STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Commissioner
R. Michael Campbell, II, Commissioner
Gene McCaskill, Commissioner

SCWCC File No. 1521141

Appellate Case No. 2018-000939

Calvin Felder, Claimant

v.

Central Masonry Inc. & Arnold Construction Co., Employer, and AmGuard Insurance Co./Old Republic Insurance Co., and South Carolina Uninsured Employers Fund, Carriers, Defendants,

Of which AmGuard Insurance Co. is the Appellant and Central Masonry Inc. and South Carolina Uninsured Employers Fund are the Respondents.

FINAL BRIEF OF THE APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. To prevent an insurance carrier from denying insurance coverage based on equitable estoppel, the carrier or its agent must have made a representation, or acted in some way, that misled the insured. The Full Commission ruled that Lloyd Pro Group ("Lloyd") was the agent of Amguard Insurance Company ("Guard"), and that Lloyd's representations, therefore, bound Guard to cover Central Masonry ("Central"), a Georgia based company, in South Carolina. However, the evidence establishes that Lloyd is not Guard's agent. As such, did the Full Commission err when it ruled that Lloyd's statements bound Guard to provide coverage for Central's employee?
2. To prevent a carrier from denying insurance coverage based on equitable estoppel, the carrier or its agent must have made a representation or acted in some way that misled. Here, the Full Commission ruled that an out-of-context statement from a brief telephone conversation constituted a misleading representation regarding coverage. When the full phone conversation and subsequent actions of Lloyd establish that no representation was made, let alone relied upon by Central, did the Commission err?
3. A principle cannot obtain equitable relief when its agent has unclean hands. Lloyd is Central's agent. Lloyd made false representations to Central, which led Central to rely on a Certificate of Insurance that did not do what Lloyd said it did. Given that Central's agent has unclean hands, did the Commission err by granting equitable relief?

STATEMENT OF THE CASE

Calvin Felder ("Claimant") sustained compensable injuries arising out of and in the course of his employment for Central Masonry ("Central"), a Georgia-based company, on December 30, 2015. Specifically, Claimant was performing construction work on a new Kroger shopping center in northeast Richland County, SC ("Kroger Job") when he slipped and fell off a scaffold onto his outstretched right arm and fractured his wrist. Claimant incurred substantial medical treatment for his injury, including fusion of his wrist by Dr. Ugino, as well as compensable lost wages from 12/30/2015 until 5/6/2016. Central had worker's compensation insurance with endorsements confirming coverage in Georgia and North Carolina under the Georgia assigned risk plan.

On August 18, 2015, Central's broker, Lloyd Pro Group ("Lloyd"), issued an ACCORD form Certificate of Insurance to Collins on behalf of Central purporting valid insurance coverage in South Carolina. The certificate plainly and prominently states in bold on its face the following:

> **This certificate does not affirmatively or negatively amend, extend, or alter the coverage afforded by the policies below. This certificate of insurance does not constitute a contact between the issuing insurer, authorized agent or producer, and the certificate holder.** (R. p. 206)

Claimant initially filed a Form 50 against the South Carolina Uninsured Employers Fund ("UEF") based on no record of applicable coverage for Central in South Carolina per the Worker's Compensation Commission's records. Following an appearance by Central alleging that it either in fact secured South Carolina coverage, or, was led to believe by Lloyd, that it had secured such coverage, Guard and Collins's carrier, Old Republic, were added as parties to the claim.

Central essentially asserts a "coverage by estoppel" theory against Guard. Central's arguments are based on the following alleged actions and representations: a) Central asked its broker, Lloyd, to secure S.C. coverage in South Carolina; b) Guard represented to Central via

Lloyd that it would add an endorsement covering South Carolina under the policy during a September, 2, 2015 telephone conversation between their respective representatives (R. p. 390); c) Guard otherwise represented to Central that South Carolina was covered when Lloyd issued a Certificate of Insurance for the Kroger job; and d) Central relied upon such actions/representations by Guard and/or Lloyd to its detriment in believing it was covered in South Carolina.

