THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

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Case No. 2010-CP-46-02851

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Pamela Dill as the Attorney-in-Fact
and Natural Mother of Britten Teno.....Appellant,

v.

Colony Insurance Company, Gill-Young
Insurance (now known as "Gill Insurance LLC")
or ("The Gill Agency") and Hull & Company, Inc.....Respondents.

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# BRIEF OF RESPONDENT GILL-YOUNG INSURANCE

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GILL-YOUNG INSURANCE

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## STATEMENT OF THE CASE

This appeal follows an order of summary judgment in favor of Respondents Colony Insurance Company ("Colony"), Gill-Young Insurance ("Gill") and Hull & Company, Inc. ("Hull").

On June 26, 2007, the Appellant filed suit against the Barn Club, Inc. d/b/a The Money ("Barn Club") and Jim Morton ("Morton"), the former president of the Barn Club, as the result of an alleged assault and battery that occurred on March 6, 2005, while Britten Teno was a patron at the Barn Club ("Tort Action"). The Barn Club and Morton denied liability. In August 2007, Colony, the Barn Club's commercial general liability insurance carrier, filed a declaratory judgment action ("Coverage Action") seeking a determination that its policy did not provide coverage for the incident described in the Tort Action. Appellant and the Barn Club were also parties to the Coverage Action. In that action, the circuit court on October 1, 2009 held that Colony was not required to provide coverage for the underlying Tort Action based on the intentional acts and assault and battery exclusions to the policy (R. pp. 2-6). Appellant and the Barn Club did not appeal that order. Following that decision, Appellant settled the Tort Action with a confession of judgment resulting in an uncontested eight million dollar ($8,000,000) judgment (R. pp. 7-8). Appellant agreed not to execute this judgment if the Barn Club would assign any potential rights to the Appellant (R. pp. 757-761).

On July 7, 2010, Appellant filed the current action alleging six causes of action, (1) reformation, (2) detrimental reliance, (3) civil conspiracy, (4) negligence, (5) negligent misrepresentation, and (6) breach of fiduciary duty. The Respondents answered the complaint denying liability. Gill also filed a motion to dismiss Appellant's first, second, third, fifth and sixth causes of action for failure to state a cause of action under Rule 12(b)(6). A hearing was

held on Gills' motion and by order dated December 8, 2010[1], Appellant's causes of action for reformation, detrimental reliance, civil conspiracy, and breach of fiduciary duty were dismissed. This left only the causes of action alleging negligence and negligent misrepresentation.

The parties engaged in discovery, and based upon the evidence gathered, Gill moved for summary judgment on Appellant's remaining claims for negligence and negligent misrepresentation. Hull and Colony filed separate motions for summary judgment. After the court heard these motions on March 31, 2011, an order was issued granting summary judgment in favor of all Respondents. Appellant appeals that order.

## STATEMENT OF FACTS

In early 2004, Morton went to Gill to purchase insurance for the Barn Club (R. pp. 178). Morton provided Gill with a letter dated February 4, 2004, from the Barn Club's landlord, Mickey Aberman ("Aberman") of the Aberman Family Partnership, with recommendations for desired insurance coverage (R. pp. 180; 469).

In that letter, Aberman recommended three things: (1) increasing the property coverage limit from $75,000 to $200,000; (2) increasing the general liability coverage from $300,000 to $1,000,000; and (3) including coverage for "dram shop" liability related to the sale of alcohol. The letter *never* made a request for insurance arising from incidents of alleged assault and battery or intentional acts. Morton made no additional requests for coverage, orally or in writing, other than as set forth in Aberman's letter. (R. pp. 170; 296-297; 420; 424; 469) Morton never requested, orally or in writing, coverage for assault and battery claims. Gill did not represent that assault and battery claims could be covered.

[1] The order granting the motion to dismiss was not appealed.

