THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2018-001353

Bouchelle Incorporated, Appellant,

v.

Canopius US Insurance, Inc.,
Seneca Specialty Ins. Co.,
the Brinson Agency and
John Brinson, of whom

The Brinson Agency and John Brinson are the, Respondents.

RESPONDENTS' FINAL BRIEF

December 27, 2018

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WHETHER JUDGE MCCOY ERRED IN RULING THAT BOUCHELLE'S CLAIM(S) AGAINST BRINSON FAIL(S) AS A MATTER OF LAW.

STATEMENT OF THE CASE

Brief Summary of Facts

Respondents John Brinson and the Brinson Agency (collectively "Brinson") will detail the facts summarized below with reference to the record. However, a brief recitation of facts is necessary to understand the nature of the case. Appellant Bouchelle Incorporated ("Bouchelle") is a commercial general contractor who purchased commercial liability coverage from Defendant Canopius US Insurance, Inc. ("Canopius") through Brinson, an insurance agent/agency. Defendant Seneca Specialty Ins. Co. ("Seneca") is an insurance carrier that provided liability insurance coverage to a subcontractor for Bouchelle on a project for which it was serving as the general contractor in July 2015.

During the project, a wall was damaged when that subcontractor was performing demolition work. This required expensive repairs. Bouchelle made a claim on both its Canopius policy and the subcontractor's Seneca policy. Both carriers denied coverage. Canopius denied it on the grounds that its policy only covered Bouchelle for artisan carpentry services, not general contracting, and

Bouchelle was serving as a general contractor for the project. Seneca denied coverage because Bouchelle was not a named insured, and the Seneca policy excluded demolition. Bouchelle says Brinson procured the wrong coverage by obtaining a policy covering it for carpentry and not general contracting services.

Procedural Posture

Bouchelle filed this case in the Charleston County Court of Common Pleas as a "Declaratory Judgment Action." (R. p. 4) The Complaint names Seneca, Canopius and Brinson as Defendants. (R. p. 4) The Complaint alleges four causes of action. The first three are listed as generically against "the Defendants" and are for: (1) breach of contract; (2) declaratory judgment under S.C. Code § 15-53-10; and (3) statutory attorney's fees under S.C. Code § 38-59-40. (*See* R. pp. 7 – 8) The Complaint also includes a fourth cause of action for breach of contract specifically directed against Brinson. (R. p. 9) Brinson filed an Answer to the Complaint denying liability and raising appropriate affirmative defenses, including the lack of a contract between Bouchelle and Brinson. (R. pp. 15 – 20) Seneca and Canopius also filed Answers denying liability.

Brinson served Bouchelle with initial Interrogatories, Requests for Production and Requests to Admit on May 19, 2017. (R. pp. 44 – 47) Bouchelle did not timely serve responses to the Requests to Admit. On September 6, 2017, Brinson filed a Motion for Summary Judgment based on the facts established as a result of Bouchelle's failure to timely respond to Brinson's Requests to Admit. (R. pp. 37 – 55) No deposition(s) had taken place at that point.

David Bouchelle, as corporate representative of Bouchelle, gave a deposition on November 29, 2017. (*See* R. p. 65) Brinson filed a Brief in Support of its September 6, 2017, Motion for Summary Judgment citing certain testimony from Mr. Bouchelle's deposition. (R. pp. 56 – 79) Judge

Nicholson heard that Motion, as well as Canopius' Motion for Summary Judgment, on December 12, 2017. He issued an Order denying Brinson's Motion for Summary Judgment and ordering the parties to participate in further discovery to develop the issues of fact (as Bouchelle alleged) related to the principal/agent relationship between the "insurance company and insurance broker." (R. p. 105) The parties then engaged in further written and deposition discovery. Andrew Fowles of Canopius gave a deposition on January 8, 2017, and John Brinson testified on January 12, 2018. (*See* R. p. 205)

Seneca filed a Motion for Judgment on the Pleadings, which Judge Lee granted via an Order filed January 9, 2018. (R. pp. 21 – 28) Canopius then renewed its Motion for Summary Judgment, which Judge Nicholson granted via an Order filed March 19, 2018. (R. pp. 29 – 36) Brinson then filed a second Motion for Summary Judgment based on the deposition testimony and other progress of the case since the December 12, 2016, hearing. (R. pp. 106 – 220) A hearing took place on Brinson's Motion for Summary Judgment on June 18, 2018, in front of Judge McCoy in Charleston. (*See* R. p. 234) On June 29, 2018, she issued an Order granting Brinson's Motion. (R. pp. 259 – 265) Bouchelle appeals that Order. This Court should affirm Judge McCoy's Order and deny the appeal.

