

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 15-CP-10-6684 (Appeal No.: 2018-000692)

Zurich American Insurance Company of Illinois,Respondent,

v.

Palmetto Contract Services, Inc.,Appellant.

APPELLANT'S INITIAL BRIEF

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June 18, 2018

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STATEMENT OF ISSUES ON APPEAL

1. **Did the trial court err in granting the Plaintiff's/Appellee's Motion to strike Defendant's/Appellant's Demand for a jury trial when it filed its Amended Answer and Counterclaim?**

STATEMENT OF THE CASE

This case involves a claim by Appellee, Zurich American Insurance Company of Illinois (hereinafter "Zurich" or "Appellee"), for breach of contract relating to payment of premiums for workers' compensation insurance. Zurich filed the complaint on December 11, 2015, and requested the case be non-jury. On February 12, 2016, Appellant, Palmetto Contract Services, Inc. (hereinafter "Palmetto" or "Appellant") filed an Answer denying the allegations in the complaint and asserting affirmative defenses. Palmetto did not request a jury trial. On July 12, 2016, Palmetto filed a motion to amend to assert counterclaims. By order dated September 20, 2017, the court granted Palmetto's motion to amend.¹ During the hearing on the motion to amend, Zurich argued it would be prejudiced if the motion was granted because Zurich would not have an opportunity to demand a jury trial. Palmetto consented to a jury trial. Thereafter, Palmetto filed its Amended Answer and Counterclaim, and demanded a jury trial. Zurich filed a motion to strike Palmetto's demand for a jury trial. After a hearing, the court issued an order granting Zurich's motion to strike "pursuant to SCRPC 38(d) and *King v. Shorter*, 291 S.C. 501. The counterclaim raised in Defendant's amended pleadings do not create new issues of fact." Appellant received notice of the order on March 19, 2018, and filed the Notice of Appeal on April 12, 2018.

¹ It took an unusually long time for the motion to amend to be granted. The motion was first heard by Judge Jeffrey Young on January 5, 2017; however, no order was issued. After discovery of the oversight, the hearing was rescheduled before Judge Nicholson for September 19, 2017, and the order granting the motion to amend was signed on September 20, 2017.

FACTS

Zurich and Palmetto entered into a contract whereby Zurich agreed to provide certain workers compensation and employers liability insurance coverage for the policy period of February 20, 2012, through February 20, 2013. R-2 at ¶¶ 4-5. Following the policy period, Zurich made a demand for payment in the amount of \$158,744.00 on June 18, 2013. R-2 at ¶¶ 8-9. By letter dated June 17, 2013, Palmetto sent a letter to Zurich contesting the audit and requested that the audit be amended. R-5, Exhibit 2. Zurich filed the complaint on December 11, 2015, for breach of contract. Zurich requested the case be non-jury. R-2. On February 12, 2016, Palmetto filed a simple answer denying the allegations in the complaint and asserting certain affirmative defenses, including a fifth defense of fraud and fraud in the inducement. R-3. Palmetto did not assert any counterclaims or demand a jury trial.

On July 12, 2016, Palmetto filed a motion to amend its answer and assert a counterclaim pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. R-4. A copy of the proposed Amended Answer and Counterclaim was attached to the motion. The Amended Answer and Counterclaim set forth a counterclaim for negligent misrepresentation and fraud, and made the following specific allegations:

The agreement entered into between Zurich and Palmetto was similar to agreements entered into between Assurance Company of America, a subsidiary of the Plaintiff, and/or Zurich, for the years 2009 through 2010, 2010 through 2011, and 2011 through 2012. R-7 at ¶ 13.

For each of the aforesaid policy periods, Zurich and/or Assurance agreed to provide coverage under NCCI Class Codes 3040, 3040U, 6824F, 6834, 7842, and 8810. Id. at ¶ 14.

During each of the aforesaid policy periods, Zurich and/or Assurance had charged Palmetto premiums and assigned employees to the different class codes, specifically including 3046. Id. at ¶ 15.

