THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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.

AMENDED INITIAL BRIEF OF RESPONDENT/APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. **Did the lower court abuse its discretion in granting Appellant/Respondent Agency's Motion to Amend its answer at trial to assert the affirmative defense of release, where the Agency was on notice of Respondent/Appellant Customer's settlement with Scottsdale Insurance Company for many months prior to trial and the Agency had received an actual copy of the release on November 30, 2015 but failed to assert the defense until the first day of trial on April 18, 2016; there was no factual support for the granting of the amendment; such amendment was highly prejudicial; Customer had no notice of this new issue; and the lower court's granting of the motion resulted in significant delay and expense, including the cancellation of two date certain trials?**[1]

   a. **Did the lower court abuse its discretion in denying Customer's Motion for Relief pursuant to Rule 60(b) where its order was based on a factual conclusion that was erroneous - namely, that the Agency had not seen the Scottsdale Release until April 8, 2016 when, in fact, the Agency had received a copy on November 30, 2015?**

[1] 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/Appellant 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 a cross-appeal by the Respondent/Appellant Porthemos Curry ("Mr. Curry" or "Customer") from the lower court's granting of Carolina Insurance Group and Maurice Derrick's (collectively "the Agency") motion to amend its answer, at trial, to assert the affirmative defense of release. Customer further appeals the denial of his motion for relief pursuant to Rule 60(b), SCRCP. The Agency has appealed the granting of summary judgment in favor of Customer as to this affirmative defense of release, which is addressed in a separate brief.

This lawsuit has been pending since July 2014. R. pp. 15-21. Customer asserted claims for negligence and gross negligence in the procurement of an insurance policy against 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's counsel, JR Murphy, Esq., wrote to Customer's counsel, enclosing a copy of the Release for Customer's signature, along with the settlement draft and stipulation of dismissal. R. pp. 446 - 449; R. p. 294. Agency's counsel, Wesley Peel, Esquire, was copied on the letter but the "cc:" did not indicate that he was also being sent a copy of the Release. However, Scottsdale's counsel did, in fact, send a copy of the Release to the Agency, which was received by Attorney Peel on November 30, 2015. R. pp. 446-449.[2] On December 14, 2015, Attorney Murphy's office forwarded a copy of the

[2] This fact was not discovered by Customer's attorney until November 14, 2016, when she was reviewing the Record on Appeal prepared by Appellant Agency. Based upon this newly discovered evidence, Customer's counsel filed a motion to amend the initial brief of Respondent/Appellant, along with a motion requesting leave to file a Rule 60 motion with the lower court.

Stipulation of Dismissal as to Scottsdale to Attorney Peel. R. pp. 443-445; R. p. 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 from Customer's counsel, 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. pp. 250, l. 4

– 19. Customer 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 granted the Agency's motion to amend its answer to assert the additional defense of release, over the objections of Customer's counsel. 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 Agency's motion without the requisite 10 days' notice under Rule 56, SCRCP. R. p. 262, l. 18 - 23.

On April 19, 2016, Judge Newman determined that the Agency's summary judgment 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 new 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. The Customer filed a

cross-appeal as to the granting of Agency's motion to amend its answer to assert the defense of release.

On November 18, 2016, Customer filed a Request for Leave to File Motion for Relief pursuant to Rule 60(b), SCRCP, along with a motion to amend his initial brief. See Footnote 2, supra. On January 12, 2017, this Court issued an order granting Customer leave to file a motion for relief from judgment under Rule 60(b), SCRCP. Customer filed his motion for relief on January 31, 2017 and Agency filed is memorandum in opposition on February 17, 2017. Customer thereafter filed a reply on March 2, 2017.

By order filed August 1, 2017, the lower court issued a Form 4 order denying the motion for relief. Customer filed a timely notice of appeal from the August 1st order.

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. pp. 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. R. pp. 69-75. Because Scottsdale Insurance Company, the issuer of the policy, contended that the policy expired at 12:01 a.m. on February 21st, Customer's claim was denied as being outside the coverage period. Id.

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 Amended Complaint, filed October 28, 2015, and in their Amended Answer filed April 19, 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. pp. 223, l. 22 – p. 226, l. 12.

