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

Porthemos Curry.....Respondent/Appellant

v.

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

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APPELLANTS' FINAL REPLY BRIEF OF APPELLANTS/RESPONDENTS

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INTRODUCTION

The Appellants/Respondents, Carolina Insurance Group of SC, Inc. and Maurice Derick ("Agency Defendants") appealed lower court's dismissal of its defense that the Respondent/Appellant, Porthemos Curry ("Curry") released the Agency Defendants when he released the insurance carrier, Scottsdale Insurance Company ("Scottsdale"). This dismissal was error because (1) the release was a complete satisfaction of Curry's claims; and (2) the release expressly releases the "agents of Scottsdale" and Curry continually asserted that the Agency Defendants were agents of Scottsdale in order to establish negligence against Scottsdale for the Agency Defendants' actions (R. p. 73).

This lawsuit was filed on July 28, 2014 and Curry amended his complaint on May 28, 2015 and again on October 1, 2015. Curry settled with Scottsdale on December 10, 2015, and never sent the Agency Defendants a copy of the signed release ("Release") until it was requested on April 8, 2016 which was an unintentional oversight by Curry's counsel. (R. p. 252, lines 13-14). The Agency Defendants raised the defense of release by way of summary judgment just seven (7) days later on April 15, 2016. The Agency Defendants moved to amend their answer on April 18, 2016 to include the release defense. The court continued the trial to allow the parties time to brief the release defense and set a hearing on the Agency Defendants' Motion for Summary Judgment for April 26, 2016. Curry promptly filed a cross-motion for summary judgment on the release, which Judge Hood granted on May 9, 2016. Therefore, any idea of prejudice to Curry seems to be a bit of a stretch.

Despite completing discovery, Curry continued to insist that the Agency Defendants were agents of Scottsdale Insurance Company ("Scottsdale") second amended

complaint on October 1, 2015, just 70 days before he signed the release. Curry's arguments in his responsive brief continue to ignore the issues of law regarding the defense and instead raises issues that are not relevant to the basis of the Agency Defendants' defense of release. Curry also largely ignored these facts at the hearing in the lower court and diverted the court's attention to the Agency Defendants and their subjective beliefs as to the release. The Agency Defendants' beliefs do not relate in any way to the matters of law set forth regarding the defense of release.

Curry signed the Release on December 10, 2015, the operative language of which states:

> "KNOW ALL MEN BY THESE PRESENTS that the undersigned, Porthemos Curry, in consideration of the sum of Eighty Five and 00/100 ($85,000) 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 actions, 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 CPS 1884774 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, 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 Release contains no reservation of rights whatsoever, particularly against the Agency Defendants.

Curry continues to argue that the state of mind of the Agency Defendants is relevant to the defense of release. This argument is without merit and is not addressed in any of the case law related to the issues. The Agency Defendants' intent and belief is not what matters. Over objections of counsel, in furthering the improper argument related to the Agency Defendants' intent and beliefs, Curry introduced extrinsic evidence of settlement communications with the mediator to Judge Hood at the summary judgment hearing. After accepting the documents and without a determination of ambiguity, the court granted summary judgment to Curry on the issue of release. The lower court relied upon these documents and other extrinsic evidence[1] as cited in the order.

The Agency Defendants believe the court should have neither considered any evidence of confidential settlement negotiations, nor the "intent" or "belief" of the Agency Defendants, which are fact questions outside the four corners of the Release and not properly before the court. The trial court ruled that the Release **clearly and unambiguously released Scottsdale and its agents** and that the intent of the parties to the release **and the intent of non-parties** [the Agency Defendants] was to encompass only claims against Scottsdale (R. p. 8) (emphasis mine). In so holding, the court relied on extrinsic evidence based solely on the Agency Defendants' subjective beliefs and evidence in the record. Id. Even if extrinsic evidence were admissible, the Agency Defendants believe the court should have never considered any evidence that contradicts or contravenes Curry's pleadings. The trial court improperly analyzed the issues of "complete satisfaction" and "judicial estoppel", especially the second prong of Bartholemew and Ecclesiasties.