In connection with the policy period for 2012 through 2013, Zurich represented that it would provide insurance and invoice Palmetto based on the class codes set forth in the agreement, as it had done during the previous three policy periods. Id. at ¶ 16.

On or around April 4, 2013, after the policy period, Zurich performed an audit of Palmetto's books. Id. at ¶ 17.

The audit was performed by Evelyn Wyatt on behalf of Zurich. Id. at ¶ 18.

The audit summary separated the work performed by Palmetto into different work categories corresponding to the different class codes, including workers under class codes 3040, 6824F, 8742, and 8810, as it had done during previous policy periods. Id. at ¶ 19.

The audit summary was provided to Palmetto on or around April 4, 2013. Id. at ¶ 20.

On or around April 6, 2013, Zurich revised the audit summary and took all of the labor originally classified under 3040 and added it under code 6824F and made a minor change to the work under class code 8810. Id. at ¶ 21.

The summary of audit review from Zurich review states that, "Class code 3040 does not apply to [Palmetto's] operations." Id. at ¶ 22.

During the policy periods of 2009 through 2010, 2010 through 2011, 2011 through 2012, Zurich and/or its subsidiaries took the position that class code 3040 did apply to Palmetto's operations. Id. at ¶ 23.

In 2012, Assurance Company of America, a subsidiary of Zurich (hereinafter "Assurance"), filed a complaint, case no. 2012-CP-10-284, in which it took the position that a portion of Palmetto's operations were covered under class code 3040. Id. at ¶ 24.

On or around June 18, 2013, Zurich invoiced Palmetto \$158,744.00, as a result of the revised audit and the change from listing work under 6824F as opposed to 3040. Id. at ¶ 25.

The representation that Zurich would properly classify people under 3040 and bill Palmetto accordingly was false. Id. at ¶ 26.

The representations in the agreement including that Zurich would classify work under 3040 and invoice Palmetto accordingly were material. Id. at ¶ 27.

Zurich knew the representations in the agreement were false. Id. at ¶ 28.

Zurich intended that the representations be acted upon. Id. at ¶ 29.

Palmetto did not know that the representations were false, and relied on the representations as set forth in the agreement. Id. at ¶ 30.

Zurich had a pecuniary interest in making the false representations as set forth herein. Id. at ¶ 31.

Zurich had a duty of due care to provide truthful information to Palmetto, and breached its duty by failing to properly communicate information regarding class codes to Palmetto, and changing the audit in direct violation of the contract requirements and prior dealings with the parties. Id. at ¶ 32.

Palmetto had a right to rely on the representations in the agreement and on the prior dealings with Zurich and its subsidiaries regarding the classification of employees. Id. at ¶ 33.

In addition to the counterclaim for fraud and negligent misrepresentation, Palmetto also asserted a counterclaim for breach of contract, and alleged that Zurich had actually overbilled Palmetto and Palmetto was entitled to a refund. R-4 at ¶ 36. The Answer and Counterclaim demanded actual damages, incidental damages, consequential damage and punitive damages in an amount to be determined by the trier of fact. Id. “Wherefore Clause.” Zurich opposed the motion. R-5.

During the hearing on Palmetto’s motion to amend, Zurich argued that the motion should be denied for two reasons: (1) that it would be prejudiced because it does not now have an opportunity to demand a jury trial, and (2) because the amendment is untimely.² R-11. On the issue of prejudice, the court ruled “there is no prejudice to Zurich. Palmetto put Zurich on notice of allegations of fraud in the original Answer, and Palmetto consented to a jury trial. Further, there is no evidence that Zurich does not have adequate time to prepare and defend against the counterclaim.” R-6. The court also noted that “Zurich has been on notice since the Defendant filed

² Zurich’s argument on timeliness was also addressed by the trial court, but is not an issue in this appeal, and is not addressed further.

the original Answer that there were issues of fraud and misrepresentation.” Id. Zurich did not seek reconsideration of the order, and did not appeal the order.