On March 12, 2004, Morton completed and signed a "Commercial Insurance Application" applying for property, commercial general liability, and dram shop or liquor liability insurance. On or about the same time, Morton completed and signed a supplemental application for liquor liability. In that liquor liability application, Morton was asked, "Is Assault and Battery excluded on your G.L. (general liability) Policy?" Morton responded, "Yes" and signed the application. (R. pp. 470) Later in March 2004, Morton was issued a commercial general liability policy from Colony. The binder for the policy provided that Assault and Battery coverage was excluded, as indicated in bold print, "**ASSAULT, BATTERY OR ASSAULT AND BATTERY EXCLUSION**."

Morton admitted he never read or reviewed the policy of insurance, but conceded if he had read the policy, he would have further understood that assault and battery coverage was expressly excluded (R. pp. 194; 471). These policies of insurance were renewed in 2005 and 2006. (R. pp. 470; 591).

In 2007, Morton completed and signed another liquor liability application (R. pp. 470). In that application, Morton again affirmed in writing that assault and battery coverage was excluded from the liability insurance. At no time did Morton seek to alter these policies of insurance or to obtain coverage for assault and battery. (R. pp. 591-592).

## STANDARD OF REVIEW

Summary judgment should be granted if "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; see also Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). The circuit court may properly consider only "such facts as would

be admissible in evidence." Rule 56(e), SCRCP; Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) (stating "materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence"). On appeal, the court applies the same standard. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991).

## LAW/ANALYSIS

### I. THE CIRCUIT COURT DID NOT ERR IN FAILING TO ADOPT THE REJECTED DOCTRINE OF REASONABLE EXPECTATIONS.

Appellant's first argument on appeal is that South Carolina should adopt the Doctrine of Reasonable Expectations to require Gill to sell the Barn Club a policy of insurance that insures against intentional acts, such as assault and battery. For the following reasons, this position is wholly without merit.

#### (a) The Doctrine of "Reasonable Expectations" is not properly preserved for appeal.

Appellant's argument that South Carolina courts should adopt the Doctrine of Reasonable Expectations is raised for the first time on appeal. It is well settled that an issue must be raised to the lower court and ruled upon to be addressed by this Court. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (stating that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review).

Appellant did not advance the argument of "reasonable expectations" to the circuit court. As stated in the Order issued by Judge Kimball, Appellant merely asserted that based on deposition testimony obtained in the Coverage Action and deposition testimony taken in the

current case, an issue of fact might exist regarding whether Morton requested assault and battery coverage (R. pp. 16-17).

There is nothing in the record to support the position that Appellant raised the doctrine of reasonable expectations to the circuit court on the claims of negligence. Appellant did not submit a memorandum in opposition to Respondents' motions for summary judgment. Additionally, there is no transcript of the hearing because the parties stipulated to proceed without a court reporter (R. pp. 13). Appellant has the burden to provide this court with an adequate record evidencing that the argument of "reasonable expectations" was raised to the lower court. She cannot. In Germain v. Nichol, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983), the Supreme Court held that an appellant failed to meet his burden of presenting an issue on appeal when the Appellant failed to secure a transcript of the proceeding. See also Enriquez v. S.C. Dep't of Corrections, 374 S.C. 165, 167, 648 S.E.2d 582, 583 (2007) (appellant has the burden to provide an adequate record for review). The language of the Order is the only evidence in the record to support what occurred at the hearing. Because Appellant failed to file anything in opposition to this motion and elected to proceed without a transcript, she cannot meet her burden of preserving this issue on appeal.

Furthermore, Appellant did not file a motion to alter or amend under Rule 59, SCRCP. Appellant's failure precludes this court for addressing this new theory. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) (trial court's general ruling insufficient to preserve specific issue for appellate review; where trial court does not explicitly rule on argument raised, and no Rule 59 motion filed, appellate court may not address the issue); Grant v. S.C. Coastal Council, 319 S.C. 348, 461 S.E.2d 388 (1995) (finding that an inaccuracy in the trial court's order must be

raised to the trial court by way of a motion to alter or amend a judgment before the inaccuracy may be challenged on appeal).

