THE 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

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.

BRIEF OF RESPONDENT COLONY INSURANCE COMPANY

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STATEMENT OF THE CASE

Plaintiff-Appellant, Pamela Dill as the Attorney-in-Fact and Natural Mother of Britten Teno, originally filed a lawsuit against the Barn Club, Inc., d/b/a The Money ("Barn Club") and Jim Morton ("Morton") on June 26, 2007, for an alleged assault and battery stemming from a March 6, 2005 incident at the Barn Club. ("Underlying Lawsuit.) On August 8, 2007, Colony Insurance Company ("Colony") filed a Declaratory Judgment action against its insured, the Barn Club, seeking a determination of its rights and obligations under a commercial general liability policy between it and the Barn Club. By order dated October 1, 2009, the circuit court presiding over the Declaratory Judgment action held that the Colony policy issued to the Barn Club did not provide coverage for the Underlying Lawsuit. (R. pp. 2-6). That order was never appealed.

Thereafter, Plaintiff-Appellant settled the Underlying Lawsuit and as part of that settlement received a confession of judgment against the Barn Club for eight million dollars ($8,000,000.00). (R. pp. 7-8). As part of the settlement of the Underlying

Lawsuit, Plaintiff-Appellant agreed not to execute the judgment against the Barn Club if the Barn Club assigned its rights to the Appellant. (R. pp. 757-761).

In the present action before this Court, Plaintiff-Appellant alleged six causes of action. The causes of action were 1) Reformation (First Cause of Action); 2) Detrimental Reliance (Second Cause of Action; 3) Civil Conspiracy (Third Cause of Action); 4) Negligence (Fourth Cause of Action); 5) Negligent Misrepresentation (Fifth Cause of Action); and 6) Breach of Fiduciary Duty. (R. pp. 84-91).

After conducting discovery, Colony moved for summary judgment on all claims. On March 31, 2011 the trial court granted summary judgment in favor of Colony on all claims. (R. pp. 13-22). On May 11, 2011, the Plaintiff-Appellant entered her notice of appeal of the March 31, 2011 order granting Defendant-Respondents summary judgment. Said appeal was limited to the causes of action for negligence and negligent misrepresentation. (Initial Brief of the Appellant.)

FACTS

Jim Morton was the president and the general manager of the Barn Club during the relevant time periods. (R. pp. 283, 334-335). Part of Morton's responsibilities was to procure insurance for the night club. (Id. at 334-335). Gill-Young was the broker. (Id. at 300). Morton approached the Gill agency in order to procure insurance of the Barn Club (R. pp. 467-472). The record is devoid of any evidence of communication between Morton (and/or his broker Gill) and Colony regarding they type of insurance he wanted to procure. Colony made no representations as to what the policy did and did not cover. Morton would to look to Ms. Rodgers of Gill insurance agency to answer questions. (Id.)

There is no evidence that Ms. Rodgers was a captured agent of Colony. Colony issued a commercial general liability coverage to The Barn, Inc. a/k/a The Money. (R. pp. 2-6).

Pursuant to Rule 208(b)(6), SCACR, Defendant-Respondent Colony adopts by reference the Facts as outlined by Defendant-Respondent Gill-Young in its Initial Brief before this Court.

STANDARD OF REVIEW

Pursuant to Rule 208(b)(6), SCACR, Defendant-Respondent Colony adopts by reference the Standard of Review outlined by Defendant-Respondent Gill-Young in its Initial Brief before this Court.

ARGUMENT

I. THERE WAS NO ERROR OF THE COURT FOR REJECTING THE DOCTRINE OF REASONABLE EXPECTATIONS.

Plaintiff-Appellant first argues that South Carolina should follow the Doctrine of Reasonable Expectations. As will be shown below, there is no basis for Plaintiff-Appellant's position.

(a) South Carolina has repeatedly rejected the Doctrine of Reasonable Expectations.

South Carolina has expressly refused to adopt the Doctrine of Reasonable Expectations. See Allstate Ins. Co. v. Mangum, 229 S.C. 226, 231-32, 383 S.E.2d 464,

466-467 (Ct.App. 1989); see also Bell v. Progressive, 2011–UP-242 (Ct.App. 2011). Instead South Carolina requires courts to interpret the policies as written and prohibits courts from rewriting the actual language of the policy in order to extend coverage where it nonetheless does not exist. See Gambrell v. Travelers Ins., 280 S.C. 69, 310 S.E.2d 814 (1983). The policy in question, based upon the plain language therein, did not provide coverage for the Underlying Lawsuit. See S.C. Farm Bureau Mut. Ins. Co. v. Oates, 356 S.C. 578, 356 S.E.2d 378 (Ct.App. 2003). As such, summary judgment for the Defendant-Respondent Colony was proper.