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?[3]

A. Correct.

R. pp. 221, l. 11 – p. 222, l. 9.

In September 2014, the Agency served Customer with Requests for Production which sought *"all e-mails, correspondence, receipts, bills, invoices, statements, between you and your agents, or you and any other party, concerning this claim, including but not limited to: (a) Tapco Underwriters; (b) Scottsdale Insurance Company; (c) Carolina Insurance Group of SC, Inc.; and (d) Maurice Derrick both prior and subsequent to the execution of the Policy."* R. pp. 450, 456.

In September 2015, the parties participated in a mediation conference. 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 "cc:" on the letter did not reflect that the Agency was also

[3] 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. R. pp. 222-226.

receiving a copy of the enclosures; however, the Agency's attorney, Wesley Peel received a copy of the letter, as well as the Release, on November 30, 2015. R. p. 446-449.

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, Scottsdale's counsel wrote to Mr. Peel to forward him a Stipulation of Dismissal 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. pp. 428 -429.

On April 8, 2016, Agency's counsel requested a copy of the Scottsdale Release from Customer's counsel, which was promptly provided to him. R. p. 250, l. 9 - 10. The parties proceeded to depose expert witnesses on April 11th and prepared for the date certain trial on April 18th before the Honorable Jocelyn Newman.

On April 18th, the parties qualified a jury and Judge Newman took up various pre-trial matters, including several motions *in limine*, after the lunch break. R. pp. 228, l. 17 – p. 235, l. 8; R. pp. 240, l. 13 – 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. pp. 250, l. 4 – pp. 254, l. 1; R. p. 14.

The Agency's attorney alleged that Customer's counsel had failed 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 – R. p. 232, l. 2.[4] It is undisputed that Agency's counsel never informed the lower court (or Customer's counsel) that he had received a copy of the unsigned Scottsdale Release from Attorney Murphy on November 30, 2015. It is undisputed that Agency's counsel never requested a copy of the Scottsdale Release from Customer's counsel until April 8, 2016. R. p. 231, l. 17-19. At the hearing on the Motion, Agency's counsel never identified the discovery request that he alluded to as applicable, nor was the discovery request before the Court or entered into evidence. R. pp. 231-232; R. pp. 250 - 254.

ARGUMENT

I. The Granting of the Agency's Motion To Amend Its Answer at Trial Was An Abuse of Discretion

This matter was set for a date certain trial, beginning on April 18, 2016, by the Honorable Alison R. Lee, in order to accommodate the schedule of the Agency's expert witness. R. pp. 441 – 442; R. p. 457.[5] On the first day of trial, the Agency moved to amend its answer to assert the additional defense of release and the motion was argued that

[4] The issue of whether the Request for Production which Agency relied upon in this argument to Judge Newman actually serves as a request for the Scottsdale Release is addressed later in the Brief.

[5] Because the motion was filed by the Agency, served upon Mr. Curry's counsel, and heard by the lower court within a matter of hours on the first day of trial, and the parties qualified a jury and took up various motions *in limine*, counsel could not brief the issue prior to the lower court's hearing on the motion. Accordingly, counsel relies upon correspondence to the Chief Administrative Judge, Alison R. Lee, to evidence the amount of time that went into scheduling the first date certain trial of this matter.

same day. R. pp. 250, l. 4 – p. 254, l. 1. The Agency asserted that it had no knowledge of the language contained in the Scottsdale Release until it received a copy of the Release from Customer's attorney on April 8, 2016, and that counsel had failed to produce the Release by way of a supplemental response to an unidentified discovery request. R. pp. 231-232; R. pp. 250 – 254. However, Agency's assertion that it "just got this release" on April 8th is inaccurate, given that it had actually received the exact same (unsigned) release on November 30, 2015.[6] R. p. 250. At the very least, the record reflects that the Court was under the impression that Agency had not seen the release until April 8th. See R. at pp. 231-232; R. pp. 250-254.

Rule 15(a), SCRCP provides that when more than thirty days have passed since a responsive pleading is served, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and **does not prejudice any other party**". While the matter of allowing amendments is left to the sound discretion of the trial judge, this power should not be exercised indiscriminately or to surprise or prejudice an opposing party. See Hale v. Finn, 388 S.C. 79, 87-88, 694 S.E.2d 51, 56 (Ct. App. 2010); See also Collins Entertainment v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005) (finding denial of motion to amend proper because the prejudice that the civil procedure rules envision, as would warrant denial of a motion to amend the pleadings, is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it); See also Hood v. Sec. Ins. Co. of New Haven, 247 S.C. 71, 145 S.E.2d 526 (1965) (denial of motion to amend where the amendment was unrelated to the act originally pleaded).