[1] The court also considered the deposition testimony of the 30(b)(6) representative of Carolina Insurance Group, Joel Sauls, and Maurice Derrick relating to what Agency Defendants' intent and beliefs.

The court erred in granting Curry's Cross-Motion for Summary Judgment dismissing the Agency Defendants' defense of release.

Arguments

I. THE AGENCY DEFENDANTS ARE RELEASED AS A MATTER OF LAW BASED ON THE PLAIN LANGUAGE OF THE UNAMBIGUOUS RELEASE AND CURRY'S COMPLAINTS.

In granting Curry's cross-motion for summary judgment, the lower court held that the release unambiguously releases agents of Scottsdale. (R. pp. 8, 12, 13). In its findings of facts, the court recognizes that "[t]he Second Amended Complaint, filed October 1, 2015, alleges that 'Defendants Maurice Derrick and Carolina Insurance are agents of Defendant Scottsdale." (R. p. 2). Then the court found that the Release "explicitly releases Scottsdale Insurance Company and solely Scottsdale Insurance Company" and that the release was only intended to apply to claims against Scottsdale (R. p. 12). The court based its decision on there being no evidence that the Agency Defendants are agents of Scottsdale. (R. p. 8).

The court ruled based on a "careful review of the evidence" which is improperly before the court without first making a determination of ambiguity (R. p. 1). The court points out that the Agency Defendants argued "that because the plaintiff's complaints alleged that the [Agency] Defendants were "agents" of Scottsdale, the language of the Release was intended to release not just Scottsdale, but these [Agency] Defendants as well." (R. p. 6).

The court later finds that the Agency Defendants presented no specific facts that show a genuine issue of fact for trial. (R. p. 13). Curry's brief starting on page 12 correctly states the parol evidence rule under Silver v. Aabstract Pools & Spas. E, 376 S.C. 585, 587, 658 S.E.2d 539, 540 (Ct. App. 2008), then corrects, then spends several paragraphs discussing a variety of extrinsic evidence:

- Deposition testimony (Resp. In. Br. at p. 14, ¶2; p. 15, ¶2)

- Attorney Peel's representations to the lower court, "as excerpted extensively herein." (Resp. In. Br. at p. 14, ¶ l).
- "Furthermore, there is no evidence in the record that Carolina Insurance Group or Maurice Derrick are "agents, servants, or employees" of Scottsdale. (Resp. In. Br. at p.15, ¶ 2).
- Stipulation of dismissal (Resp. In. Br. at p. 16, ¶ l).
- Balance of the record (Resp. In. Br. at p. 15, ¶ 2)

A. WITHOUT FIRST DETERMINING AN AMBIGUITY EXISTS THE RELEASE, CONSIDERING EXTRINSIC EVIDENCE IS IMPROPER AS A MATTER OF LAW.

The court erred by considering extrinsic evidence before finding an ambiguity in the release. When asked why he could not consider documents outside the four comers of the release, counsel responded that he must first find an ambiguity. (R. p. 324, lines 6-17). The court, clearly in error, responded "I don't need to make a determination of ambiguity." (R. p. 324, lines 13-15). Moreover, the trial judge did not address the violation of the rule ADR Rules.

Extrinsic evidence to explain the Release was improper in any fashion, particularly where it disclosed settlement and mediation communications to the occur. Plaintiff claims that the Agency Defendants did not object to his handing up self-serving affidavits of counsel and Curry that address "the intent of the parties to the release." While this matter has already been discussed it is worth noting that the record reflects counsel's objections. (R. p. 324). First, counsel argued that the affidavits were not proper because there had been no finding of ambiguity as to the Release. Counsel also objects to the affidavits because they violate the ADR rule on confidentiality. (R. p. 325, lines 4-12). The affidavits were accepted over the objection.

Whether or not an objection was made does not matter as to inappropriate extrinsic evidence.

