

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**  
AUG 27 2018  
SC Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

IN CASE NO. 15-CP-10-6684, THE HONORABLE KRISTI LEA HARRINGTON

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Case No. 2018-000692

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Zurich American Insurance Company of Illinois, .....Respondent,

v.

Palmetto Contract Services, Inc., .....Appellant.

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**APPELLANT’S RESPONSE TO RESPONDENT’S  
MOTION TO DISMISS APPEAL**

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Zurich’s Motion to Dismiss should be denied because Palmetto is entitled to a jury trial as a matter of right on its legal counterclaims. The demand for a jury trial was properly “endorsed upon a pleading” of the Amended Answer and Counterclaim, and was not waived. The trial court erroneously granted Zurich’s Motion to Strike the case from the jury roster. Since the trial court’s Order affects the mode of trial and Palmetto’s substantial right to a jury trial, the Order is immediately appealable. In fact, the failure to appeal would result in the waiver of Palmetto’s rights to a jury trial.

**FACTS**

The facts necessary to dispose of Zurich’s Motion are straightforward.

1. Zurich filed the Complaint on December 11, 2015, for breach of contract. Zurich requested the case be non-jury. (Exhibit A).

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. (Exhibit B).

3. Palmetto did not assert any counterclaims or demand a jury trial.

4. Five months later, on July 12, 2016, Palmetto filed a Motion to Amend its Answer and Assert Counterclaims for breach of contract, negligent misrepresentation, and fraud. The counterclaim sought actual damages, incidental damages, consequential damages, and punitive damages in an amount to be determined by the trier of fact. (Exhibit C).

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.<sup>1</sup> (Exhibit D, p. 2).

6. By Order dated September 20, 2017, the court granted Palmetto's Motion to Amend.<sup>2</sup> The Order states "[t]here 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." (*Id.*, p. 3). The court also noted that "Zurich has been on notice since the Defendant filed the original answer that there were issues of fraud and misrepresentation." (*Id.*, p. 4). Zurich did not seek reconsideration of the Order, and did not appeal the Order.

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<sup>1</sup> 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.

<sup>2</sup> It took an unusually long time for the Motion to Amend to be granted. The motion was filed on July 12, 2016, and was 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.

7. Palmetto filed its Amended Answer and Counterclaim, and demanded a jury trial. (Exhibit E).

8. The Charleston County Clerk of Court transferred the case to the jury roster. (Respondent's Motion at ¶ 7).

9. Zurich filed a Motion to Strike Palmetto's demand for a jury trial.

10. 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. (Exhibit F, p. 3, ln 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." (*Id.*, p. 4, ln 15-18). "It was just an issue raised to show possible prejudice to our client." (*Id.*, p. 5, ln 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." (*Id.*, p. 8, ln 4-6).

11. The court issued an Order granting Zurich's Motion to Strike stating it was "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."

12. Neither party filed a motion for reconsideration of Judge Harrington's Order. Zurich did not file a motion for reconsideration to have the court consider or refer to Rule 39.

### **ARGUMENT**

Zurich contends this matter is governed by Rule 39, and that the Order denying Palmetto's demand for a jury trial is not immediately appealable. The argument is misplaced. Judge

Harrington's Order does not reference Rule 39 in any way. This matter is governed by Rule 38. Palmetto properly made a demand for a jury trial when it filed its Amended Answer and Counterclaim. Palmetto is entitled to a jury trial as a matter of right on its counterclaims and has not waived its right to a jury trial on those claims. Since this matter is controlled by Rule 38, and the trial court's Order affects the mode of trial and Palmetto's substantial right to a jury trial, the matter is immediately appealable.

**I. This Matter Is Immediately Appealable.**

An order denying a jury trial under Rule 38 is immediately appealable. 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). In Satcher v. Satcher, the Court of Appeals held that an order denying a jury trial under Rule 38 "affecting the mode of trial [also] affect substantial rights protected by statute and must, therefore, be immediately appealed. *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997)." Satcher v. Satcher, 351 S.C. 477, 490, 570 S.E.2d 535, 541–42 (Ct. App. 2002). The Court went on to state: "Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue. *Id.*" Id. More recently, the Court of Appeals reiterated that the denial of a right to a jury trial is a substantial right and must therefore, be appealed immediately. South Carolina Community Bank v. Salon Proz, LLC, 420 S.C. 89, 93–94, 800 S.E.2d 488, 490 (Ct. App. 2017), citing *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998). The court went on to state: "[t]he right of trial by jury is highly favored, and waivers of the right are always strictly construed and not lightly inferred or extended by implication." *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993). "In the absence of an express agreement or consent, a waiver of the right to a jury trial

will not be presumed.’ *Id.* ’’ *Id.* The law is clear that Judge Harrington’s Order denying Palmetto’s right to a jury trial is immediately appealable.

## II. Palmetto Made A Proper Demand For A Jury Trial Pursuant To Rule 38.

There is no question that Palmetto made a valid demand for a jury trial. Rule 38(b) provides:

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.

Rule 38(b) SCRPC. Rule 38 specifically states “such demand may be endorsed upon a pleading of the party.” *Id.* The caption of Palmetto’s amended answer and counterclaim clearly states “**Jury Trial.**” (emphasis in original). No specific language is required by the Rule. Zurich’s contention in footnote 1 that “Palmetto never actually made a ‘demand’ for a jury trial” is completely unfounded.<sup>3</sup> The Clerk of Court clearly recognized the demand for a jury trial on the Amended Answer and Counterclaim when it transferred the case to the jury roster. Further, Zurich obviously knew and understood that Palmetto demanded a jury trial. Otherwise, there would have been no reason to file the motion to strike.

## III. Palmetto Did Not Waive Its Right To A Jury Trial.

Palmetto’s right to a trial by jury is highly favored, and “waivers of the right are always strictly construed and not lightly inferred or extended by implication.” South Carolina Community

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<sup>3</sup> While Zurich contends Palmetto failed to make a proper demand for a jury trial because it only put the words “Jury trial” on the caption, and did not use the word “Demand,” Zurich’s Complaint only included the phrase “Non-Jury” on the caption to the Complaint, but did not use the word “Demand.” Based on Zurich’s argument, Zurich never made a proper demand for a non-jury trial, and the matter should have been designated as a jury trial from the beginning.

Bank, 420 S.C. at 93–94, 800 S.E.2d at 490, citing Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993).

Palmetto made the demand for a jury trial by endorsing the demand on the Answer and Counterclaim, which was “not later than 10 days after the service of the last pleading directed to such issue” as required by Rule 38(b) SCRPC. Since the Answer and Counterclaim was the “last pleading directed to such issue,” the demand was proper and timely under Rule 38.

Palmetto did not waive its right to a jury trial under Rule 38(d), which states in pertinent part: “The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury.” Rule 38(d) SCRPC. Since Palmetto endorsed the last pleading directed at the counterclaims with a demand for a jury trial, the demand met every requirement imposed by Rule 38 necessary to make a valid demand for a jury trial. Rule 38(b) is simply not relevant. The record is void on any evidence that Palmetto waived its right to a jury trial.