As such, Appellant's argument based on the Doctrine of Reasonable Expectations is not preserved for appellate review.

**(b) Appellant's "reasonable expectations" argument does not relate to Gill or the causes of action on appeal.**

Appellant is only appealing the grant of summary judgment as to claims of negligence and negligent misrepresentation. The Doctrine of Reasonable Expectation is not referred to in Gill's Motion for Summary Judgment or any related filings. The only specific reference to this doctrine found in the Order relates to the second cause of action against Colony for detrimental reliance. The claim against Gill for detrimental reliance was dismissed in a prior unappealed order. Thus, the reasonable expectations argument is not the subject of this appeal, as it was not raised to and ruled upon concerning Gill or the claims for negligence and negligent misrepresentation.

**(c) Appellant's argument of "reasonable expectations" is barred by *res judicata*.**

The issue of coverage was fully adjudicated in the Coverage Action. (R. pp. 2-8) On October 1, 2009, the circuit court held that Colony had no duty to defend or indemnify for the allegations in the underlying personal injury action. The Barn Club and Appellant were both parties to that case. That decision was not appealed. It is well settled that an unappealed ruling, right or wrong, is the law of the case. Yelson Land Co. v. State, 397 S.C. 15, 723 S.E.2d 592 (2012).

Here, Appellant is attempting to relitigate coverage after receiving an unappealed judgment. Appellant's argument of "reasonable expectations" is advanced in an effort to persuade this Court to "remand [this] matter for further development regarding whether coverage

for assault and battery injuries in a bar was within Morton's reasonable expectations." (Appellant's Brief, p. 13). "Reasonable expectations" is a minority rule doctrine of coverage used to determine whether insurance coverage exists even when it is not specifically included in the policy. Ex parte United Services Auto. Ass'n, 365 S.C. 50, 54, 614 S.E.2d 652, 654 (Ct. App. 2005). In addition to the fact that South Carolina does not recognize the doctrine of "reasonable expectations," discussed *infra*, the issue of whether assault and battery coverage existed was already litigated and adjudicated in the declaratory judgment proceeding. Coverage has already been litigated. Appellant is not entitled to a second "bite at the apple."

Under the doctrine of *res judicata*, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n of South Carolina, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). "*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Development Co., Inc. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999).

A claim is barred by *res judicata* when the following three elements are established: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Reidman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992); Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986). All three elements are met here. First, Colony, the Barn Club, and the Appellant were parties to the Coverage Action. The subject matter of the Coverage Action was to adjudicate whether insurance coverage existed for the underlying claim. Lastly, the issue of coverage was fully adjudicated and unappealed in the former suit. Without question, the Coverage Action fully addressed and disposed of any issue

related to the reasonable expectations of the insured, and this issue is clearly barred under the doctrine of *res judicata*.

**(d) South Carolina expressly rejects the Doctrine of Reasonable Expectations.**

Even if this Court addresses the merits of Appellant's argument, South Carolina has flatly rejected the Doctrine of Reasonable Expectations. This Court has held "the doctrine of reasonable expectations, which is essentially that the objectively reasonable expectations of insureds as to coverage will be honored even though a careful review of the terms of the policy would have shown otherwise, **has been rejected in South Carolina**." Ex parte United Services Auto. Ass'n, 365 S.C. 50, 54, 614 S.E.2d 652, 654 (Ct. App. 2005) (cert. denied) (emphasis added) (citing Allstate Ins. Co. v. Mangum, 299 S.C. 226, 231-32, 383 S.E.2d 464, 466-67 (Ct. App. 1989); see also Bell v. Progressive, 2011-UP-242 (Ct. App. 2011). Recent opinions from the District Court of South Carolina also recognize that South Carolina law rejects this doctrine. Cindy Mize v. Travelers Casualty of Conn., 2011 U.S. Dist. LEXIS 26129 (D.S.C March 10, 2011) (Wooten, J.); Nationwide Mut. Fire Ins. Co. v. Neetu, Inc., 2010 U.S. Dist. LEXIS 106386 (D.S.C. Oct. 4, 2010) (Currie, J.).