> "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary[,] or explain the written instrument." McGill v. Moore, 381 S.C. 179, 188, 672 S.E.2d 571, 576 (2009) (citing In re Estate of Holden 343 S.C. 267, 275, 539 S.E.2d 703, 708 (2000)). "Where a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties. Id. (citing Holden 343 S.C. at 275, 539 S.E.2d at 708). Under the parol evidence rule, the terms of the writing are controlling, even if extrinsic evidence is admitted without objection or admitted over appropriate objection. Adams v. Marchbanks 253 S.C. 280, 282, 170 S.E.2d 214, 215 (1969) (citations omitted).

Bluffton Towne Ctr. LLC v. Gilleland-Prince 412 S.C. 554, 571, 772 S.E.2d 882, 891 (Ct.App. 2015).

Here, clearly the court erred in considering the extrinsic evidence where the court misstated that law in that Judge Hood clearly stated, "I don't need to make a determination of ambiguity." (R. p. 325, lines 13-15). The bulk of the trial court's order cites to evidence outside of the Release and therefore clearly and improperly influenced the court's decision. (R. pp. 2-4; pp. 3-6; p. 8; p. 11; p.13).

B. EVEN IF CURRY DID NOT INTEND TO RELEASE THE AGENCY DEFENDANTS, THE AGENCY DEFENDANTS ARE RELEASED BECAUSE CURRY HAS RECEIVED FULL COMPENSATION FOR ALL DAMAGES, INJURIES, LOSSES, AND CLAIMS, WHICH AMOUNTS TO A SATISFACTION UNDER SOUTH CAROLINA LAW.

Curry claims that CIG ignored the fact that it is possible for an insurance customer to collect more than the policy limits in a negligent procurement action against an agent. This is inaccurate and ignores the issues that have already been fully briefed.

However, when an insurance carrier ultimately pays a claim and the payment is accepted, then there would be no negligence on the part of the agency because the claim under the policy was fully paid. This is not a case where the carrier settled a claim against it while denying culpability. The plain language of the release shows that Scottsdale paid

Curry for his insurance claim. 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). There was no reservation of rights and no mention that this was a settlement of disputed claims. There is no mention of any particular cause of action or other claims, just claims brought against Scottsdale. This includes the claim for negligent procurement brought against both was payment under the policy. (R. p. 73). It was payment under the policy.

Curry's fourth cause of action for negligence and gross negligence was against Derrick and Carolina Insurance, and Scottsdale as the principal of Derrick and CIG. (R. pp. 72-74). Plaintiff prayed for joint and several verdicts against all of the Defendants for the negligence/gross negligence cause of action. (R. p. 75). Therefore, despite his protestations, Curry was seeking the exact same damages in the Fourth Cause of Action against all Defendants. The lower court does not recognize the negligence claim against Scottsdale, and the same has been conveniently omitted in Curry's brief. (R. p. 2; pp. 9-10); (Resp. In. Br. at pp. 2, 5, 14, 17-19).

Curry has been unable to demonstrate what differing damages were available to him other than "policy benefits and consequential damages" as described in the Release. Those are exactly the damages described and cited by Curry in Republic Textile Equip. v. Aetna Inc. Co. 239 S.C. 381, 360 S.E.2d 540 (Ct. App. 1987). Plaintiffs in negligent procurement cases can recover the full policy benefits due to them and consequential

damages resulting from non-payment of the benefits. The damages recoverable from Scottsdale and the Agency Defendants are identical—policy benefits due and consequential damages. There can be no different consequential damages incurred except statutory damages against Scottsdale. Curry's damages were covered amounts under the policy. His consequential damages were cost incurred due to non-payment of the policy, regardless of who was at fault.

Curry spends an inordinate amount of time on the question of his own "intent" as to the release, which becomes irrelevant and inapplicable under the second prong of Bartholemew. The release of on tortfeasor releases the others where (1) that was the intention of the parties, or (2) if the Plaintiff has received full compensation amounting to a satisfaction. Bartholomew v. McCartha, 255 S.C. 489, 179 S.E.2d 912 (1971). Examining anything beyond the four corners of the release is error.

