STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	FOR THE FIFTEENTH JUDICIAL CIRCUIT
KENNETH A. DAVIS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KENNETH MILES DAVIS,	Case No. 2017-CP-26-02910
Plaintiff,	**ORDER**
vs.	
COLE AUSTIN DUNN and JOHN RICHARD SMITH,	
Defendants.	

This matter came before the Court on September 12, 2017, for hearing of the four pending motions: (1) Defendants' Motion to Dismiss Plaintiff's Complaint; (2) Defendants' Motion to Dismiss Defendant Cole Austin Dunn as a Party; (3) Defendants' Motion to Reform the Covenant Not to Execute; and (4) Plaintiff's Motion to Dismiss Defendants' Counterclaims. Present at the hearing were counsel for Defendants, J. Dwight Hudson, Esquire and Mary Anne Graham, Esquire, and counsel for Plaintiff, J. Taylor Powell, Esquire. Both Plaintiff and Defendants presented matters outside of the pleadings with respect to each motion, by consent and without objection, which has converted the motions into motions for summary judgment.

In view of the entire record and applicable law, as set forth more fully below, the Court rules as follows on the pending motions: (1) Defendants' converted motion for summary judgment on Plaintiff's Complaint is DENIED; (2) Defendants' converted motion for summary judgment on the inclusion of Defendant Cole Austin Dunn as a party is DENIED; (3) Defendants' converted motion for summary judgment seeking reformation of the covenant not to execute is DENIED; DENIED; and (4) Plaintiff's converted motion to summary judgment on Defendants' counterclaims is GRANTED.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises from the tragic death of Kenneth Miles Davis ("Decedent"), who was only sixteen years old at the time of his passing. On October 9, 2016, Cole Austin Dunn ("Dunn") and Decedent were at the property were Decedent lived with his parents (Plaintiff's Complaint ¶ 5). Dunn was in possession of a loaded 12-gauge shotgun and was waving it around. Decedent said "Whoa, man!" indicating that Dunn should stop his behavior. Dunn responded' "[i]t ain't loaded," just before he accidentally activated the trigger and shot Decedent in the face at point blank range. Decedent was transported to Conway Medical Center and pronounced dead. (Plaintiff's Complaint ¶¶ 7-12).

At all times relevant to Plaintiff's Complaint, Dunn lived with his mother, Charlotte Smith ("Mrs. Smith") at 2340 Highway 1115 in Galivants Ferry, South Carolina ("Smith Residence"). Mrs. Smith obtained homeowners' insurance on the residence through South Carolina Farm Bureau Insurance Company ("Farm Bureau"). Mrs. Smith was the only named insured listed upon the declarations page of the Farm Bureau policy. *See* Exhibit A to Plaintiff's Memorandum in Opposition to Defendants' Motions.

Decedent's father, Kenneth A. Davis, was appointed as the Personal Representative of Decedent's estate. Mr. Davis retained Mr. Powell and the firm of Lesemann & Associates LLC to pursue claims for wrongful death and survival damages on behalf of the estate. Prior to the filing of this action, on January 30, 2017, Mr. Powell sent a "*Tyger River*" demand letter to Farm Bureau Insurance Company, stating that Plaintiff would grant a Covenant Not to Execute upon any judgment that Plaintiff may obtain against Dunn or Mrs. Smith in exchange for Farm Bureau paying policy limits of $300,000.00 in liability coverage and $5,000.00 in medical payment coverage under the Farm Bureau policy. *See* Mr. Powell's January 30, 2017 Letter, attached to

Defendants' Answer and Counterclaims. On January 31, 2017, Farm Bureau sent a letter to Mr. Powell confirming that Farm Bureau had accepted Plaintiff's demand and would pay its policy limits in exchange for a Covenant Not to Execute. Farm Bureau also indicated that it would be hiring Mr. Hudson as its local counsel to draft the Covenant Not to Execute. *See* Farm Bureau's January 31, 2017 Letter. The documents were drafted and presented to counsel for Plaintiff, who requested certain revisions in the wording that were accepted and implemented by counsel for Defendants.