[6] It is undisputed that the signed and unsigned releases are identical.

The Agency contended that Mr. Curry's claims for negligence and gross negligence in the procurement of the policy were barred because 1.) Mr. Curry alleged that the Agency was an agent of Scottsdale in his pleadings (which was always denied) and since the Release released Scottsdale and its agents, employees, and servants, they were included in the Release and 2.) the Release constituted a "full compensation amounting to a satisfaction" of Mr. Curry's claims under a theory of joint tortfeasor liability because the Release stated 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. 95-113.

At the hearing, the Agency argued that its discovery requests to Customer would have encompassed the Scottsdale Release, and alluded to, but never produced to the lower court, Agency's Request for Production No. 6, which, in September 2014, had requested the following information from Customer:

> *"All emails, correspondence, receipts, bills, invoices, statements, between you and your agents, or you and any other party, concerning this claim, including but not limited to: (a) Tapco Underwriters; (b) Scottsdale Insurance Company; (c) Carolina Insurance Group of SC, Inc.; and (d) Maurice Derrick both prior and subsequent to the execution of the Policy."*
> R. pp. 450 – 456.

Looking at the plain language of the Request, it clearly does not request releases or covenants not to executes or settlement agreements; it asks for financial records (i.e. receipts,bills, invoices, statements) and emails and correspondence. The Release is not an "email" and it is not "correspondence". "Correspondence" is defined as "communication by means of letters or email: the letters or e-mail exchanged." Merriam-Webster

Dictionary. Black's Law Dictionary defines a "correspondent" as "a writer of letter or letters." Black's Law Dictionary.

It is undisputed that the Agency's attorney never requested a copy of the Release until April 8, 2016. It is further undisputed that the Agency actually received the Scottsdale Release on November 30, 2015 when it received JR Murphy's letter and enclosures. Because the Agency never asserted that it was, or could be, a party to the Scottsdale Release – as further evidenced by the Agency's execution of the Stipulation of Dismissal which specifically reserved Mr. Curry's claims against the Agency – the Agency's motion to amend at trial to assert this new and novel defense – over 4 months after having notice of the settlement and the terms of the release - should have been denied and the lower court's granting of the motion was an abuse of discretion, as the shock, surprise, and prejudice to Mr. Curry was substantial. The lower court erred because it found that there were "earlier written **requests** for [the Release]"; however, the undisputed fact is that the Agency only requested the Scottsdale Release once – on April 8, 2016, - and never sent a letter to Customer's attorneys, after receiving the Release on November 30, 2015, that it considered the Release to be responsive to discovery requests.

Furthermore, the lower court abused its discretion because the Agency actually never offered into evidence or produced a copy of the discovery request it referred to at oral argument; accordingly, the lower court erred in "taking its word" that the discovery request that Agency's counsel was referencing actually requested a settlement agreement or release. By failing to review the actual discovery request that Agency alluded to (but never produced at the hearing), the lower court abused its discretion when it found that the delay in Agency's filing of a motion to amend its answer "was a direct result of Plaintiff's

delay in providing necessary documents to Defendants." R. p. 14; See State v. Allen, 370 S.C. 88, 634 S.E.2d 653 (2006) ("an abuse of discretion occurs when the trial court's ruling is based upon an error of law . . . or, when based upon factual conclusions, the ruling is without evidentiary support . . ."); See also Rish v. Rish 296 S.C. 14, 370 S.E.2d 102 (Ct. App. 1988) (an abuse of discretion may be found if the conclusions reached by the lower court are without reasonable factual support.)[7]

To allow the Agency, at trial, to assert this affirmative defense – in contravention of its sworn testimony - was an abuse of discretion and this Court should find that the granting of the motion to amend was an abuse of discretion, given the lack of factual support; the lack of notice to the Customer; and a lack of opportunity to refute it. The new defense of the Agency – which has continuously denied it was an agent of Scottsdale –was totally unrelated to any position taken by the Agency leading up to April 18th and the lower court abused its discretion in granting the motion. R. pp. 221 – 226.