In Ecclesiastes Production Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 649 S.E.2d 494 (Ct.App. 2007), this court found that a release between two parties satisfied both independent prongs of Bartholomew. The release in Ecclesiastes did not limit its scope to any specific party. The Court also found an additional ground to support the release of the third-party, which was full payment amounting to a satisfaction. As concisely stated by this court, this "issue is not determining the exact amount (assuming liability) a jury would award. Instead the issue is 'full compensation amounting to a satisfaction.'" Id. at 495.

The Release makes it clear that Curry received full payment for policy benefits due to him because of the fire. The plain language of the release states that the Scottsdale and its agents are released from

> **"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 . . . which have resulted or may result from the loss aforesaid."**

(emphasis mine). The lower court improperly concluded that Curry received "full compensation amounting to a satisfaction" Ignoring the plain language of the Release, the court looked outside the Release for evidence, only to find Curry's improperly admitted affidavits. (R. p. 11). Thus, under South Carolina law, the amount Curry received clearly releases the claims asserted against Scottsdale, and such amount is full payment for the only damages Curry could have recovered against either Scottsdale or the Agency Defendants.

C. EVEN IF THE COURT DETERMINED THE RELEASE WAS AMBIGUOUS AND EXTRINSIC EVIDENCE WAS ADMISSIBLE, SOUTH CAROLINA LAW PROHIBITS CURRY FROM PRESENTING ANY EVIDENCE WHICH CONTRAVENES OR CONTRADICTS HIS OWN PLEADINGS BECAUSE CURRY HAS ADMITTED THAT THE AGENCY DEFENDANTS ARE AGENTS OF SCOTTSDALE WHERE HE HAS INSISTED UPON AND MAINTAINED THE ALLEGATION THROUGH THREE COMPLAINTS AND HIS INTENT TO TREAT THE AGENCY DEFENDANTS AS AGENTS OF SCOTTSDALE.

Curry is correct that the allegations in his complaint are not evidence, which would be improperly before the court notwithstanding a finding ofambiguity in the release. Curry has continually cited Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 518 S.E.2d 201 (Ct. App. 1999) as supporting the trial's court's ruling that the Release was unambiguous in that it only release Scottsdale because "allegations in a complaint denied in answer are evidence of nothing." (Resp. Initial Brief at p. 14-15). However, firstly, CIG has never argued that Curry's Paragraph 34 allegation that the Agency Defendants are Scottsdale's agent is evidence. If it was, as Curry continues to point out, it would be

improper for the court to consider. However, the allegation that the Agency Defendants are agents of Scottsdale is a judicial admission.

Secondly, the language Curry quoted in his brief is not a holding in Vermeer but a direct quotation of a parenthetical quote from Griffin v. Van Norman, 302 S.C. 520, 522, 397 S.E.2d 378 (Ct. App. 1990). The full quote is as follows and only related to whether the allegations of the complaint entitled a party to indemnity and did not relate to judicial admissions:

> The allegations of the complaint are not determinative of whether a party has the right to indemnity. *See* Griffin v. Van Norman 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990) ("The Complaint serves merely as a background to this [indemnification] litigation. Allegations in a Complaint denied in answer are evidence of nothing. See also First General Servs. v. Miller 314 S.C. 439, 445 S.E.2d 446 (1994) (defendant's mere allegations in counterclaim as to negligence of plaintiff may not defeat plaintiffs right to claim derivative liability); Jourdan v. Boggs/Vaughn Contracting. Inc., 324 S.C. 309, 476 S.E.2d 708 (Ct. App. 1996) (allegations of complaint are not determinative of right to indemnity; rather, such determination is based on evidence and facts found by fact finder).

Vermeer at 307.

> "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).