On March 15, 2017, Plaintiff and his counsel signed the Covenant Not to Execute drafted by counsel for Defendants. *See* Covenant Not to Execute at p. 4. After the Covenant Not to Execute was signed, this Court conducted a settlement approval hearing. The Court reviewed Plaintiff's Petition for Approval of a Wrongful Death Settlement, and asked questions of Plaintiff to ensure the propriety of the proposed settlement under S.C. Code § 15-51-42. The proposed settlement was approved, and the Court signed an Order Approving Wrongful Death Settlement, which was filed March 28, 2017. *See* Order Approving Wrongful Death Settlement filed March 28, 2017.

The Covenant Not to Execute, as drafted and signed, did not include a release of any party. On the contrary, the Covenant Not to Execute included language confirming that it merely provided Payors with "freedom from the threat of execution upon any judgment that may be obtained against them." *See* Covenant Not to Execute at ¶ 11. The Covenant Not to Execute also included a provision specifically confirming that it did "not constitute a release of any claim or of any party." *Id.*, at ¶ 12.

On May 9, 2017, Plaintiff filed a Summons and Complaint against Dunn and John Richard Smith ("Mr. Smith"), collectively referred to as ("Defendants"). Mrs. Smith was not

named as a party. Mr. Smith, Dunn's stepfather, purchased and entrusted the 12-guage shotgun to Dunn, who was 17 years old on the date when Decedent was shot and killed. Within the Complaint, Plaintiff alleged that the proximate causes of Decedent's death were negligence on the part of Dunn and Mr. Smith. On June 23, 2017, Defendants filed their Answer and Counterclaims against Plaintiff. Thereafter, Defendants filed its three pending motions. On July 24, 2017, Plaintiff filed a Motion to Dismiss Defendants' Counterclaims. Both Plaintiff[1] and Defendants[2] filed supporting and opposing memoranda, which included evidence outside of the pleadings without objection. The Court has carefully considered all filings, evidence, and arguments of counsel at the hearing. Neither party requested the opportunity to conduct further discovery on the issues presented to the Court within the pending motions, all of which had been filed more than 30 days prior to the September 17, 2017, hearing.

LEGAL STANDARD

The South Carolina Rules of Civil Procedure provide for the potential conversion of motions to dismiss into motions for summary judgment, provided that the moving party complies with Rule 56 and the non-moving party is afforded a reasonable opportunity to introduce evidentiary matters. *Johnson v. Dailey,* 318 S.C. 318, 321, 457 S.E.2d 613, 615 (1995). Specifically, Rule 12(b) states as follows:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated

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[1] Items which Plaintiff's counsel presented without objection in support of or in opposition to the pending motions included: (1) the Farm Bureau policy declarations page and Homeowner's Insurance Policy; (2) Mr. Powell's January 30, 2017 Tyger River Demand Letter to Farm Bureau; (3) Farm Bureau's January 31, 2017 letter; and Response to Plaintiff Counsel's January 30, 2017 Tyger River Demand Letter; and (4) the Covenant Not to Execute.

Conversely, items which Defendants' counsel presented in support of or in opposition to the pending motions included: (1) Counsel for Plaintiff's June 7, 2017 letter; (3) Counsel for Defendants' June 12, 2017 letter; (4) Counsel for Plaintiff's June 13, 2017 letter; (5) Counsel for Plaintiff's February 9, 2017 email; (6) Affidavit of John Richard Smith; and (7) Affidavit of Cole Austin Dunn.

> as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion by Rule 56.

Rule 12(b), SCRCP. On this basis, each motion filed in this case was converted, by consent, into a motion for summary judgment and shall therefore be resolved under Rule 56, SCRCP.

Motions for summary judgment should be granted where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SCRCP Rule 56(c). Summary judgment is appropriate when "plain, palpable and undisputed facts exist on which reasonable minds cannot differ." *Thompkins v. Festival Ctr. Grp. I*, 306 S.C. 193, 194, 410 S.E.2d 593, 593-94 (Ct. App. 1991).