#### **IV. Palmetto Is Entitled To A Jury Trial As A Matter Of Right.**

Rule 38 concerns trial by jury as matter of right. Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). Palmetto is entitled to a jury trial as a matter of right on its counterclaims because the counterclaims are legal in nature and compulsory. Palmetto’s counterclaims for breach of contract, fraud and negligent misrepresentation are all legal claims. “The South Carolina Constitution provides that the right of trial by jury is to be ‘preserved inviolate.’ *S.C. Const. art. I, § 14.*” Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997), see also, Carolina First Bank v. BADD, L.L.C., 414 S.C. 289, 293, 778 S.E.2d 106, 108 (2015). A party is entitled to a jury trial on counterclaims that are legal and compulsory. South Carolina Community Bank, 420 S.C. at 96, 800 S.E.2d at 490. “A counterclaim is compulsory if it arises out of the same transaction

or occurrence as the party's claim. *Id.* (citing Rule 13(a), SCRCR).” *Id.* There is no dispute that Palmetto’s counterclaims arise out of the same contract as Zurich’s claim for breach of contract and are, therefore, compulsory.<sup>4</sup>

Palmetto is entitled to a jury trial because the counterclaims raise new issues of fact. As the court held in *King*, a litigant’s entitlement to a jury trial on the issues presented by an amended pleading when no prior demand for a jury trial has been made, turns on whether the amended pleadings create new issues of fact. *King v. Shorter*, 291 S.C. 501, 502-03, 354 S.E.2d 402, 403 (Ct. App. 1987), *see also* *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1050 (9th Cir. 1974). In *King*, the defendant originally filed an answer with counterclaims, but did not make a demand for a jury trial. Thereafter, the defendant served two additional sets of pleadings before he finally made a demand for a jury trial. Based on Rule 38, the trial court denied the demand for a jury trial. The court of appeals ruled the trial court did not abuse his discretion in denying the demand for a jury trial. *Id.*

Here, Palmetto filed its initial Answer with defenses, including asserting defenses of fraud and misrepresentation, but did not assert any counterclaims at that time. Five (5) months later, Palmetto filed the Motion to Amend after it had an opportunity to fully evaluate the case.

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<sup>4</sup> Based on Judge Nicholson’s Order allowing the Amended Answer and Counterclaim, Zurich argues that the “allegations in Palmetto’s Amended Answer and Counterclaim are based upon the same facts [sic] issues raised in Zurich Verified Complaint and Palmetto’s initial Answer.” (Respondent’s Motion at ¶ 8). However, Judge Nicholson’s Order does not state they are based on the same facts. The Order just states “[t]here 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.” (Exhibit D)(emphasis added). The court also noted that “Zurich has been **on notice** since the Defendant filed the original answer that there were issues of fraud and misrepresentation.” *Id.* (emphasis added). Having notice of an issue is different than proving all of the elements to support a cause of action.

There is no dispute that Palmetto's counterclaims arise out of the same contract as Zurich's claim for breach of contract; however, the claims and counterclaims are distinctly different, and raise new issues of fact. Palmetto's breach of contract claim is based on Zurich's breaches, as opposed to the alleged breaches 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. 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 fraud<sup>5</sup>, and the five elements to state a cause of action for negligent misrepresentation.<sup>6</sup> 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

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<sup>5</sup> 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.

<sup>6</sup> (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.

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

While Palmetto did not demand a jury trial when it first answered the Complaint, Palmetto was permitted to demand a jury trial on its counterclaims when the court granted Palmetto's Motion to Amend to Assert Counterclaims. That fact is demonstrated by Zurich's argument during the hearing on the Motion to Amend that it would be prejudiced if it were not allowed to demand a jury trial in response to the newly asserted counterclaims.

**V. Rule 39 Is Not Applicable.**

Judge Harrington's Order does not mention Rule 39, however, Zurich somehow contends the Order is not immediately appealable because Palmetto's counsel used the word "discretionary" during the hearing on the Motion to Strike. (Respondent's Motion at ¶11). Zurich's argument is misplaced. First, the Order does not refer to Rule 39. Certainly, if the trial court intended to base the order on Rule 39, the order would have so stated. Second, "discretionary" was used based on the standard of review by an appellate court. Counsel for Palmetto stated:

A party is entitled to a jury trial as a matter of right. And your decision here is discretionary. We agree that the case in here that rules is King v. Shorter. If I may, it's cited in their memorandum. And it's what I have, would rely on also. (Exhibit F, p. 5, ln 13-17).

...

Your Honor, what's interesting is, if – it's your discretion. If you grant this motion, this matter is immediately appealable. (Id., p. 5, ln 18-20).

The King v. Shorter case dealt with Rule 38. There is no reference to Rule 39 at all. More importantly, “discretion” goes to the standard of review by the appellant court. In King, the court indicated the standard of review denying a party's right to a jury trial was abuse his discretion. King, 291 S.C. at 503, 354 S.E.2d at 403. However, 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 Products, Inc., 406 F.3d 1102, 1105 (9th Cir. 2005). Therefore, the proper standard of review by this court of Judge Harrington's Order is a *de novo* review. Accordingly, this court can decide questions of law with no particular deference to the trial court. Verenes, 387 S.C. at 15, 90 S.E.2d at 772–73. The term “discretionary” used at the hearing did not somehow imply that Rule 39 was applicable. Zurich's argument that the use of the word “discretionary” in some way invoked Rule 39 is simply unfounded.

#### **VI. The Cases Cited By Zurich Are Distinguishable.**

Zurich cited two cases, Satcher v. Satcher and Rowe Furniture Corp. v. Carolina Wholesale Furniture Co., in support of its position that Rule 39 applies to the Order issued by Judge Harrington, and that the Order is not immediately appealable. Both cases are distinguishable from this case.

In Satcher, all of the legal counterclaims were dismissed, leaving only equitable counterclaims where a jury trial is not a matter of right. Satcher v. Satcher, 351 S.C. 477, 490, 570

S.E.2d 535, 541–42 (Ct. App. 2002). That is not the case here. All of Palmetto’s counterclaims are legal in nature which entitle Palmetto to a jury trial as a matter of right.

In Rowe Furniture Corp., the defendant did not demand a jury trial under Rule 38, and filed a motion to have a jury trial under Rule 39. The court stated that “Rule 38 provides that the failure of a party to demand a jury trial within ten days of the service of the last pleading constitutes a waiver of trial by jury. Carolina Wholesale and Mr. and Mrs. Smoak did not demand a jury trial as required by this rule.” Rowe Furniture Corp. v. Carolina Wholesale Furniture Co., Inc., 292 S.C. 575, 575–76, 357 S.E.2d 725, 725 (Ct. App. 1987). That is not the case here. Palmetto made a proper demand for a jury trial within 10 days of the last pleading when it filed the Amended Answer and Counterclaim.

Significantly, in both Satcher and Rowe Furniture Corp., the court acknowledged that a party is entitled to a jury trial as a matter of right on legal claims, and that the denial of that right was immediately appealable. Satcher, 351 S.C. at 490, 570 S.E.2d at 541–42; Rowe Furniture Corp., 292 S.C. at 575–76, 357 S.E.2d at 725.

### CONCLUSION

For the foregoing reasons, Palmetto requests this court deny Zurich’s Motion to Dismiss.