STANDARD OF REVIEW

In reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Spence v. Wingate, 385 S.C. 316, 684 S.E.2d 188 (Ct. App. 2009) *citing* Nexsen v. Haddock, 353 S.C. 74, 77, 576 S.E.2d 183, 185 (Ct. App. 2002). The trial court should grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Summary judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. Rawlinson Rd. Homeowners Assoc., Inc. v. Jackson, 395 S.C. 25, 33, 716 S.E.2d 337, 342 (Ct. App. 2011). When determining if any triable issues of fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857 (2002). The purpose of summary judgment is to "expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003).

ARGUMENT

Bottom Line

Judge McCoy correctly granted summary judgment. As a matter of law, Bouchelle's breach of contract claim against Brinson fails. Brinson is an insurance agent/agency through which Bouchelle obtained liability insurance. Brinson was not a party to the contract for insurance. There was no contract between Brinson and Bouchelle. Brinson was Bouchelle's agent, and Bouchelle paid Brinson no consideration that would be required to form the basis of a contract between them.

Bouchelle's claim also fails because the Policy at issue was the renewal of coverage Bouchelle obtained year after year from 2008 – 2014. Bouchelle received but never read any of these policies. The law precludes it from making a claim against the agent that procured the policies now.

Appellant says there are genuine issues of material fact that preclude an award of summary judgment but fails to actually identify a single such fact. Appellant also fails to cite any authority to support its legal position. The truth is there is no issue of material fact that could preclude the award

of summary judgment, and Judge McCoy appropriately granted Brinson's Motion. This Court should affirm Judge McCoy's Order.

Relevant Facts

Bouchelle is a commercial general contracting firm located Charleston County. (R. p. 4, para. 1) David Bouchelle owns and operates the company as the President and sole owner. (R. p. 67, ln. 2 – 7) He holds a bachelor's degree in business and has been licensed as a general contractor since 1995. R. p. 69, ln. 1 – 5. Bouchelle Incorporated has been in business as a commercial general contractor since 2001. (R. p. 67, ln. 17 – 25) It has always been a commercial general contractor. (R. p. 243, ln. 13 – 14, p. 186, ln. 12- 13 and p. 67, ln. 22 – 25)

John Brinson is an insurance agent who owns and operates the Brinson Agency on Folly Road in James Island. (R. p. 5, paras. 4 – 5) Beginning in 2005 Brinson handled all of Bouchelle's insurance needs, including selling worker's compensation, commercial general liability and automobile coverage. (*See* R. p. 237, ln. 9 – 13, p. 201, ln. 12 – 19, p. 192, ln. 15 – 17, and p. 186, ln. 19 – 20). When asked how often he went to the Brinson Agency to discuss insurance, Mr. Bouchelle responded, "[P]robably once a year, twice a year. I'm not sure. Three times. Who knows?" (Dep. D. Bouchelle, p. 43, ln. 7 – 10[1]) Mr. Bouchelle would handle insurance business with Brinson in person, over the phone and via email. (R. p. 91, ln. 8 – 16) Many of the times Mr. Bouchelle came to Brinson's office in person were to drop off late premium renewal checks in an effort to avoid cancelation of coverage. (R. p. 94, ln. 21 – p. 95, ln. 9)

[1] Respondent cannot cite to the Record on Appeal because Appellant failed to include this section of Mr. Bouchelle's deposition transcript in the Record.

Beginning with the 2008 – 2009 policy period, Bouchelle obtained commercial general liability ("CGL") coverage through Brinson as the insurance agent. (R. p. 71, ln. 2 – p. 72, ln. 17 and R. p. 117 – 127) The first application for CGL coverage Brinson submitted on behalf of Bouchelle showed the risk being covered as "carpentry" and was for the policy period of July 18, 2008 – July 18, 2009. (R. p. 120 – 122) Starting in 2008, and continuing annually thought 2014, Brinson submitted CGL renewal applications on behalf of Bouchelle and obtained CGL coverage for the company covering it for "carpentry" services. (R. p. 189, ln. 1 – 13; R. pp. 117 – 127) One of these policies was in effect in 2015, Canopius policy # OUS009069353 ("the Policy"), policy period August 11, 2014 – August 11, 2015. (R. pp. 128 – 179)