If the Agency actually believed it was subject to the Release, then it would never have executed a stipulation of dismissal as to Scottsdale which specifically mandated that Mr. Curry's claims against the Agency would go forward. R. pp. 428-429. If the Agency actually believed it was subject to the Release, it would never have communicated with the lower court time and time again after November 2015 regarding the scheduling of the date certain trial. R. pp. 441-442; R. p. 457. The Agency received the Release on November

[7]At the hearing, Customer's counsel was also not provided with a copy of the discovery request that Agency's counsel was alluding to but acknowledged that if the Request for Production did seek settlement documents such as the Release, it would have been error for her to fail to provide it. R. p. 252, l. 1-17. However, after reviewing the discovery request alluded to by Agency's counsel following the hearing, Agency's counsel submits that the Release is not responsive to the RFP No. 6.

30, 2015 and took no action. R. p. 446. As a result, this Court should find that the lower court abused its discretion in granting the Motion to Amend, given that Agency had a chance to review the terms of the Release beginning in November 2015 – and request a signed version at that time – but failed to do so. See Holland v. Morbark, Inc., 407 S.C. 227, 754 S.E.2d 714 (Ct. App. 2014) (affirming denial of motion to amend on eve of trial, noting that the party had been on notice of its "new" theory 5 months prior to moving to amend.)

A. The Denial of the Rule 60(b) Motion Was an Abuse of Discretion

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Our standard of review, therefore, is limited to determining whether there was an abuse of discretion. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or whether the order is based on factual conclusions that are without evidentiary support." BB&T v. Taylor, 369 S.C. 548, 633 S.E.2d 501, 502-503 (2006).

Relevant portions of the hearing transcript, excerpted below, reflect the oral argument before the lower court:

> **Mr. Peel:** I did not see the executed releases until April 8th. Ms. Peavy gave it to me as soon as I asked for it, the same day. However, it was apparently signed in December . . . When they served the release on me, not just the stipulation of dismissal, I had signed it, I did not get – I went back and checked – I did not get anything but the stipulation. So I didn't see it. As I said, **I just got this release**, copy of the release April 8th from – I did move this morning.
>
> . . .
>
> **Ms. Peavy:** Your honor, we would oppose their motion to amend at this late date. And the reason for that is that they were on notice that we settled with Scottsdale in December . . They are moving to amend the day of trial on an issue that they had notice of five months ago.

Mr. Peel: **I did not have notice of it.** You did not serve with me with a copy of the release and I distinctly requested copies of correspondence, e-mails, anything like that . . . and ya'll did not provide it to me.

. . .

Ms. Peavy: Your honor, my position is he was on actual notice that settlement agreement had been executed. If I failed to provide that to him in December, that is my error, but it is not that he didn't have notice that it existed. He knew Scottsdale had been released because he signed off on the stipulation of dismissal as to Scottsdale.

The Court: ***I know, but it seems to me that you are seeking to benefit from your failure to provide him with a copy of the document. . . [Y]ou came into possession of it in December and did not provide a copy to him in December, January, February, or March,*** *and he seeks to enforce it in April, I don't know that you should benefit from your delay.*

. . .

Mr. Peel: ... There is absolutely no prejudice because it is their document. They know what is in it.

The Court: ***And he has just received a copy of it on April 8th.*** I am inclined to – yes, I am going to grant the motion [to amend].

R. pp. 231-232, R. pp. 250-254 (emphasis added).

The Agency did not clarify opposing counsel's remarks to the Court, or inform the Court (and counsel) that it had actually received a copy of the Release on November 30th – over 4 ½ months before trial.

Accordingly, Customer respectfully submits that it was the Court's understanding at trial that the Agency had never had the opportunity to review the terms and conditions of the Scottsdale Release until April 8, 2016. Accordingly, the Court's order is based on factual conclusions that are without evidentiary support and should therefore be reversed.

See BB&T v. Taylor, supra (reversing denial of motion for relief under Rule 60(b) where there were no facts in the record to support a finding that petitioner had been properly served, and the record reflected that petitioner was not even aware of the process server and his attempts to serve her).

