

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Judicial Circuit Court Judge
Trial Court Case No.: 2013-CP-16-00317

Appellate Case No.: 2014-000626

RECEIVED
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SC Court of Appeals

JONATHAN TEAL AND STACIE TEAL Appellants

-vs.-

MARY ELIZABETH HICKMAN-TEDDER, ALLSTATE PROPERTY & CASUALTY
INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY
AND NATIONWIDE MUTUAL INSURANCE COMPANY Respondents

RECORD ON APPEAL

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COPY

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON

CIVIL ACTION NO: 2013-CP-16-00317

Jonathan Teal and Stacie Teal,

Plaintiffs,

v.

Mary Elizabeth Hickman-Tedder, Allstate
Property & Casualty Insurance Company,
Government Employees Insurance Company
and Nationwide Mutual Insurance Company,

Defendants.

ORDER

2013 DEC 17 AM 11:10
CLERK OF COURT
DARLINGTON COUNTY, S.C.

This matter comes before me upon motions of all the Defendants to dismiss the Complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. A hearing was held on this matter on November 21, 2013 at the Darlington County Courthouse. Appearing on behalf of the Plaintiffs was Ashley Twombly, Esquire. Appearing on behalf of the Defendant Hickman-Tedder was Heath Ruffner, Esquire, appearing on behalf of the Defendant Allstate Property & Casualty Insurance Company was Johnston Cox, Esquire, appearing on behalf of Government Employees Insurance Company was Robert T. King, Esquire, appearing on behalf of the Defendant Nationwide Mutual Insurance Company was J.R. Murphy, Esquire. After reviewing the pleadings, motions, supporting memoranda and applicable case law, I find that the Defendants' motions to dismiss are proper and therefore, hereby dismiss the Plaintiffs' Complaint with prejudice.

This action seeks to set aside the prior settlements entered into between the Defendants and the Plaintiffs for damages resulting from an automobile accident between the Plaintiffs and Defendant Mary Elizabeth Hickman-Tedder. The Complaint also asserts a cause of action against Hickman-Tedder for negligence in connection with the automobile accident.

TRUE CERTIFIED COPY.

Est B. Juggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

The basis of the lawsuit are the allegations that the Plaintiffs' prior attorneys, William Rivers and the firm of Schuriknight & Rivers, settled the case without their knowledge, forged their names to the settlement documents and drafts and then absconded with all of the money. The Complaint does not allege any knowledge of or participation in the wrong doing of Attorney Rivers on the part of any of the Defendants.

It is alleged and undisputed that Attorney Rivers entered into three separate settlement agreements on behalf of the Plaintiffs. The claim against Hickman-Tedder was settled in exchange for the liability policy limits of \$25,000.00 under the automobile insurance policy issued by Allstate in exchange for a Covenant Not to Execute in favor of Hickman-Tedder. Attorney Rivers subsequently settled the Plaintiffs' claim for underinsured motorist coverage under the GIECO and Nationwide policies for \$25,000.00 and \$50,000.00, respectively. All of these settlements represent the full limit of coverage available to the Plaintiffs in connection with the accident whether liability or underinsured motorist. After signing appropriate Covenants Not to Execute and/or releases, Rivers signed his own name to a Stipulation of Dismissal pursuant to Rule 41(a)(1)(A) which was filed on June 13, 2012 dismissing Plaintiffs' suit against Hickman-Tedder with prejudice. Plaintiffs allege that they did not sign any of these documents and did not consent to the settlements or dismissal of the underlying action. Therefore, Plaintiffs ask this court to set aside the settlements based upon their contention that the conduct of Attorney Rivers constitutes a "fraud upon the court".

At the outset, the court notes that any claim based on "fraud upon the court" lies in equity. Therefore, equity must first consider whether the Plaintiffs have adequate remedies at law before providing equitable relief. Since the court concludes that Plaintiffs have multiple

adequate remedies at law, any claim for equitable relief including "fraud upon the court" must fail.

In addition, it is clear that under the principles of agency law in South Carolina, Plaintiffs bear the risk of their chosen attorney's misconduct. By filing the lawsuit with the Plaintiffs' permission, Rivers acquired apparent authority to enter into settlements with all of the Defendants and to consummate the settlements by execution of appropriate releases or covenants and the filing of a stipulation of dismissal. It is well established that "where one of two innocent persons must suffer, the law should fall upon him who put it in the power of a third person to cause such a loss." Bolton v. Wharton, 163 S.C. 242, 161 S.E. 454 (1931). This rule is founded upon the agent's apparent authority and promotes the public policy of encouraging settlements so that parties who are forced to deal with another party's agent have confidence in the finality of the transaction. The Supreme Court explained this principle in Spence v. Spence, 368 S.C. 106, 126-27, 628 S.E.2d 869, 880 (2006):