The application for the Policy clearly shows the risk covered as "CARPENTRY" and includes answers to various questions, including one asking whether Bouchelle performs any demolition work (it answers in the negative). (R. pp. 117 – 119) This application was consistent with others submitted for Bouchelle's coverage through the years. (R. p. 117 – 127) From 2008 – 2015, Bouchelle obtained CGL coverage for carpentry services through the Brinson Agency. (R. p. 191, ln. 12 – 19) Carpentry coverage is much cheaper than general contracting coverage. (*See* R. pp. 107 and p. 237, ln. 9 – 14) Mr. Brinson and Mr. Bouchelle discussed this the first time they spoke about CGL coverage in 2005 or 2006. (R. p. 233, ln. 17 – 25 and p. 88, ln. 2 – 11) Mr. Brinson quoted Bouchelle at $3,500 per year for general contracting coverage, while the premium for coverage for carpentry coverage was only $760 per year. Dep. J. Brinson, at p. 52 – 53.[2]

[2] Respondent cannot cite to the Record on Appeal because Appellant failed to include this section of Mr. Brinson's deposition transcript in the Record.

Every year (including 2014), Brinson would send Bouchelle a renewal letter and an invoice, and Bouchelle would pay the premium and obtain coverage. (R. p. 230, ln. 7 – 24, p. 61, p. 107, p. 185, ln. 9 – 11, p. 201, ln. 12 – 19, p. 208, ln. 14 – 19, p. 210, ln. 18 – p. 210, ln. 11 and p. 34 – 35). Bouchelle received copies of these policies annually and cannot identify any policy it failed to receive. (R. pp. 191, ln. 20 – 192, ln. 23 and 240, ln. 2 – 11) Mr. Bouchelle is literate, had the ability and opportunity to read these policies and simply chose not to. (R. p. 194, ln. 12 – 19) However, he never read any of these policies, including the Policy. (R. p. 181, ln. 24 – p. 182, ln. 1; *see also* R. p. 240, ln. 2 - 11) At no time during this seven-year period did Bouchelle ever notify Brinson that it had procured the wrong coverage. (R. p. 193, ln. 1 – 24)

During this time (2008 – 2015), Bouchelle was operating as a general contractor, not a carpenter. (R. p. 186, ln. 10 – 13) On July 14, 2015, Bouchelle was serving as the general contractor for a commercial project at 7350 Industry Drive, North Charleston, South Carolina, when its subcontractor, Charleston Wrecking, Inc. ("Charleston Wrecking") was performing scheduled demolition work and damaged portions of an adjacent building ("the Loss"). (R. pp. 4 – 5) Bouchelle presented a claim to Canopius under the Policy for damages resulting from the Loss. (R. p. 6, para. 13) The Policy offered coverage for carpentry services, not general contracting. (R. p. 6, para. 14) Since Bouchelle was acting as the general contractor on the job, Canopius denied the claim. (R. p. 23, ln. 6 – 12) Seneca offered an insurance policy covering Charleston Wrecking for that same project, and the policy listed Bouchelle as a Certificate Holder of the policy. (R. p. 5, para. 9) Bouchelle made a claim on that policy for the Loss as well, which Seneca denied. (R. p. 6., para. 15)

Bouchelle then brought this lawsuit against Brinson, Canopius and Seneca. Judge Lee determined that Bouchelle lacked standing to bring a claim against Seneca and dismissed it as a

Defendant. (R. pp. 21 – 28) Canopius filed a Motion for Summary Judgment, which Judge Nicholson granted via an Order filed March 19, 2018. (R. pp. 29 – 36) Bouchelle did not appeal that Order or Judge Lee's Order granting Seneca's Motion for Judgment on the Pleadings.

Judge Nicholson's Order granting Canopius' Motion for Summary Judgment discussed the relationships between and the roles of the various parties with respect to the purchase and sale of the Policy at issue. Retail agents such as Brinson, submit business to Managing General Agents ("MGAs"), including Tapco Underwriters, Inc. ("Tapco"), to fulfill their clients' needs. (R. p. 33, ln. 20 – 23) "There is no agreement between Canopius and the retail agents. They are the agent of the insured. There is no relationship, contract or agreement between Canopius and Brinson." (R. p. 33, ln. 21 – 23)

Canopius gives Tapco guidelines for classes of business and pricing of policies that Canopius wishes to write, and it agrees to give a certain amount of commission to Tapco. (R. p. 34, ln. 1 – 5) Tapco then decides how much of that it wishes to pass on to Brinson or other retail insurance agents. (Id.) Canopius is not a party to the agreement between Tapco and Brinson. (Id.)