During the hearing on the motion to strike, Zurich argued that Palmetto had waived its rights to demand a jury trial because the Amended Answer and Counterclaim were based on the same issues that were raised previously in its initial Answer to the plaintiff’s complaint. R-11 at 3:16-18. Zurich went out of its way to argue that it had not requested a jury trial during the hearing in front of Judge Nicholson, but only that “it would be prejudicial to our client to not be able to request a jury trial, but we never actually requested or demanded a jury trial in writing or verbally.” R-11 at 4:15-18. “It was just an issue raised to show possible prejudice to our client.” R-11 at 5:8-9. Zurich’s attorneys explained that they “argued before Judge Nicholson the fact that we wanted to be able to look at the option of a jury trial.” R-11 at 8:4-6.

The court issued an order granting Zurich’s motion to strike stating it was “pursuant to SCRCF 38(d) and *King v. Shorter*, 291 S.C. 501. The counterclaim raised in Defendant’s Amended Pleadings do not create new issues of fact.”

ARGUMENT

I. STANDARD OF REVIEW

Palmetto is entitled to a jury trial as a matter of right. SCRCF 38. When a trial court’s order deprives a party of a mode of trial *to which it is entitled as a matter of right*, as did Judge Harrington, such order is immediately appealable. Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). South Carolina follows federal case law concerning the right to a jury trial pursuant to Rule 38. See King v. Shorter, 291 S.C. 501, 502–03, 354 S.E.2d 402, 403 (Ct. App. 1987). While the court in King indicated the standard of review denying a party’s right to a

jury trial was abuse his discretion, *id.* at 503, later courts have held that whether a party is entitled to a jury trial is a question of law. *Verenes v. Alvanos*, 387 S.C. 11, 15, 690 S.E.2d 771, 772–73 (2010). This is in line with federal case law where “[e]ntitlement to a jury trial is a question of law reviewed *de novo*. See *Kulas v. Flores*, 255 F.3d 780, 783 (9th Cir.2001). This court reviews *de novo* a district court's interpretation of the Federal Rules of Civil Procedure. See *Atchison, Topeka & Santa Fe Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1073 (9th Cir.1998).” *California Scents v. Surco Prod., Inc.*, 406 F.3d 1102, 1105 (9th Cir. 2005). Therefore, the proper standard of review is a *de novo* review. Accordingly, this court can decide questions of law with no particular deference to the trial court. *Verenes v. Alvanos*, 387 S.C. at 15, 690 S.E.2d at 772–73.

II. PALMETTO IS ENTITLED TO A JURY TRIAL ON ITS COUNTERCLAIM

Palmetto is entitled to a jury trial on its counterclaim as a matter of right pursuant to Rule 38 SCRPC. Rule 38(b) provides that:

Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

Normally, when a party has not previously demanded a jury trial, and files an amended pleading, the party's right to a jury trial turns on whether the amended pleadings create new issues of fact. *King v. Shorter*, 291 S.C. 501, 503, 354 S.E.2d 402, 403 (Ct. App. 1987). In the absence of South Carolina law on the issue, in *King*, the court relied on federal case law, including *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045 (9th Cir. 1974), to support its position. In *Trixler*, the court ruled that the trial court properly denied the demand for a jury trial because the amended pleadings “failed to create new issues of fact.” *King*, 291 SC at 503, 354 S.E.2d 403,