LEGAL ANALYSIS

I. Defendants' Converted Motion for Summary Judgment on Plaintiff's Claims against Mr. Smith is Denied

In response to Plaintiffs' Complaint, Defendants have sought summary judgment on the claims asserted against Mr. Smith on the alleged basis that he is a "named insured" under the Farm Bureau Policy. Even if this would be a potential basis for summary judgment, which it is not, Mr. Smith is not a named insured. Nothing contained in the definitions listed in the Farm Bureau policy defines Mr. Smith as a "named insured." The term "named insured" is not a defined term anywhere in Farm Bureau's policy, and only Mrs. Smith is identified as a "named insured" within the policy. Absent ambiguity, in South Carolina the language of an insurance policy is given its plain, ordinary, and popular meaning. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 637, 594 S.E.2d 455, 458 (2004). It is clear to this Court that the only named insured is Mrs. Smith. On this basis, Mr. Smith is not a named insured on Farm Bureau's policy, and is thus not immune from suit on the basis of either the Order Approving Wrongful Death Settlement or the Covenant Not to Execute.

In addition to the fact that Mr. Smith is not a named insured, neither he, nor any party, received a release of claims as a result of the Covenant Not to Execute. The Covenant Not to Execute, which was drafted by counsel for Defendants, is not a release. Instead, the Covenant Not to Execute is simply a covenant not to execute upon any judgment as might be against the Payors, as that term is defined in the Covenant Not to Execute:

> **Payees further understand and agree that this instrument is NOT a release, discharge, or accord and satisfaction** and is only as a Covenant Not To Execute any judgment against Payors, their heirs, executors, administrators, legal representatives, successors, and assigns and is executed simply for Payors to purchase freedom from the threat of execution upon any judgment that may be obtained against them after payment of $305,000.00 under the Policy.

See Covenant Not to Execute at ¶ 11 (emphasis added). It is clear to this Court that the Covenant Not to Execute was never intended to function as a Release of any causes of action or of any potential tortfeasor. Reasonable minds cannot differ as to the plain meaning of this language.

Defendants then argue the Covenant Not to Execute should be treated as a release of Mrs. Smith and Mr. Dunn, and that the alleged release of these tortfeasors should be construed as a release of all other joint tortfeasors under South Carolina law. This argument is incorrect, both factually and legally. The relevant section of the South Carolina Contribution Among Tortfeasors Act, S.C. Code § 15-38-50, states as follows:

> When a release or a 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 the 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 others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

See S.C. Code § 15-38-50. As noted above, Paragraph 12 of the Covenant Not to Execute states that the Covenant Not to Execute does not diminish Payee's rights to recover from any other source, such as Mr. Smith. Furthermore, the Covenant Not to Execute specifically confirms that it is not a release. Finally, even if it were a release, it would "not discharge any of the other tortfeasors from liability," but rather would only serve to "reduce the claim against the others" in accordance with S.C. Code § 15-38-50. It is clear to this Court that the Covenant Not to Execute was never intended to discharge any potential source of recovery for Decedent's wrongful death, and specifically never intended to discharge Mr. Smith.

With regard to the claims against Mr. Dunn, Defendants' arguments also fail. Specifically, Defendants reliance upon *Tyger River Pine Co. v. Maryland Casualty Co.* and its progeny is misplaced. Defendants argue that the *Tyger River* doctrine recognizes that an insurer has one contract and one group of insureds protected by that contract to whom a carrier owes a duty, and that it does not hold that an insurer owes a severable duty to individual insureds and a separate policy limit to each. This argument by Defendants is not supported by South Carolina law. The duty to defend is separate and distinct from the obligation to pay a judgment rendered against the insured. *American Casualty Co. v. Howard,* 187 F.2d 322, 327 (4th Cir.1951). Although these duties are related in the sense that the duty to defend depends on an initial or apparent potential liability to satisfy the judgment, the duty to defend exists regardless of the insurer's ultimate liability to the insured. *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 654, 661 S.E.2d 791, 796 (2008). Our Supreme Court has held a tender of policy limits does not relieve an insurer's duty to defend its insured. *Nationwide Mutual Ins. Co. v. Simmonds,* 315 S.C. 404, 434 S.E.2d 277 (1993).