The rule "is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency. . . . *Seeing that someone must be loser by the deceit, it is more reasonable that he who employs and confides in the deceiver should be the loser than a stranger.*"

(emphasis added). This rule has been applied by courts in North Carolina and Georgia to similar factual situations as the one alleged here. Purcell Int'l Textile Group, Inc. v. Algeme AFW N.V., 185 N.C. App. 135, 647 S.E.2d 667 (Ct. App. 2007) (holding that, because the attorney acted with apparent authority as defendant's agent, defendants failed to meet the criteria for setting

aside the judgment); Wilson v. N.E. Isaacson of Georgia, Inc., 139 Ga. App. 582, 229 S.E.2d 29 (Ct. App. 1976) (holding that the plaintiff is bound by his attorney's dismissal of the case).

Although Plaintiffs cite to a case from Nevada that reached a different conclusion, Nevada does not recognize that an attorney who files suit on behalf of a client gains apparent authority to settle or dismiss the case. South Carolina law is clear that an attorney may settle litigation on behalf of his client, absent fraud or mistake, and that such a settlement is binding on the client. Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 70, 488 S.E.2d 334, 334 (Ct. App. 1997). To the extent that Rivers acted fraudulently towards the Defendants by entering into a settlement agreement and dismissing the case, he acted within his apparent authority. Furthermore, Plaintiffs, as Rivers' principal, are not only bound by Rivers' conduct, but would be liable for frauds committed while acting under his apparent authority. See Williams v. Commercial Casualty Ins. Co., 159 S.C. 301 (1931) (holding that, in addition to being obligated to honor the fraudulently produced policy, an insurer could be liable for punitive damages where its agent issued fake policies with apparent authority, collected premiums, and absconded with the funds). Therefore, Plaintiffs bear the loss caused by Rivers' conduct and the Defendants are entitled to rely upon and enforce the settlement agreements. In this case, the terms of the settlement did not result from any fraud of the Defendants. The attorney hired by the Plaintiffs entered into an otherwise bonafide settlement before fraudulently diverting the funds for his own use. Because the Defendants innocently purchased their peace from Plaintiffs through Plaintiffs' selected agent, Plaintiffs are bound by Rivers' conduct.

Moreover, although South Carolina has recognized an equitable action for fraud upon the court, it is limited to fraud committed by an opposing party. Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003); See also Purcel Int'l Textile Group, Inc., 185 N.C. App. at 138,

647 S.E.2d at 670 (“Relief from attorney fraud on the court is to be granted only where the judgment was obtained by the improper conduct of the party in whose favor it was rendered.”) (quotation omitted). Also, Plaintiffs do not allege that their counsel made any representations to the court and the stipulation of dismissal counsel signed and filed with the court did not require judicial approval. Therefore, it is doubtful that the conduct of Plaintiff’s counsel would even constitute “fraud upon the court.”

AS TO DEFENDANT MARY ELIZABETH HICKMAN-TEDDER ONLY

In addition to joining in the other Defendants’ motions to dismiss pursuant to Rule 12(b)(6), Hickman-Tedder also moved to dismiss pursuant to Rule 12(b)(4) and/or (5) based upon the Plaintiffs’ failure to properly serve Hickman-Tedder.

Rule 3(a) provides:

A civil action is commenced when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or (2) *if not served within the statute of limitations, actual service must be accomplished not later than 120 days after filing.*

(emphasis added). As set forth in the Plaintiffs’ Complaint, the automobile accident involving the Plaintiffs and Defendant Hickman-Tedder occurred on June 29, 2010, meaning that pursuant to S.C. Code § 15-3-535 the statute of limitations ran on June 29, 2013. The Plaintiffs filed their Complaint on April 15, 2013, well within the statute of limitations. Under Rule 3(a), the Plaintiffs could either (1) serve Hickman-Tedder within the statute of limitations (June 29, 2013); or (2) serve Hickman-Tedder not later than one hundred twenty days after filing (August 13, 2013).

On May 7, 2013, counsel for Hickman-Tedder wrote to Plaintiffs’ counsel via facsimile stating in part: “It is my understanding that Mrs. Hickman-Tedder has not been served. If that is

incorrect, please let me know that and forward a copy of your proof of service to me as soon as possible." Receiving no response from Plaintiffs' counsel, on May 10, 2013, Hickman-Tedder's Answer and Notice of Motion and Motion to Dismiss were served. The first ground listed on the motion to dismiss was "Pursuant to Rule 12(b)(4) and/or (5) of the South Carolina Rules of Civil Procedure inasmuch as the Plaintiffs have failed to properly serve said Defendant." The same ground for dismissal was listed as the Second Defense in Hickman-Tedder's Answer. Hickman-Tedder was personally served with the Summons and Complaint on November 20, 2013.