This doctrine is a minority view held by few jurisdictions and cannot be reconciled with long-standing South Carolina law that insurance policies are subject to the traditional rules of contract construction. Recently, the Supreme Court of Florida reaffirmed that it has "specifically declined to adopt the doctrine of reasonable expectations in the context of insurance contracts, concluding that construing insurance policies under this doctrine 'can only lead to uncertainty and unnecessary litigation.'" QBE Ins. Corp. v. Chalfonte Condo. Apt. Ass'n, No. SC09-441, 2012 Fla. LEXIS 1063 (FL, May 31, 2012). Thus, the court properly held that "South Carolina has rejected the doctrine of reasonable expectations for the scope of coverage in an insurance

contract. Instead insurance contracts are subject to the general rules of contract construction." (R. 20)

Appellant's reliance on Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Company, 395 S.C. 40, 717 S.E.2d 589, (2011) for the proposition that the doctrine of "reasonable expectations" has been adopted by the South Carolina Supreme Court through a "time on risk" approach is misplaced. Appellant cites to *dicta* in an effort to persuade this Court that the South Carolina Supreme Court has rejected the law espoused in Ex parte United Services. This is a gross misinterpretation of the scope and intent of Crossman.

To be clear, Crossman does not overturn or reject the law set forth in Ex parte United Services. Rather, Crossman is limited to "the proper method for allocating damages in a *progressive property damage* case," which involves "assign[ing] each triggered insurer a pro rata portion of the loss based on that insurer's time on the risk." Id. at 63, 717 S.E.2d at 601. (emphasis added). The Crossman court adopted the "time on risk" approach in lieu of a joint and several approach for determining allocation of loss between multiple policies of insurance. In setting forth this "time on risk" approach "the formula must result in a reasonable approximation of the amount of property damage that occurred during each insurer's policy period." Id. at 66, 717 S.E.2d at 602.

Unlike the case at bar, Crossman dealt with progressive property damage and sought to determine a fair and workable method for the appropriate allocation of loss among successive insurers under policies that the court had determined *actually provided coverage* for the loss. Here, Appellant's loss cannot be categorized as one constituting "progressive property damage" or multiple insurance policies. The "time on risk" analysis does not apply and, in no way, constitutes an acceptance by South Carolina of the Doctrine of Reasonable Expectations.

Further, to adopt the argument that Plaintiff is advancing on appeal would turn the traditional rules of insurance contract construction on its head. South Carolina law has long prohibited courts from rewriting or torturing the meaning of a policy to extend coverage or disregarding valid policy exclusions. See Gambrell v. Travelers Ins. Co., 280 S.C. 69, 310 S.E.2d 814 (1983). The only reasonable expectation is that the courts will enforce the policy's provisions. In fact, South Carolina courts have previously enforced other similar assault and battery exclusions contained in commercial general liability insurance policies. See Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 438 S.E.2d 275 (Ct. App. 1993). Similarly, South Carolina courts have deemed that intentional acts exclusions are valid, reasoning that one should not be permitted to insure against his or her own intentional wrongdoings. See South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 20, 382 S.E.2d 11, 14 (Ct. App. 1989); Manufacturers and Merchants Mut. Ins. Co. v. Harvey, 330 S.C. 152, 166, 498 S.E.2d 222, 229 (Ct. App. 1998); Miller v. Fidelity-Phoenix Ins. Co., 268 S.C. 72, 231 S.E.2d 701 (1977); Snakenberg v. Hartford Ins. Co., 299 S.C. 164, 169, 383 S.E.2d 2, 4 (Ct. App. 1998).