Guard first disputed the alleged substance of the 9/2/15 call, noting that its representative in fact advised Lloyd's employee that Guard would NOT be adding South Carolina to the coverage [See Transcript of 9/2/15 call]. Subsequent email correspondence from Lloyd confirms their belief that coverage was never extended to South Carolina as a result of the 9/2/15 call. (R. pp. 261-265). Guard next argued that Central did not rely to its detriment on any action or representation made or precipitated by Guard. Finally, Guard submits it cannot be bound by Lloyd's actions or representations in issuing the Certificate of Insurance because Lloyd is not its agent.

Old Republic acknowledges that its insured, Collins, was Claimant's statutory employer for the Kroger job. However, Collins contends they should be absolved from liability under the Act based on it its good faith reliance on the Certificate of Insurance produced by Lloyd purporting Central had valid coverage in South Carolina. As such, Collins/Old Republic submit that liability for the claim should be assumed by the UEF pursuant to S.C. Code § 42-1-415. In the alternative, Collins/Old Republic join Central's position that Guard's policy should apply. The UEF disputes that all statutory requirements for transfer of liability from Collins/Old Republic to the UEF have been satisfied. In addition, the UEF also contends that Guard should provide coverage for the claim.

By Order dated June 20, 2017, Commissioner Melody James made the following findings, *inter alia,* regarding the responsible entity for the claim: 1) Central was subject to the Act; 2)

Guard's Georgia assigned risk policy on its face does not provide coverage for claims arising under South Carolina law; 3) Guard is not estopped from denying coverage based on the 9/2/15 call because the evidence establishes that a) its representative never represented that South Carolina would be added to the policy, and in fact indicated to the contrary, and b) Lloyd was not Guard's agent and cannot be bound by Lloyd's actions/representations; 4) Collins as the statutory employer met all essential requirements for imposing liability on the UEF; and 5) Central Masonry and the UEF are responsible for the award to Claimant. (R. pp. 39-50)

Thereafter, Central timely appealed the Commissioner's decision to the Full Commission Appellate Panel ("Full Commission"). Central did not appeal the Commissioner's findings that the policy itself did not provide coverage in South Carolina; therefore, they remain the law of this case. Central only argued that Guard is nevertheless estopped from denying coverage. The UEF did not appeal the adverse ruling against them as to the transfer of liability issue from Collins, but it joined in Central's estoppel arguments against Guard to defeat their liability for the claim. Since no other party contends Collins should be liable for the Commissioner's award, Collins was dismissed from the case via consent of the parties.

By Order dated April 17, 2018, the Full Commission reversed the Single Commissioner, finding, *inter alia,* that Guard was estopped from denying coverage for the claim based on representations made by its employee during the 9/2/15 call. In addition, the Full Commission necessarily implied that Lloyd was acting as Guard's agent when it issued the Certificate of Insurance for the Kroger job. The Full Commission stressed that Central's "hands were clean" in the transaction at issue. The Full Commission, therefore, ordered that Guard was responsible for paying Claimants benefits and award. Guard now appeals to this Court.

STANDARD OF REVIEW

As an initial matter of the Commission's jurisdiction to adjudicate the issues presented, "when there is a pending employee claim for compensation, the exclusive jurisdiction for determination of questions concerning cancellation, coverage, construction of insurance contracts, and the like, is with the Worker's Compensation Commission." Labouseur v. Harleyville Mut. Ins. Co., 302 S.C. 540, 397 S.E.2d 526 (1990). The usual standard of judicial review of a decision and order of the Workers Compensation Commission is the "substantial evidence rule." Under this standard, the court may not substitute its judgement for that of the Commission on questions of fact but may reverse if the decision is affected by an error of law. Gibson v. Spartanburg school District No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. app. 2000). The determination of coverage under an insurance policy is a question of law. Nationwide Mut. Ins. Co. v. Prioleau, 359 S.C. 238, 597 S.E.2d 165 (Ct. App. 2004). Moreover, the appellate court's standard of review in equitable matters is *de novo*, meaning its own view of the preponderance of the evidence. Belle Hall Plantation Homeowner's Association v. Murray, 419 S.C. 605, 799 S.E.2d 310 (Ct. App. 2017) (it is the appellant's burden to satisfy the appellate court that the *preponderance of the evidence* is against the findings of the master) (*emphasis added*). Pursuant to these authorities, this Court owes no deference to the Commission's factual findings regarding insurance coverage, especially when equitable issues like estoppel are involved.