Brinson is also an independent insurance agent and broker with the ability to access various markets to procure coverage for clients. (R. p. 34) Tapco provides Brinson access to such markets. (Id.) Brinson did not have as business relationship or contract with Canopius, nor did he receive any communications or money from it. (Id.) After Brinson received Bouchelle's premium check, Brinson sent it to Tapco, not Canopius. (R. p. 34 – 35) Tapco would then send Brinson a check (written on Tapco's checking account) for his commission. (Id.) Brinson never received any compensation from Bouchelle.

Brinson is subject to an agreement with Tapco that provides that the broker/agent agrees it is neither an agent of Tapco, nor a representative of Tapco, nor of any insurer or other company used by or represented through Tapco. (R. p. 35) Judge Nicholson's Order concluded that **Brinson was not an agent of either Canopius or Tapco**. (R. p. 36) "The mere fact that he [Brinson] receives a commission from the insurer for placing the insurance does not change his character as an agent of the insured." (R. p. 36) Again, Bouchelle did not appeal Judge Nicholson's Order.

Judge McCoy's Order (subject of this appeal) held that the Complaint's first cause of action for breach of contract, despite not naming specific Defendants, is a bad faith breach of contract claim against Canopius and Seneca. (R. p. 261) The Order also said that the Declaratory Judgment cause of action is not a claim for damages against Brinson, which is an insurance agent/agency, not an insurer, and that the Orders granting Seneca's Motion for Judgment on the Pleadings and Canopius' Motion for Summary Judgment dispose of this cause of action. (Id.) As a result, Judge McCoy's Order substantively dealt with the causes of action against Brinson for breach of contract and statutory attorney's fees under S.C. Code § 38-59-40.[3] Bouchelle's appeal does not challenge this.

Judge McCoy's Order granting summary judgment determined that as a matter of law, Bouchelle's claims against Brinson for breach of contract and statutory attorney's fees fail. Bouchelle appeals the dismissal of the breach of contract claim[4] on the basis that "there was evidence that there existed genuine issues as to material facts in the case [sic]." This is incorrect. As detailed below, Appellant never actually identifies any issue of material fact that could preclude an award of summary

[3] It is not clear from the Complaint whether this cause of action is intended to include Brinson or is only against the insurance carrier Defendants. Out of an abundance of caution, Brinson addressed that cause of action in the Motion for Summary Judgment.

[4] Bouchelle's appellate brief does not say anything about the cause of action for statutory attorney's fees.

judgment. The law as applied to the facts in the record bars Appellant's claim(s) against Respondents. This Court should affirm Judge McCoy's Order.

Points of Law

1. Breach of Contract.

The cause of action in the Complaint against Brinson for breach of contract alleges the following:

- Brinson provided CGL insurance, through Canopius, to Bouchelle. (R. p. 9, para. 31)
- Brinson was Bouchelle's agent for several years and knew Bouchelle conducted its business as a general contractor. (R. p. 9, para. 32)
- Brinson breached their contract with Bouchelle by failing to obtain CGL coverage under the correct category of general contractor, thereby causing Canopius to deny the subject claim. (R. p. 9, para. 33)
- Brinson applied and re-applied yearly on Bouchelle's behalf for coverage for carpentry services without Bouchelle's knowledge or consent. (R. p. 9, para. 34)

These allegations fail to allege the existence of a contract between Brinson and Bouchelle, the first element of a breach of contract claim. The evidence on record developed through discovery conclusively establishes there was no contract at all between Bouchelle and Brinson.

(a) No contract existed between Brinson and Bouchelle that could serve as the basis for a breach of contract claim.

The elements of a breach of contract cause of action are: (i) a binding contract entered into by the parties; (ii) breach or unjustified failure to perform the contract; and (iii) damage suffered by the plaintiff as a direct and proximate result of the breach. Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602 (1962). "Generally, any claim or suit by a party to an insurance contract must be based on the terms of the policy as issued." Carolina Bank & Trust Co. v. St. Paul Fire & Marine Co., 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983) *citing* Home Indemn. Co. v.