Importantly, the existence of prejudice is further implicated by the Agency's actual possession of the release in November 2015 (instead of April 2016). The Agency asserted that "there is absolutely no prejudice because it is their document. They know what it is in it." R. pp. 231-232; R. pp. 250-254. However, because the Court did not know that the Agency had the opportunity to review the release in November, its ruling was based upon an erroneous view of the evidence. In the interest of fairness and justice, and with a view towards a judicial system that requires candor towards the tribunal, this Court should find an abuse of discretion on the part of the lower court and reverse the denial of the motion for relief. If the Agency, after receiving the unsigned release in November, believed that the executed release was responsive to its discovery requests, then it should have requested a copy of same from counsel in December 2015, when it knew that the settlement had been consummated – as evidenced by counsel's signature on the Stipulation of Dismissal as to Scottsdale. Any delay in receiving the executed release lies with the Agency.

Customer anticipates that Agency will rely upon the case of Paul Davis Systems v. Deepwater of Hilton Head, 362 S.C. 220, 607 S.E.2d 358 (Ct. App. 2004) in support of its argument that the only release that mattered was the executed release and therefore the issue of having the unsigned release is "much ado about nothing."

However, Customer submits this confuses the issue as it stood before the trial judge – namely, at what point Agency was on notice of the terms of the Release and had a chance

to review same (and move to amend its answer). The undisputed evidence, unknown to the trial court, is that Agency received the unsigned (but identical release) on November 30, 2015, and had actual knowledge that the release had been consummated at the latest by December 16, 2016, when it received the Stipulation of Dismissal for signature.

In Paul Davis Systems, a party believed that it had been discharged from a mechanic's lien because it had received a copy of a letter to another party enclosing unexecuted and unsigned documents to that effect. The party sought relief from judgment on the ground that it "reasonably believed it had been discharged from the lien." The Court of Appeals disagreed, finding the belief "unreasonable." The situation here is not one of a defaulting party relying on an unexecuted document to request relief; rather, it is an issue of disclosure (or non-disclosure) of all material, relevant facts to the lower court.

Conclusion

With a view towards fairness and justice, Mr. Curry submits that the orders of the lower court represent an abuse of discretion necessitating reversal. Accordingly, Mr. Curry respectfully requests that this Court issue an order finding that the lower court abused its discretion in granting the Agency's Motion to Amend and denying the Customer's Motion for Relief pursuant to Rule 60(b). Mr. Curry further requests that the Court issue an order striking the defense; dismissing the appeal of the Agency as moot; and remanding the case to the circuit court for immediate trial. The prejudice is severe, the surprise great.

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Dated: October 11, 2017

THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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Jocelyn Newman, Circuit Court Judge

Appellate Case No.: 2016-0006986

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PROOF OF SERVICE

I certify that I have served the **Respondent/Appellant's Amended Initial Brief** along with **Respondent/Appellant's Amended Designation of Matter to be Included in the Record on Appeal and Consent Motion to Supplement Record on Appeal,** on Wesley D. Peel, Esquire, Esquire, Attorney for the Appellants/Respondents, at the address listed below by depositing a copy of same in the United States Mail, postage prepaid, on October 11th, 2017.

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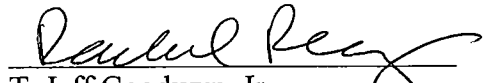

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October 11th, 2017

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October 11, 2017

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

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

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the **Amended Initial Brief of Respondent/Appellant** and **Designation of Matter to Be Included in the Record on Appeal**, along with the Proof of Service, in regard to the above-referenced matter. I also enclose an original and one copy of a consent motion to supplement the existing record on appeal, by way of an appendix.

By copy of this letter and as evidenced by the attached Proof of Service, I am serving a copy of the Initial Brief of Respondent/Appellant and Designation of Matter, along with the motion, upon Wesley D. Peel, Esquire, attorney for the Appellants/Respondents. I spoke with Mr. Peel and he advised me that Bryan J. Triplett has left the firm.

Should you have any questions, please don't hesitate to contact me.

Very truly yours,

Rachel G. Peavy

RGP/
Enclosures

cc: Wesley D. Peel, Esquire (w/encl.) (via US Mail)
Porthemos Curry (w/encl.) (via US Mail)