Respectfully submitted.

PEDERSEN & SCOTT, P.C.



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*Attorney for Appellant*

Dated this 24<sup>th</sup> of August, 2018

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

AUG 27 2018

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

IN CASE NO. 15-CP-10-6684, THE HONORABLE KRISTI LEA HARRINGTON

Case No. 2018-000692

Zurich American Insurance Company of Illinois, .....Respondent,

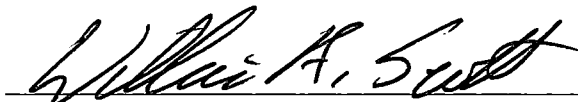
v.

Palmetto Contract Services, Inc., .....Appellant.

**CERTIFICATE OF SERVICE**

I certify that I have served the Appellant's Response to Respondent's Motion to Dismiss Appeal, by depositing a copy of it in the United States Mail, postage prepaid, on August 24, 2018, addressed to its attorneys of record, Larry D. Cohen, Esq., Larry D. Cohen, LLC, P.O. Box 30547, Charleston, SC 29417, and Carolyn H. Blue, Esq., P.O. Box 30845, Charleston, SC 29417.

August 24, 2018



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*Attorney for Appellant*

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
ZURICH AMERICAN INSURANCE )  
COMPANY OF ILLINOIS, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PALMETTO CONTRACT SERVICES, )  
INC., )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
CASE NUMBER 2015-CP-10-12684

VERIFIED COMPLAINT

(Breach of Contract)

(Non-Jury)



BY  
COPY

2015 DEC 11 PM 12:46  
CLERK OF COURT

Now comes Plaintiff Zurich American Insurance Company of Illinois (Zurich) complaining of Defendant Palmetto Contract Services, Inc. ("Palmetto"), and shows the court as follows:

1. Plaintiff Zurich is an Illinois Corporation authorized to do business in South Carolina.
2. Plaintiff is informed and believes that Defendant Palmetto is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business located in Charleston County, South Carolina.
3. This Court has subject matter jurisdiction and venue is proper by virtue of § 15-07-30, S.C. Code Ann. (1976).
4. On or about February 20, 2012, Plaintiff Zurich and Defendant Palmetto entered into a contract whereby Plaintiff Zurich agreed to provide certain workers compensation and employers liability insurance coverage to Defendant Palmetto, for which Defendant Palmetto agreed to pay the premiums.
5. Plaintiff Zurich issued Workers Compensation and Employers Liability Insurance

Policy WC9595139-02 (the "Policy"), with coverage for the time period February 20, 2012 through February 20, 2013.

6. After a premium audit, it was determined that an additional premium amount was owed by Defendant Palmetto to Plaintiff Zurich for the insurance coverage provided.

7. Based on the terms of Policy, Defendant Palmetto is required to pay all premiums when due, including audit and retrospective premiums.

8. After all offsets and credits, Defendant Palmetto owes Plaintiff Zurich for past due audit premiums in the amount of One Hundred Fifty-Eight Thousand Seven Hundred Forty-Four and 00/100 (\$158,744.00) Dollars as of June 18, 2013. A true and correct copy of the "Final Invoice" is attached hereto as Exhibit "A" and incorporated herein by reference.

9. Demand has been made by Plaintiff Zurich on Defendant Palmetto but Defendant Palmetto has failed and refused to pay as agreed.

10. The amount of Plaintiff Zurich's claim is based on an agreement as to a sum certain amount.

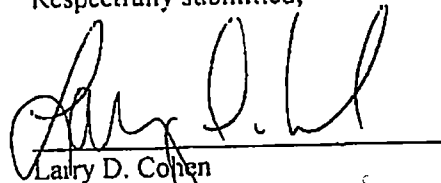
11. Plaintiff Zurich is informed and believes that it is entitled to interest on the unpaid balance of \$158,744.00, after June 18, 2013 to the date of entry of judgment, at the rate of 8.75% per annum, as provided for in S.C. Code Ann. §34-31-20 (1976).

12. All conditions precedent to Plaintiff Zurich's recovery of judgment against Defendant Palmetto have been performed or have occurred.

WHEREFORE, Plaintiff Zurich prays that this Court grant judgment in its favor against Defendant Palmetto in the following particulars:

- a. For the unpaid principal amount of \$158,744.00;
- b. For accrued interest after June 18, 2013 to the date of the entry of judgment, calculated at the rate of 8.75% per annum, on the unpaid principal amount;
- c. The costs and disbursements of this action;
- d. Post-judgment interest at the prevailing statutory rate; and
- e. Any other relief to which Plaintiff Zurich may show itself entitled.

Respectfully submitted,



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Charleston, South Carolina  
December 11, 2015

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**ATTORNEYS FOR PLAINTIFF  
ZURICH AMERICAN INSURANCE  
COMPANY OF ILLINOIS**

# EXHIBIT “A”

P.O. BOX 5187  
Jacksonville, FL 32247-5387

INVOICE

AGENT: ALL RISKS, LTD  
CODE: 09178000



ZURICH

PAYOR NAME AND ADDRESS

PALMETTO CONTRACT SERVICES INC  
616 KING STREET  
MOUNT PLEASANT, SC 29464

JUNE 03, 2013

ACCOUNT NUMBER  
M019382706-001-00001

ACCOUNT NAME  
PALMETTO CONTRACT SERVICES INC

The above account is no longer active. However, a premium amount of \$158,744.00 is still due. We would like to bring closure to your account in a timely and positive manner

To avoid possible credit bureau reporting, your payment must be received in our office no later than 06/18/13. Please use the enclosed envelope to send your payment with the coupon below.

If you dispute the amount owed, please advise us in writing by the due date of this invoice at the following address: P.O. Box 10400, Jacksonville, FL 32247-0400.

If you have any questions about your account, please call our Customer Accounting Department at 1-800-332-6641 between the hours of 7:30 a.m. and 7:30 p.m. Eastern Time Monday through Friday.

| <u>Policy Number</u> | <u>Coverage Dates</u> | <u>Premium Type</u> | <u>Amount Due</u> |
|----------------------|-----------------------|---------------------|-------------------|
| WC 9595139           | 02/20/12 - 02/20/13   | AUDIT               | \$158,744.00      |

UNPAID FEES \$0.00

0795 CARTRIDGE 15

PLEASE DETACH AND RETURN THIS PORTION WITH YOUR PAYMENT

| <u>ACCOUNT NUMBER</u> | <u>DUE DATE</u>                | <u>TOTAL AMOUNT DUE</u> |
|-----------------------|--------------------------------|-------------------------|
| M019382706-001-00001  | 06/18/13                       | \$158,744.00            |
| <u>PAYOR NAME</u>     | PALMETTO CONTRACT SERVICES INC |                         |
|                       |                                | <b>AMOUNT ENCLOSED</b>  |

\$

PLEASE INCLUDE YOUR ACCOUNT NUMBER ON YOUR CHECK

Make Check Payable To:

ZURICH NORTH AMERICA  
PO BOX 4664  
CAROL STREAM, IL 60197-4664




130000000158744002000000000001938270600100001030016

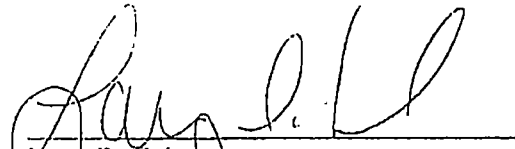
STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
ZURICH AMERICAN INSURANCE )  
COMPANY OF ILLINOIS, )  
 )  
Plaintiff, )  
 )  
PALMETTO CONTRACT SERVICES, )  
INC., )  
 )  
Defendant. )  
\_\_\_\_\_

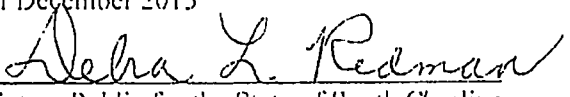
IN THE COURT OF COMMON PLEAS  
CASE NUMBER 2015-CP-10-10684

VERIFICATION

 COPY BY  
CLERK OF COURT  
2015 DEC 11 PM 12:46

The undersigned, having been duly sworn, deposes and says that he is an attorney for Plaintiff Zurich American Insurance Company of Illinois, and as such, he has read the foregoing Summons and Verified Complaint and he knows the facts stated therein to be true of his own knowledge, except to those matters stated upon information and belief and as to those matters he believes them to be true.

  
\_\_\_\_\_  
Larry D. Cohen  
Attorney for Plaintiff

SWORN to before me this 11<sup>th</sup> Day  
of December 2015  
  
\_\_\_\_\_  
Notary Public for the State of South Carolina  
My Commission Expires: 5/7/17

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-10-6684

ZURICH AMERICAN INSURANCE  
COMPANY OF ILLINOIS,

Plaintiff,

v.

PALMETTO CONTRACT SERVICES,  
INC.,

Defendant.

**DEFENDANT'S ANSWER TO  
PLAINTIFF'S COMPLAINT**

The Defendant, Palmetto Contract Services, Inc. (hereinafter "Palmetto"), answering the Complaint would show as follows:

**FOR A FIRST DEFENSE**  
(General Denial)

1. Any allegations contained in the Plaintiff's Complaint not specifically admitted, denied or otherwise modified are expressly denied and strict proof demanded thereof. To the extent any allegation or part thereof may not be expressly referred to and specifically answered, it is hereby denied and legal proof thereof is requested.

**FOR A SECOND DEFENSE**  
(Specific Responses)

2. Upon information and belief, Palmetto admits Paragraph 1 of the Complaint
3. Palmetto admits the allegations contained in Paragraphs 2 through 5 of the Complaint.
4. Palmetto denies the allegations contained in Paragraph 6 of the Complaint.
5. Palmetto denies the allegations contained in Paragraph 7 of the Complaint as written.

Palmetto is not required to pay amounts not due under the terms of the policy.

6. Palmetto denies the allegations contained in Paragraphs 8 through 12 of the Complaint.

**FOR A THIRD DEFENSE**  
(Failure to Mitigate Damages)

7. The Plaintiff has failed to mitigate damages as required by law.

**FOR A FOURTH DEFENSE**  
(Waiver, Estoppel, Laches)

8. The Plaintiff's claims are barred by the doctrine of waiver, estoppel and/or laches.

**FOR A FIFTH DEFENSE**  
(Fraud and Fraud in the Inducement)

9. The Plaintiff's claims are barred as a result of the Plaintiff's fraud and misrepresentations concerning the policy and audit.


**RESERVATION AND NON-WAIVER**

Palmetto reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, the Defendant, Palmetto Contract Services, Inc., prays that the Complaint be dismissed with prejudice, attorney's fees as may be allowed at law, the cost of defending this action, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

PEDERSEN & SCOTT, P.C.

  
\_\_\_\_\_  
William A. Scott (SC Bar #15148)  
775 St. Andrews Blvd.  
Charleston, SC 29407  
Tel. (843) 556-5656  
Fax. (843) 556-5635  
Email: [bscott@pslawpc.com](mailto:bscott@pslawpc.com)  
*Attorney for Defendant,*  
*Palmetto Contract Services, Inc.*

February 12, 2016

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-10-6684

ZURICH AMERICAN INSURANCE  
COMPANY OF ILLINOIS,

Plaintiff,

v.

PALMETTO CONTRACT SERVICES,  
INC.,


Defendant.

**CERTIFICATE OF SERVICE**

The undersigned paralegal at Pedersen & Scott, P.C., hereby certifies that a copy of the Defendant's Answer to Plaintiff's Complaint in the above-captioned action has been placed in an envelope, prepaid, addressed and mailed via US Mail to:

Larry D. Cohen, Esq.  
Larry D. Cohen, LLC  
P.O. Box 30547  
Charleston, SC 29417  
[ldcohen@ldcohenlaw.com](mailto:ldcohen@ldcohenlaw.com)

John J. O'Brien, Esq.  
4862 Marshwood Drive  
Hollywood, SC 29449  
[lionsthree@aol.com](mailto:lionsthree@aol.com)

  
Tracy E. Braceland  
Paralegal

Dated this 12th day of February, 2016

COPY

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS )

NINTH JUDICIAL CIRCUIT )

COUNTY OF CHARLESTON )

CASE NO.: 2015-CP-10-6684 )

Zurich American Insurance Company of )  
Illionis, )

MOTION AND ORDER INFORMATION )

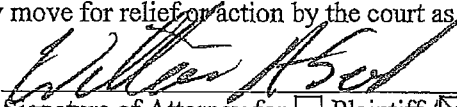
Plaintiff, )

FORM AND COVERSHEET )

vs. )

Palmetto Contract Services, Inc. )

Defendant. )

|   |  |
|---|--|
| Plaintiff's Attorney:<br>Larry D. Cohen, Bar No. 06264<br>Address:<br>P.O. Box 30547<br>Charleston, SC 29417<br>Phone: 843-225-4445 Fax 843-225-2009<br>E-mail: ldcohen57@gmail.com Other:<br>Carolyn H. Blue, Esq., P.O. Box 30845,<br>Charleston, SC 29417  | Defendant's Attorney:<br>William A. Scott, Bar No. 15148<br>Address:<br>775 St. Andrews Blvd.<br>Charleston, SC 29407<br>Phone: 843-556-5656 Fax 843-556-5635<br>E-mail: bscott@pslawpc.com Other: _____ |
| <input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)<br><input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)<br><input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)   |  |
| <b>SECTION I: Hearing Information</b>   |  |
| Nature of Motion: Motion to Amend Answer and Assert Counterclaim<br>Estimated Time Needed: 10 minutes Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO  |  |
| <b>SECTION II: Motion/Order Type</b>  |  |
| <input checked="" type="checkbox"/> Written motion attached<br><input type="checkbox"/> Form Motion/Order<br>I hereby move for relief or action by the court as set forth in the attached proposed order.   |  |
| <br>Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant   | July 12, 2016<br>Date submitted  |
| <b>SECTION III: Motion Fee</b>  |  |
| <input checked="" type="checkbox"/> PAID - AMOUNT: \$ _____<br><input type="checkbox"/> EXEMPT: (check reason)  |  |
| <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support<br><input type="checkbox"/> Domestic Abuse or Abuse and Neglect<br><input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party<br><input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief<br><input type="checkbox"/> Motion for Stay in Bankruptcy<br><input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCF)<br><input type="checkbox"/> Proposed order submitted at request of the court; or,<br>reduced to writing from motion made in open court per judge's instructions<br>Name of Court Reporter: _____<br><input type="checkbox"/> Other: _____ |  |
| <b>JUDGE'S SECTION</b>  |  |
| <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other: _____  | JUDGE CODE _____<br>Date: _____  |

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_

MOTION FEE COLLECTED: \$ \_\_\_\_\_

CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-10-6684

ZURICH AMERICAN INSURANCE  
COMPANY OF ILLINOIS,

Plaintiff,

v.

