

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

RECEIVED

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DEC 06 2016

SC Court of Appeals

Robert E. Hood, Circuit Court Judge  
Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2016-000986

Porthemos Curry.....Respondent/Appellant,

v.

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

**FINAL BRIEF OF RESPONDENT/APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

- I. **Did the Lower Court Abuse its Discretion in Granting Appellant Agency's Motion to Amend its Answer at Trial to Assert the Affirmative Defense of Release, Where the Agency Was On Notice of Respondent Customer's Settlement with Scottsdale Insurance Company For Many Months Prior to Trial and Never Asserted it was Released Until Trial; Such Amendment Was Highly Prejudicial; Mr. Curry Had No Notice of this New Issue; and the Lower Court's Granting of the Motion to Amend Resulted in Significant Delay and Expense, Including the Cancellation of Two Date Certain Trials?<sup>1</sup>**
  
- II. **Was the Lower Court's Granting of Summary Judgment In Favor of Customer As to the Affirmative Defense of Release Proper Where the Plain and Unambiguous Language of the Release Encompassed Only Customer's Claims Against Scottsdale and Not The Agency and There Was No Evidence Presented Which Contradicted the Plain Language of the Release or Could Possibly Be Construed To Have Released the Agency?**
  
- III. **Was the Lower Court's Granting of Summary Judgment As to the Affirmative Defense of Release In Favor of Customer Proper Where There Was No Evidence That Customer Received "Full Compensation" as a Result of his Settlement with Scottsdale and the Law is Clear That a Party Seeking Damages under a Claim for Negligent Procurement of an Insurance Policy can Recover Damages In Excess of the Underlying Policy Limits?**
  
- IV. **Given that the Agency always denied that it was an "agent" of Scottsdale Insurance Company yet asserted that Customer's claims against it were barred by language releasing Scottsdale's "agents" in the Scottsdale Release, Did the Lower Court Properly Admit Affidavit Testimony as to the Intent of the Parties as it Related to the Settlement With Scottsdale Insurance Company, Where the Intent of the Parties to the Release Was Before the Lower Court and, Further, Did The Agency Fail to Preserve this Issue for Review?**

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<sup>1</sup> This Issue is addressed in the Respondent/Appellant's Final Brief of Appellant, filed herewith, in support of the cross-appeal; in the event this Court finds that the lower court abused its discretion in granting the motion to amend the Agency's answer to assert the defense, the Respondent respectfully contends that the Appellants' appeal from the granting of summary judgment in favor of Customer would be moot. See Byrd v. Irmo High School, 321 S.C. 426, 468 S.E.2d 861 (1996) ("This [c]ourt will not pass on moot and academic questions or make an adjudication where there remains no actual controversy)

## STATEMENT OF THE CASE

This is an appeal from the lower court's granting of summary judgment in favor of the Respondent, Porthemos Curry ("Customer") as to the affirmative defense of release, which was asserted by the Appellants Carolina Insurance Group and its agent, Maurice Derrick (collectively "the Agency"). Customer, as Respondent/Appellant, cross-appeals the lower court's granting of the Agency's motion to amend its answer, at trial, to assert the defense of release.

This lawsuit has been pending since July 2014. R. pp. 15 - 21. Customer asserts claims for negligence and gross negligence in the procurement of an insurance policy against Appellants/Respondents Carolina Insurance Group and its agent, Maurice Derrick (collectively "the Agency"), and claims for breach of contract and bad faith against Scottsdale Insurance Company, the issuer of the policy. R. pp. 69 - 75.

In November 2015, Customer settled with Scottsdale and executed a Release in exchange for the payment of \$85,000 by Scottsdale. R. pp. 426-427. On November 25, 2015, Scottsdale notified the Agency that it had settled with Customer by way of payment of \$85,000 and the execution of a release. R. pp. 446 - 449; R. p. 294. On December 14, 2015, Attorney Murphy's office forwarded a copy of the Stipulation of Dismissal as to Scottsdale to Wesley Peel, Esq., the attorney for the Agency. R. pp. 443-445; R. pp. 294-295. Attorneys for Customer and for the Agency executed a Stipulation of Dismissal as to Scottsdale Insurance Company, which was filed with the Richland County Clerk of Court in December 2015. R. pp. 428-429.

On December 8, 2015, the Agency's attorney contacted the Honorable Alison R. Lee, Chief Administrative Judge for Richland County, to request a status conference and

to confirm that the Agency still wanted a date certain trial in April 2016, due to various issues with expert witness availability. R. pp. 441- 442. The case was ultimately set by Judge Lee for a date certain trial beginning on April 18, 2016.