ARGUMENTS

Guard submits the Full Commission's decision constitutes an erroneous application of South Carolina law regarding insurance coverage, equitable estoppel, and agency. Lloyd is clearly the star of this saga, yet, the Full Commission never addresses the fundamental question of whose

behalf Lloyd was acting on at the times in question. In short, was Lloyd an agent of Central or an agent of Guard? This was clear error by the Full Commission.

First, however, it is important to note that these issues also hinge largely on Central's interpretation of the 9/2/2015 call between Lloyd's employee ("Patrick") and Guard's underwriting representative ("Carley"). Central's reliance on this single conversation is misplaced, both in terms of the substance of what was represented, as well as its significance in the broader context of whether Guard's policy for Central can be bound as a matter of law and equity to cover a claim arising under South Carolina law. Appellant submits that

Regarding the merits of Central's arguments, Guard submits the following: 1) the 9/2/2015 call between Lloyd and Guard does not evidence an intent by Guard to endorse coverage in South Carolina or to mislead Lloyd to that effect; 2) Central cannot otherwise satisfy the other essential elements of coverage by estoppel against Guard; and 3) Guard cannot be bound by Lloyd's representations to Central and/or on its behalf because Lloyd was not Guard's agent.

I. Guard's underwriter did not represent to Lloyd that South Carolina coverage would be added to Central's policy.

When considering the substance of the 9/2/15 call, Appellant reiterates that the Court is not bound by the Full Commission's findings that Guard represented it would cover South Carolina, or otherwise misled Lloyd on behalf of Central that it would do so. Since the substance of the 9/2/15 call is inextricably linked to the issue of Central's coverage under Guard's insurance policy, and that coverage determination is a matter of law, the Court is free to draw its own conclusions and make its own findings consistent or inconsistent with those of the Full Commission. *See* Addison v. Dixie Chevrolet, 246 S.C. 86, 142 S.E.2d 442 (S.C. 1965) (the Court is not bound by the Commission's findings of fact upon which its jurisdiction is dependent; the court has both the

power and the duty to consider all the evidence in the record and reach its own conclusions as to the jurisdictional issue). Likewise, the Full Commission's decision is based on the equitable principle of estoppel; therefore, the Court's standard of review is *de novo*.

With that standard in mind, the lynchpin of Central's case is the 9/2/15 call between Lloyd's representative Patrick and Guard's underwriter Carley. Central cites a single sentence uttered by Carley at the very beginning of the conversation for the proposition that Guard promised to add South Carolina to its coverage- "Now, I am going to add South Carolina to the policy...." (R. p. 185, lines 9-10). However, Central takes this utterance out of context by ignoring the remainder of the conversation. After further examination of the relevant underwiring factors, Carley actually advised Patrick that adding South Carolina to the policy is unnecessary because Central is not claiming any employee payroll in South Carolina and is engaging only subcontractors with their own insurance on South Carolina jobs. Patrick acknowledges this point when he sates, "They're [referring to Central] are just going to be hiring subs with certificates." (R. p. 187, lines 5-7). The following exchange later during the call is instructive:

> Patrick: They're saying only jobs three---I made sure she broke that out—was for that, but all the other jobs, including South Carolina [sic] She said they're not even traveling themselves, but they just have to have this added. Ant that's why [sic] *they didn't even assume they had to add South Carolina to the policy*, and the reason why.....
> Carley: Okay. Yeah. *Probably in this case, I wouldn't if it's not our actual payroll.* I mean, for the purposes of this waiver, is the excluded officer overseeing the work? Is that where our policies tie in?
> Patrick: Yes. Yeah.
> Carley: Okay.
> Patrick: I mean, they'll be having somebody that going to be running the job but they're going to be having subs doing the work.
> Carley: Okay. *So--- Yeah. For our purposes on this policy, I'll add the waiver on behalf of the excluded officer only and then just note that he is overseeing the sub work which is all covered; they all have their own insurance.*

Patrick: Okay. [Transcript of 9/2/2015 call p. 5 ll1-25- p. 6 ll. 1-2] (emphasis added).