Harleyseville Mut. Ins. Co., 252 S.C. 452, 166 S.E.2d 819 (1960). An insurance agent is not a party to an insurance contract, and no contractual duties extend to a person (insurance agent) who is not a party to the contract. *See* Id., Carter v. Amer. Mut. Fire Ins. Co., 279 S.C. 368, 307 S.E.2d 227 (1983) and Nichols v. State Farm Mut. Auto Ins. Co., 279 S.C. 336, 306 S.E.2d 616 (1983).

The evidence indisputably shows there was no binding contract between Brinson and Bouchelle that could serve as the basis for a breach of contract action. There is no allegation, much less evidence, that Brinson did anything other than act as Bouchelle's insurance agent. Bouchelle readily admitted as much. (R. p. 187, ln. 13 – 23) Mr. Brinson testified that his only role was to procure insurance coverage for Bouchelle, and that he had nothing to do with Canopius' decision to deny Bouchelle's claim. (R. p. 217, ln. 12 – 20) The record shows all Brinson did was procure insurance coverage for Bouchelle. As the insurance agent, Brinson was not a party to the contract for insurance. Brinson cannot be liable to Bouchelle for breach of contract.

Further, Bouchelle and Brinson actually agree there was no contract between them. Brinson specifically said that he had no contract with Bouchelle, and the only contract that existed here was the insurance Policy. John Brinson testified as follows:

> Q. Did you have any contract with Mr. Bouchelle or his company?
>
> A. No.
>
> Q. Is it true that the contract in this case is between Mr. Bouchelle's company and the insurance provider?
>
> A. Yes. (R. p 217, ln. 21 – p. 218, ln. 2)

Mr. Bouchelle said this:

> Q. There's no contract between Bouchelle, Inc. and Mr. Brinson's agency for these insurance policies, is there?

A. No. (R. p. 195, ln. 3 – 6)

Q. And you know that the insurance carriers and not Mr. Brinson or the Brinson Agency actually provided your liability policy over the years, correct?

A. Yes. (R. p. 200. ln. 8 – 12)

Q. The agency is not the policy writer?

A. Correct.

Q. The agency does not have the contract to provide insurance with the insured, correct?

A. I do understand that. (R. p. 202, ln. 1 – 5)

As the insurance agent, Brinson was not a party to the contract for insurance or any contract with Bouchelle at all. There is no evidence Brinson's role was anything other than procuring insurance coverage as Bouchelle's insurance agent. Bouchelle cannot show even a scintilla of evidence that a contract existed between it and Brinson. Thus, Judge McCoy correctly determined Bouchelle's breach of contract claim fails.

(b) There was no contract between Bouchelle and Brinson because of a lack of consideration.

Bouchelle also seems to argue there was some other contract between it and Brinson (other than the insurance contract). There is no evidence to support this claim, and the law precludes such a claim as well because of a lack of consideration. The long-established law in South Carolina is that in order to have a binding contract between two parties, there must be the exchange of valuable consideration. Connor v. Renneker, 25 S.C. 514 (1886); *see also* Hunter v. Mills, 29 S.C. 72, 6 S.E. 907 (1888). Valuable consideration for a contract may consist of some forbearance given or detriment suffered. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996). "In the absence of an express or implied agreement to the contrary, a check does not constitute payment unless it

produced payment in cash, the presumption being the check must be accepted on condition that it be paid." Burns v. Prudence Life Ins. Co., 243 S.C. 515, 134 S.E.2d 769 (1964). This is specifically applicable to insurance premiums, and ordinarily the taking of a check for a premium is conditional upon payment of the check upon presentation. Id. at 520. Of course, the payment of an insurance premium to a carrier only leads to the creation of a contract for insurance, i.e., an insurance policy. It does nothing to create a contract between an agent that procures coverage and the insured.

The only monetary exchange here was Bouchelle's payment of the insurance premiums, and specifically, the premium for the Policy. However, as Judge Nicholson's Order conclusively established, this money went to the insurance carrier, not Brinson. Brinson received his commission in the form of a check from Tapco pursuant to Brinson's agreement with Tapco. Brinson did not receive any payment or other thing of value from Bouchelle.

Bouchelle's only contract was with Canopius, which agreed to insure a particular risk in exchange for payment of the premium. Brinson's contract is with Tapco, which agreed to pay Brinson a commission based on insurance policies procured. There was simply no exchange of consideration between Bouchelle and Brinson that supports the allegation that a contract existed between them.