On April 8, 2016, the Agency's counsel requested a copy of the Scottsdale Release, which was provided to him that same day. R. p. 231, l. 17-19. On April 11, 2016, the parties deposed their respective expert witnesses in Charleston. On April 15, 2016, the Agency filed a motion for summary judgment, asserting that the Agency was released as a result of the Scottsdale Release and settlement. R. pp. 95-100. The Agency argued in its supporting memorandum that "the language of the [Scottsdale] release indicates that the Plaintiff intended to release Carolina Insurance Group and [Maurice] Derrick, in addition to Scottsdale." R. p. 109. The Agency further alleged that "there is no limited (*sic*) language in the release as to any other claims, injuries, or parties, which could have easily been added if that was the intent." R. p. 109.

As this defense theory had never before been raised, on April 18, 2016 – the first day of the date certain trial before the Honorable Jocelyn Newman - the Agency filed a motion to amend their answer to assert the affirmative defense of release. R. p. 250, l. 4 – 19. Customer thereafter filed a cross-motion for summary judgment as to the affirmative defense of release. R. pp. 116 – 119.

The parties proceeded to qualify a jury. Judge Newman considered various pre-trial motions, and granted the Agency's motion to amend its answer to assert the additional defense of release. R. p. 250, l. 4 – p. 254, l. 2; R. p. 14. Judge Newman indicated that she was inclined to hear the Agency's motion for summary judgment as to

the affirmative defense of release; however, Customer objected to the hearing of the motion without the requisite 10 days' notice under Rule 56, SCRCP. R. p. 262, l. 18-23.

Judge Newman proceeded to adjourn for the day, and directed the parties to return the following morning, April 19<sup>th</sup>, prepared to argue 1.) whether the motion for summary judgment should be heard outside the 10 days notice required under Rule 56; and 2.) if the court ruled that the motion could be heard, to be prepared to argue and defend the motions for summary judgment. R. p. 262, l. 18 – p. 264, l. 9.

On April 19, 2016, Judge Newman determined that the motion could not properly be heard by her without the required 10 days' notice under Rule 56. R. p. 268, l. 19-25. Accordingly, Judge Newman continued the trial and set the case for a new date certain trial on May 16, 2016. R. p. 283, l. 6 -15. Judge Newman set the summary judgment motions for hearing on April 25, 2016 before the Honorable Robert E. Hood. R. p. 282. The hearing was then moved to April 26th by the Clerk of Court's office.

Judge Hood denied the Agency's motion for summary judgment from the bench and took Customer's cross-motion under advisement, informing the parties that he would promptly issue a ruling, given that the date certain trial was fast approaching. R. p. 325, l. 14 - 15; R. p. 335, l. 4 - 6.

On May 6, 2016, Judge Hood issued his order granting Customer's cross-motion for summary judgment. R. pp. 1-13. On May 11, 2016, the Agency filed a Notice of Appeal, resulting in the cancellation of the second date certain trial.

## STATEMENT OF FACTS

This lawsuit arises out of the alleged negligent failure to procure insurance coverage for a vacant structure. Customer brought claims against Scottsdale Insurance Company, the issuer of the policy, for breach of contract; statutory bad faith; and common law bad faith. Customer also brought claims against his insurance agents, Carolina Insurance Group and Maurice Derrick (collectively, “the Agency”) for negligence and gross negligence in the procurement of the Scottsdale insurance policy. R. pp. 69-75.

The *gravamen* of the complaint is that Customer believed that the Agency procured a vacant structures policy with a term of coverage that ran from December 2, 2013 to March 2, 2014. R. pp. 69-75. The Agency contends that it properly procured a renewal policy that ran from November 21, 2013 to February 21, 2013. R. p. 305, l. 16 – p. 306, l. 6. The term of coverage ultimately became important because the vacant structure – a modest home being built by Customer on his property off Monticello Road in Columbia – suffered severe damage when a stolen car ran into the house sometime before midnight on February 21, 2013 and caught fire. Because Scottsdale Insurance Company, the issuer of the policy, contended that the policy expired at 12:01 a.m. on February 21<sup>st</sup>, Customer’s claim was denied as being outside the coverage period. R. pp. 69 – 75.

The Second Amended Complaint, filed October 1, 2015, alleges that “Defendants Maurice Derrick and Carolina Insurance are agents of Defendant Scottsdale.” R. p. 73 at ¶34. This was also alleged in prior complaints.