Plaintiff, in his demand to Farm Bureau, was very specific in what he was demanding and what he was willing to give up in order for Farm Bureau to accept his demand. Plaintiff's *Tyger River* timed demand clearly stated in the first paragraph that Plaintiff would accept Farm Bureau's policy limits:

> In exchange for a Covenant Not to Execute, which would specifically allow Plaintiff to pursue and collect on any other liability insurance policies should any be located, as to all claims against Defendants Charlotte Smith and Cole Dunn.

In the first paragraph of the second page of Plaintiff's *Tyger River* timed demand letter Plaintiff reiterated:

> For clarification purposes, I am requesting that you tender Three Hundred and Five Thousand and 00/100 Dollars ($305,000.00) on behalf of Charlotte Smith and Cole Dunn. Upon receipt, I will provide you with a Covenant Not to Execute, that specifically allows for my client to pursue and collect on any other liability insurance policies should any be located, as to all claims against Charlotte Smith and Cole Dunn.

It is clear that Plaintiff's demand, if accepted, would only exempt Dunn and Mrs. Smith from the execution of any judgment that Plaintiff might obtain. Nothing contained in the correspondence from Plaintiff's counsel or in Farm Bureau's reply to that correspondence supports a conclusion that there was any other intention.

Defendants also incorrectly argue that summary judgment should be granted on Plaintiff's claims under the preclusion doctrines of *res judicata* and collateral estoppel, which are two distinct doctrines. Under *res judicata*, a final judgment on the merits in a prior action will preclude the parties and their privies from bringing a second action based on the same claim that either was or could have been litigated in the prior action. The doctrine of collateral estoppel, on the other hand, deals with preclusion of the second action is based upon a different claim and the judgment in the

first action precludes re-litigation of only those issues actually and necessarily litigated and determined in the first suit.

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Judy v. Judy,* 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011). "Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co. v. State,* 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). The doctrine requires three essential elements: (1) the judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical to those in the first; and (3) the second action must involve matter properly included in the first action. *Town of Sullivan's Island v. Felger,* 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995). In order to successfully assert collateral estoppel, the party seeking issue preclusion must show that the issue was actually litigated and directly determined in the prior action, and that the matter or fact directly in issue was necessary to support the first judgment. *Richburg v. Baughman,* 290 S.C. 431, 351 S.E.2d 164 (1986); *Beall v. Doe,* 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct.App.1984).

Here, neither *res judicata* nor collateral estoppel is applicable to the settlement approval hearing that occurred on March 15, 2017, that Defendants have argued was a prior action. The settlement approval hearing was merely a statutory requirement that Plaintiff and Farm Bureau had to comply with before any wrongful death settlement proceeds could be paid to Plaintiff. There was no trial on the merits of the case, but rather the approval of a settlement that itself specifically contemplated and authorized future litigation relating to the underlying events. No issues were litigated or directly determined in the settlement approval hearing. The settlement approval hearing did not result in a final judgment on the merits, nor are the parties to that

settlement approval identical to the present action, nor did the prior settlement approval hearing involve the identical subject matter as the present action. Neither Dunn nor Mrs. Smith were sued in conjunction with the prior settlement approval hearing. The only parties that have been sued in any matter arising from the wrongful death of Decedent are Dunn and Mr. Smith, who have been sued in the present action only. No party or entity has been sued twice after having been involved in a prior action that was heard and decided on the merits. For these reasons, neither *res judicata* nor collateral estoppel are applicable in any way to the present action. Defendants' argument that Plaintiff's Complaint is barred by the doctrines of *res judicata* and collateral estoppel fails.