Bouchelle alleges Brinson knew Bouchelle was operating as a general contractor and intended to obtain general contracting coverage. Bouchelle says Brinson somehow breached a contract by procuring coverage for carpentry services instead, which led to the carrier's denial of Bouchelle's claim on the Policy. However, this does not allege, nor does the evidence on record support, the existence of any contract between Bouchelle and Brinson, much less the breach of any such contract. To the extent these allegations set forth the basis for any sort of claim, it might be one for negligence. However, Bouchelle did not allege negligence, nor did it ever move to amend the Complaint to allege

any new cause of action. Judge McCoy correctly determined that Bouchelle's breach of contract claim against Brinson fails as a matter of law.

(c) Bouchelle's failure to read his insurance policies precludes him from bringing a claim based on them now.

Bouchelle applied for and obtained general liability coverage for carpentry services through Brinson as the insurance agent annually from 2008 – 2014. Bouchelle received these policies annually for years, and each one listed the classification of coverage as being for carpentry services, not general contracting. Bouchelle failed to read these or let Brinson know something was wrong with the coverage. This precludes Bouchelle's claim against Brinson.

An insurance agent has no duty to advise an insured at the point of application absent an express or implied undertaking to do so. Gordon v. Fid. & Cas. Co. of N.Y., 238 S.C. 438, 120 S.E.2d 509 (1961). The record contains no evidence of any such undertaking. It is also well settled in South Carolina that one cannot complain of fraud in the misrepresentation of contents of a written instrument in his possession when the truth could have been ascertained by reading the instrument. Reid v. George Washington Life Ins. Co., 234 S.C. 599, 109 S.E.2d 577 (599). One entering into a contract should read it and avail himself of every reasonable opportunity to understand its contents and meaning. Id.

The Supreme Court applied this reasoning to a nearly identical case by an insured against an insurance agent in Doub v. Weathersby-Breeland Ins. Agency, 268 S.C. 319, 233 S.E.2d 111 (1977). After the insured property experienced a loss due to a snow and ice storm, the insured made a claim with his fire insurance carrier. The insured's agent had procured the policy, which specifically excluded this type of loss. The insured sued his agent because the agent allegedly told him that the

policy would cover losses caused by such hazards. The court noted the insured had received the policy and others like it and merely failed to read them:

> *While this is not an action between an insured and the insurer upon a contract of insurance, under the facts of this case, the principles enunciated in the cases above*[5] *are equally applicable. Here, plaintiff has 18 months to inform himself as to the terms, conditions and exclusions of the written contract to which he was a party. He made no effort to do so, and never read the contract.* Id. at 114.

As a result, the court affirmed the dismissal of the plaintiff's claim against the agent.

The same analysis applies here. Mr. Bouchelle, the President and sole owner of Bouchelle, Inc., is an educated, experienced contractor. He applied for and obtained coverage for carpentry services on behalf of the company for years through his agent Brinson. Mr. Bouchelle never once read any of the policies, all of which clearly indicated he had purchased coverage for carpentry services. The law precludes Bouchelle from making a claim against the agent based on the alleged failure to procure the proper policy under these circumstances. Judge McCoy correctly ruled that Bouchelle's claim for breach of contract against Brinson fails as a matter of law.

2. Bouchelle's claim for attorney's fees fails.

Judge McCoy's Order held that Bouchelle's claim for recovery of attorney's fees under S.C. Code § 38-59-40 fails as a matter of law. Bouchelle's appeal does not challenge this element of Judge McCoy's Order, and Bouchelle has therefore waived the right to do so now. To the extent Bouchelle does challenge this, Judge McCoy's ruling in this regard was correct.

The Code Section provides for liability of an insurer for attorney's fees when the insurer, in bad faith, refuses to pay a claim. Judge Lee's and Judge Nicholson's Orders issued previously in the

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[5]Reid v. George Washington Life Ins. Co., 234 S.C. 599, 109 S.E.2d 577 (1959); O'Connor v. Brotherhood of Railroad Trainmen, 217 S.C. 442, 60 S.E.2d 884 (1950); Parnell v. United Amer. Ins. Co., 246 S.C. 26, 142 S.E.2d 204 (1965) and J.B. Colt Co. v. Britt, 129 S.C. 226, 123 S.E. 845 (1924).

case dismiss Bouchelle's claims against the insurance carriers for breach of contract, which were really strangely worded claims for bad faith against the insurance carrier Defendants. With no bad faith refusal to pay claim, Bouchelle's claim for recovery of attorney's fees under S.C. Code § 38-59-40 fails.