It is undisputed that the Agency has 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. R. p. 51 at ¶14; R. p. 83 at ¶14.

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:

***Questioning of Joel Sauls, 30(b)(6) designee for 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.

R. p. 223, l. 22 – p. 226, l. 12; R. p. 37, l. 4 – 23.

***Questioning of Maurice Derrick, agent with Carolina Insurance Group***

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 Customer?

A. Correct.

Q. And in doing this, you dealt with TAPCO, who in turn represented the interest of Scottsdale?<sup>2</sup>

A. Correct.

R. p. 221, l. 11 – p. 222, l. 9; R. p. 321, l. 24 – p. 322, l. 18

Furthermore, the Agency's attorney, Wesley Peel, Esq., upon questioning from Judge Hood, further confirmed the lack of an agency relationship between his clients and Scottsdale Insurance Company:

The Court: They say –

Mr. Peel: -- they say we're an agent. We're not Scottsdale's agent. We denied it continuously.

...

The Court: I mean, you told me and your clients have testified they are not agents of Scottsdale Insurance Group, right?

Mr. Peel: Correct.

R. p. 311, l. 23 -25; R. p. 327, l. 22-25.

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<sup>2</sup> TAPCO is a general agent for Scottsdale, an excess and surplus lines insurance company. TAPCO is authorized to handle certain underwriting and issue policies on behalf of Scottsdale. Independent agencies such as Carolina Insurance Group submit quote requests and applications to TAPCO, not to Scottsdale.

In September 2015, the parties participated in a mediation conference. At that time, Scottsdale Insurance was still a defendant in the case. R. p. 307, l. 20-25. As a result of the mediation and subsequent negotiations between Scottsdale and Customer's counsel with the assistance of the mediator, Customer reached a settlement agreement with Scottsdale Insurance Company. R. pp. 426-429; R. p. 443; R. pp. 446-449.

On November 25, 2015, the attorney for Scottsdale, J.R. Murphy, wrote a letter to Customer's counsel whereby he wrote that he was enclosing a check in the amount of \$85,000, along with a Release (hereafter "the Scottsdale Release") and Stipulation of Dismissal for signature. The Agency's attorney, Wesley Peel, was copied on the letter. R. p. 446.

Customer executed the Scottsdale Release, which contains no mention of either Carolina Insurance Group or Maurice Derrick (collectively "the Agency"). The Release 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. Like most releases of corporations, the Release also releases the agents, employees and servants of Scottsdale Insurance Company. R. pp. 426-427.

On December 14, 2015, J.R. Murphy's associate, Hannah D. Stetson, wrote Mr. Peel to forward him a Stipulation of Dismissal as to Scottsdale for Mr. Peel's signature. R. pp. 443-445. The Stipulation provided that "*the Plaintiff's case against the remaining Defendants shall not be affected by this Dismissal.*" The Stipulation was signed by Mr. Peel and filed with the Richland County Clerk of Court on December 30, 2015. R. p. 428.

The Agency does not dispute that it did not settle with Customer, nor does the Agency dispute that it did not pay Customer any money in the Scottsdale settlement, as evidenced by the below exchange:

The Court: I mean, you don't dispute that –

Mr. Peel: We did not settle.

The Court: That their [Customer's] position is they didn't think they released your client?

Mr. Peel: I don't know what they thought, but I say we didn't settle with them. I didn't pay them any money.

The Court: Right.

Mr. Peel: I did not execute a release . . . There is no dispute as to that.

R. p. 324, l. 18 – p. 325, l. 2.

On April 8, 2016, Mr. Peel requested a copy of the Scottsdale Release, which was promptly provided to him. R. p. 250, l. 9-10. The parties proceeded to depose expert witnesses on April 11<sup>th</sup> and prepared for the date certain trial on April 18<sup>th</sup> before the Honorable Jocelyn Newman.

On April 15<sup>th</sup>, the Agency filed a motion for summary judgment, arguing that Customer's claims against the Agency were barred by the Scottsdale Release and asserting the affirmative defense of release. R. pp. 95-100. This affirmative defense had not been raised or pleaded by the Agency previously.