PALMETTO CONTRACT SERVICES,  
INC.,

Defendant.

**NOTICE OF MOTION AND  
MOTION TO AMEND ANSWER AND  
ASSERT A COUNTERCLAIM AGAINST  
PLAINTIFF**


FILED  
2016 JUL 18 PM 12:39  
CLERK OF COURT

TO: LARRY D. COHEN, ESQ. and CAROLYN H. BLUE, ESQ.

YOU PLEASE TAKE NOTICE that the Defendant, Palmetto Contract Services, Inc., by and through its undersigned counsel, pursuant to Rules 13 and 15 of the South Carolina Rules of Civil Procedure, hereby requests that the Court allow the Defendant to amend its Answer and assert a counterclaim against Plaintiff, Zurich American Insurance Company of Illinois ("Zurich"), to conform to the evidence.

Respectfully submitted,

PEDERSEN & SCOTT, P.C.



William A. Scott (SC Bar #15148)

775 St. Andrews Blvd.

Charleston, SC 29407

Tel. (843) 556-5656

Fax. (843) 556-5635

Email: [bscott@pslawpc.com](mailto:bscott@pslawpc.com)

*Attorney for Defendant,*

*Palmetto Contract Services, Inc.*

July 12, 2016

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
CASE NO.: 2015-CP-10-6684

ZURICH AMERICAN INSURANCE  
COMPANY OF ILLINOIS,

Plaintiff,

v.

PALMETTO CONTRACT SERVICES,  
INC.,

Defendant.

**CERTIFICATE OF SERVICE**

FILED  
2016 JUL 18 PM 12:39  
CLERK OF COURT  
CHARLESTON, SC

The undersigned paralegal at Pedersen & Scott, P.C., hereby certifies that a copy of the Notice of Motion and Motion to Amend Answer and Assert a Counterclaim Against Plaintiff in the above-captioned action has been placed in an envelope, prepaid, addressed and mailed via US Mail to:

Larry D. Cohen, Esq.  
Larry D. Cohen, LLC  
P.O. Box 30547  
Charleston, SC 29417  
[ldcohen@ldcohenlaw.com](mailto:ldcohen@ldcohenlaw.com)

Carolyn H. Blue, Esq.  
P.O. Box 30845  
Charleston, SC 29417

  
Tracy E. Braceland  
Paralegal

Dated this 12th day of July, 2016

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
CASE NO.: 2015-CP-10-6684

ZURICH AMERICAN INSURANCE  
COMPANY OF ILLINOIS,

Plaintiff,

v.


PALMETTO CONTRACT SERVICES,  
INC.,

Defendant.

**ORDER**  
**GRANTING DEFENDANT'S**  
**MOTION TO AMEND**

2017 SEP 22 PM 12:46

FILED

 This matter came before the court on September 19, 2017, on the motion of the Defendant, Palmetto Contract Services, Inc. (hereinafter "Palmetto"), to amend its answer to add a counterclaim for breach of contract and for fraud and negligent misrepresentation. The Plaintiff, Zurich American Insurance Company of Illinois (hereinafter "Zurich"), filed a complaint for breach of contract relating to the payment of premiums for workers' compensation insurance. Palmetto filed an answer denying all of the allegations in the complaint and alleged defenses, including Plaintiff's fraud and misrepresentation. (Answer, Par. 9). For the reasons set forth below, Palmetto's motion to amend is granted.

According to the complaint, this matter involves insurance premiums allegedly due for the time period of February 20, 2012, through February 20, 2013. Zurich made a demand for payment in the amount of \$158,744.00 on June 18, 2013. (Complaint, Par. 8). By letter dated June 17, 2013, Palmetto sent a letter to Zurich contesting the audit and requested that the audit be amended. (See, Exhibit 2 to Plaintiff's Response in Opposition to Defendant's Motion to Amend). Zurich filed the complaint on December 11, 2015. Palmetto filed an answer on February 12, 2016.

Palmetto contends that it is entitled to amend its answer to add a counterclaim pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. Zurich contends 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. Zurich contends that the statute of limitations has run because Palmetto knew or should have known about its counterclaim as of June 17, 2013, but did not file the motion to amend until July 12, 2016, more than three years after the June 17, 2013, letter.

Rule 15(a) provides that “a party may amend his pleading ... 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.” Rule 15(a), SCRPC. “The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. [citations omitted]” City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232–33, 599 S.E.2d 462, 465–66 (Ct. App. 2004). The party opposing the motion has the burden of establishing prejudice. Id. During the hearing, Palmetto consented to a jury trial, therefore there can be no prejudice.

Rule 15(c) provides that any amendment under this rule “relates back to the original pleadings.” Rule 15(c), SCRPC. If there is a question relating to the statute of limitations, “the issue then becomes whether the amended claim was time-barred at the time the action was commenced.” Arant v. Kressler, 327 S.C. 225, 228, 489 S.E.2d 206, 208 (1997). The statute of limitations runs “from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).” McAlhany v. Carter, 415 S.C. 54, 63, 781 S.E.2d 105, 110 (Ct. App. 2015), reh'g denied (Jan. 28, 2016). However, “[w]hen there is

conflicting testimony regarding the time of discovery, it becomes an issue for the jury to decide.”

Arant 327 S.C. at 229, 489 S.E.2d at 208.

In Collins v. Sigmon, 299 S.C. 464, 385 S.E.2d 835 (1989), the S.C. Supreme Court provided helpful guidance regarding motions to amend.

A motion to amend an Answer should be contested primarily by procedural arguments, not arguments concerning the substance and merits of the counterclaims and/or defenses proposed. For example, one might argue that it is too late in the case to allow an amendment, and that prejudice would result from such an amendment. Arguments going to the legal merits of a proposed defense or counterclaim are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56 motion for summary judgment. It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage.

Id. at 466, 385 S.E.2d at 836. See also, City of N. Myrtle Beach, 360 S.C. at 232–33, 599 S.E.2d at 465–66.

Palmetto is entitled to amend the complaint to add a counterclaim. First, Rule 15(a) provides that a motion to amend shall be freely given. Second, 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. Therefore, both requirements of 15(a) are met.

I also find that Zurich’s statute of limitations argument fails based on the plain language of Rule 15(c). Zurich bases its statute of limitations argument on the assertion that Palmetto knew or should have known about the causes of action against Zurich as of the June 17, 2013 letter. However, Rule 15(c) provides that an amendment relates back to the time the original filing, in this case, December 11, 2015. Therefore, for the purposes of this motion, the fact that Palmetto filed the motion to amend more than three (3) years after the letter dated June 17, 2013, is irrelevant. Pursuant to the language in Rule 15(c), the counterclaim would have been appropriate, and could have been asserted at the time the answer was filed.