Further, those Orders conclusively establish (as does the evidence developed in discovery) that Brinson was not an insurer. To the contrary, he acted as Bouchelle's agent, not the carrier's agent, for the purposes of procuring insurance coverage for Bouchelle. Brinson had nothing to do with, nor is it responsible for the carriers' coverage decisions. There is no evidence to the contrary. Brinson therefore cannot be liable for bad faith refusal to pay an insurance claim, which is the only basis for recovery of attorney's fees under S.C. Code § 38-59-40.

3. There is no genuine issue of material fact that could preclude an award of summary judgment.

The only cognizable basis for Bouchelle's appeal is the claim that an issue of material fact exists that preclude summary judgment. This is incorrect. Judge McCoy's Order details relevant conclusions of fact and law and appropriately concluded that Bouchelle's breach of contract claim fails as a matter of law under Rule 56(c), SCRCP. Bouchelle points to alleged material issues of fact in its Response in Opposition to Brinson's Motion for Summary Judgment. According to that Response, those issues of fact are whether: (i) Brinson "can prove" it had Bouchelle's permission to sign Mr. Bouchelle's name to the 2014 – 2015 insurance renewal application and (ii) Brinson "can prove" it obtained carpentry service coverage for the 2014 – 2015 insurance term with Bouchelle's consent:

4. **There exists genuine issues as to material fact, namely: as to whether or not Defendants can prove that they had Plaintiff's permission to sign Plaintiff's name to the 2014-2015 insurance renewal application and whether or not Defendants can prove that they obtained carpentry service coverage for the 2014-2015 insurance term, with the Plaintiff's consent.**

(R. p. 223, para. 4)

Besides confusing the burden of proof, Bouchelle alleged a breach of contract claim against Brinson. As described above, there is no basis in fact for such a claim because the evidence fails to support the existence of a binding contract between Brinson and Bouchelle, the first element of a breach of contract claim.

(a) Whether Brinson had specific written permission to sign Mr. Bouchelle's name to the renewal application(s) is not a material fact that could preclude summary judgment.

Whether Brinson had specific written permission to sign Mr. Bouchelle's name to the renewal application is a complete red herring and not a material fact. Bouchelle does not allege Brinson lacked his authority or permission to submit renewal applications on his behalf. All the evidence shows Bouchelle knew this was taking place annually, including the year the subject Policy was issued. Bouchelle paid the policy premiums and received the policies every year.

Even if taken as true that Brinson did not have Bouchelle's specific permission to sign the application at issue, this does nothing to create a basis for a breach of contract claim against Brinson. Therefore, to the extent this is a fact in dispute, it is not a material fact. Counsel discussed this at the hearing for the Motion for summary judgment. Even if Brinson lacked Bouchelle's specific written permission to submit this policy application, this does not create a contract between Bouchelle and

Brinson. (R. p. 241, ln. 2 – 18) Without a contract between the two, Bouchelle's claim fails as a matter of law. This "fact" is therefore immaterial.

(b) No factual or legal support for the claim that Brinson somehow became a party to the insurance contract.

Bouchelle has also argued that Brinson, by signing the renewal application(s) for Bouchelle, somehow "became a party to the formation of the insurance contract and its terms." (R. p. 223, para. 5; *see also* Appellant's Initial Brief, p. 12) Bouchelle cites no legal authority to support this strange conclusion and only throws around the term "fraud" with no factual or legal basis. However, the only cause of action at issue is breach of contract. Bouchelle did not allege negligence or fraud, nor did it move to amend the Complaint to do so. Nothing about whether Bouchelle gave Brinson specific permission to sign insurance applications has anything to do with a breach of contract claim.

As the prior Orders in this case conclusively establish (and as the evidence shows), Brinson was Bouchelle's insurance agent and not a party to the insurance contract. The only contract was the Policy between the insured and insurer. (*See* R. p. 33 – 36 and p. 201, ln. 12 – p. 202, ln. 5) There is no factual or legal support for the assertion that Brinson somehow became a party to the insurance contract by submitting or signing the application on Bouchelle's behalf. This is true regardless of whether Brinson had Mr. Bouchelle's permission to sign his name.