citing Trixler. Federal case law has been consistent. “The presentation of a new theory does not constitute the presentation of a new ‘issue’ on which a jury trial should be granted [as of right] under ... Rule 38(b).” Trixler Brokerage Co. v. Ralston Purina Co., 505 F.2d 1045, 1050 (9th Cir. 1974). “An amended or supplemental pleading that raises new issues enables a party to request a jury trial for those issues in the manner established by Rule 38(b). But an amended or supplemental pleading that merely restates issues previously raised does not revive the right to demand a jury trial when one had not earlier been demanded. As we said in Guajardo v. Estelle, 580 F.2d 748 (5th Cir.1978), ‘A complaint ‘raises an issue’ only once within Rule 38(b)'s meaning-when it introduces it for the first time. Amendments not introducing new issues will not give rise to a demand for a jury trial.’ *Id.* at 752-53.” Fredieu v. Rowan Companies, Inc., 738 F.2d 651, 653 (5th Cir. 1984). “New issues” must relate to new issues of fact and not to new theories of recovery. *Id.* Where the issues in the original complaint and the amended complaint turn on the same “matrix of facts” an amended complaint does not revive a party’s right to request a jury trial. California Scents, 406 F.3d at 1106. “The definition of an issue for purposes of Rule 38 is not a matter solely of fact or of law’ and that ‘one issue is the same as another when it is based on the same conduct or concerns the same general area of dispute.’ [citation omitted]. ‘If the factual allegations underlying two claims are the same or if the issues ‘turn on the same matrix of facts’ the issues are the same.’” *Id.* at 1108, *quoting* Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 620 (9th Cir. 1979).

Unlike other cases, this case involves an amended answer and a counterclaim when no counterclaim had been asserted in the original answer. Thus, the counterclaim was the first time Palmetto asserted affirmative claims against Zurich, and the first time and opportunity Palmetto

had to demand a jury trial on its affirmative claims. Palmetto does not seek, and is not requesting a jury trial on Zurich's claims. That is not the issue here. The issue is – is Palmetto entitled to a jury trial on its counterclaims asserted for the first time in the Amended Answer and Counterclaim?

There is no dispute that Palmetto did not demand a jury trial in its Answer and the affirmative defenses asserted therein. However, Palmetto did not make any affirmative claims against Zurich in its initial Answer. After reviewing all of the facts, Palmetto properly filed a motion to amend to add affirmative counterclaims against Zurich. There is no dispute that Palmetto's counterclaim arises out of the same contract as Zurich's claim for breach of contract, however, the two claims are distinctly different. Palmetto's breach of contract claims are based on Zurich's breaches, as opposed to the alleged breached by Palmetto. Likewise, there is no dispute that Palmetto's counterclaim for fraud and negligent misrepresentation are related to the contract, and are based on similar facts to Palmetto's affirmative defense of fraud in the inducement. However, Palmetto made NO affirmative claims that would warrant a jury trial in its initial Answer. Palmetto seeks a jury trial ONLY as to its counterclaim. Palmetto is agreeable to having the judge decide Zurich's breach of contract claim; however, that decision should be made after the jury decides Palmetto's breach of contract action against Zurich.

As the federal courts have held, "amended pleading must raise for the first time the issue as to which a jury trial is sought. See 5 Moore's Federal Practice § 38.41, at 38-364 to 38-3." G. Bauknecht GmbH v. Elec. Relays, Inc., 569 F. Supp. 404, 414 (N.D. Ill. 1983). That is the case here. Palmetto's amended pleadings, specifically its counterclaims, raised for the first time the issues to which it seeks a jury trial. The counterclaim for fraud and negligent misrepresentation

require the jury to make findings on each of the nine elements for a cause of action for fraud³, and the five elements to state a cause of action for negligent misrepresentation.⁴ Not all of the elements are the same as for the defense of fraud in the inducement that was originally pled as an affirmative defense. In particular, Palmetto must show and prove that Zurich had a “pecuniary interest” in making the misrepresentations. Therefore, issues and facts necessary to prove those issues are clearly different than those raised in Zurich’s breach of contract claim, and from those set forth in Palmetto’s original Answer and affirmative defenses.

The issues and facts are also different in Palmetto’s breach of contract claim. The original complaint and answer dealt only with whether Palmetto breached the contract. Simply put - did Palmetto live up to its side of the bargain? While Palmetto denied it breached, neither the complaint nor the answer dealt with whether Zurich lived up to its side of the bargain. Palmetto’s counterclaim raises those issues.

