

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2010-CP-46-02851

RECEIVED

FEB 04 2013

SC Court of Appeals

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.

REPLY BRIEF OF APPELLANT

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ARGUMENTS

All Respondents have raised the same points in their briefs to this Court.

Accordingly, Plaintiff/Appellant files one brief in Reply to these arguments.

I.

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO PLAINTIFF'S CLAIMS FOR NEGLIGENCE AND NEGLIGENT MISREPRESENTATION AS TO ALL DEFENDANTS

Plaintiff stands on the arguments he made in his Brief of Appellant. However, Plaintiff addresses here certain arguments Respondents/Defendants made in their Briefs of Respondent.

(A) SOUTH CAROLINA FOLLOWS THE DOCTRINE OF "REASONABLE EXPECTATIONS"

As Plaintiff noted in his Brief of Appellant, this Court did not expressly reject the doctrine of "reasonable expectations" in *Allstate Ins. Co. v. Mangum*, 299 S.C. 226, 383 S.E.2d 464 (Ct. App. 1989). Instead, the *Mangum* Court observed the doctrine had not been adopted in South Carolina as of that date, and further that the argument was not preserved in that case. As Plaintiff pointed out in her Brief, the Supreme Court applied the doctrine in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), although the Court did not use the name "doctrine of reasonable expectations" in doing so.

In its Brief of Respondent Colony conspicuously failed to discuss *Crossmann* at all. Instead, Colony gave a "see" cite to the unpublished opinion in *Bell v. Progressive*

Direct Ins. Co., 2011-UP-242 (S.C. Ct. App. filed June 23, 2011), without any parenthetical explanation of that case. (Colony Resp. Br. p. 4). This Court should not be persuaded by the cite to *Bell*.

First, as noted, *Bell* is an unpublished opinion, and Colony's cite to it is improper. See Rule 268(d)(2), SCACR ("Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.").

Second, the case itself adds nothing to the analysis. What this Court stated in *Bell* was the following with regard to the doctrine of reasonable expectations:

Admittedly, the court's statement in *Mangum* is not the law of the case; however, the supreme court has consistently held that unambiguous insurance policies are subject to the general rules of contract construction. See, e.g., *Gambrell v. Travelers Ins. Co.*, 280 S.C. 69, 71, 310 S.E.2d 814, 816 (1983); see also [*Ex Parte United Servs. Auto. Ass'n*, 365 S.C. 50, 54, 614 S.E.2d 652, 654 (Ct. App. 2005)] (suggesting that implementation of this rule is the equivalent of rejecting the doctrine of reasonable expectations). Therefore, even assuming for the sake of argument that the doctrine has not been explicitly rejected, because the doctrine cannot be reconciled with the rule that unambiguous insurance policies are subject to the traditional rules of contract construction, this court is precluded from adopting the doctrine. Such a departure from jurisprudence must be left to our supreme court.

Bell v. Progressive. Thus, *Bell* is inapposite to the argument being made here.

Third, *Bell* preceded *Crossman*, which was filed August 22, 2011, or about 2 months after *Bell*. The Supreme Court in *Crossman* embraced the rule of "reasonable expectations" in adopting the approach it took in that case. Insofar as *Bell* may be authority for rejecting the doctrine, *Bell*'s holding cannot stand in the face of the Supreme

Court's analysis in the subsequent case of *Crossman*.¹

Respondent Gill-Young Insurance (Gill) mentions *Crossmann*, but declares Plaintiff's reliance thereon to be "clearly misplaced." (Gill Resp. Br. p. 9).² Although Gill discusses one holding of *Crossmann*, Gill ignores completely the core of the Supreme Court's decision on rehearing, where the Court stated "In our view, the 'time on risk' approach best conforms to the terms of a standard CGL policy and to the parties'

¹ The *Bell* decision highlights the sound reason the appellate court rules prohibit citing to unpublished opinions. This Court in *Bell* acknowledged the limited reach of *Magnum* but affirmed based upon the Court's inability to tread upon Supreme Court precedent. Further, the Appellate Court Rules permit citation of unpublished opinions in very limited circumstances and set forth a form for citation, which includes the precise date of the decision (i.e., month and day). Rule 268(d)(2). Colony's omission of the precise date in its brief might have caused this Court to overlook the fact that *Crossman* was decided later and at least implicitly overruled *Bell*.