Moreover, Plaintiff's Complaint does not argue that Brinson became a party to the insurance contract. It says Brinson somehow breached a contract by procuring the wrong coverage. Bouchelle cannot now change its theory on appeal. Brinson had no contract with Bouchelle. Brinson was the insurance agent, not a party to the insurance contract between Bouchelle and Canopius. The claim for breach of contract fails as a matter of law.

(c) Nothing was premature about summary judgment.

Bouchelle's appellate Brief also says that summary judgment is premature and, "[f]irst, there needs to be a fact-finding decision as to whether or not there exists genuine issues of material fact [sic]." Appellant's Initial Brief, p. 12. Judge McCoy's Order clearly states, "[p]laintiff argues this creates a scintilla of fact precluding summary judgment. This is incorrect." (R. p. 264. ln. 14 – 15) In that sentence, "this" refers to whether Brinson had specific permission to sign Bouchelle's name to the insurance application. Judge McCoy explicitly and correctly ruled on this issue. Bouchelle just disagrees with the decision.

Nothing about Judge McCoy's ruling was premature. The parties completed discovery, including the depositions of Bouchelle and Brinson. Further Bouchelle did not raise prematurity of the Motion for Summary Judgment as a basis for denying it. (*See* R. p. 221 – 223 and 234 – 247) Bouchelle cannot now raise that as an issue on appeal.

Judge McCoy's Order properly held that no issue of material fact exists, and Bouchelle's claim for breach of contract fails as a matter of law. The Order is based on thoughtful conclusions of fact and law detailed in its text. It is unclear from Bouchelle's brief exactly what its legal argument is, or even with what in Judge McCoy's Order it disagrees. Bouchelle states only that "the material issue in dispute is that Appellant did not give Respondent permission to sign his name to the" renewal application at issue. However, Judge McCoy's Order addressed this issue in depth and explained why this is not a material fact.

CONCLUSION

The issue before the Court is whether Judge McCoy correctly granted summary judgment on Bouchelle's breach of contract claim against Brinson. The first requirement in proving a breach of

contract claim is establishing the existence of a binding contract between the parties. Bouchelle simply cannot show this essential element.

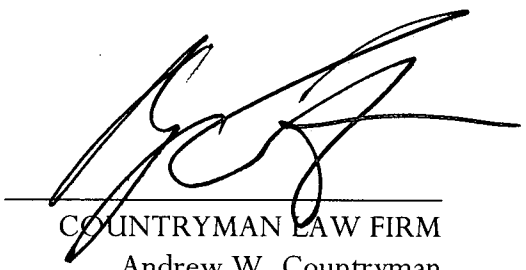
The only contract was the insurance contract between Canopius and Bouchelle. As the insurance agent, Brinson was not a party to the contract for insurance, and there was no separate contract between Bouchelle and Brinson. Further, Brinson received no consideration from Bouchelle that could serve as the basis of the creation of a contract between them. The record lacks even a scintilla of evidence exists that any contract existed between Bouchelle and Brinson. Bouchelle's claim against Brinson therefore fails as a matter of law.

Whether Brinson had Bouchelle's specific permission to sign his name to the subject application for insurance is not a material issue of fact. Even if Brinson signed Bouchelle's name without permission, all the evidence shows Bouchelle knew Brinson was submitting renewal applications for Bouchelle year after year. Regardless, signing Bouchelle's name to the insurance application without permission would not make Brinson a party to any contract with Bouchelle. Bouchelle makes the blanket claim that Brinson somehow became a party to the insurance contract but cites no authority to support this position. Even taking all evidence in the light most favorable to Bouchelle, there is no evidence at all that Brinson was a party to any contract with Bouchelle. The claim for breach of contract therefore fails as a matter of law.

Finally, Bouchelle did not allege negligence or any other cause of action against Brinson based on the allegation that Brinson procured the wrong insurance coverage for Bouchelle. Even if Bouchelle made such a claim, the law precludes it from pursuing a claim against Brinson when Bouchelle paid for and received carpentry policies year after year and never once raised an issue with the type of coverage. As a matter of law, Bouchelle's claim(s) against Brinson fail.

Bouchelle has no legal or factual basis for this appeal. Its appellate brief cites no authority to support any legal position on which it bases the appeal. The reality is that there is no legal basis for Bouchelle's claim against Brinson or this appeal. Judge McCoy correctly granted Brinson's Motion for Summary Judgment, and this Court should affirm her ruling.

12/27/18
Date



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