(b) 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 Plaintiff-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. Morton relied solely on his broker Gill in procuring insurance coverage for the Barn Club. (R. pp. 467-472). Gill procured insurance through Hull who performed the underwriting on the policy. (Id.) The policy was issued on Colony paper. During the insurance procurement and underwriting process, Colony had no direct dealings with Morton or the Barn Club. (Id.) All negotiations and underwriting were performed by Gill and Hull. No party has contended that Colony's policy was other then what was requested by these intermediaries.

The *only* insurance coverage requested by Morton when he met with Gill was the items described in the letter of the Barn Club's landlord, Aberman Family Limited Partnership. (R. pp. 13-22; 467-472 at ¶ 11-12, 26). Specifically, the Aberman letter sought to increase the property coverage limit from $75,000 to $200,000, the general

liability coverage from $300,000 to $1,000,000, and to "make sure that there is no 'dram shop' exclusion." (R. pp. 13-22 at 16). The Aberman letter did not mention, request, or require assault and battery coverage. (Id.) Morton affirmed that 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. 13-22 at 17, R. pp. at 467-472 at ¶ 24). Morton even acknowledged by his signature on two subsequent insurance applications that assault and battery claims were excluded by Colony's policy. (Id. at ¶ 17, 20). Further, he had no basis for an expectation of assault and battery coverage because he did not even bother to read the policy. (Id. at ¶ 21). The language of the policy expressly and prominently excludes coverage for assault and battery claims. (R. pp. 2-6). This is a common policy exclusion as is the exclusion of coverage for intentional torts. A thorough reading of the policy confirms that the only reasonable expectation the parties could have had was that intentional torts including, assault and battery, would not be covered by the policy. Such coverage was expressly and conspicuously excluded. (Id.) Thus, Morton could not have a "reasonable expectation" for coverage that he did not ask for and coverage that he affirmed was expressly excluded. See Gambrell, 280 S.C. 69, 310 S.E.2d 814.

(c) Plaintiff-Appellant's argument is barred by *Res Judicata.*

While Defendant-Respondent has shown why there is no merit to Plaintiff-Appellant's argument that the Doctrine of Reasonable Expectations applies to this case, this Court should not even reach this issue because Plaintiff-Appellant's argument is barred by the Doctrine of *Res Judicata*. Plaintiff-Appellant fails to bring to the attention of this Court that the circuit court that oversaw Colony's coverage action against

Plaintiff-Appellant has already ruled that the Colony policy in question did not provide coverage for the allegations asserted in the Underlying Lawsuit. (Id.) Plaintiff-Appellant never appealed the Declaratory Judgment Order. As such, that judgment becomes the law of this case and is binding upon Plaintiff-Appellant. See Yelson Land Co. v. State, 397 S.C. 15, 723 S.E. 2d. 592 (2012) (holding that regardless of whether the ruling was right or wrong, an unappealed ruling becomes the law of the case at hand).

The Doctrine of *Res Judicata* serves to prohibit subsequent claims 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. See Plum Creek Development Co., Inc., v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Both, Plaintiff-Appellant and the Barn Club were parties in Colony's Declaratory Judgment action. (R. pp. 23-28). Additionally, the subject of the Declaratory Judgment action was to determine whether or not the Colony policy of insurance, the very policy at issue in the case *sub judice*, provided coverage for Plaintiff-Appellant's tort claims in the Underlying Lawsuit. (Id.)

The circuit court fully adjudicated all issues and defenses regarding the policy and found no coverage for Plaintiff-Appellant's claims. (R. pp. 2-6). A finding and conclusion that Plaintiff-Appellant never appealed. As such, *res judicata* bars Plaintiff-Appellant's contention that the Colony policy should be interpreted by using the Reasonable Expectations Doctrine to find coverage for the Underlying Lawsuit. See Reidman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992).

(d) Plaintiff-Appellant's Argument that the Doctrine of Reasonable Expectations provides it with coverage under the Colony policy was not properly preserved for appeal.