Defendants then argue that this action is barred by the doctrine of equitable estoppel on the grounds that Plaintiff falsely invoked *Tyger River*, and promised that the settlement would protect Farm Bureau's insureds without ever intending that it would protect Dunn or Mr. Smith, and that Plaintiff and his counsel acted in a dishonest manner and were part of some deliberately deceitful scheme. This argument fails. Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 577, 762 S.E.2d 696, 700 (2014). The South Carolina Supreme Court has held a party cannot avoid the parol evidence rule simply by claiming he thought the contract he signed meant something other than what it said, and that quasi-contractual remedies such as equitable estoppel are inapplicable when the parties are bound by an express contract. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017).

An unambiguous, written contract is inherently incompatible with the doctrine of equitable estoppel. To succeed on a claim for equitable estoppel, a party must prove "lack of knowledge, and the means of knowledge, of the truth as to the facts in question." *Strickland*, 375 S.C. at 84,

650 S.E.2d at 470. However, an unambiguous contract is, by definition, capable of only one reasonable interpretation. *See Carolina Ceramics, Inc.*, 251 S.C. at 155–56, 161 S.E.2d at 181 (stating that a contract is *ambiguous* if it is "capable of being understood in more senses than one"). Therefore, a party to an unambiguous contract cannot prove lack of knowledge or the means of acquiring knowledge of the contract's meaning, which bars an equitable estoppel claim in the first instance. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017).

The Covenant Not to Execute is a clear and unambiguous contractual document, which was drafted by counsel for Farm Bureau and which Plaintiff signed and Dunn, Mrs. Smith, and Farm Bureau were Payors. The first paragraph of the Covenant Not to Execute states:

> This COVENANT is made this 15th day of March, 2017 by and between Kenneth A. Davis, individually and as Personal Representative of the Estate of Kenneth Miles Davis (hereinafter referred to as "Payees") and Cole Austin Dunn, Charlotte Smith and South Carolina Farm Bureau Mutual Insurance Company (SCFB), (hereinafter referred to as "Payors"), their heirs, executors, legal representatives, successors and assigns.

As Dunn, Mrs. Smith, and Farm Bureau were all parties to the Covenant Not to Execute, they are prohibited from asserting any claims for equitable estoppel. Only Mr. Smith has the legal right to assert any claim for equitable estoppel, but upon consideration of all of the evidence, Mr. Smith's claim for equitable estoppel is without merit.

The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts by the party. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party to be estopped; and (3) a prejudicial change of

position in reliance on the conduct of the party to be estopped. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916–17 (2017).

Defendants argue that Plaintiff and his counsel acted in a dishonest manner to induce a settlement under false pretenses, and have somehow participated in some sort of deliberately deceitful scheme to extort Farm Bureau. The truth of the matter is that Plaintiff and his counsel have done exactly what they represented to Farm Bureau and Counsel for Defendants, and have done so at every step of the way. Furthermore, Plaintiff never made any representations of any kind to Mr. Smith prior to filing suit and serving him with a copy of the Summons and Complaint, as the record does not reflect any contact occurred between Plaintiff or Plaintiff's counsel and Mr. Smith regarding the Farm Bureau policy, the *Tyger River* demand, the response from Farm Bureau, the preparation or execution of the Covenant Not to Execute, the Order Approving Wrongful Death Settlement. The record does not reflect that Mr. Smith took any action, or refrained from taking any action, on the basis of any conduct by Plaintiff. As a result, there is no basis upon which Mr. Smith could base a claim for estoppel against Plaintiff.

The Covenant Not to Execute, which was drafted by counsel for Defendants, specifically stated that the Covenant Not to Execute does not diminish Payee's rights to recover from any other source, such as Mr. Smith due to his specific negligence that led to the wrongful death of the decedent Kenneth Miles Davis:

> This Covenant Not to Execute is not intended to and DOES NOT diminish, impair or limit Payee's rights, if any, to recover additional funds from other insurance coverage or from any other source for the Claim.