Admittedly, this brief conversation, without further background and context, is somewhat cryptic, especially given the use of insurance terminology and the vernacular of everyday dealings between brokers and underwriters. Central never called Patrick, or any other representative of Lloyd, to clarify their understanding of this conversation.[1] The vagueness of this conversation simply underscores the point that there is no clear representation by Guard to cover South Carolina, much less any discernible intent to mislead Central, by and through its agent Lloyd. (R. p. 43, lines 16-29). As such, Central cannot establish a fundamental element of estoppel- a misleading or even erroneous representation. *See* Pitts v. New York Life Ins. Co. *supra.* The Full Commission's finding of fact # 5 is, therefore, erroneous.

Guard submits the opposite proposition- that Guard in fact determined S.C. coverage was not necessary and advised Lloyd accordingly- is a more reasonable interpretation of the 9/2/2015 call in light of other evidence in the Record. Specifically, e-mail correspondence between Patrick's superior at Lloyd, Jordan Dunn ("Dunn"), and defense counsel during discovery proves this point. R. pp. 262-263). In that email, Dunn reviewed the transactions on the policy at issue and prepared a timeline of events. First, Dunn recounts that on 8/19/2015, one day after Lloyd issued the Certificate Insurance purporting coverage in South Carolina, Lloyd advised Central that South Carolina could only be added to the policy if it could produce payroll for all jobs in South Carolina. Central then advised Loyd that work in South Carolina was being performed by insured subcontractors, not employees. (R. p. 262-263). Dunn's acknowledgement here proves Lloyd fraudulently issued a certificate of insurance purporting that Central had coverage in South

[1] Ironically, Guard subpoenaed Dunn to testify at the Hearing before the Single Commissioner via a properly domesticated subpoena in Georgia but she failed to appear.

Carolina when it knew otherwise. It also supports the notion that Lloyd itself did not believe such coverage was necessary.

Second, regarding the 9/2/2015 call specifically, Dunn noted, "phone call between Guard and "the agent" [sic] SC was not added to this policy and will not be added." (emphasis added). **As such, Lloyd essentially admits that Guard never represented that South Carolina would be added to Central's coverage**. Third, after being notified by Guard of Claimant's accident, Dunn noted that Central hired Claimant as an employee under the "belief" that South Carolina had been added to the coverage (R. p. 263). However, Dunn never attributes that belief to any representation from Guard. In fact, nothing changed between the 9/2/2015 call, where Dunn confirmed her understanding that Guard would not be adding South Carolina as a covered state, and her conversation with Guard claiming she thought South Carolina was added. (R. p. 263).

Lloyd further confirmed its belief that Guard did not add South Carolina to the policy when Dunn emailed Central's representative on n January 15, 2016. (R. p. 370). In that email Dunn stated the following, "I *just* spoke with Guard regarding adding South Carolina to your policy. We were advised you were beginning a job in South Carolina and needed coverage. In order to add coverage, we need payroll and address for the job. We were advised on 8/19/2015 all of your jobs in South Carolina were performed by sub-contractors and there would be no payroll- **thus SC was not added to the policy.**" Dunn goes on to state "[p]lease provide payroll for SC so we can add the state." This email was prompted by an email from Tami Hoover with Guard dated the same date. Hoover's email advises Dunn that "SC was not added to this policy and will not be added. The agent confirmed on 9/2/2015, via phone conversation, that waivers should only be added for the excluded officer." (R. p. 372). In sum, this January 15, 2016 email correspondence confirms Guard's and Lloyd's belief that the 9/2/15 call did not add coverage in South Carolina.