Plaintiffs have offered no explanation for not serving Hickman-Tedder, the alleged tortfeasor, within the time prescribed by Rule 3(a). The court notes that counsel for Hickman-Tedder, even before filing Hickman-Tedder's Answer, raised the issue of service by correspondence to Plaintiffs' counsel on May 7, 2013.

Clearly, the Plaintiffs failed to serve Hickman-Tedder within the time required by Rule 3(a) and, therefore, Hickman-Tedder is entitled to dismissal of the Plaintiffs' Complaint against her.

Based upon the above, it is

ORDERED, ADJUDGED and DECREED that the Defendants' motions to dismiss are GRANTED and the Plaintiffs' Complaint is hereby DISMISSED with prejudice.

IT IS SO ORDERED.

Pageland, South Carolina

Dated: December 13, 2013


The Honorable Paul M. Burch
Chief Judge for Administrative Purposes for
the Fourth Circuit

2013 DEC 17 PM 11:10
CLERK OF COURT
JAILBRIFF
S.C.

TRUE CERTIFIED COPY,
Scott B. Suggs
CLERK OF COURT/IMC
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-16-0317

JONATHAN TEAL AND STACIE TEAL

MARY ELIZABETH HICKMAN-TEDDER, ALLSTATE
PROPERTY AND CASUALTY INSURANCE COMPANY,
GOVERNMENT EMPLOYEES INSURANCE COMPANY AND
NATIONWIDE MUTUAL INSURANCE COMPANY

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: JUDGE PAUL M. BURCH

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCF; ☐ Rule 41(a), SCRCF (Vol. Nonsuit); ☐ Rule 43(k), SCRCF (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCF; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: PLAINTIFF'S MOTION TO ALTER OR AMEND THE ORDER DATED DECEMBER 13, 2013 IS HEARBY DENIED.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount to be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

motion to Reconsider is denied.

FILED
2014 FEB -5 PM 4:03
SCOTT H. SUBBS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED COPY
CLERK OF COURT
DARLINGTON COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-16-0317

JONATHAN TEAL AND STACIE TEAL,

Plaintiffs,

vs.

MARY ELIZABETH HICKMAN-TEDDER,
ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY, GOVERNMENT
EMPLOYEES INSURANCE COMPANY
AND NATIONWIDE MUTUAL
INSURANCE COMPANY

Defendants.

COPY

**ORDER DENYING PLAINTIFFS'
MOTION FOR HEARING ON
PLAINTIFFS' MOTION TO
RECONSIDER, ALTER OR AMEND
ORDER DATED DECEMBER 13, 2013**

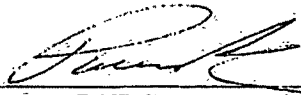
Plaintiffs Motion for Hearing on Plaintiffs' Motion to Reconsider, Alter or Amend Order

Dated December 13, 2013 is hereby denied.

AND IT IS SO ORDERED!

TRUE CERTIFIED COPY

Scott B. Suggs
CLERK OF COURT/CMC
DARLINGTON COUNTY, SC


PAUL M. BURCH
Presiding Judge

Pageland, South Carolina

2/28, 2014

2014 MAR 10 PM 1:43
SCOTT B. SUGGS
CLERK OF COURT/CMC
DARLINGTON COUNTY, S.C.

FILED

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

JONATHAN TEAL AND STACIE TEAL,

Plaintiff(s)

vs.

MARY ELIZABETH HICKMAN-TEDDER, ALLSTATE
PROPERTY AND CASUALTY INSURANCE COMPANY,
GOVERNMENT EMPLOYEES INSURANCE COMPANY AND
NATIONWIDE MUTUAL INSURANCE COMPANY,

Defendant(s)

Submitted By: J. Ashley Twombly
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Beaufort, SC 29902

SC Bar #: 72916
Telephone #: (843) 982-0100
Fax #: (843) 982-0103
Other:
E-mail: twombly@twlawfirm.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20__-CP-_____
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☒ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (610) | | |

Submitting Party Signature: _____

Date: April 11, 2013

TRUE CERTIFIED COPY,

CLERK OF COURT/RMC

DARLINGTON COUNTY, S.C.

Note: Frivolous civil proceedings may be subject to sanctions pursuant to S.C. Rule 10.1 and the South Carolina Frivolous SCCA / 234 (04/2012)

FILED
2013 APR 15 PM 1:18
SCOTT B. SUGGS
CLERK OF COURT/R.M.C.
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

Scott B. Suggs

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

TRUE CERTIFIED COPY,

Scott B. Suggs

**CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.**

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
)

COUNTY OF DARLINGTON

) CIVIL ACTION NO: 2013-CP-16-
)

13CP160317

JONATHAN TEAL AND STACIE TEAL,

Plaintiffs,

vs.

MARY ELIZABETH HICKMAN-TEDDER,
ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY, GOVERNMENT
EMPLOYEES INSURANCE COMPANY AND
NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendants.