On April 18<sup>th</sup>, the parties qualified a jury and Judge Newman took up various pre-trial matters, including several motions *in limine*, after the lunch break. R. p. 228, l. 17 – p. 235, l. 8; R. p. 240, l. 13 – p. 248, l. 15. On this same day, the Agency moved to amend their answer to assert the affirmative defense of release; the motion to amend was

granted by Judge Newman, over Customer's objection. R. p. 250, l. 4 – p. 254, l. 1. The Agency's attorney alleged that Customer's counsel had failed to properly supplement their discovery responses to produce a copy of the Scottsdale Release, in response to Agency's Request for Production for copies of correspondence, e-mails, etc., but that he believed that such failure was inadvertent. R. p. 251, l. 16-25; R. p. 276, l. 7-11; R. p. 230, l. 17 – p. 232, l. 2.<sup>3</sup> It was undisputed, however, that Mr. Peel never requested a copy of the Scottsdale Release until April 8, 2016, almost five months after he received JR Murphy's letter notifying him of the existence of the Release. R. p. 231, l. 17 – 19.

Customer objected to the hearing of the summary judgment motion outside the 10 days' notice requirement under Rule 56, SCRCF. R. p. 262, l. 18-23. Judge Newman ordered the parties to be prepared to argue the summary judgment motions the following morning, and to brief the issues, in the event that she ruled that they could properly be heard outside the 10 days' notice requirement. R. p. 258, l. 5 – p. 264, l. 7. The following morning of April 19<sup>th</sup>, Customer's counsel filed and served upon Agency's counsel his Memorandum in Opposition to Summary Judgment. R. pp. 120-161.

Upon review, Judge Newman agreed that the Agency's motion could not be heard outside the 10 days' notice period and set both the motions for hearing the following week before the Honorable Robert E. Hood.<sup>4</sup> R. p. 268, l. 23-25. Judge Newman, mindful of the age of the case and Judge Lee's previous date certain, set the case for a

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<sup>3</sup> The issue of whether the actual Request for Production which Agency relied upon in this argument to Judge Newman actually requested the Scottsdale Release is addressed later in the Brief.

<sup>4</sup> The Agency's attorney agreed to waive the 10 day requirement as to the cross-motion filed by Mr. Curry and have both motions heard on the same date by Judge Hood.

date certain trial for May 16, 2016, to allow time for the summary judgment motions to be heard and ruled upon by Judge Hood.

## ARGUMENT

### **A. The Circuit Court Correctly Found The Scottsdale Release Was Unambiguous**

Summary judgment is appropriate where 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 reasonable inferences 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). “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot rest on mere allegations or denials contained in the pleadings. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial.” Hansen v. United Serv. Auto. Ass’n, 350 S.C. 62, 67, 565 S.E.2d 114, 116 (Ct. App. 2002); See also Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 216-17, 407 S.E.2d 637, 638 (1991).

A party “cannot create ambiguity [in a contract] 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).

“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.”)

“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.

“The term "release" has been defined as the "relinquishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced. A release is an agreement providing that a duty owed to the maker of the release is discharged immediately. A release is contractual in nature. Whether a particular agreement constitutes a release is to be determined from the intent of the parties. Under the common law, the release of one of multiple joint tortfeasors, regardless of the intention of the parties, released all. The [South Carolina Supreme] Court rejected this common law rule and held ... that the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction.” Wade v.

Berkeley County, 339 S.C. 513, 529 S.E.2d 743 (S.C. App. 2000) (*reversed in part on other grounds*) (internal citations omitted)

***The Lower Court Correctly Found that Release Only Released Scottsdale Insurance Company and Its Agents, Servants, and Employees and a Denied Allegation in a Complaint Would Not Change the Plain Language of the Scottsdale Release***

The Agency contends that because Customer alleged the Agency was an “agent” of Scottsdale in his pleadings, it was error for the Court to grant summary judgment in favor of Customer because the Scottsdale Release contains language that provides for the release by Customer of “Scottsdale Insurance Company, **its agents**, servants, employees, successors and assigns of and from any and all actions, causes of actions, demands and/or claims...”. See R. pp. 426-427; Init. Br. at §II, pp.15-19. It is undisputed that the Agency (and Scottsdale) always denied any agency relationship whatsoever, as evidenced by its answers, deposition testimony, and Attorney Peel’s representations to the lower court, as excerpted extensively herein.

In short, the Agency argues that this denied allegation in the complaint somehow leads to the inclusion of the Agency in the Scottsdale Release and that, relying upon various opinions of the 5<sup>th</sup> and 7<sup>th</sup> Circuits, Customer has “plead himself out of court”. Init. Br. at p. 17 (citing to numerous Federal Courts of Appeals in urging this Court to adopt the concept of “judicial admissions” and bar Customer’s claim for negligent procurement of an insurance policy).