Under South Carolina law, the principles of judicial admissions are consistent with the doctrine of judicial estoppel, prohibiting a party who attempts to change their position when the facts become unfavorable. Judicial estoppel prohibits parties from misrepresenting facts in order to gain an unfair advantage, once a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when

the initial version no longer suits him. Carrigg v. Cannon. 347 S.C. 75, 78, 552 S.E.2d 767, 769 (Ct. App. 2001). Facts deemed judicially admitted precludes a party from taking contrary position, and treats the admitted fact as conclusively determined. See Truesdale v. Jones 224 S.C. 237; 78 S.E.2d 274 (1953) (holding that a party is judicially bound by the allegations in his own pleadings, and such an admission is conclusive of the fact), In Truesdale our Supreme Court held that the Plaintiff was judicially bound by the factual allegations made in his complaint, which was deemed a judicial admission of the fact alleged. Further, the Court ruled that a party may even not raise the question suggesting a contradictory conclusion using evidence or testimony. Quite simply, the alleged fact is conclusively determined, and the pleader may not make bring the fact into question or put the fact in issue.

A judicial admission is fundamentally different than evidence; it is a waiver that releases the opposing party from their burden of proof. In Meyer v. Berkshire, the Fourth Circuit Court of Appeals recognized that judicial admissions are not limited to affirmative statements that a fact exists, but also include intentional and unambiguous waivers that release the opposing party from its burden to prove the facts necessary to establish the waived conclusion of law. Id., 372 F.3d 261, 264-65 (4th Cir. Ct. App. 2004) (citing Martinez v. Bally's Louisiana. Inc., 244 F.3d 474, 477 (5th Cir. 2001) ("although a judicial admission is not itself evidence, it has the effect of withdrawing a fact from contention. A statement made by counsel during the course of trial may be considered a judicial admission if it was made intentionally as a waiver, releasing the opponent from proof of fact.")); see also Black's Law Dictionary 54 (10th ed. 2014) (defining a judicial admission as "[a]formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the patty who made the admission from disputing it).

While courts are reluctant to treat opinions and legal conclusions as biding judicial admissions, "deliberate, clear[,] and unambiguous" statements by counsel may be

considered judicial admissions that bind the conceding party to the representations made. MacDonald v. General Motors Corp., 110 F.3d at 340-41 (6th Cir. 1997). When a party takes a position contrary to an admitted fact and the court reaches a conclusion which contradicts the admission, such a finding is erroneous as a matter of law. Id.

Moreover, it is widely accepted that an admission in the pleadings forbids the consideration of contrary evidence, any discussion of such evidence is irrelevant and immaterial. Thurman v. Bayshore Transit Management, Inc., 203 Cal. App. 4th1112 (2012). "If the court does find adversely to the admission, such a finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings...In such case the facts alleged must be assumed to exist." Id.

The present case supports a finding that the allegations in Curry's complaint are judicial admissions under Truesdale and the consistent application of the doctrine in other courts. Curry is bound by his pleadings under Postal. Curry maintained the benefit of his allegation that the Agency Defendants are agents of Scottsdale through his second amended complaint, expert witness depositions, dispositive motions, and through the day of trial. Curry benefitted from this allegation in the negligence and gross negligence claims brought against both the Agency Defendants and Scottsdale in an effort to hold Scottsdale liable for the alleged negligent acts of the Agency Defendants (R. pp. 72-74). Curry refuses to acknowledge this claim in his brief, and instead turns to extrinsic evidence to prove the contrary position that the Agency Defendants are not agents of Scottsdale. Like the Plaintiff in Truesdale Curry never made any effort to alter or amend the allegation. The facts became unfavorable when the Agency Defendants raised the release defense. Under Carrigg, Curry is not allowed to assert a certain version of the facts in litigation and then change those facts when the initial version longer suits him. until the facts became

unfavorable to him. Even if Curry the court found an ambiguity in the Release and needed extrinsic evidence, Curry is prohibited from introducing evidence of a fact that is conclusively established. See Truesdale 224 S.C. at 241, 78 S.E.2d at 276. Then under Thurman, should the court make a finding contrary to the admission, such a finding should be disregarded.

Accordingly, the court should find that the allegations in Curry's complaints are judicial admissions, to which he is bound, and any inconsistent finding by the lower court should be disregarded.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and find that the Release releases the Agency Defendants as a matter of law.

Respectfully submitted,

December 6, 2016

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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

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