Accordingly, the circuit court did not err in failing to apply a rejected doctrine of insurance coverage.

**(e) The Doctrine of Reasonable Expectations does not apply to insurance brokers and there is no evidence to establish that a reasonable expectation existed between the parties regarding assault and battery insurance coverage.**

Assuming *arguendo*, this court finds Appellant's argument of "reasonable expectations" is properly before it, the evidence does not support a finding that the parties had a "reasonable expectation" that assault and battery coverage would be provided. This doctrine has no applicability to an insurance broker or agent, such as Gill. Appellant does not cite to or rely upon any legal authority for the proposition that an insurance agent or broker has a duty to sell a policy

of insurance that will cover all foreseeable risks a reasonable person could anticipate. Appellant does not rely upon any authority that creates liability if an insurance broker or agent fails to procure insurance that covers all "reasonable expectations." This would lead to absurd results. If this were the law, an insurance agent would be held liable every time an alleged insurable loss was not covered. It goes without saying that not everything can be insured. It must be understood that Gill is not an insurance company and can only sell policies that are offered by insurance carriers. Gill cannot create insurance that otherwise does not exist.

The *only* insurance coverage requested by Morton when he met with Gill was for those items delineated in the letter provided by Aberman. (R. pp. 16; 456; 469; 471) The Aberman letter did not include assault and battery coverage. (Id.) Morton affirms he did not request any additional coverage from Gill. (Id.) Morton indicated that Gill never represented assault and battery coverage would be included in the policy. (R. pp. 17; 471) He even acknowledged by his signature that assault and battery claims were excluded. Further, he had no expectation of coverage because he did not even bother to read the policy. A thorough reading of the policy affirms the only reasonable expectation the parties could have had was that the intentional tort alleged, assault and battery, would not be covered by the policy as it was expressly and conspicuously excluded. Thus, Morton could not have a "reasonable expectation" for coverage that he did not ask for and coverage that he affirmed was expressly excluded.

## II. THE CIRCUIT COURT CORRECTLY FOUND THAT GILL DOES NOT HAVE A DUTY TO ADVISE.

### (a) Appellant's argument that Gill implicitly undertook a duty to provide coverage is not preserved for appellate review.

Appellant's argument that Gill implicitly undertook a duty to procure coverage for incidents of assault and battery was never raised to the circuit court. Appellant never raised these

arguments at the hearing and Appellant never filed a Rule 59 motion arguing that the circuit court failed to consider this issue. Since this argument was never raised to or ruled upon, it cannot now be raised for the first time on appeal.

**(b) Gill did not have a duty to advise Morton.**

Gill did not have a duty to advise Morton regarding insurance coverage for the Barn Club. Gill only assisted in procuring the insurance coverage as specifically requested by Morton in Aberman's letter. Under well-settled law, Gill cannot be held liable for doing exactly what Morton requested. In the context of procuring a policy of insurance, "an insurer and its agents owe no duty to advise an insured." Trotter v. State Farm Mut. Ins. Co., 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988). At the application stage, the agent is "not required to go beyond the request of the insured for information, to inject matters not raised by the insured, or to make independent inquiries into such extraneous matters, especially when these matters were well within the knowledge of the insured herself." Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 336, 574 S.E.2d 502, 511 (Ct. App. 2002). The circuit court did not err in relying on these sound propositions of law.

**(c) Gill did not expressly or impliedly undertake a duty to advise.**

Appellant asserts Gill had a duty to advise Morton based on an express or implied undertaking.

If an agent expressly undertakes to advise an insured, a duty can be imposed. Carolina Prod. Maint., Inc. v. United States Fid. & Guar. Co., 310 S.C. 32, 425, S.E.2d 39 (1992). There is no evidence of an express undertaking to specifically advise the Barn Club. Morton made no request for assault and battery coverage (R. pp. 181; 198; 444-446; 456; 469). Morton never asked Gill to explain the provisions of the policy or the exclusions (R. pp. 296-297; 300; 410-

411). Gill made no representations that assault and battery coverage would be afforded. To the contrary, in the application process, Morton affirmatively recognized the insurance coverage specifically excluded claims for assault and battery. (R. pp. 287-290).