The lower court was correct in finding the Scottsdale Release unambiguously released only Scottsdale (and Scottsdale agents, employees, and servants) 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>5</sup> 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) (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)) (emphasis added).

The lower court correctly found that the plain and unambiguous language of the Scottsdale Release releases only Scottsdale Insurance Company, its agents, servants, employees, successors and assigns and therefore summary judgment was properly entered as to the affirmative defense. R. p. 8; pp. 12-13. 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 undisputed testimony is that there was no agency relationship between Carolina Insurance and Scottsdale whatsoever. R. pp. 221-226.

However, the Agency contends that this “denied allegation” either 1.) results in the Agency being released under the Scottsdale Release because the Release is unambiguous or, alternatively, 2.) renders the language contained in the Scottsdale Release ambiguous, and therefore “the issue remanded for a proper determination as a matter of law based upon the clear intent of the Release.” Init. Br. at p. 19. Seeking to proverbially “have it both ways”, both arguments fail as a matter of law because 1.) it is

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<sup>5</sup> Upon receiving notice on April 18<sup>th</sup> that defense counsel intended to advance this novel argument and new defense, Customer also filed a Stipulation that Defendants are not agents of Scottsdale. See Crossmann Cmtys. Of N.C. v. Harleysville Mut. Ins. Co., 411 S.C. 506, 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.)

undisputed by the Agency that the Agency is not an agent of Scottsdale; and 2.) the clear intent of the parties to the Release was that Scottsdale – who was paying money and being dismissed from the lawsuit – was the sole party being released from Customer’s claims; otherwise, the Agency, upon receiving the Stipulation of Dismissal as to Scottsdale Insurance Company only, would have requested that they, too, be dismissed from the action.<sup>6</sup>

The Agency’s 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 the Agency rely upon in making this argument is a denied allegation in the complaint. The trial court correctly found that the theory of “judicial admission” espoused by Federal courts of appeals in the Second, Fifth, Seventh, and Eighth circuits was unpersuasive and did not state the law of South Carolina.

Here, there is a mere allegation that was denied by the Agency and denied by the Agency’s attorney at the hearing. R. p. 311, l. 24-25. There is no “admission” under South Carolina law; there is no evidence that the Agency was an agent of Scottsdale (and in fact the overwhelming undisputed evidence was to the contrary) and the lower court correctly found the Release unambiguously released only Scottsdale. Accordingly, this Court should affirm the order of the lower court for the reasons stated herein or for any other reason found in the record, pursuant to Rule 220 (c), SCACR.

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<sup>6</sup> The Agency argues that because it never received a copy of the Release until it requested it on April 8, 2016 – almost 5 months after it received notice of the Scottsdale settlement from Attorney Murphy – that its conduct is not evidence of the intent of the parties or the meaning of the Release.

***The Court Correctly Found that There Was Not Full Compensation Amounting to a Satisfaction***

The Agency confuses the issue of its right to request a set-off at the post-verdict stage with the right of Customer to recover damages in excess of the policy limits in a negligent procurement case.<sup>7</sup> The Agency argues that “the absurd result produced (by Judge Hood’s granting of summary judgment) is that Curry is allowed to seek a double recovery for the only damages to which he would have been entitled to in this action, which are the amounts due under the policy because of the fire loss and any consequential damages.” Init. Br. at pp. 14-15.

The Agency contends that the “funds due under the [Scottsdale] 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 . . . Any other finding would allow Curry a double recovery of his damages.” Init. Br. at p. 8. In short, under the reasoning advanced by the Agency, an insured who sues both an insurance company and his independent insurance agent – alleging different causes of action against each defendant - can only ever recover the policy limits. This is not the law in South Carolina.

The Court of Appeals has specifically held that a party (here Customer) can recover “all pecuniary losses that are a natural result of the defendant’s misconduct, regardless of whether these losses could have been anticipated, since . . . the purpose of the damages is to place the Plaintiff in the same position it occupied before the

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<sup>7</sup> Customer denies that the Agency is entitled to a set-off in light of the Supreme Court’s recent ruling in Riley v. Ford Motor Company, 414 S.C. 185, 777 S.E.2d 824 (2015); however, Customer does not dispute that the Agency would be allowed to make a motion for set-off at the post-verdict stage.