SUMMON

2013 APR 15 PM 1:18
SCOTT B. SUGGS
CLERK OF COURT/R.C.D.
DARLINGTON COUNTY, S.C.

FILED

TO: DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to the said Complaint on the Plaintiffs by and through their attorney(s), J. Ashley Twombly of TWENGE + TWOMBLY LAW FIRM, 311 Carteret Street, Beaufort, SC 29902, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint. Any Answer that you serve on the parties in this action must be filed with the Clerk of Court within a reasonable period of time after service.

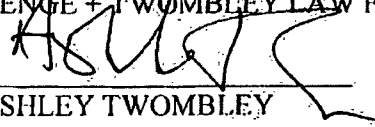
TRUE CERTIFIED COPY,

Scott B. Suggs

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

TWENGE + TWOMBLEY LAW FIRM

BY:


J. ASHLEY TWOMBLEY

311 Carteret Street

Beaufort, SC 29902

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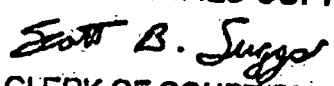
Attorney for Plaintiffs

Beaufort, South Carolina

April 11, 2013

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DARLINGTON COUNTY, S.C.

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON

CIVIL ACTION NO: 2012-CP-16

13CP160317

JONATHAN TEAL AND STACIE TEAL,

Plaintiffs,

vs.

MARY ELIZABETH HICKMAN-TEDDER,
ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY, GOVERNMENT
EMPLOYEES INSURANCE COMPANY AND
NATIONWIDE MUTUAL INSURANCE
COMPANY,

Defendants.

VERIFIED

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Aldon Roller
MY COMMISSION EXPIRES 02-21-2017

PERSONALLY appeared before me, Jonathan Teal and Stacie Teal, who being duly sworn, deposes and says that they are the Plaintiffs in the foregoing action; that they have read the foregoing Verified Complaint and the same is true of their own knowledge, save and except any matters therein alleged upon information and belief, and as to those matters, they verily believe them to be true.

Jonathan Teal
JONATHAN TEAL

Stacie Teal
STACIE TEAL

SWORN to and subscribed before
me this 5 day of April 2013

Aldon Roller
Notary Public for South Carolina
My Commission Expires: 02-21-2017

TRUE CERTIFIED COPY,

MY COMMISSION EXPIRES 02-21-2017

Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON

) CIVIL ACTION NO: 2013-CP-16-

13CP160317

JONATHAN TEAL AND STACIE TEAL,

Plaintiffs,

vs.

VERIFIED COMPLAINT
(Jury Trial Demanded)

MARY ELIZABETH HICKMAN-TEDDER,
ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY, GOVERNMENT
EMPLOYEES INSURANCE COMPANY
AND NATIONWIDE MUTUAL
INSURANCE COMPANY,

Defendants.

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TO: DEFENDANTS ABOVE NAMED:

Jonathan Teal and Stacie Teal, hereinafter "Plaintiffs," complaining of Mary Elizabeth Hickman-Tedder, Allstate Property and Casualty Insurance Company, Government Employees Insurance Company and Nationwide Mutual Insurance Company, would allege and state as follows:

INTRODUCTION

This is an action for fraud upon the Court. Fraud upon the Court occurs where a party, or an attorney, tampers with the fair administration of justice by deceiving the institutions set up to protect and safeguard the public or otherwise abuses or undermines the integrity of the judicial process. An attorney is an officer of the Court. An attorney's loyalty to the Court, as an officer thereof, demands integrity and honest dealing with the Court, and when the attorney departs from that standard in the conduct of a case, he perpetrates fraud on the Court. Attorney fraud calls

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into question the integrity of the entire judicial system and erodes public confidence in the fairness of our system of justice. Therefore, when it is clear that there has been fraud upon the Court, it is imperative that quick and decisive action be taken to stamp out the fraud, which is the only way to restore the public's confidence in our system of justice.

PARTIES AND JURISDICTION

1. Plaintiffs are, and at all times were, citizens and residents of the County of Chesterfield, State of South Carolina.

2. Mary Elizabeth Hickman-Tedder, hereinafter "Defendant Hickman-Tedder," is a resident of the County of Darlington, State of South Carolina.

3. Allstate Property and Casualty Insurance Company, hereinafter "Allstate," is a corporation organized and existing under the laws of the State of Illinois and maintains agents and servants in South Carolina for the purpose of carrying on its business. Allstate was the liability insurance carrier for Walter Tedder, owner of the vehicle driven by Mary Elizabeth Hickman-Tedder, and is so situated that the disposition of this suit may, as a practical matter, impair or impact Allstate's interest, unless it is joined as a party and allowed to participate.