Further, the question of whether the statute of limitations had run is best left to a motion for summary judgment when all of the facts can be sorted out. At this juncture, the court is not in a position to determine as a matter of law that the statute had run. Since the statute of limitations is a question of fact, that issue is not before the court, and should not be considered in this motion to amend.

Under the circumstances here, there is no basis for denying the motion. Zurich has failed to show how it might be prejudiced by the amendment. Zurich has been on notice since the Defendant filed the original answer that there were issues of fraud and misrepresentation. Further, even if the statute of limitations is a defense available to Zurich, it is free to assert that defense in the answer to the counterclaim and in any subsequent motions for summary judgment. As discussed above, if there is a dispute as to when the statute of limitations began, it is an issue for a later motion.

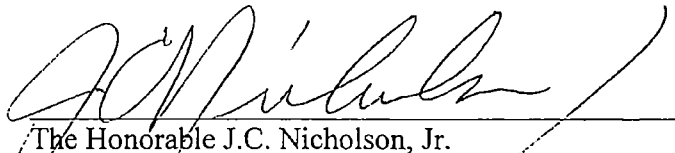
For all the foregoing reasons, Palmetto's motion to amend the answer to add counterclaims is granted. The amended answer and counterclaims shall be filed within ten (10) days of receipt of this court's order. Plaintiff shall have thirty (30) days to answer upon receipt of the amended answer and counterclaims.

AND IT IS SO ORDERED.

Dated: \_\_\_\_\_, 2017

9/20

2017

  
The Honorable J.C. Nicholson, Jr.

COPY

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
CASE NO.: 2015-CP-10-6684

ZURICH AMERICAN INSURANCE  
COMPANY OF ILLINOIS,

Plaintiff,

v.

PALMETTO CONTRACT SERVICES,  
INC.,

Defendant.

DEFENDANT'S AMENDED ANSWER  
AND COUNTERCLAIM  
(Jury Trial)

2017 SEP 29 AM 10:50  
CLERK OF COURT  
BY

The Defendant, Palmetto Contract Services, Inc. (hereinafter "Palmetto"), answering the Complaint of Plaintiff, Zurich American Insurance Company of Illinois (hereinafter "Zurich" or "Plaintiff"), would show as follows:

**FOR A FIRST DEFENSE**  
(General Denial)

1. Any allegations contained in the Plaintiff's Complaint not specifically admitted, denied or otherwise modified are expressly denied and strict proof demanded thereof. To the extent any allegation or part thereof may not be expressly referred to and specifically answered, it is hereby denied and legal proof thereof is requested.

**FOR A SECOND DEFENSE**  
(Specific Responses)

2. Upon information and belief, Palmetto admits Paragraph 1 of the Complaint
3. Palmetto admits the allegations contained in Paragraphs 2 through 5 of the Complaint.
4. Palmetto denies the allegations contained in Paragraph 6 of the Complaint.

5. Palmetto denies the allegations contained in Paragraph 7 of the Complaint as written. Palmetto is not required to pay amounts not due under the terms of the policy.
6. Palmetto denies the allegations contained in Paragraphs 8 through 12 of the Complaint.

**FOR A THIRD DEFENSE**  
(Failure to Mitigate Damages)

7. The Plaintiff has failed to mitigate damages as required by law.

**FOR A FOURTH DEFENSE**  
(Waiver, Estoppel, Laches)

8. The Plaintiff's claims are barred by the doctrine of waiver, estoppel and/or laches.

**FOR A FIFTH DEFENSE**  
(Fraud and Fraud in the Inducement)

9. The Plaintiff's claims are barred as a result of the Plaintiff's fraud and misrepresentations concerning the policy and audit.

**FOR A SIXTH DEFENSE**  
(Full Accord and Satisfaction)

10. The Plaintiff's claims are barred due to full accord and satisfaction by the Defendant.

**FOR A SEVENTH DEFENSE**  
(Setoff)

11. The Plaintiff's claims must be reduced by the amount paid for the value of the work performed.

**FOR A EIGHTH DEFENSE AND BY WAY OF A COUNTERCLAIM**  
(Negligent Representation and Fraud)

12. On or about January 12, 2012, Zurich and Palmetto entered into a contract whereby Plaintiff agreed to provide certain workers' compensation and employer's liability insurance coverage to Palmetto for which the Palmetto agreed to pay the premiums.

13. 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.
14. 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.
15. 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.
16. 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.
17. On or around April 4, 2013, after the policy period, Zurich performed an audit of Palmetto's books.
18. The audit was performed by Evelyn Wyatt on behalf of Zurich.
19. 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.
20. The audit summary was provided to Palmetto on or around April 4, 2013.
21. 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.
22. The summary of audit review from Zurich review states that, "Class code 3040 does not apply to [Palmetto's] operations."

23. 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.
24. 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.
25. 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.
26. The representation that Zurich would properly classify people under 3040 and bill Palmetto accordingly was false.
27. The representations in the agreement including that Zurich would classify work under 3040 and invoice Palmetto accordingly were material.
28. Zurich knew the representations in the agreement were false.
29. Zurich intended that the representations be acted upon.
30. Palmetto did not know that the representations were false, and relied on the representations as set forth in the agreement.
31. Zurich had a pecuniary interest in making the false representations as set forth herein.
32. 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.
33. 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.

34. As a direct and proximate result of the aforesaid negligent misrepresentations and fraud, which were intentional, willful, reckless, and grossly negligent, Palmetto has been overbilled, and has incurred actual, incidental, and unspecified damages all in the amount to be determined by the trier of fact.

**FOR A NINTH DEFENSE AND BY WAY OF A COUNTERCLAIM**  
(Breach of Contract)

35. Zurich breached the contract by failing to classify operations properly and improperly billing Palmetto.
36. As a direct and proximate result of the breach of contract, Zurich overbilled Palmetto, and Palmetto is entitled to a refund for actual damages in an amount to be determined by the trier of fact.

**RESERVATION AND NON-WAIVER**

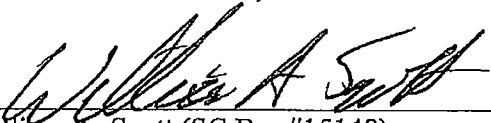
Palmetto reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, the Defendant, Palmetto Contract Services, Inc., requests that the Court issue an Order dismissing the Plaintiff's Complaint with prejudice, and for judgment against the Plaintiff in excess of \$100,000.00, for actual, incidental, and consequential damages, for punitive damages in an amount to be determined by the trier of fact, for the cost of this action and for such and further relief as this Court deems just and proper.

[SIGNATURE ON NEXT PAGE]

Respectfully submitted,

PEDERSEN & SCOTT, P.C.