Paragraph 13 of the Covenant Not to Execute, goes on to state that:

> It is understood that the Personal Representatives of the Estate of Kenneth Miles Davis may file suit regarding this Claim. This Covenant Not To Execute is not intended to limit or impair the right of the Personal Representatives to file suit. (emphasis added)

The fact that Mr. Smith is not named or protected by the Covenant Not to Execute was not the result of any misrepresentations made by Plaintiff or his counsel. It results from the plain wording of the document. At all times relevant to the facts contained in Plaintiff's Complaint, both Farm Bureau and counsel for Defendants had the ability to properly and thoroughly investigate all potential claims that could be made against any of Farm Bureau's potential insureds as a result of Dunn shooting and killing the Decedent, and the full range of the potential defendants in light of the underlying facts of the case. It would seem clear that Dunn, Mrs. Smith, and Mr. Smith were each aware that Mr. Smith was the original purchaser of the shotgun that resulted in the shooting death of Decedent. Neither Plaintiff nor Plaintiff's counsel engaged in any conduct that would support a belief on the part of Mr. Smith, or Farm Bureau, that Plaintiff intended to release Mr. Smith or intended him to be protected by the Covenant Not to Execute. For these reasons, the Court denies summary judgment to Mr. Smith on the claims asserted by Plaintiff against Mr. Smith in this case.

II. Defendants' Motion to Dismiss Cole Austin Dunn as a Party is Denied and Summary Judgment on this Issue is Granted in Favor of Plaintiff

Defendants argue that Dunn is a "sham" defendant against whom Plaintiff has no cause of action. Defendants argue that because Plaintiff cannot recover from Dunn personally, based upon the terms of the Covenant Not to Execute, and because there is no coverage from which Plaintiff could conceivably collect, that this Court should dismiss Dunn as a party to this action. Whether or not there is any insurance coverage from which Plaintiff could collect upon any judgment obtained against Dunn has no bearing on his viability as a defendant in the case. Plaintiff's

Complaint pleads facts which, when viewed in a light most favorably to Plaintiff would support a cause of action against Dunn. The mere fact that Plaintiff has agreed not to execute upon a judgment against Dunn does not affect Plaintiff's fundamental right to pursue a judgment against Dunn. Covenants Not to Execute are relatively common. Defendants' argument that Dunn is a "sham" defendant fails. Summary judgment on this argument is denied.

III. Defendants' Motion to Reform the Covenant Not to Execute is Denied

In their Motion to Reform the Covenant Not to Execute, Defendants argue that the Covenant Not to Execute should be reformed on the grounds that Defendants made a unilateral mistake in not including Mr. Smith as a party to the Covenant Not to Execute, and that such a mistake was induced by the fraud, deceit, and misrepresentation of Plaintiff and his counsel. This argument is without merit.

It is clear from the actions of Plaintiff that the mistake made by Farm Bureau and/or counsel for Defendants in failing to include Mr. Smith as a party to the Covenant Not to Execute was not a mutual mistake, and it was not a unilateral mistake of the kind that would permit reformation of the Covenant Not to Execute to include a party that was not included. The filing of the present action, and the multiple correspondences between Plaintiff's counsel and counsel for Defendants makes it clear that Plaintiff never intended to include Mr. Smith as a party to the Covenant Not to Execute. Furthermore, there is nothing to suggest that Plaintiff ever induced Defendants, Farm Bureau, or Defendant's counsel into believing that Mr. Smith was considered a party.

A court of equity may reform a contract where the mistake is not mutual but unilateral and has been induced by the fraud, deceit, misrepresentation, concealment or imposition in any form of the party opposed in interest to the reformation without negligence on the part of the party claiming the right. *See, e.g., Shaw v. Aetna Casualty and Surety Insurance Co.*, 274 S.C. 281,

(1980). First and foremost, if Farm Bureau or counsel for Defendants intended to include Mr. Smith as a party to the Covenant Not to Execute, they failed to do so. They also failed to ever make any such alleged intention known to Plaintiff or his counsel. Defendants' claim that their failure to include Mr. Smith as a party to the Covenant Not to Execute was somehow induced by Plaintiff and his counsel is wholly unsupported by the facts. This Court finds that any mistake in failing to include Mr. Smith as a Party to the Covenant Not to Execute falls squarely on the shoulders of Farm Bureau and counsel for Defendants, as they were the ones in the best position to fully investigate all potential sources of liability for Decedent's wrongful death prior to drafting and entering into the Covenant Not to Execute. There is no basis for reforming the covenant on the basis of mutual mistake or unilateral mistake, and summary judgment is granted to Plaintiff on this issue.