Further proof that Guard did not promise coverage for South Carolina in the 9/2/15 call can be found in Central's independent confirmation that it did not anticipate needing to use its direct employees on South Carolina jobs at the time policy was issued in August 2015. (R. pp. 158-159). Specifically, in response to a question from his counsel regarding the commencement of the Kroger job in August of 2015, Max Gallardo testified that the need to use his own employees on the job came up later. (R. p. 159, lines 22-25). This begs the question why Lloyd would need to request the additional coverage for South Carolina in the 9/2/15 call if Central was not planning to engage its own employees in South Carolina at that time? That is exactly the question Carlie posed to Patrick that he could not answer. Consequently, she advised Patrick that "in this case I wouldn't if it not our actual payroll" and "*for purposes of this policy I'll add the waiver on behalf of the excluded officer only.*" (R. p. 188, lines 20-22).

Finally, Appellant acknowledges the possibility that Lloyd's *intention* for the 9/2/15 call was to request the additional coverage in South Carolina on behalf of Central. However, the mere manifestation of a unilateral intention should not be confused with mutual assent to that intention. *See* Timmons v. McCutcheon, 284 S.C. 4, 324 S.E.2d 319 (Ct. App. 1984) (an enforceable contract only arises when there is an actual agreement by the parties in which they demonstrate a mutual intent to be bound- the proverbial "meeting of the minds" of the parties). Although the Full Commission never found that the 9/2/15 call created an enforceable contract between Guard and Central, contract analysis is nevertheless instructive on whether Guard represented it would provide coverage in South Carolina as a representation for estoppel purposes. Guard never issued a new policy or endorsement to Lloyd or Central, which supports the proposition that adding South Carolina to the coverage was certainly not *Guard's* intent for the 9/2/15 call. Moreover, Guard never assessed, and Central never paid, any additional premium to bind coverage in South

Carolina. Both points belie the Full Commission's interpretation that Guard represented it would cover South Carolina.

For these reasons, the Full Commission erred in finding that Guard represented it would cover South Carolina in the 9/2/15 call. As such, Guard is not estopped to deny coverage of the underlying claim in South Carolina.

II. Central did not rely to its detriment on any representations made by Guard; therefore, Guard is not estopped to deny coverage of the claim.

South Carolina courts have recognized "coverage by estoppel" to extend the scope of risk under an existing insurance policy when the insurer has misled the insured into believing the risk is within the coverage. Crescent Co. of Spartanburg, Inc. v. Ins. Co. of North America, 266 S.C. 598, 225 S.E.2d 656 (1976). The test to be applied to disputes involving the scope of insurance coverage entail the normal elements of equitable estoppel: 1) ignorance of the party invoking it as to the truth of the facts in question; 2) representations or conduct *by the party to be estopped* which mislead; 3) reliance on the representations or conduct; and 4) prejudicial change in position as the result of such reliance. Pitts v. New York Life Ins. Co., 247 S.C. 552, 148 S.E. 369 (1966).

In the instant case, the Full Commission found that Central relied to its detriment upon both Lloyd's issuance of the certificate of insurance for the Kroger job, as well as Guard's alleged representations to Lloyd in the 9/2/15 call. R. pp. 2-27). The former argument obviously hinges upon the proposition that Lloyd was acting as an agent of Guard when it issued the certificate, whereas the latter assumes the converse- that Lloyd was Central's agent when Guard allegedly represented to Lloyd that it would extend coverage. However, both cannot be true under these circumstances, and as noted earlier, the Full Commission never reconciled this fundamental conflict with Central's alternative positions. Regardless, Central did not rely upon actions or

representations made or precipitated by Guard in either case; therefore, estoppel elements # 2 and #3 are not satisfied. *See* Pitts *supra.*

Both witnesses for Central (Max Gallardo and Sandra Sturkie) testified they relied exclusively upon the issuance of the certificate on the Kroger job for their belief that Central was covered in South Carolina. (R. p. 157 – p. 161 – p.93 – pp. 105-106). Sandra Sturkie confirmed she never even spoke with anyone with Guard. (R. p. 106, lines 17-21). The only other evidence in the Record regarding South Carolina coverage is the email correspondence between Lloyd and Central on August 19, 2015, which is the day after the certificate of insurance was already issued and three weeks before the 9/2/15 call. (R. p. 385). Central does not allege Lloyd took any action to secure South Carolina coverage with Guard other than the 9/2/15 call, and there is no evidence that Central even knew about that call. Consequently, the 9/2/15 call must necessarily be eliminated as a source of Central's alleged reliance, and element # 3 of estoppel (detrimental reliance) has not been satisfied.