---

William A. Scott (SC Bar #15148)

775 St. Andrews Blvd.

Charleston, SC 29407

Tel. (843) 556-5656

Fax. (843) 556-5635

Email: [bscott@pslawpc.com](mailto:bscott@pslawpc.com)

*Attorney for Defendant,*

*Palmetto Contract Services, Inc.*

September 27, 2017

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-10-6684

ZURICH AMERICAN INSURANCE  
COMPANY OF ILLINOIS,

Plaintiff,

v.

PALMETTO CONTRACT SERVICES,  
INC.,

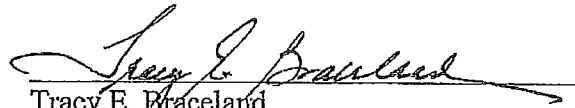
Defendant.

**CERTIFICATE OF SERVICE**

The undersigned paralegal at Pedersen & Scott, P.C., hereby certifies that a copy of the Defendant's Amended Answer and Counterclaim in the above-captioned action has been placed in an envelope, prepaid, addressed and mailed via US Mail to:

Larry D. Cohen, Esq.  
Larry D. Cohen, LLC  
P.O. Box 30547  
Charleston, SC 29417

Carolyn H. Blue, Esq.  
P.O. Box 30845  
Charleston, SC 29417

  
Tracy E. Braceland  
Paralegal

Dated this 27th of September, 2017

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|-----------------------------------|---|---------------------------|
| STATE OF SOUTH CAROLINA           | ) |                           |
|                                   | ) | Court of Common Pleas     |
| COUNTY OF CHARLESTON              | ) | Case No. 2015-CP-10-06684 |
| _____                             | ) |                           |
| ZURICH AMERICAN INSURANCE         | ) |                           |
| COMPANY OF ILLINOIS,              | ) |                           |
|                                   | ) |                           |
| Plaintiff,                        | ) |                           |
|                                   | ) |                           |
| vs.                               | ) | Transcript of Record      |
|                                   | ) |                           |
| PALMETTO CONTRACT SERVICES, INC.) | ) |                           |
|                                   | ) |                           |
| Defendant.                        | ) | DATE: March 3, 2018       |
| _____                             | ) |                           |

B E F O R E:     

THE HONORABLE KRISTI LEA HARRINGTON

A P P E A R A N C E:

LARRY COHEN and CAROLYN BLUE  
Attorney for the Plaintiff

WILLIAM A. SCOTT  
Attorney for the Defendant

Karen V. Andersen, RMR, CRR  
Circuit Court Reporter

1 THE COURT: Good afternoon. How are you?

2 MR. SCOTT: Pretty well.

3 THE COURT: Good. What are we doing here today?

4 MR. SCOTT: Your Honor, we are here, I think, on  
5 three motions. This is Zurich case against Palmetto  
6 Contracting. I represent Palmetto. I had filed a motion to  
7 withdraw. I was able to work things out with my client this  
8 morning, and that was withdrawn.

9 THE COURT: You are withdrawing your motion to  
10 withdraw?

11 MR. SCOTT: Yes, Your Honor. There was also a  
12 motion to quash a notice of a 30(b)(6) deposition. That is  
13 also withdrawn. I filed that because it was filed while --  
14 when I did not think I would be continuing to represent  
15 Palmetto. So my two motions are withdrawn.

16 THE COURT: All right.

17 MR. SCOTT: And the motion -- I received a notice  
18 of that 30(b)(6) deposition to take place in April. I think  
19 the only other motion is a motion by Zurich to strike a  
20 demand for a jury trial in my amended answer and  
21 counterclaim.

22 THE COURT: All right. Thank you.

23 MR. COHEN: Hi, Your Honor. I'm Larry Cohen. I  
24 represent plaintiff Zurich Insurance Company, along with my  
25 co-counsel, Carolyn Blue. Can we proceed with our motion?

1 THE COURT: Sure.

2 MR. COHEN: My client filed this motion because the  
3 time for the defendant to demand a jury trial passed in  
4 February 2016, 10 days after it filed its initial answer.  
5 After filing its initial answer, approximately five months  
6 later, the defendant filed a motion to amend its complaint  
7 and attached a copy of the proposed -- I'm sorry, amended  
8 answer, and asserted a counterclaim along with its answer.

9 In September, I think it was September 2017, the  
10 answer to amend or the motion to amend the answer and assert  
11 a counterclaim was granted. At that time, the first time,  
12 defendant put a notation on its amended answer and  
13 counterclaim, the words "jury trial", no actual demand for a  
14 jury trial as required by Rule 38.

15 And the other problem with the defendant's request  
16 for a jury trial is that it's based on the same issues that  
17 were raised previously in its initial answer to the  
18 plaintiff's complaint. In fact, if you look at Judge  
19 Nichols's (sic) order granting the motion to amend, he  
20 references one of the reasons he's granting the defendant's  
21 motion to amend is that there's no surprise because it's  
22 based on the same facts as in the original answer, which  
23 were affirmative defenses for misrepresentation and fraud.

24 So we don't believe that the defendant is entitled  
25 to a jury trial because it's waived. It's waived its right

1 to a jury trial by failing to file the request timely. And  
2 just because they filed amended answers and counterclaims,  
3 it doesn't resuscitate their right to request a jury trial.

4 THE COURT: All right. Mr. Scott.

5 MR. SCOTT: Your Honor, I sort of find this whole  
6 motion strikingly odd, because when we argued, or Ms. Blue  
7 argued against the motion to amend in front of Judge  
8 Nicholson, she actually argued that it would be prejudicial  
9 to grant that motion to amend because they couldn't ask for  
10 a jury trial. And in the order, I consented and said, we  
11 will consent to a jury trial.)

12 THE COURT: I thought that's what it says on page 3  
13 of the order, that jury trial was consented to.

14 MR. COHEN: Yes, Your Honor. Part of our argument  
15 was that it would be prejudicial to our client to not be  
16 able to even consider being able to request a jury trial,  
17 but we never actually requested or demanded a jury trial in  
18 writing or verbally.

19 THE COURT: If we were here -- you were here in  
20 front of Judge Nicholson and, evidently, somebody stated  
21 that there was a consent to a jury trial or wouldn't have  
22 been an order --

23 MR. COHEN: Well, what happened was, we argued that  
24 the motion to amend was prejudicial to our case. (And one of  
25 the reasons was because our time had passed of requesting a)

1 jury trial. But we made clear that we were not requesting a  
2 jury trial.

3 Well, at that hearing, Mr. Scott stood up and said,  
4 well, we will consent to the jury trial. But we never  
5 actually requested a jury trial. So when you read that, you  
6 have to read it in the light that we didn't request it, but  
7 that Mr. Scott consented to something that we never  
8 requested. It was just an issue raised to show possible  
9 prejudice to our client.

10 MR. SCOTT: Your Honor, while I find that odd, I  
11 don't think that's the determinative issue in this case.

12 THE COURT: All right.

13 MR. SCOTT: A party is entitled to a jury trial as  
14 a matter of right. And your decision here is really  
15 discretionary. We agree that the case in here that rules is  
16 *King v. Shorter*. If I may, it's cited in their memorandum.  
17 And it's what I have, would rely on also.