Defendants' wrongdoing occurred." Republic Textile Equip. v. Aetna Ins. Co. and Connelly Beckham & Associates, 293 S.C. 381, 360 S.E.2d 540, 545 (Ct. App. 1987). In Republic, the Court of Appeals specifically held that a party is not limited to damages up to the policy's face value and, further, that recovery against an insurance agency under a claim of negligent procurement is not restricted to the policy amounts. Id. at 544 (finding that language in Riddle-Duckworth, Inc. v. Sullivan was not controlling because that case did not involve losses beyond the policy's face value).

The Agency argues that they are entitled to summary judgment because the language of the Release provides 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." R. pp. 426-427; R. pp. 104 – 115.

The Agency relies 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.

According to the position advanced by the Agency, this language means that Customer 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. The lower court correctly found this argument without merit. The lower court correctly noted that Customer's claims against Scottsdale were distinct from those pending against the

Agency, and could result in an award of different types of damages.<sup>8</sup> R. pp. 1-13; R. pp. 69-75. The Agency's belief that the amount recovered by Customer from Scottsdale represents the exact same damages he seeks from the Agency is not supported by the common law and the lower court correctly found that this argument 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 et seq. 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)).

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<sup>8</sup> 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.

Again, the lower court correctly found that there is no evidence that the Customer received “full compensation amounting to a satisfaction” from the Agency; in fact, Customer’s own testimony is that “the amount I received from Scottsdale did not cover all of my damages in the case” and that he wanted to recover punitive damages against Carolina Insurance Group and Maurice Derrick because of their grossly negligent action in procuring a policy that was “backdated” by 10 days. R. p. 11; R. pp. 430 - 431 at ¶6; R. p. 215; R. pp. 69-75.<sup>9</sup> The Release itself makes no mention of either Carolina Insurance Group or Maurice Derrick (collectively “the Agency”) and it is undisputed that Customer received nothing in the form of payment from the Agency.

The Agency argues 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 it is undisputed that the Agency here has not paid any monies to Customer and, further, that the obligations and duties of an insurance agent can be separate and distinct from those of the insurer. The lower court correctly found that there had not been a satisfaction and the Order should be affirmed for this reason, or for any other reason found in the record pursuant to Rule 220 (c), SCACR.

***The Issue of Whether Testimony as to the Intent of the Parties Was Properly Admitted is Not Preserved for Review***

The Agency raised the issue that they were “agents” under the language of the Scottsdale Release, and therefore the Agency was released along with Scottsdale, for the

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<sup>9</sup> Mr. Curry alleges that he essentially paid for 10 days of worthless coverage when the Agency elected to backdate the policy without his authorization, even though there were no losses on the risk for that period of time and never had there been.

first time at trial on April 18, 2016. R. pp. 101-103. Specifically, the Agency alleged that where “there is no limited (*sic*) language in the release as to any other claims, injuries, or parties, **which could have easily been added if that was the intent.**” Furthermore, the Agency alleged that “the parties intention must, in the first instance, be derived from the language of the release [and that] [t]he language of the Release indicates that the Plaintiff intended to release Carolina Insurance in addition to Scottsdale.” R. pp. 104-115. Accordingly, the issue of intent was squarely before the lower court as a result of the Agency’s assertion of the affirmative defense of release.

On the afternoon of April 18, 2016, Judge Newman directed the parties to brief their respective summary judgment motions overnight and be ready for hearing on April 19<sup>th</sup>. In light of the cardinal rule that, when a contract is before the court for interpretation, “the paramount concern of the court is to give effect to the intention of the parties” to such contract, it was necessary and, in fact, required for Customer’s counsel to submit evidence of the intent of all of the parties – including Scottsdale and the Agency – as it related to the settlement of Customer’s claims against Scottsdale, as reflected in the Release. See Rule 8(b)(5), SCADR; Rule 56(e), SCRCP; Rule 407, SCACR.

Accordingly, Customer submitted to Judge Newman a memorandum in opposition to the Agency’s motion for summary judgment and in support of his cross-motion that attached, as exhibits, correspondence reflecting the ongoing settlement negotiations between the Agency and Customer after the Scottsdale Release had been executed and the Stipulation of Dismissal as to Scottsdale had been signed by counsel, up to the eve of trial. R. pp. 120-161.

The Agency raised no objection to the Memorandum at the April 19<sup>th</sup> hearing and counsel admitted that he did not read the Memorandum until April 22, 2016. R. p. 289, l. 4-10. On April 22<sup>nd</sup>, Mr. Peel read the Memorandum and advised counsel that he considered the Memorandum to be violative of the confidentiality provisions contained in the South Carolina ADR Rules. R. p. 199. The Agency subsequently filed a Motion for Sanctions, alleging that counsel had violated the ADR confidentiality rules. R. pp. 192 -198.