Gill also did not impliedly undertake to advise Morton about his insurance coverage. An implied duty can arise when "the insured [makes] a clear request for advice." Trotter, 377 S.E.2d at 347. An agent can also be liable when he does not follow instructions or does not provide the coverage he undertook to supply. Sullivan Co, Inc. v. New Swirl, Inc., 313 S.C. 34, 437 S.E.2d 30 (1993). All the evidence in this case unequivocally shows that Morton did not request assault and battery coverage and never sought advice about procuring such coverage.

Appellant cites to deposition testimony given by Morton in the Coverage Action in an attempt to create an issue of fact. However, Morton's deposition testimony and affidavit in this case leaves no genuine dispute as to the facts. In the earlier Coverage Action, Morton testified he requested Gill only provide him with the insurance coverage outlined in Aberman's letter. (R. 180) At that time, Morton was asked to testify as to the contents of Aberman's letter that was provided to him almost five years earlier. Most significantly, Morton was *never* given a copy of the letter (or any documents he had given Gill for purposes of procuring coverage) at the deposition so that he could familiarize himself with the contents. (R. pp. 180) Appellant cannot create an issue of fact based on Morton's speculation and his erroneous and faulty recollection of a letter. McKnight v. S.C. Dep't of Corrs., 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009) (holding that a summary judgment cannot be defeated by speculation and that any dispute of fact must be genuine).

In the instant case, Morton was presented with a copy of the Aberman letter. Based on his review of that document, Morton provided both an affidavit and deposition testimony

clarifying his prior testimony from the Coverage Action. Morton still maintained he never requested any coverage other than what was specifically listed in Aberman's letter; however, Morton testified that after he reviewed the contents of the letter, his recollection was refreshed that he never sought assault and battery coverage (R. pp. 296-297). The request for specific coverage that Morton had erroneously recalled as a request for assault and battery coverage was actually a request that there be "no dram shop exclusion" (R. pp. 420, 424; 456). Morton confirmed that he never asked about nor requested assault and battery coverage (R. pp. 300; 420; 424). The circuit court correctly found that "Morton's erroneous testimony based on recollection of the contents of a document not previously before him, in cases in which Gill was not a party, does not create a genuine issue of fact" (R. pp. 16-17). The circuit court further found that Morton's testimony "in this case is unwavering" and "any dispute concerning the underlying facts has been resolved though Morton's testimony and review of documents produced in discovery in this case" (R. p. 17). This finding is not erroneous.

Since the Appellant failed to present the court with a genuine issue of material fact to support the negligence and negligent misrepresentation claims, the circuit court should be affirmed.

## III. THE CIRCUIT COURT CORRECTLY FOUND THAT MORTON'S FAILURE TO READ THE INSURANCE POLICY IS A BAR TO LIABILITY.

### (a) Appellant's argument is not properly preserved for appellate review.

Appellant argues the circuit court erred in holding that Morton's failure to read the policy bars any relief because the Order references case law that pre-dates the modified comparative negligence doctrine. This argument was never presented at the hearing before the circuit court, and a Rule 59 motion was never filed advancing this argument. Without being properly raised to and ruled upon, this argument cannot be considered on appeal.

**(b) The circuit court correctly found that Morton's failure to read the policy bars liability based on comparative fault.**

The circuit court correctly found that "Morton's failure to read the insurance policy bars any recovery as a matter of law" for claims of negligence and negligent misrepresentation. (R. p. 18) Appellant erroneously argues the doctrine of comparative negligence, which was adopted in Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991), does not act as a complete bar for recovery of alleged damages. Appellant also claims the holding of Carolina Prod. Main., Inc. v U.S. Fidelity and Guar Co., 310 S.C. 32, 425 S.E.2d 39 is "no longer good law." (App. Brief p. 19). Appellant has misstated the law and misinterpreted the holding of Carolina Prod..