IV. Summary Judgment is Granted in Favor of Plaintiff as to Defendants' Counterclaims

The Court finds that summary judgment in favor of Plaintiff is proper on each of Defendants' counterclaims. As an initial matter, Defendant John Richard Smith was not a party to the Covenant Not to Execute, and therefore cannot assert contract-based counterclaims of any kind. Summary judgment on those claims asserted by Mr. Smith is granted to Plaintiff on this basis.

The contract-based counterclaims asserted by Dunn also fail. The only contractual document involving Plaintiff is the Covenant Not to Execute given by Plaintiff, as Payee, and Cole Austin Dunn, Charlotte Smith, and South Carolina Farm Bureau Mutual Insurance Company, as Payors. Defendants have failed to identify a specific provision in the Covenant Not to Execute that Plaintiff allegedly breached. In order to state a claim for breach of contract, Defendants must present competent allegations regarding each of the following elements: (1) a binding contract

entered into by the parties; (2) a breach or unjustifiable failure to perform the contract; and (3) damage suffered as a direct result of the breach. *See Fuller v. E. Fire & Cas. Ins. Co.,* 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

The plain terms of the Covenant Not to Execute preclude defendants' counterclaim for breach of contract. The Covenant Not to Execute, which was drafted by Defendants' counsel in this case with limited input from counsel for Plaintiff, contains multiple provisions that preclude Defendants' counterclaims. First, Paragraph 7 of the Covenant Not to Execute includes an integration clause confirming that it represents the only agreement between Plaintiff and the Payors:

> Payees declare and represent that Payors have made no promises, inducement, or agreement not expressed herein, that this Covenant contains the entire agreement between the Payees and the Payors, that the terms of this Covenant are contractual and not merely recital, and that Payors have made no representations as to the possibility of the recovery of any monies by Payees from any other source or policy for the claim.

Next, Paragraph 11 of the Covenant Not to Execute confirms that the Covenant Not to Execute is "NOT a release." Rather, the Covenant Not to Execute is a covenant not to execute any judgment:

> Payees further understand and agree that this instrument is NOT a release, discharge, or accord and satisfaction and is only as a Covenant Not To Execute any judgment against Payors, their heirs, executors, administrators, legal representatives, successors, and assigns and is executed simply for Payors to purchase freedom from the threat of execution upon any judgment that may be obtained against them after payment of $305,000.00 under the Policy.

Additionally, Paragraph 12 of the Covenant Not to Execute states that the Covenant Not to Execute does not diminish Payee's rights to recover from any other source, such as Defendant Richard Smith due to his specific negligence that led to the wrongful death of the decedent Kenneth Miles Davis:

> This Covenant Not To Execute is not intended to and DOES NOT diminish, impair or limit Payee's rights, if any, to recover additional funds from other insurance coverage or from any other source for the Claim.

The above-cited provisions of the Covenant Not to Execute could not be more clear that Plaintiff was reserving the right to pursue claims and agreed only to not execute on any judgment against Payors Cole Austin Dunn and Charlotte Smith.

Defendants allege that by filing this action that Plaintiff has breached the terms of the Covenant Not to Execute. This allegation is quickly dispelled by reading Paragraph 13 of the Covenant Not to Execute, which specifically states:

> It is understood that the Personal Representatives of the Estate of Kenneth Miles Davis may file suit regarding this Claim. This Covenant Not To Execute is not intended to limit or impair the right of the Personal Representatives to file suit.

Based on the plain terms of the contractual document, it is not possible for Defendants to state a claim for breach of contract when Plaintiff has done exactly what the Covenant Not to Execute contemplated and allowed Plaintiff to do, which was to file suit for the wrongful death of Decedent.