4. Government Employees Insurance Company, hereinafter "GEICO," is a corporation organized and existing under the laws of the State of Maryland and maintains agents and servants in South Carolina for the purpose of carrying on its business. GEICO was the underinsured motorist carrier for Plaintiff, Jonathan Teal, and is so situated that the disposition of this suit may, as a practical matter, impair or impact GEICO's interest, unless it is joined as a party and allowed to participate.

5. Nationwide Mutual Insurance Company, hereinafter "Nationwide" is a corporation organized and existing under the laws of the State of Ohio and maintains agents and

servants in South Carolina for the purpose of carrying on its business. Nationwide was the underinsured motorist carrier for Plaintiff, Stacie Teal, and is so situated that the disposition of this suit may, as a practical matter, impair or impact Nationwide's interest, unless it is joined as a party and allowed to participate.

6. The Court has jurisdiction over the parties and the subject matter of this lawsuit and venue is appropriate in this Court.

NEGLIGENCE

7. On or about June 29, 2010 at approximately 1:00 p.m., the Plaintiffs' vehicle was traveling in a southerly direction on Secondary 133, in the County of Darlington, South Carolina and was approaching and passing through an intersection with Secondary 95.

8. Defendant Hickman-Tedder's vehicle was traveling in a northerly direction on Secondary 133 in the County of Darlington, South Carolina attempting to make a left turn onto Secondary 95.

9. That Defendant Hickman-Tedder pulled into the path of the Plaintiffs causing the two vehicles to collide in the intersection.

10. Defendant Hickman-Tedder, by her acts and omissions, was negligent, grossly negligent, careless, reckless, willful and wanton in a) failing to keep a proper lookout; b) failing to maintain proper control over the aforesaid motor vehicle; c) failing to properly equip the said motor vehicle with adequate and safe brakes, and if so properly equipped, in failing to properly utilize them; d) failing to take advantage of any last clear chance to avoid striking Plaintiffs motor vehicle when Defendant saw or should have seen Plaintiffs' motor vehicle approaching and passing through the intersection; e) failing to take any evasive action, by any means, to keep from striking Plaintiffs' motor vehicle; f) in colliding with the motor vehicle operated by

Plaintiffs; g) failing to exercise that degree of care which a reasonable and prudent person would have exercised under the same or similar circumstances; h) failing to reduce the speed of her motor vehicle upon approaching a place where she saw or should have seen the Plaintiffs approaching and passing through the intersection; i) making a left turn into the path of travel of oncoming traffic without first ascertaining that the roadway was clear of approaching traffic; j) failing to yield the right-of-way; all of which were the direct and proximate cause of the injuries and damages suffered by Plaintiffs herein, said acts being in violation of the Statute laws of the State of South Carolina.

11. That as a direct and proximate result of the aforesaid negligent, grossly negligent, careless, reckless, willful and wanton acts or omissions of Defendant Hickman-Tedder, Plaintiffs were a) severely, seriously and painfully injured; b) suffered injuries, bruises, contusions and/or lacerations about various parts of the body; c) were subjected to the administration of strong and potent drugs and medications; d) suffered extreme, painful and dangerous injuries to the body from which Plaintiffs are informed and believe they will have permanent adverse effect and disability; e) have incurred, and will incur in the future, substantial medical and doctor bills; f) were subjected to extreme pain, mental anguish, suffering and discomfort over a long period of time; g) were unable to pursue their usual and normal vocation, thereby being deprived of substantial wages.

12. Therefore, Plaintiffs are entitled to money damages from Defendant Hickman-Tedder in an amount to be determined by a jury.

FRAUD ON THE COURT

13. On or about September 3, 2010, Plaintiffs retained and employed William J. Rivers, III and Schurlnknight & Rivers, P.A. (hereinafter "Schurlnknight & Rivers") to represent them in a claim for the injuries sustained as set forth above (hereinafter "Claim").

14. Plaintiffs entered into a contract (hereinafter "Contract") with William J. Rivers, III and Schurlnknight & Rivers dated September 3, 2010 that governed Plaintiffs' relationship with the firm regarding their Claim. A true and correct copy of the Contract with William J. Rivers, III and Schurlnknight & Rivers is attached as "Exhibit A."

15. The Contract specifically provides that William J. Rivers, III and Schurlnknight & Rivers would "make no settlement without consent of claimant."

16. Plaintiffs never gave consent to anyone to settle their Claim.

17. On or about June 16, 2011, William J. Rivers, III and Schurlnknight & Rivers filed a lawsuit related to Plaintiffs' Claim in the Darlington County Court of Common Pleas.

18. The lawsuit was assigned the civil action number of 2011-CP-16-00416.

19. Throughout the course of William J. Rivers, III and Schurlnknight & Rivers' representation, Plaintiffs consistently contacted William J. Rivers, III and Schurlnknight & Rivers asking for a status of their Claim.