² Gill and Hull gave a "see also" cite to *Bell v. Progressive*, also without parenthetical explanation. (Gill Resp. Br. p. 8; Hull Resp. Br. p. 20). Gill and Hull also cite to two unpublished orders from the United States District Court of South Carolina. (Gill Rep. Br. p. 8; Hull Resp. Br. p. 20). See *Mize v. Travelers Cas. Co. of Connecticut*, CA No. 4:09-cv-0076-TLW-TER (D.S.C. 2011) (2011 WL 891322) (slip at p. 4) (citing only to *United Services* and *Allstate v. Magnum* in summarily observing "this doctrine has been rejected in South Carolina and this court finds no reason to conclude that South Carolina courts would choose to adopt it in the present case"; case predated *Crossmann*); *Nationwide Mut. Fire Ins. Co. v. Neetu, Inc.*, CA No. 3:09-cv-2703-CMC (D.S.C. 2010)(2010 WL 3927568) (citing only to *United Services* in stating the doctrine has been rejected in South Carolina, but rejecting the argument anyway because it was based upon insured's "subjective" belief, not the objective reasonable expectations of the parties; case predated *Crossmann*). Hull cites to another federal district court case in observing that the district court "has similarly declined to adopt the doctrine on many occasions." (Hull Resp. Br. p. 20, citing *Southern Land and Golf Co. Ltd. v. Harleysville Mut. Ins. Co.*, C/A No. 2:03-2189-DCN (D.S.C. 2006) (2006 WL 2443340) (citing only to *Magnum*, and predating *Crossmann*)).

Like *Bell*, none of these unpublished federal district court orders add anything to the discussion. Once again this exercise demonstrates why the Rules of Appellate Procedure prohibit citing to unpublished orders and opinions because those decisions are generally for the parties in the case before the court at that time and are not intended to pronounce holdings that control generally. For the same reasons discussed above the Court should reject Gill's cite to *Bell* and the unpublished federal court orders. See Rule 268(d)(2), SCACR.

objectively reasonable expectations.” *Crossmann*, at 50, 717 S.E.2d at 594 (emphasis added). This is an application of the doctrine of “reasonable expectations” to reach the result the Court reached in that case. Additionally, the Supreme Court discussed the approach Massachusetts took in *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 910 N.E.2d 290 (2009), and stated:

Not only does the *Boston Gas* interpretation give effect to each part of the insuring agreement (rather than focusing solely on the terms “all sums” or “those sums”), *it is consistent with the objectively reasonable expectations of the contracting parties.*

Crossmann, at 62, 717 S.E.2d at 600-601. Thus, the Court noted that although courts must give effect to the terms of the insuring agreement, courts must also consider “the objectively reasonable expectations of the contracting parties.” South Carolina therefore follows the doctrine of “reasonable expectations,” particularly with regard to insurance agreements.

Respondent Hull & Company, Inc. (Hull) discusses the “reasonable expectations” language from *Crossmann*, but minimizes its effect on the holding of that case. (Hull Resp. Br. pp. 20-21). Central to the amended opinion in which the Supreme Court completely reversed its earlier holding was the notion from the *Boston Gas* case that the contracting parties “objectively reasonable expectations” drove the result.

Accordingly, contrary to Respondents’ arguments, South Carolina has now embraced the doctrine of “reasonable expectations,” and the trial court’s ruling to the contrary must be reversed.

(B) THERE IS EVIDENCE OF REASONABLE EXPECTATIONS

Colony asserts that even if South Carolina follows the doctrine of “reasonable expectations,” there is *no* evidence in this record that the policyholder, Morton, had any “reasonable expectations” that the policy would not exclude assault and battery coverage. (Colony Resp. Br. pp. 4-5). The Court should not find this argument persuasive.