Under the system of comparative negligence, a plaintiff can *only* "recover damages if his or her negligence is not greater than that of the defendant." Nelson, 425 S.E.2d at 784. For purposes of summary judgment, the Supreme Court has held that when "evidence of the plaintiff's *greater* negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to a jury." Bloom v. Ravoria, 339 S.C. 417, 424, 529 S.E.2d 710, 714 (2000) (emphasis in original). Under South Carolina's comparative negligence doctrine, Appellant may in fact be barred from recovery if it is established that Morton's negligence outweighs that of Gill, the insurance agent.

It is clear in both Carolina Prod. and Doub v. Weathersby-Breeland Insurance Agency, 268 S.C. 319, 233 S.E.2d 111 (1977), that the failure of an insured to read the insurance policy is tantamount to greater negligence on the part of the insured and recovery is barred. This is not "bad law" as the Appellant argues, and even District Court Judge Joseph F. Anderson has recently affirmed that "In South Carolina . . . where an insured fails to read and familiarize himself with a policy, the insured abandons all care and is thus more negligent than the agent."

Mullen v. State Farm Cas. And Fire Co., C/A No. 09-2392-JFA, 2010 WL 2228369 (D.S.C. June 1, 2010)(Anderson, J.) (citing Carolina Prod. and Doub.).

Morton's negligence is the only negligence appearing in the record. The undisputed evidence is that Morton did not read the insurance policy. Morton conceded it was his "responsibility to look at [the policy] and see what kind of liability that would leave us [Barn Club] with." (R. p. 264) Morton readily admitted had he read the policy, he would have known that assault and battery coverage was excluded. He also admitted any misunderstanding regarding coverage could have been resolved by reading the policy. (R. pp. 297; 300, 340; 471)

Furthermore, the exceptions to Doub cited by Appellant related to the specific inquiry of an insured regarding coverage and reliance upon an agent to provide an insured with the same coverage it previously had, are not applicable here. There is absolutely no evidence Morton made a specific inquiry regarding assault and battery coverage. In fact, all evidence in the record is to the contrary. Morton has insistently stated he only sought the coverage outlined in Aberman's letter (R. pp. 180, 296-297). Morton went on to state he *never* asked for assault and battery coverage (R. pp. 300, 420, 424). A specific request was never made. Also, Appellant cannot point to any evidence that assault and battery coverage had been provided in the past. The Barn Club renewed the same policy in 2005 that it had in 2004 when Morton affirmed that assault and battery coverage was not afforded.

In any event, Appellant cannot now claim that Gill was negligent or misrepresented the contents of the policy to Morton. Not only are those facts not the in record, but "it is well settled that one cannot complain of misrepresentation over the contents of a written instrument in his possession when the truth could have been ascertained by his reading the instrument." Doub 233 S.E.2d at 114; Reid v. George Washington Life Insurance Untitled event Company, 234 S.C.

599, 109 S.E.2d 577 (1959); Giles v. Lanford Gibson, Inc., 285 S.C. 285, 289, 328 S.E.2d 916, 918 (Ct. App. 1985); Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 337, 574 S.E.2d 502, 511 (Ct. App. 2002).

Thus, the circuit court did not err in finding that the comparative fault of Morton exceeded any alleged fault of Gill as a mater of law.

## IV. THE CIRCUIT COURT CORRECTLY FOUND THE STATUTE OF LIMITATIONS BARS APPELLANT'S CLAIMS OF NEGLIGENCE AND NEGLIGENT MISREPRESENTATION.