The only actions or representations Central could have possibly relied upon for the belief it was covered in South Carolina was the certificate issued by Lloyd on August 18 and/or the August 19 email from Patrick. In that email, Patrick represented to Central he "just requested" that South Carolina be added and "we should all be good at this point." (R. p. 385). For either or both of those actions and representations to estop Guard from denying coverage in South Carolina, Lloyd would have to have been acting as Guard's agent. Guard submits that Lloyd was not its agent at the time of these representations, and in fact was Central's agent; therefore, the house of cards upon which estoppel element # 2 (representations or conduct by the party to be estopped) is purportedly based must fall.

South Carolina law makes a clear distinction between "agents" of the insurer and "brokers" for the insured. S.C. Code §38-43-10 provides that an "agent" of an insurance company is:

> Any person who (a) solicits insurance on behalf of any insurance company, (b) takes or transmits other than for himself any application for insurance or any policy of insurance to or from such company, (c) advertises or otherwise gives notice that he will receive or transmit any such application or policy, (d) shall receive or deliver a policy of insurance of any such company, (e) shall examine or inspect any risk, (f) shall receive, collect or transmit any premium of insurance, (g) shall make or forward any diagram of any building or buildings, (h) shall do or perform any other act or thing in the making or the consummating of any contract of insurance for or with any such company, other than for himself, or (i) shall examine into and adjust or aid in adjusting any loss for or in behalf of any such insurance company, whether any such acts shall be done by employee of such insurance company or at the instance or request of such insurance company, shall be held to be acting as the agent of such insurance company for which such act is done or risk is taken.

If one becomes an "agent" for the insurer by reason of operation of this statute, the extent of the authority of the statutory agent must still be determined. Allstate Ins. Co. v. Smoak, 256 S.C. 382, 182 S.E.2d 749 (1971). Every statutory agent cannot be said to be a general or unlimited agent. *Id.* The extent of the statutory agent's authority is a question of fact for the fact finder. *Id.*

Pursuant to § 8726 of Appleman Insurance Law and Practice, "a broker is ordinarily one who acts as a middleman between the insured and insurer and who solicits insurance from the public under no employment from any special company, but having secured an order, either places the insurance with a company selected by the insured or with a company selected by the broker himself." A broker is ordinarily employed by the individual seeking to purchase insurance and should be distinguished from the ordinary insurance agent who is employed by an insurance company to solicit and write insurance in the company. Allstate *supra*. The mere fact that a broker receives a commission from the insurer for placing the policy does not change his character as an agent of the insured. *Id.* Where one has no agency license with the insurer and is merely requested by the insured to place the business, then he is a broker. Id. (citing Tri-City Transportation Co. v. Bituminous Casualty Corp., 311 Ill. App. 610, 37 N.E.2d 441 (1941)). A broker, who is the agent

of the insured, cannot be converted by reason of the statute into an agent of the insurer without evidence that he was acting at the "instance or request" of the insurer. Allstate 256 S.C. at 386, 182 S.E.2d at 754. The Supreme Court has further held that agency by operation of §38-43-10 applies only to persons performing the acts set forth in the statute on behalf of the insurance company. Cook v. Canal Insurance Co., 245 S.C. 238, 140 S.E.2d 166 (1965).