18 Your Honor, what's interesting is, if -- it's your  
19 discretion. If you grant this motion, this matter is  
20 immediately appealable. If you deny their motion, it's not  
21 appealable. And that's only significant to trying to get  
22 this thing resolved. I would have to appeal it just because  
23 of the issues. However, if you look at Rule 38(b) in *King*  
24 *v. Shorter*, the operative language that *King* states is, does  
25 the amended counterclaim create new issues of fact? And

1 that's really what the case is all about.

2           The original complaint or answer did not assert a  
3 counterclaim. It asserted an offense of fraud and  
4 misrepresentation. The amended complaint asserts a  
5 complaint for breach of contract and affirmative claim for  
6 fraud and negligent misrepresentation. (And there are)  
7 damages, including actual and consequential damages and  
8 punitive damages, all of which are issues of fact or new  
9 issues of fact that were not in the original pleading.

10           And, therefore, I believe the rule is, we can ask  
11 for that when we amend the complaint. That is what the *King*  
12 *v. Shorter* case says. And that's what we are relying on.

13           THE COURT: So wasn't that what you argued in front  
14 of Judge Nicholson and, in essence, it was the consent?

15           MR. SCOTT: I consented and said, yes, they want a  
16 jury trial, we will have a jury trial.

17           MR. COHEN: Judge, he didn't argue -- he didn't  
18 even request a jury trial until he filed his formal amended  
19 answer and counterclaim. There was no issue about him  
20 requesting or his client requesting a jury trial in any of  
21 his motions prior to the time period until after Judge  
22 Nichols (sic) granted that. So that wasn't even an issue.

23           In fact, we weren't even given the opportunity by  
24 the defendant to review the proposed order submitted to the  
25 judge before it was submitted. It was submitted at 6:45 in

1 the morning by e-mail to the court. So we didn't even --

2 THE COURT: But you did have an opportunity to file  
3 a motion to reconsider a final order, right?

4 MR. COHEN: We could have, yes, but we didn't.

5 Well, at that time, there was no issue about a jury demand.  
6 So that wasn't an issue. And the fact that the defendant is  
7 now seeking a -- instead of having affirmative defenses of  
8 negligence -- I'm sorry, negligent misrepresentation,  
9 misrepresentation, fraud, versus having a counterclaim on  
10 the same issues, it's still the same facts. The facts  
11 haven't changed. There are no new facts in this case. And  
12 new facts are the basis for Mr. Scott's client being able to  
13 assert a demand for a jury trial.

14 MR. SCOTT: Your Honor, just briefly, the new facts  
15 include breach of contract claim that was not asserted in  
16 the original answer, the damages. Even if you assume for  
17 the purpose of this argument that the facts are the same for  
18 the negligence and fraud in the defense, versus affirmative  
19 claims, the damages are clearly different and are issues for  
20 a jury. And the issue of whether punitive damages are  
21 appropriate, those are clearly issues for the jury.

22 MR. COHEN: But the damages are still based on  
23 facts arising from alleged misrepresentation and fraud.

24 THE COURT: Who do you want to decide your issues?

25 MR. COHEN: We want the Court to.

1 THE COURT: Ms. Blue, anything you wish tell you  
2 the Court?

3 MS. BLUE: Your Honor, I think that there's been  
4 some misunderstanding. I argued before Judge Nicholson the  
5 fact that we wanted to be able to look at the option of a  
6 jury trial. And I didn't want our client to be prejudiced.  
7 I did not request a jury trial. And Judge Nicholson  
8 understood that. I have not been able to get a transcript;  
9 otherwise, we would have submitted that.

10 But what happened was, opposing counsel submitted  
11 the order to the court without our being able to see it in  
12 advance. And it was submitted at 6:42 a.m. on October the  
13 5th. As soon as I saw it at 9:33 that morning, I e-mailed  
14 opposing counsel to say that was not the language that had  
15 been agreed to in the courtroom and what Judge Nicholson  
16 said.

17 I copied -- because I was so concerned about it --

18 THE COURT: It was filed in September, not October.  
19 I'm sorry.

20 MS. BLUE: Right. But October the 5th is when  
21 opposing counsel submitted the order. I'm sorry. He  
22 submitted the order without giving it to us to review what  
23 it meant. And I immediately e-mailed him and copied Carolyn  
24 Leonard, as well as Judge Nicholson, to make sure --  
25 normally, I would not copy the court. But I was so

1 concerned that the order -- we had not seen it in advance,  
2 and it said consented to a jury trial. And that was not  
3 what was agreed to.

4 And my co-counsel here attempted to call Judge  
5 Nicholson's law clerk. And Judge Nicholson's law clerk said  
6 Judge Nicholson already signed the order. And we were just  
7 like, oh, my gracious, because we had not seen an advanced  
8 copy or had not been given it until it was submitted at 6:45  
9 in the morning.

10 And so that's where I think there has been some  
11 confusion. But I argued that we wanted to have the option.  
12 We didn't want to be prejudiced, but I did not make a  
13 written demand for a jury trial.

14 THE COURT: Anything else, Mr. Scott?

15 MR. SCOTT: Your Honor, I just will say that Judge  
16 Nicholson asked that we submit an order, proposed order. I  
17 did. At the same time I submitted to him, I submitted it to  
18 opposing counsel. They didn't like it. They told the judge  
19 that. The judge opted, for whatever reason, to sign the  
20 order I presented. And that's where we are, Your Honor.

21 THE COURT: All right. I will take the matter  
22 under advisement. Good luck to you both. Thank you.

23 MR. SCOTT: Your Honor, I will be out of the  
24 country for the next -- pretty much until the end of this  
25 month. So I'm just -- if there's something that comes up,

1 you won't be able to get in touch with me.

2 THE COURT: All right. Thank you.

3 MR. SCOTT: Thank you very much.

4 (Whereupon, proceedings are adjourned.)

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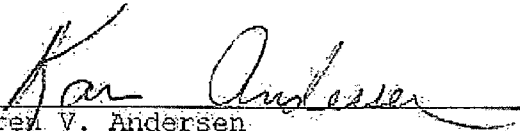
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CERTIFICATE OF REPORTER

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I, Karen V. Andersen, Registered Merit Reporter,  
Certified Realtime Reporter for the State of South Carolina  
at Large, do hereby certify that the foregoing transcript is  
a true, accurate and complete Transcript of Record of the  
proceedings.

I further certify that I am neither related to nor  
counsel for any party to the cause pending or interested in  
the events thereof.

  
Karen V. Andersen  
Registered Merit Reporter  
Certified Realtime Reporter

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August 24, 2018

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

**RECEIVED**

AUG 27 2018

SC Court of Appeals

Re: **Zurich American Insurance Company of Illinois, Respondent**  
**v. Palmetto Contract Services, Inc., Appellant**  
**Appellate Case No.: 2018-000692/Case No. 15-CP-10-6684**

Dear Ms. Kitchings:

Enclosed with respect to the above-referenced matter, please find an original and seven (7) copies of the *Appellant's Response to Respondent's Motion to Dismiss*, with attached Certificate of Service.

Kindly file the documents and return a stamped copy in the return addressed stamped envelope.

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

With regards,



William A. Scott

WAS/teb  
Enclosures  
Counsel of Record (w/enc.):  
Larry Cohen, Esq.  
Carolyn H. Blue, Esq.