Appellant's claims are subject to a three-year statute of limitations. S.C. Code Ann. § 15-3-530 (Supp. 2010). In the Complaint, Appellant alleges that in March 2004, Gill negligently failed to procure a policy of insurance that would expressly cover an assault and battery. (R. pp. 85; 89-90) The alleged act or omission that gives rise to these negligence-based claims had to have occurred in March 2004. This lawsuit was filed over six (6) years later on July 8, 2010. The circuit court correctly found the statute of limitations barred the relief sought for negligence and negligent misrepresentation.

Appellant argues that "[u]ntil Colony indicated it was denying coverage under the exclusion Morton should not have know that he had claims against the Defendants for failing to procure appropriate coverage." (App. Brief, p. 23). This argument was never once advanced to the circuit court at the hearing, nor is it reflected in the order on appeal. During the hearing, Appellant offered no counter argument to the statute of limitations issue. This is evidenced in the circuit court's order, which states, "[Appellant] presented no arguments or evidence that the statute of limitations could have begun at any time thereafter [March 2007] to create an issue of fact to avoid the application of the statute of limitations." (R. p. 19) No Rule 59 motion was filed. Again, the court cannot accept this argument because it was not preserved for appeal.

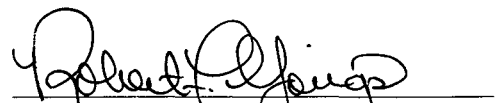
In any event, Appellant's new position lacks merit. The statute of limitations begins to run "when a party knows or should know, through the exercise of due diligence, that a cause of action might exist." Anonymous Taxpayer v. S.C. Dept. of Revenue, 377 S.C. 425, 438-39, 661 S.E.2d 73, 80 (2008). The first time Morton would have been on notice that the insurance policy did not include coverage for assault and battery was when he procured the policy in March of 2004 (R. p. 469-470). At that same time, Morton also executed a Liquor Liability Application where he affirmed that assault and battery coverage was excluded (R. p. 470). At this point, Morton knew or should have known that his policy did not provide this coverage. Moreover, Morton would have been on notice several weeks later when he received the policy itself. Admittedly, had Morton read the policy at that time, he would have, again, been on notice that assault and battery coverage was excluded (R. p. 297; 300; 340; 471). Finally, in March 2007, Morton stated in another insurance application that assault and battery claims were excluded. (Id.)

Based on this timeline, Morton was on notice as early as March 2004 or as late as March 2007 that the insurance policy did not cover these claims. Appellant filed the instant suit in July of 2010. There is no conflicting evidence regarding whether Morton knew or should have known assault and battery coverage was excluded. The coverage Morton obtained was known to him, or should have been known to him, at the time he obtained the policy. The law precludes Gill from being sued six (6) years after an alleged negligent act occurred. Accordingly, the circuit court properly held the statute of limitations operates as a bar for the causes of action for negligence and negligent misrepresentation.

## CONCLUSION

For these reasons, this Court should affirm the circuit court's order granting summary judgment in favor of Gill and the other Respondents.

Respectfully submitted,

By: 

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January 28, 2013
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas
S. Jackson Kimball, Special Court Judge

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Case No. 2010-CP-46-02851

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Pamela Dill as the Attorney-in-Fact
and Natural Mother of Britten Teno.....Appellant,

v.

Colony Insurance Company,
Gill-Young Insurance (now known as
"Gill Insurance, LLC" or ("The Gill Agency")
and Hull & Company, Inc. .....Respondents.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that the Brief of Respondent Gill-Young Insurance compiles with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.

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**PROOF OF SERVICE**

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I certify that I have served the Brief of Respondent Gill-Young Insurance on all parties by mailing a copy of same, via United States Mail, on January 28, 2013, to the following:

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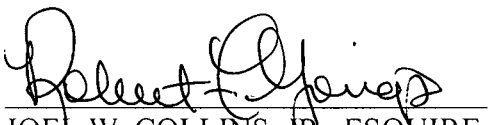
By: 

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Proof of Service of Brief of Respondent Gill-Young Insurance

Columbia, South Carolina
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