Regarding the counterclaim for breach of contract accompanied by fraudulent act, there are no competent allegations of fraudulent intent or fraudulent acts accompanying the non-existent alleged breach of contract. Defendants have failed to identify a specific provision in the Covenant Not to Execute that Plaintiff allegedly breached, thus they are not able to satisfy the first element of a cause of action for breach of contract accompanied by fraudulent act. Additionally, Defendants fail to present well-pled allegations of any fraudulent intent or fraudulent act that accompanied any breach of contract, rendering the counterclaim for breach of contract accompanied by fraudulent act subject to summary judgment. To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove three elements: "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making;

and (3) a fraudulent act accompanying the breach." *See RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 470, 597 S.E.2d 881, 883 (Ct. App. 2004), citing *Conner v. City of Forest Acres*, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002).

Merely doing what a contract allows to be done is not actionable as a breach of the implied covenant of good faith and fair dealing. Defendants' counterclaim for breach of the covenant of good faith and fair dealing against Plaintiff also fails as a matter of law because such a claim does not arise when the party alleged to be in breach merely did what the contract allowed him to do, which in this case is to file suit and seek a recovery. Under well-settled law in South Carolina, "there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995), *citing First Federal Savings and Loan Ass'n. of South Carolina v. Dangerfield*, 307 S.C. 260, 414 S.E.2d 590 (Ct.App.1992); *see also Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (same) *and Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 653, 780 S.E.2d 263, 273 (Ct. App. 2015) (same).

Contrary to Defendants' assertions, there exists no common law duty of good faith and fair dealing between Plaintiff and Defendants. Specifically, there is no independent cause of action relating to the implied covenant of good faith and fair dealing under South Carolina law. *See, e.g., RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 472, 597 S.E.2d 881, 884 (2004) (the implied covenant of good faith and fair dealing does not constitute a standalone cause of action separate from breach of contract). As Defendants' counterclaim for breach of contract fails as a matter of law, their counterclaim for breach of the implied covenant of good faith and fair dealing also fails as a matter of law. Again, as noted above, it is not a breach of the implied covenant of

good faith and fair dealing when a party does something that the relevant contract permits that party to do. *See Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995), *citing First Federal Savings and Loan Ass'n. of South Carolina v. Dangerfield,* 307 S.C. 260, 414 S.E.2d 590 (Ct.App.1992); *see also Tadlock Painting Co. v. Maryland Cas. Co.,* 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (same) *and Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 653, 780 S.E.2d 263, 273 (Ct. App. 2015) (same).

With regard to Defendant's alleged counterclaim under Rule 11, SCRCP, it is clear that Rule 11 is not a cause of action. In relevant part, Rule 11 of the South Carolina Rules of Civil Procedure requires that every pleading of a party represented by an attorney shall be signed by at least one attorney who is admitted to practice law in South Carolina, and that the signature of such an attorney constitutes a certificate by him that he has read the pleading and that to the best of his knowledge that there is good ground to support it, and that it is not interposed for delay. The filing of the Complaint to seek damages for the wrongful death of Decedent is not sanctionable. Any violation of Rule 11, whether real or imagined, is addressed by motion, not by counterclaim, as there is no cause of action for "Rule 11 sanctions." For these reasons, Defendants' counterclaim for SCRCP Rule 11 violations fails as a matter of law.

CONCLUSION

Based upon the foregoing, the evidence, pleadings and memoranda in the record, and arguments of counsel, it is hereby ordered that:

(1) Defendants' converted motion for summary judgment on Plaintiff's Complaint is DENIED;

(2) Defendants' converted motion for summary judgment on the inclusion of Defendant Cole Austin Dunn as a party is DENIED;

(3) Defendants' converted motion for summary judgment seeking reformation of the covenant not to execute is DENIED; and

(4) Plaintiff's converted motion to summary judgment on Defendants' counterclaims is GRANTED.

IT IS SO ORDERED.

Horry Common Pleas

Case Caption: Kenneth A Davis , plaintiff, et al VS Cole Austin Dunn , defendant, et al

Case Number: 2017CP2602910

Type: Order/Summary Judgment

So Ordered

s/ Larry B. Hyman 2152