Plaintiff set forth in his brief abundant deposition testimony by Morton in the declaratory judgment action that Morton specifically requested assault and battery coverage for the business. (App. Br. pp. 14-17). Although Colony points to an affidavit Mr. Morton later submitted, the conflict in his testimony cannot be resolved on a motion for summary judgment; instead, it is for a jury to resolve that conflict and decide at which point Mr. Morton is telling the truth.

To withstand a motion for summary judgment, in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009). Here, the issue is whether there is any evidence Mr. Morton expected that the policy he purchased would have coverage for assault and battery. The deposition testimony set forth in Plaintiff’s brief is some evidence, at least a scintilla of evidence, of such, so that summary judgment was improper.

Accordingly, this Court must reverse the trial court’s ruling to the contrary.

(C) RES JUDICATA DOES NOT BAR THE CLAIMS

Colony asserts it has demonstrated that there is “no merit” to Plaintiff’s arguments

regarding the doctrine of reasonable expectations. (Colony Resp. Br. p. 5). Of course, whether Plaintiff's argument has merit is a matter for this Court to determine.

In any event, Colony and Gill contend that an order dated October 1, 2009, in a separate declaratory judgment action it brought against The Barn Club acts as *res judicata* to prevent Plaintiff's claim in this case. (Colony Resp. Br. pp. 5-7; Gill Resp. Br. pp. 6-8). The Court should not find this argument persuasive.

Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action. *Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 723 S.E.2d 592 (2012); *Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011). *Res judicata* bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit. *Id.*

In the underlying declaratory judgment case, the issue before the court was whether the terms of the policy covered the incident at issue in this case. The order in that case found that the policy did not provide the coverage for the assault and battery that caused the injuries.

The basis for the claims in this case, however, are that the insured had a reasonable expectation of coverage, and further that there was liability for the failure to include the coverage. Thus, there is not an "identity of subject matter" required to support an assertion of *res judicata*. This explains why the trial court below did not rule that these claims were barred by *res judicata* under the October 2009 order. Accordingly, this Court should reject the assertion by Colony and Gill that *res judicata* bars the claims in this case.

(D) THE ARGUMENT ON “REASONABLE EXPECTATIONS” IS PRESERVED

Respondents contend that Plaintiff failed to raise the doctrine of “reasonable expectations” before the circuit court judge. (Colony Resp. Br. p. 7; Gill Resp. Br. pp. 4-6; Hull Resp. Br. pp. 23-24). They contend that Plaintiff did not raise the issue in support of her claims for negligence or negligent misrepresentation. (*Id.*) The Court should not be persuaded by this argument.

Plaintiff alleged that in procuring insurance for The Barn Club, Morton had reasons to expect that the policy he sought provided coverage for assault and battery. (R.p.85, ¶¶ 9, 10, 11, 15; p.87, ¶¶ 31, 32, 33). Plaintiff also contended Morton advised Gill of the need to purchase insurance for the very claims that are, indeed, excluded. (R.p.88, ¶¶ 37-43 (claim styled “Detrimental Reliance”). Plaintiff alleged further that “the Defendants had a duty to sell a bar owner coverage that a reasonable bar owner would not only need and desire but all to sell a bar owner coverage that he specifically requested.” (R.p.89, ¶ 48). These allegations, while perhaps not the most artful in their drafting, raise the issue the doctrine of “reasonable expectations.” *Cf. Charleston County School Dist. v. Harrell*, 393 S.C. 552, 713 S.E.2d 604 (2011) (pleadings in a case should be construed liberally and the court must presume all well pled facts to be true so that substantial justice is done between the parties).

Furthermore, as Plaintiff pointed out in her Brief of Appellant, the trial court in fact ruled that under *Ex parte United Services Auto. Ass’n*, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005), South Carolina does not follow what is essentially the doctrine of “reasonable expectations.” (App. Br. p. 10). The trial court did not use the phrase

“reasonable expectations,” the order rejected Plaintiff’s assertion that there was a “duty to sell a policy of insurance that will cover all foreseeable risks a reasonable person could anticipate.” (R.p.17, Part (2), first paragraph, citing *Ex Parte United Services*). The trial court also ruled that “South Carolina law does not currently recognize a separate cause of action for detrimental reliance based on the allegations set forth in the complaint,” adding “South Carolina has rejected the doctrine of reasonable expectation for the scope of coverage in an insurance contract.” (R.p.20, Part III(b), citing *Ex Parte United Services*). There rulings addressed Plaintiff’s contention that these Defendants sold a policy that provided the illusion of coverage, and failed to meet Mr. Morton’s reasonable expectations for protection for his bar.