On April 22<sup>nd</sup>, mindful of the 2-day rule for affidavits under Rule 56 and the upcoming April 26<sup>th</sup> hearing date, Customer's attorney served Mr. Peel with affidavits of Porthemos Curry; Rachel Peavy, Esq.; and T. Jeff Goodwyn, Jr., Esq. The affidavits attested to the ongoing settlement negotiations and the intent of the parties to the Scottsdale Release. R. pp. 430 – 440. Customer's counsel did not serve Judge Hood with these affidavits, as he had not yet heard and ruled upon the Agency's pending Motion for Sanctions, which would necessarily address whether evidence of settlement negotiations and the intent of the parties to the Scottsdale Release could properly be considered by the lower court.

During the hearing on the Agency's motion for sanctions, Mr. Peel objected to Attorney Peavy arguing that the parties had engaged in settlement negotiations following Customer's settlement with Scottsdale, and that evidence of such settlement offers was necessarily submitted to Judge Newman. R. p. 295, l. 22 – p. 299, l. 16. The Court, in considering the Motion for Sanctions, noted that Rule 8(b)(5), SCADR, contains an exception to the confidentiality requirement **if required by law**, "meaning like Judge Newman told you to go talk about this issue?" R. p. 297, l. 1-4.

The Agency thereafter withdrew the Motion for Sanctions. R. p. 299, l. 13-16. The Agency then proceeded to argue its Motion for Summary Judgment as to the Affirmative Defense of Release. R. p. 300, l. 4 – p. 319, l. 19.

After withdrawing its motion for sanctions, the Agency never made a motion to exclude the new affidavits of Customer and his attorneys (which had not yet been entered into evidence by the lower court) and, in fact, never objected to their admissibility:

Ms. Peavy: *[In Opposition to Agency's Motion for Summary Judgment]*  
I want to also, address, again, Mr. Peel talks about the *McArthur* decision, which puts into direct consideration for the Court the intention of the parties or whether a party received full compensation by virtue of release.

Your honor, in this case, the intent of the parties is clear. And I've submitted affidavits to Mr. Peel on Friday. I did not serve them on the Court pending the Court's ruling on whether he would consider these affidavits .... The affidavits of my client, Customer, as to what he intended to do when he accepted payment only from Scottsdale. The other two affidavits of both myself and Mr. Goodwin, which attest to a course of dealing . . . I'd like to hand up those affidavits in the event Your Honor considers them properly before the Court to review. And I think because Mr. Peel has argued specifically as to the intent of the parties to this release that they're properly before the Court.

Mr. Peel: Your Honor, I guess it's – I think – thank you for letting me respond. I think that there are only admissible if you make the determination – there are two steps. One, you make a determination that the language of the release itself is ambiguous . . . If you made a ruling that you found that the contract is ambiguous, then you can consider outside evidence to deduce intent . Secondly, I'm unaware again of any rule that --- I've read the affidavits. They're very detailed as to the settlement negotiations and what occurred at mediation. And I think the ADR protects those anyway.

...  
The Court: Okay. So I don't understand under what theory of Rule 56 the affidavits are not admissible.

Mr. Peel: Rule 56?

The Court: Yes.

Mr. Peel: I don't know, Your Honor.

The Court: That's the –

Mr. Peel: The problem is the ADR Rule. Of course, you can consider whatever you want.

R. p. 323, l. 5 – p.325, l. 11.

Immediately thereafter, the lower court denied the Agency's motion for summary judgment and requested that Customer's counsel proceed with arguing the plaintiff's cross-motion. R. p. 325, l. 14 -17.

The lower court allowed Attorney Peavy to hand up the affidavits in support of Customer's cross-motion for summary judgment, **without objection from Agency's counsel**, after the denial of Agency's motion. R. p. 325, l. 16-20. Because the Agency did not object or seek a ruling at that time, the issue is not preserved for review. See S.C. Dept. of Trans. v. First Carolina Corp. 372 S.C. 295, 641 S.E.2d 903 (2007) (in order to preserve an issue for appellate review, the issue must have been raised and ruled upon by the lower court); See also State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (finding issue unpreserved because any objection was too general and did not present any specific grounds to the trial court.)<sup>10</sup>

***Even if the Issue Was Preserved, The Court Properly Considered Evidence of the Intent of the Parties to the Release***

The lower court considered the pleadings; deposition testimony; and affidavits of Customer and his attorneys when ruling in favor of Customer's cross-motion for summary judgment. See Rule 56(c), SCRCP. The intent of the parties was properly considered by the

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<sup>10</sup> The Agency also did not file a motion for reconsideration of the lower court's order and therefore this issue is not properly before this Court. See Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992).

lower court; however, this was not the only evidence before the lower court and the lower court properly considered the affidavits as one piece of evidence – however, the Order reflects that the language of the Release itself; the pleadings; the representations of counsel at the hearing; and the deposition testimony were equally considered in support of the court’s finding that there was no genuine issue of material fact as to whether the Scottsdale Release also released the Agency. R. pp. 1 -13.