20. At no time during Plaintiffs' discussions with William J. Rivers, III, or any other person at Schurlnknight & Rivers, was either Plaintiff ever informed that their Claim had settled or that settlement negotiations were even taking place.

21. When Plaintiffs were able to speak with someone at Schurlnknight & Rivers, they were always informed that their Claim was moving along, that nothing further was needed from them, and that someone would get back in touch with them when there was news to report.

22. On November 15, 2012, Nicholas W. Lewis, Esquire, was appointed by the South Carolina Judicial Department, Office of Disciplinary Counsel, to assume responsibility for Mr. Schurlknight's client files.

23. On November 20, 2012, William J. Rivers, III was suspended from the practice of law by the South Carolina Supreme Court.

24. On November 20, 2012, Nicholas W. Lewis, Esquire, was appointed by the South Carolina Judicial Department, Office of Disciplinary Counsel, to assume responsibility for Mr. Rivers' client files.

25. On or about December 10, 2012 Plaintiffs received a letter from Nicholas W. Lewis, the Attorney/Trustee appointed by the South Carolina Judicial Department, Office of Disciplinary Counsel, to protect Plaintiffs' interests related to their Claim.

26. Mr. Lewis advised Plaintiffs that Schurlknight & Rivers would no longer be serving as Plaintiffs' attorneys, that Lewis had Plaintiffs' Schurlknight & Rivers' file related to their Claim, and that they should come pick it up. Plaintiffs picked up their file a few days later.

27. After reviewing the file, Plaintiffs discovered that Schurlknight & Rivers had perpetrated a fraud on the Court by fraudulently settling Plaintiffs' Claim without their knowledge, consent or authorization, and furthermore, had fraudulently agreed to dismiss Plaintiffs' Claim.

28. Specifically, Schurlknight & Rivers negotiated a settlement in the amount of \$25,000 with Allstate Property and Casualty Insurance Company.

29. Plaintiffs never received those funds.

30. A Release, Covenant Agreement Not to Execute and Settlement Agreement purporting to bear Plaintiffs' signatures was found in the file related to the \$25,000 settlement.

31. Plaintiffs' signatures were forged on the Release, Covenant Not to Execute and Settlement Agreement, as Plaintiffs never signed any document or otherwise agreed to release anyone from liability related to their Claim. A copy of the forged Release, Covenant Not to Execute and Settlement Agreement dated March 30, 2011 is attached hereto as "Exhibit B."

32. Plaintiffs' file further revealed that Schurlknight & Rivers negotiated a settlement in the amount of \$25,000 with the underinsured motorist carrier, Government Employees Insurance Company.

33. A Covenant Not to Execute purporting to bear Plaintiffs' signatures was found in the file related to the \$25,000 settlement with Government Employees Insurance Company.

34. Plaintiffs' signatures were forged on the Covenant Not to Execute, as Plaintiffs never signed any document or otherwise agreed to release anyone from liability related to their Claim. A copy of the forged Covenant Not to Execute dated May 12, 2011 is attached hereto as "Exhibit C."

35. Plaintiffs' file further revealed that Schurlknight & Rivers negotiated a settlement in the amount of \$50,000 with the underinsured motorist carrier, Nationwide Mutual Insurance Company, and Plaintiff Jonathan Teal's name was also forged on a Release for Underinsured Motorist Coverage with Nationwide Mutual Insurance Company.

36. A copy of the forged Release for Underinsured Motorist Coverage with Nationwide Mutual Insurance Company dated June 20, 2011 is attached hereto as "Exhibit D."

37. Plaintiff Jonathan Teal never signed any document or otherwise agreed to release, not execute a judgment against, or otherwise withhold from exercising his legal rights against anyone related to his Claim.

38. Plaintiffs never signed any check, release or other settlement paper and no one had the authority to forge Plaintiffs' name to any such document or try and settle Plaintiffs' Claim without their knowledge or consent.

39. Plaintiffs' file further revealed that on June 13, 2012 a Stipulation of dismissal with prejudice was filed with the Court dismissing Plaintiffs' Claim. A true and correct copy of the dismissal is attached as "Exhibit E."

40. Plaintiffs were never informed, and never authorized anyone, to dismiss any proceeding related to Plaintiffs' Claim.

41. Schurknight & Rivers perpetrated fraud on the Court by a) fraudulently representing that Plaintiffs have agreed to settle their claim; b) fraudulently representing that Schurknight & Rivers would hold settlement funds in trust until certain actions were taken with respect to the settlement funds; c) fraudulently representing that they had carefully and fully explained aspects of the settlement agreement to Plaintiffs; d) fraudulently representing that they recommended that Plaintiffs execute various settlement papers; e) fraudulently representing that they had the authority to execute and file a stipulation of dismissal related to Plaintiffs' claims; and f) fraudulently representing to the Court that the parties to the Claim had reached a satisfactory resolution of the issues related to the Claim.