Finally, Palmetto’s original Answer and affirmative defenses did not seek any damages from Zurich. In contrast, Palmetto’s counterclaims seek damages, including actual damages, incidental damages, consequential damages, and punitive damages. These are all new issues based on new facts raised for the first time in Palmetto’s counterclaims. Accordingly, Palmetto is entitled

³ To establish a cause of action for fraud and deceit based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance of its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent and proximate injury. Michael G. Smith, *Elements of Civil Causes of Action* (2000) at 103.

⁴ (1) a false representation made by the defendant to the plaintiff; (2) a pecuniary interest by the defendant in making the statement; (3) a duty of care owed by the defendant to see that truthful information was communicated to the plaintiff; (4) the defendant breached the duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation. *Id.* at 183.

to a jury trial on all issues raised in its counterclaims.

Significantly, in opposing Palmetto's Motion to Amend, Zurich argued to Judge Nicholson that it would be prejudiced if the motion was granted because it would not have an opportunity to demand a jury trial. R-11. Palmetto consented to the jury trial so there would be no prejudice to Zurich. Id. In direct contradiction to its arguments to Judge Nicholson, Zurich now contends it only wanted the opportunity to request a jury trial, but it did not really want one. R-11. First, one must wonder why Zurich would make such an argument to Judge Nicholson when Zurich did not actually intend on requesting a jury trial. More importantly, Zurich's argument about prejudice demonstrates why Palmetto is entitled to a jury trial. A party is entitled to a jury trial as a matter of right. Carolina First Bank v. BADD, L.L.C., 414 S.C. 289, 293, 778 S.E.2d 106, 108 (2015) (The South Carolina Constitution provides that the right to a jury trial shall be preserved inviolate. S.C. Const. art. I, § 14). Just as Zurich argued, it would have been prejudiced if it could not demand a jury trial in response to the Amended Complaint, Palmetto will be prejudiced because it will be denied a Constitutional right. Palmetto demanded a jury trial on the counterclaim when the counterclaim was first filed. It could not have demanded a jury trial on those affirmative claims any sooner because they had not been asserted. To deny Palmetto a jury trial now would be to deny Palmetto its Constitutional right to a jury trial.

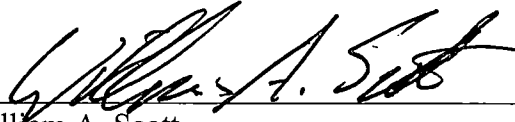
CONCLUSION

For the foregoing reasons, Palmetto requests this court reverse the trial court's order striking Palmetto's demand for a jury trial, and remand this matter with instructions that Palmetto

is entitled to a jury trial.

Respectfully submitted.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Initial Brief complies with Rule 208(a)(1) and (b)(1), SCACR.

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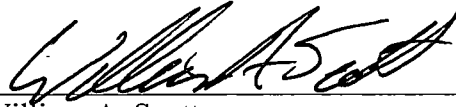
I certify that I served the Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, Certificate of Counsel and Proof of Service by depositing a copy of it in the United States Mail, postage prepaid, on June 18, 2018, addressed to counsel for Respondent, Larry Cohen, Larry D. Cohen, LLC, P.O. Box 30547, Charleston, SC 29417, and Carolyn H. Blue, P.O. Box 30845, Charleston, SC 29417.

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Case No. 18-000692

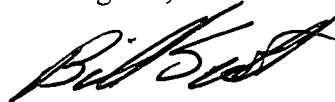
Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, Certificate of Counsel and Proof of Service. Please return a stamped-in copy of these documents in the enclosed envelope.

By copy of this letter, the Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, Certificate of Counsel and Proof of Service are being served upon Respondent's counsel.

If you have any questions, please do not hesitate to contact me.

With regards,

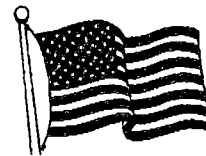


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