The upshot of Respondents’ argument is an invitation to this Court to elevate form over substance. The Court should decline that invitation and find that the arguments are, in fact, preserved for this Court’s review.

II.

THE TRIAL COURT ERRED IN CONCLUDING COLONY, GILL NOR HULL HAD A DUTY TO ADVISE

Colony and Gill cite to *Sullivan Co., Inc. v. New Swirl, Inc.*, 313 S.C. 34, 437 S.E.2d 30 (1993), for the purported proposition that, as a matter of law, they had no duty to advise their insured. (Colony Resp. Br. p. 7; Gill Resp. Br. pp. 12-14). The *Sullivan* Court stated, however, that “an insurance agent or broker must exercise good faith, reasonable skill, care, and diligence. If, because of his fault or neglect, the agent fails to

procure insurance, or does not follow instructions, or the policy issued is void, or materially deficient, or does not provide the coverage he undertook to supply, the agent is liable to his principal.” *Id.*, at 35, 437 S.E.2d at 31. The narrow holding of *Sullivan* was the refusal to expand the duty of an insurance agent to procure the represented coverage to include a duty to obtain coverage at any particular rate, absent an express promise to do so. *Id.*

Furthermore, the subsequent case of *Houck v. State Farm Fire and Cas. Ins. Co.*, 366 S.C. 7, 620 S.E.2d 326 (2005) stands for the proposition that, while as a general rule, an insurance agent has no duty to advise an insured at the point of application, absent an express or implied undertaking to do so, a duty may be imposed if the agent, nevertheless, undertakes to advise the insured. *Houck*, at 12, 620 S.E.2d at 329. The Court added that, absent an express undertaking to assume such a duty, a duty can be impliedly created, and set forth the factors the courts should consider in making this determination. *Id.*

Colony cites to *Allstate Inc. Co. v. Smoak*, 256 S.C. 382, 182 S.E.2d 749 (1971), for the argument that it had no duty to advise, particularly since there was a broker (Gill) in this matter. (Colony Resp. Br. p. 8). Whether a broker acts as an agent for an insurer is generally a question of fact for a jury. *Holmes v. McKay*, 334 S.C. 433, 513 S.E.2d 851 (Ct. App. 1999) (citing *Smoak*). The *Holmes* Court added “[t]he terms agent and broker are not mutually exclusive. Under certain circumstances, a broker may be an agent for an insurance company.” *Id.*, at 442, 513 S.E.2d at 855.

This Court should reject these arguments and reverse the trial court’s order.

III.

THE INSURED'S FAILURE TO READ THE POLICY DOES NOT BAR PLAINTIFF'S CLAIMS

Respondents assert that even following the adoption of comparative negligence, the cases the trial court relied upon remain of full force and would hold, as a matter of law, that any negligence by Mr. Morton in failing to read in detail the complex insurance policy would be greater than any negligence attributable to the agent. (Colony Resp. Br. p. 9; Hull Resp. Br. pp. 24-26; Gill Resp. Br. pp. 14-17). There is nothing in those cases, however, that supports Colony's contention. Instead, under the law of South Carolina prior to 1991, *any* negligence on behalf of a plaintiff was fatal to recovery; the adoption of modified comparative negligence changed the rule and necessarily impacted all "contributory negligence" cases published prior to that time (*i.e.*, 1991).