FOR A FIRST CAUSE OF ACTION

(Fraud on the Court)

42. Plaintiffs repeat and reallege each and every allegation contained in the above paragraphs as if repeated hereinafter verbatim.

43. A Judgment/dismissal was entered in Civil Action 2011-CP-16-00416.

44. The judgment/dismissal ought not, in equity and good conscience, be enforced.

45. Plaintiffs have a good claim related to the matters on which the dismissal/judgment is founded.

46. Fraud on the Court has prevented Plaintiffs in the judgment from obtaining the benefit of their claim.

47. There is an absence of fault or negligence on the part of the Plaintiffs.

48. Plaintiffs do not have an adequate remedy at law.

49. Therefore, the Court should enter an order dismissing or otherwise voiding the dismissal entered in Civil Action 2011-CP-16-00416, and allow Plaintiffs to litigate their claims in the normal course.

FOR A SECOND CAUSE OF ACTION

(Negligence)

50. Plaintiffs repeat and reallege each and every allegation contained in the above paragraphs as if repeated hereinafter verbatim.

51. Defendant Hickman-Tedder owed a duty to Plaintiffs to act as a reasonable and prudent person.

52. The negligent, grossly negligent, careless, reckless, willful and wanton acts of Defendant Hickman-Tedder was the direct and proximate cause of the injuries and damages suffered by Plaintiffs, and was a breach of the duty Defendant Hickman-Tedder owed to Plaintiffs.

53. If Defendant Hickman-Tedder would have exercised the degree of care which a reasonable and prudent person would have exercised under the same or similar circumstances and yielded the right-of-way to Plaintiffs, Plaintiffs would not have been injured.

54. Defendant Hickman-Tedder, by her acts and omissions, was negligent, grossly negligent, careless, reckless, willful and wanton in a) failing to keep a proper lookout; b) failing to maintain proper control over the aforesaid motor vehicle; c) failing to properly equip the said motor vehicle with adequate and safe brakes, and if so properly equipped, in failing to properly utilize them; d) failing to take advantage of any last clear chance to avoid striking Plaintiffs motor vehicle when Defendant saw or should have seen Plaintiffs' motor vehicle approaching and passing through the intersection; e) failing to take any evasive action, by any means, to keep from striking Plaintiffs' motor vehicle; f) in colliding with the motor vehicle operated by Plaintiffs; g) failing to exercise that degree of care which a reasonable and prudent person would have exercised under the same or similar circumstances; h) failing to reduce the speed of her motor vehicle upon approaching a place where she saw or should have seen the Plaintiffs approaching and passing through the intersection; i) making a left turn into the path of travel of oncoming traffic without first ascertaining that the roadway was clear of approaching traffic; j) failing to yield the right-of-way; all of which were the direct and proximate cause of the injuries and damages suffered by Plaintiffs herein, said acts being in violation of the Statute laws of the State of South Carolina.

55. That as a direct and proximate result of the aforesaid negligent, grossly negligent, careless, reckless, willful and wanton acts or omission of Defendant Hickman-Tedder, Plaintiffs were a) severely, seriously and painfully injured; b) suffered injuries, bruises, contusions and/or lacerations about various parts of the body; c) were subjected to the administration of strong and potent drugs and medications; d) suffered extreme, painful and dangerous injuries to the body from which Plaintiffs are informed and believe they will have permanent adverse effect and disability; e) have incurred, and will incur in the future, substantial medical and doctor bills; f)

were subjected to extreme pain, mental anguish, suffering and discomfort over a long period of time; g) were unable to pursue their usual and normal vocation, thereby being deprived of substantial wages.

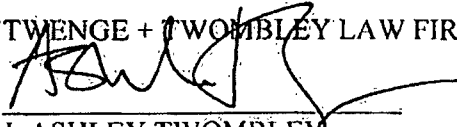
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants as follows:

- a. The Court should enter an order dismissing or otherwise voiding the dismissal entered in Civil Action 2011-CP-16-00416, and allow Plaintiffs to litigate their claims in the normal course;
- b. That Plaintiffs be allowed to have a trial by jury of their claims against Hickman-Tedder, and that a jury award them all available damages under the law for the same; and
- c. For such other and further relief as the Court may deem just and proper.