In the instant case, the evidence establishes that Lloyd was a broker selected by Central to procure and place its insurance with a to be designated carrier. (R. pp. 150-151). Again, Central confirmed that it relied exclusively upon Lloyd for its insurance needs, including the issuance of certificates of insurance necessary to secure jobs. (R. p. 98, lines 18-25 – R. p. 99, lines 1-13). Central was not eligible for coverage in the voluntary insurance market so Lloyd had to apply for coverage on its behalf under the Georgia assigned risk plan. The coverage was placed with Guard as a participating carrier in the assigned risk plan. There is absolutely no evidence in this Record that Lloyd was acting at the "instance or request" of Guard when it issued the certificate purporting coverage in South Carolina for the Kroger job. Moreover, Guard cannot be deemed an agent by operation of §38-43-10, because the issuance of a certificate of insurance, even if it were done at the instance or request of Guard, is not one of the acts set forth in the statute. *See* Cook *supra.* Finally, there is no evidence that Lloyd was acting at the instance or request of Guard when its representative Patrick emailed Central's business manager, Sandra Sturkie, on August 19, 2015 to confirm "we should all be good at this point" regarding the request to add South Carolina coverage. (R. p. 385-388).

The Full Commission found that the insurance contract between Guard and Central "states clearly and unambiguously invites it to rely on the agent to obtain proof of insurance" and enabled Central to "obtain and rely upon such Certificate of Insurance provided by the agent." (R. p. 24,

lines 9-11 – p. 25, lines 1-5). Arguably, these finding imply that Lloyd was acting as Guard's agent when it issued the certificate for the Kroger job. Looking to the policy language in question, it merely states:

> **To request Certificates of Insurance:**
> If you are *represented by an agency*, they can provide you with the certificates you need....Either way, be prepared to provide the company name, address, fax number, and contact person of the entity requesting the certificate. *(emphasis added)* (R. p. 267).

This provision is merely advisory on how an insured may call *its own agent* to request a certificate of insurance. This language clearly does not create an agency relationship between the entity that placed the coverage at issue and Guard for the issuance of certificates. As such, this language is not evidence that Lloyd was authorized by Guard to issue a certificate of insurance or that Lloyd was acting at Guard's instance or request.

For all these reasons, Central's estoppel arguments premised on the assumption that Lloyd was acting as Guard's agent when it issued the certificate of insurance for the Kroger job are invalid. Therefore, the Full Commission Order must be reversed.

III. Central cannot invoke equitable estoppel to impose coverage on Guard for this claim when its agent, Lloyd, has unclean hands.

The equitable doctrine of unclean hands is based on the maxim that "He who comes into equity must come with clean hands." Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004). This doctrine will bar a party's plea for equitable relief and "close the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." Precision Instrument Mfg. Co. v. Auto Maintenance Machine Co., 324 U.S. 806 (1945). Moreover, an agent's inequitable acts may be imputed to the principal for purposes of the unclean hands doctrine. Queiroz v. Harvey, 220 Ariz. 223, 205 P. 3d 1120 (Supreme Court Arizona 2005). In Querioz, the Arizona Supreme Court noted that "under ordinary principles of agency law, an

agent's acts bind the agent's principal," when a principal works through an agent to secure a contract with a third party. *Id.* In sum, principals may not benefit from the inequitable conduct of their agents. *Id.*

In the instant case, Lloyd clearly has unclean hands by issuing a certificate of insurance purporting South Carolina coverage on August 18, 2015 when it knew there was no such coverage. Lloyd further represented to its principal on August 19, 2015 that it had "just requested" the addition of South Carolina to the coverage and "we should all be good." Both statements are demonstrably false because Lloyd did not even allegedly seek to have South Carolina added to the coverage until the 9/2/15 call, nearly three (3) weeks after the certificate had been issued. These misrepresentations from Lloyd are what misled its principal, Central, into believing South Carolina was a covered jurisdiction for this claim, not any representations made by Guard. Although Central was clearly ignorant of these misrepresentation by its agent Lloyd, the doctrine of unclean hands bars its entitlement to the equitable relief of coverage by estoppel. *See* Queiroz *supra.*

CONCLUSION

Consequently, the Full Commission's Order imposing coverage on Guard based on equitable estoppel must be REVERSED.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

In accordance with Rule 211(a), I certify that the final briefs comply with Rule 211(b), SCACR.

Mailed 12/28, 2018

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