***It was Within the Court’s Discretion to Admit Evidence of Post-Release Settlement Negotiations between the Agency and Customer.***

The admission of evidence is within the trial judge’s discretion. Whaley v. CSX Trans., 362 S.C. 456, 609 S.E.2d 286 (2005). The decision whether to admit testimony into evidence will not be disturbed on appeal absent an abuse of that discretion. See Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 673 S.E.2d 448 (2009). “Furthermore, no error in the admission . . . of evidence . . . is ground for . . . vacating, modifying, or otherwise disturbing a judgment unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” Rule 61, SCRPC.

Furthermore, when such evidence is the disclosure of mediation details, the disclosure of same has been found to be proper under Rule 8(b)(5) of the ADR Rules. See Brandt v. Brandt, 2015-UP-558 (S.C. Ct. App. Dec. 16, 2015) (unpublished) (finding the disclosure of communications during a mediation settlement conference is not barred for purposes of upholding a settlement agreement.)<sup>11</sup> The lower court properly exercised its

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<sup>11</sup> Counsel is mindful of Rule 268(d)(2), SCACR, and submits that this unpublished opinion, while not binding authority, could be useful to the Court’s review of this matter.

discretion in admitting the affidavits and such evidence was properly for the lower court's consideration in ascertaining the intent of the parties to the contract. See Parker v. Byrd, supra.

Customer requests that this Court affirm the order of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220(c), SCACR.

### Conclusion

The lower court correctly found that the Scottsdale Release did not release the Agency and that there was no genuine issue for trial as to the affirmative defense of release. The order of the lower should be affirmed for the reasons stated herein, or for any other reason found in the record pursuant to Rule 220(c), SCACR, and the matter remanded to the lower court for immediate trial. Customer respectfully contends that this appeal (and the asserted defense of release) are frivolous and made solely to delay the trial of this matter. See Rule 269, SCACR.

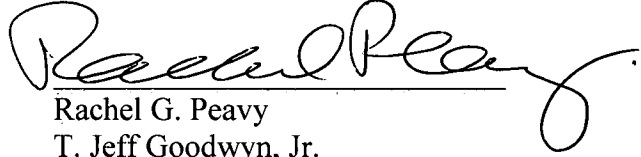
In the alternative, Customer respectfully requests that the Court find that the lower court erred in granting the Agency's motion to amend its answer to assert the affirmative defense of release, as briefed in the Respondent/Appellant's Final Brief of Appellant, filed herewith, and remand the matter back to the circuit court for trial, thereby rendering moot the instant appeal by the Agency.<sup>12</sup>

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<sup>12</sup> The Agency asks the Court to reverse the trial court's denial of the Agency's motion for summary judgment as to the affirmative defense of release and grant summary judgment in favor of the Agency, thereby ending the case. See Init. Br. at p. 15 ("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"); p. 23 ("because the circuit court erred . . . the courts ordered (*sic*) 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.). Because the denial of summary judgment is never appealable, Customer requests that the Court deny

Respectfully submitted,

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December 6, 2016

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this request to grant summary judgment in favor of the Agency. See Olsen v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003) (denial of summary judgment is never subject to review, whether through an interlocutory appeal, or after final judgment); See also Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001) (declining to consider the denial of a motion for summary judgment, even though another appealable issue was present).

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DEC 06 2016

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Robert E. Hood, Circuit Court Judge  
Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2016-000986

Porthemos Curry.....Respondent/Appellant,

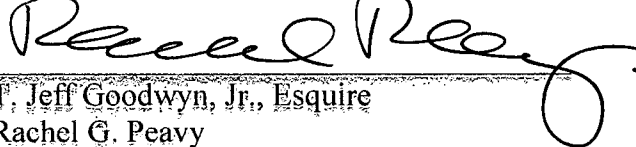
v.

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

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this Final Brief of Respondent/Appellant complies with Rule 211(b), SCACR.

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