Because Plaintiff-Appellant failed to raise the application or adoption of the Doctrine of Reasonable Expectations at the circuit court level, it cannot now be raised before this Court. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). The circuit court's Order granting summary judgment clearly shows that Plaintiff-Appellant did not raise the Doctrine of Reasonable Expectations in support of her claims for negligence or negligent misrepresentation. (R. pp. 13-22). As such, Plaintiff-Appellant can not meet her burden to show that this issue was preserved for appeal. See Germain v. Nichol, 278 S.C. 508, 299 S.E.2d 335 (1983).

II. THE COURT CORRECTLY RULED THAT NEITHER COLONY, GILL, NOR HULL HAD A DUTY TO ADVISE

Plaintiff-Appellant in her brief does not maintain a position that Defendant-Respondent Colony had any duty to advise the Barn Club or Morton. (Plaintiff-Appellant Brief, pp. 13-18.) As a matter of law, there cannot be any duty on Colony to advise its insured. See Sullivan Co. v. New Swirl, Inc., 313 S.C. 34, 437 S.E.2d 30 (1993). Instead, Plaintiff-Appellant alleges that Gill, as insurance agent and/or broker had such duty. (Id.) Regardless, the circuit court correctly held that the insurer (in this case Colony) had no duty to advise an insured. See Trotter v. State Farm Mutual Auto Ins. Co., 207 S.C. 465, 377 S.E.2d 343 (Ct. App. 1988).

It is undisputed that Gill was the broker who procured insurance on behalf of the Barn Club. South Carolina recognizes that "a broker is ordinarily one who acts as a middle man between the insured and insurer and who solicits insurance from the public under no employment from any special company, but having secured an order, either places the insurance with a company selected by the insured or with a company selected by the broker himself." Allstate Ins. Co. v. Smoak, 256 S.C. 382, 392, 182 S.E.2d 749,

754 (1971) (internal citations omitted). As such, a broker acting for an insured has no authority to bind the insurer. See Allstate Ins. Co., 256 S.C. at 393, 182 S.E.2d at 754. In such circumstances the broker is the agent of the insured, not of the insurer. See id.; see also Hoitt v. Guaranty National Ins. Co., 329 S.C. 522, 530, 496 S.E.2d 417, 422 (1997). Additionally, the mere fact that a broker receives a commission from an insurer does not, without more, create an agency relationship between the broker and the insurer. Id. (See also Rule 208(b)(2), SCACR, allowing the Court Respondent to ask the Court to affirm the circuit court on any ground appearing from in the record as provided by 220(c).)

In the case, *sub judice*, there is no evidence or suggestion of any communications between Defendant-Respondent Colony and the Barn Club or Morton. (R. pp. 467-472). There is no evidence and, as such, no genuine issue of material fact to support that Gill had the explicit or implicit authority to bind Colony, thereby making Gill Colony's general agent. Thus, Colony cannot be held to be vicariously liable for the acts or omission of Gill.

Plaintiff-Appellant's sole argument against Colony for negligent and/or negligent misrepresentation is that Colony is somehow derivatively liable for the acts and omissions of Gill. As stated above, this argument has no merit. See Allstate, 256 S.E. 382, 182 S.E.2d 749; Hoitt v. Guaranty Nat'l, 329 S.C. 522, 496 S.E.2d 417. However, even if this Court were to find that Gill was a general agent for Colony on this issue, because Gill had no duty to advise Morton, the circuit court did not err in granting summary judgment for all Defendant-Respondents. Defendant-Respondent Colony,

hereby adopts by reference Section II of Gill's brief to this Court, pursuant to Rule 208(b)(6), SCACR, for the proposition that Gill had no duty to advise Morton.

III. THE COURT CORRECTLY RULED THAT THE INSURED'S FAILURE TO READ THE COLONY POLICY BARS PLAINTIFF-APPELLANT'S CLAIMS

Defendant-Respondent Colony asserts that the trial court correctly ruled that Morton was negligent for failure to read the Colony policy, and that such negligence was an abandonment of all care. (R. pp. 13-22). Contrary to Plaintiff-Appellant's position, Carolina Production Maintenance Inc., v. U.S. Fidelity and Guaranty Co., 310 S.C. 32, 425 S.E.2d 39, is good law and stands for the proposition that such a failure to read the policy is negligent as a matter of law and greater than any negligence attributable to an agent. See Mullen v. State Farm Cas. and Fire Co., 2010 U.S. Dist. LEXIS 54959 (D.S.C. June 1, 2010.) Crossman Communities of North Carolina Inc. v. Harleysville Mutual Ins. Co., 395 S.C. 40, 717 S.E.2d 589 (2011) does not change this result.

