CIG/Derrick's defense of Release, where it did not find the release to be ambiguous and mistakenly analyzed intent as to the issues of “full compensation amounting to a satisfaction.” The court ruled that the settlement was an agreement between only Curry and Scottsdale, which is not in dispute and has no relation to the defense of Release. (R. p. 13). Despite not finding an ambiguity in the Release related to the full compensation or the release of Scottsdale's agents, the court in error considered extrinsic evidence, including confidential communications and testimony arising from the mediation and settlement negotiations over the objection of CIG/Derrick's counsel. (R. pp. 1-4; p. 8; pp. 11-13; pp. 321-25). When CIG/Derrick's counsel made an objection to the consideration of the affidavits disclosing matters outside of the four corners of the documents and revealing confidential mediation and settlement discussions in violation of Rule 8, SCADR, and without a determination of ambiguity, the court stated: “I don't need to make a determination of ambiguity. The Defendant's motion for summary judgment is denied.” (R. p. 325).

Both Plaintiff's counsel and the trial court mistakenly asserted that the subjective intent of either the Plaintiff or Defendants controls whether or not the Release between Scottsdale and Curry operated to release the third-parties to the release, CIG and Derrick. (R. p. 9; pp. 293-309; pp. 320-26). The argument before the court was that the release operated as a full satisfaction of all damages, because that language of the release stated

that it was for full payment of the only damages available to Curry in this proceedings — the insurance proceeds.

Thereafter, Curry, over objections by CIG/Derrick's counsel submitted confidential settlement information to the court consisting of emails between counsel regarding settlement, emails between counsel and the mediator, and affidavits detailing the occurrences at mediation and continuing negotiations through the mediator. All of these documents were unnecessary to the argument, prejudicial and in violation of Rule 10, SCADR. (R. p. 324-25).

Initially, after Curry's counsel first filed the confidential information as attachments to a memo in opposition to the motion for summary judgment, (R. p. 156, pp. 158-59), counsel for CIG/Derrick requested that it be withdrawn. After it was not withdrawn, counsel then filed a motion for Sanctions pursuant to Rule 10, SCADR. (R. pp. 287-93). This motion was before Judge Hood along with cross-motions for summary judgment. Counsel for Appellant/Respondents offered to withdraw the Motion for Sanctions if Curry would withdraw the confidential settlement information from the court and counsel for Curry indicated that they would withdraw those documents. (R. pp. 287-93). “Your Honor, we notified counsel and Your Honor that we were willing to withdraw it.” (R. p. 293, lines 4-5).

Despite having agreed to withdraw the settlement documents from the record, and having secured a withdrawal of the CIG/Derrick's Motion for Sanctions, counsel then reintroduced more confidential communication in violations of Rule 8, SCADR and the Mediation Agreement, by way of the affidavits of Rachel Peavy, Jeff Goodwyn and Mr. Curry. These affidavits detailed all settlement negotiations between the parties and

reintroduced the objectionable exhibits that were withdrawn by agreement earlier in the hearing. (R. p. 323, line 10 – p. 324, line 3).

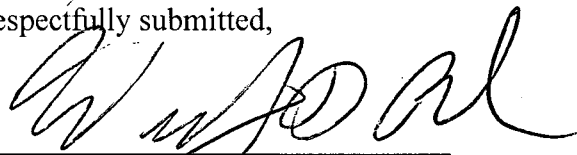
Appellant objected to the introduction of the affidavits and documents on the same grounds as stated throughout the hearing that they were protected under the ADR rules and that the court should not look outside the four corners of the contract. (R. pp. 324-25). Despite pointing out the ADR prohibition of considering the settlement information and the improper consideration of matters outside of the Release without a finding of ambiguity, and prior to the conclusion of arguments, Judge Hood ruled that “I don't need to make a determination of ambiguity. The Defendant's summary judgment is denied.” (R. p. 325). The court then accepted the affidavits despite their clear and intentional violation of the rules of Rule 8, SCADR, confidentiality, and failure to find an ambiguity, and reviewed them in making its decision. (R. p. 1, p. 13). Such actions were prejudicial to CIG/Derrick. The court referenced the confidential information and used it in rendering its decision. (R. p. 5).

Because the Release was "perfectly plain and capable of legal construction" it alone determines the document's force and effect. Curry is governed by his “outward expressions and the court is not at liberty to consider their secret intentions.” Ecclesiastes Prod. Ministries, 374 S.C. at 497, 649 S.E.2d at 501. Therefore the court erred in reviewing and applying the any extrinsic evidence in its decision and particularly extrinsic evidence that was submitted in violation of the ADR rules and the common law of this state related to the confidentiality of settlement discussions.

CONCLUSION

Because the circuit court erred in the application of facts and law as set forth above, particularly there is no question of material fact that Curry received full compensation for his losses and that Curry intended to release CIG and Derrick as agents of Scottsdale, the courts ordered should be reversed and the defense restored and as a matter of law the matter below dismissed because as a matter of law, CIG/Derrick have been released.

Respectfully submitted,



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December 6, 2016

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC 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

Porthemos Curry.....Respondent/Appellant

v.

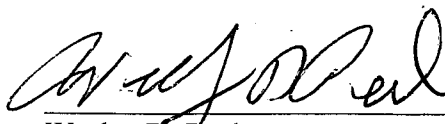
Carolina Insurance Group of SC, Inc. and Maurice Derrick.....Appellants/Respondents

CERTIFICATE OF COUNSEL

The undersigned certified that the following final briefs comply with Rule 211(b),
SCACR:

- (1) APPELLANTS' FINAL BRIEF OF APPELLANTS/RESPONDENTS
- (2) RESPONDENTS' FINAL BRIEF OF APPELLANTS/RESPONDENTS
- (3) APPELLANTS' FINAL REPLY BRIEF OF APPELLANTS/RESPONDENTS

December 6, 2016



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