Colony and Gill cite to *Mullen v. State Farm Cas. and Fire Co.*, C/A No. 09-2392-JFA (D.S.C. 2010) (2010 WL 2228369), an unpublished decision by the United States District Court in furtherance of its contention. (Colony Resp. Br. p. 9; Gill Resp. Br. p. 16). First, citation to this unpublished case is improper. *See* Rule 268(d)(2), SCACR (unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved). Second, the district court actually held plaintiff "failed to show that he clearly made a request for advice" and further that the only evidence demonstrated the insured "requested his coverage be reduced and ... such request bars [insured] from proving the causation element of his negligence theories." Slip p. 3. The district court's discussion of the "failure to read" cases was dictum, as evidenced by the court's statement that:

In a similar vein, there is a line of cases in South Carolina holding that 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. See *Carolina Prod. Maint., Inc. v. U.S. Fid. & Guar. Co.*, 310 S.C. 32, 425 S.E.2d 39, 42 (S.C. App.1992). See also *Doub v. Weathersby-Breeland Ins. Agency*, 268 S.C. 319, 233 S.E.2d 111 (1977). These cases would present marked difficulty for [insured's] claims even if he were able to show that he clearly requested advice from [the insurance agent].

Mullen, Slip p. 2. In other words, this was not the holding of the decision but merely an observation by the federal district court judge. Notably, the judge relied upon pre-*Nelson* cases and did not analyze the impact of comparative negligence on those decisions.

Mullen does not present an obstacle to Plaintiff's claims.

Respondents also point to *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000) to assert that Morton's negligence "far outweighed any negligence shown by Gill or any other Defendant-Respondent...." (Colony Resp. Br. p. 10; Hull Resp. Br. p. 25; Gill Resp. Br. p. 15). However, because the term is relative and dependant on the facts of a particular case, comparing the negligence of two parties is ordinarily a question of fact for the jury. *Creech v. South Carolina Wildlife and Marine Res. Dep't*, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997); *Mahaffey v. Ahl*, 264 S.C. 241, 214 S.E.2d 119 (1975). See also *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004) (plaintiff's negligence, under a theory of comparative negligence, is a question for the jury). For these reasons, the Supreme Court is reticent to endorse directed verdicts in cases involving comparative negligence. *Thomasko v. Poole*, 349 S.C. 7, 561 S.E.2d 597 (2002). The same should be true of summary judgment.

This Court should reverse the trial court's holding.

IV.

THE STATUTE OF LIMITATIONS DOES NOT BAR PLAINTIFF'S CLAIMS

Plaintiff stands upon the arguments he made in his Brief of Appellant. (App. Br. pp. 21-22).

V.

PLAINTIFF HAS NOT ABANDONED ALL CLAIMS AGAINST COLONY

Plaintiff has not pursued an appeal regarding the dismissal of claims for civil conspiracy of breach of fiduciary duty. However, insofar as Colony asserts Plaintiff has abandoned any other claims against it, Plaintiff asserts that she has properly preserved and argued error in the trial court's dismissal of her claims:

This includes the claims styled "detrimental reliance," which is, in fact, an assertion of the doctrine of "reasonable expectations," as argued above and in the Brief of Appellant.

VI.

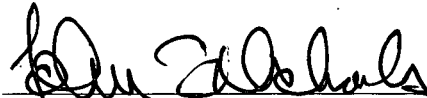
THE ISSUE OF MORTON'S FAILURE TO READ THE POLICY IS PROPERLY BEFORE THE COURT

Hull contends summarily any issue regarding Morton's failure to read the policy is not preserved for appeal. (Hull Resp. Br. p. 26). The short answer to this argument is that the issue involved a *defense* to the claims upon which Respondents had the burden of production and proof. Further, contrary to Hull's assertion, the trial court addressed the issue. (R.p.18, ¶ I (3)).

CONCLUSION

For the reasons stated this Court should reverse the grant of summary judgment for Defendants as to Plaintiff's claims for negligence and negligent misrepresentation and permit this matter to proceed to trial.

Respectfully Submitted,



January 31, 2013

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the
Reply Brief comply with the provisions of Rule 211(b), SCACR, and with the August 13,
2007, Supreme Court Order regarding personal data identifiers.

/Signature page attached

February 4, 2013

Respectfully Submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served
counsel for the Respondents with a copy of the *Final Brief of Appellant* and *Reply Brief*
by mailing a copy of the same by United States Mail with first class postage prepaid to
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