The facts before the Court are clear. Morton understood he had a responsibility to look at the Colony policy, but did not. (R. pp. 264, 322). He also admitted, had he read the policy he would have understood that assault and battery were excluded from coverage. (R. pp. 169, 194, 467-472 at ¶ 21). Because Morton's negligence far outweighed any negligence shown by Gill or any other Defendant-Respondent, summary judgment was proper. See Bloom v. Ravoria, 398 S.C. 417, 529 S.E.2d 710 (2000).

IV. THE STATUTE OF LIMITATIONS BARS PLAINTIFF-APPELLANT'S CLAIMS FOR NEGLIGENCE AND NEGLIGENCE MISREPRESENTATION.

As Plaintiff-Appellant conceded at the hearing on Defendant-Respondents' motion for summary judgment, and as correctly noted in the trial court's order, any claim

for negligence or negligent misrepresentation against Colony would only be based upon a derivative theory of liability based upon the actions or omissions of Gill. (R. pp. 13-22). As such, Colony adopts by reference, pursuant to Rule 208(b)(6), SCACR, Section IV of the Initial Brief of Defendant-Respondent Gill-Young.

V. PLAINTIFF-APPELLANT HAS ABANDONED HER CLAIMS AGAINST COLONY FOR 1) DETRIMENTAL RELIANCE (SECOND CAUSE OF ACTION); 2) CIVIL CONSPIRACY (THIRD CAUSE OF ACTION); AND 3) BREACH OF FIDUCIARY DUTY (SIXTH CAUSE OF ACTION). NEVERTHELESS THE TRIAL COURT DID NOT ERR IN GRANTING COLONY SUMMARY JUDGMENT ON THESE CLAIMS.

As stated in Plaintiff-Appellant's brief, the only issues being appealed concern the granting of summary judgment on the claims for negligence and negligent misrepresentation. Nowhere in Plaintiff-Appellant's brief does she raise error with the trial court's grant of summary judgment for Colony on Plaintiff-Appellant's remaining causes of action. (Initial Brief of Appellant.) As such, she has abandoned her appeal on these issues. (R. pp. 13-22). However, had the Plaintiff-Appellant preserved these issues before this Court, there was no error.

Plaintiff-Appellant asserted a claim of Civil Conspiracy against Colony in her Third Cause of Action. (R. pp. 84-91). In order to support a claim for civil conspiracy one must show a conspiracy or agreement between a "combination of two or more persons to injure a plaintiff and cause him [or her] special injuries." Pinion v. Pinion, 363 S.C. 564, 566-567, 611 S.E.2d 271, 272 (Ct.App. 2005). Plaintiff-Appellant has asserted no facts to create a genuine issue of fact of either special damages or of an additional act committed in furtherance of the alleged conspiracy. See Hackworth v. Greywood at Hammett. LLC, 285 S.C. 100, 682 S.E.2d 871 (Ct.App. 2009); see also Pridgen v. Ward, 391 S.C. 238, 705 S.E.2d 58 (Ct.App. 2010). As such, summary

judgment for Colony was proper. The circuit court also correctly concluded that South Carolina law does not currently recognize a separate cause of action for detrimental reliance based on the allegations of the complaint said being a statement of legal principle rather then a separate tort.

Finally, there is no doubt that Colony does not have a fiduciary duty towards its insured in regard to advising its insured as to coverage. See Pitts v. Jackson National Life Ins. Co. 352 S.C. 319, 574 S.E.2d 502 (Ct.App. 2002.)

CONCLUSION

For the foregoing reasons, the Court should affirm the circuit court's order granting summary judgment in favor of Colony and all other Defendant-Respondents.

[*Signature page to follow*]

Date: February 13, 2013

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondent Colony Insurance Company complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

The undersigned hereby certifies that I have served the Brief of Respondent Colony Insurance Company on all parties by mailing a copy of same, via United States Mail, on February 13, 2013, to the following:

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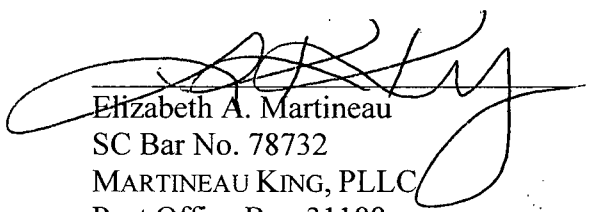

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