TWENGE + TWOMBLEY LAW FIRM

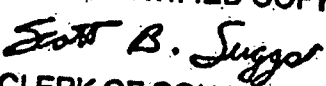
BY:


J. ASHLEY TWOMBLEY
311 Carteret Street
Beaufort, SC 29902
Telephone: (843) 982-0100
Facsimile: (843) 982-0103
www.twlawfirm.com
Attorney for Plaintiffs

Beaufort, South Carolina

April 11, 2013

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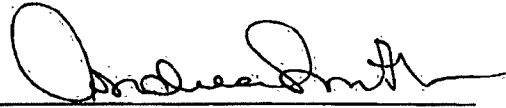
13CP160317

CERTIFICATE OF SERVICE

The undersigned, Andrea Smith, hereby avers that she is the Paralegal to TWENGE + TWOMBLEY LAW FIRM, Attorneys for Plaintiffs, and that on the 11th day of April 2013 a true and accurate copy of the attached was placed in an envelope with first class postage thereon prepaid through the United States Postal Service, and mailed to the following:

C. Anthony Harris, Jr., Esquire
Harris, McLeod & Ruffner
222 Market Street
P.O. Box 1449
Cheraw, SC 29520
Telephone: (843) 537-5204
Facsimile: (843) 537-9352
Attorney for Defendant and
Allstate Property and Casualty Insurance Company

BY:



Andrea Smith, Paralegal to
TWENGE + TWOMBLEY LAW FIRM

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EXHIBIT A

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DARLINGTON COUNTY, S.C.

John L. Schurilknight



William J. Rivers, III

CONTRACT

I hereby retain and employ Schurilknight & Rivers, P.A., to represent me in my claim resulting from: Accident on 6/29/10

I agree to pay said attorney fees as follows:

1. 33 1/3 % of whatever may be recovered from said claim in the event settlement is obtained at any time prior to instituting a lawsuit.
2. 40% of any settlement, verdict or recovery obtained after initiation of a lawsuit.

I further agree that in addition to the above attorney fees, all court costs, subpoena costs, photographs, depositions, and other out-of-pocket expenses directly incurred in investigating or litigating this claim shall be deducted from the proceeds of any recovery.

I agree to be ultimately responsible for all medical bills related to this accident and direct my attorney to pay all medical bills related to this case at the time of disbursement. I understand my attorney must honor all statutory liens such as Medicaid, Medicare, Workers Compensation, and all other liens I have incurred. I fully understand that all outstanding medical bills related to this claim are my full responsibility.

I agree that associate counsel may be employed at the discretion and expense of my attorney and that any attorney so employed may be designated to appear on my behalf or to undertake my representation in this matter.

I fully understand that this Contract for legal services applies to only the initial settlement or trial of my case and no appeals. Any appeals from a jury verdict or verdict of Judge sitting without a jury to the Court of Appeals or Supreme Court will be under a separate contract. I fully understand that my attorney is under no duty to represent me on an appeal.

No promise has been made by Schurilknight & Rivers, P.A. as to the outcome of my claim or as to what sums of money, if any, I may be entitled to recover in this case.

I have received a copy of the Contract for legal services.

Date: 9-3-10

Stacie Leal
Client
Jonathan Leal
Client

The above employment is hereby accepted on the terms stated: and should the terms of this Contract be on the percentage contingent fee basis, we agree to make no charge for services unless recovery is had in this matter. In addition, we agree to make no settlement without consent of claimant.

William J. Rivers, III
Attorney at Law

EXHIBIT B

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CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA)
COUNTY OF Florence)

allstate

RELEASE, COVENANT NOT TO
EXECUTE AND SETTLEMENT AGREEMENT

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Jonathan Teal and Stacie Teal, in consideration of the sum of \$25,000.00 Dollars and 0/100 Cents paid to Jonathan Teal and Stacie Teal, the receipt of which sums are hereby acknowledged, do hereby release and forever discharge Walter Tedder and Mary Tedder, the Allstate Property and Casualty Insurance Company, their agents, servants, employees, heirs, executors, administrators and assigns, none of whom admit any liability to the undersigned, but all expressly deny any liability from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, which Jonathan Teal and Stacie Teal may have against Walter Tedder and Mary Tedder on account of the accident on June 29, 2010 at or near BEL AIR RD / UNKNOWN, SOCIETY HILL, SC.

This release is not intended to and does not release any claims that the undersigned may have for underinsured motorist coverage through the underinsured motorist provision of any policy which by statute or policy definition the undersigned qualifies as an insured. The undersigned expressly reserves the right to prosecute legal actions in tort against the releasees solely for the purpose of establishing a claim for underinsured motorist benefits under any automobile policy applicable to the undersigned. For the consideration cited above, the undersigned specifically agrees and covenants never to attempt to collect any sum from the released parties and agrees and covenants never to seek to execute any judgment obtained against the releasees and will not seek to collect any such judgment out of the personal or real assets of the releasees.

If any judgment is obtained against the releasees, the undersigned agrees to seek to collect such judgment from the underinsured motorist carrier. The undersigned further agrees and covenants that if a verdict is returned against the releasees, the undersigned will move the Court to order that the judgment be entered against the underinsured motorist carrier and not the releasees in an appropriate amount. If the judgment is entered against the releasees, or either of them, it is specifically agreed and covenanted that the undersigned and their attorney will mark the judgment paid and satisfied as soon as is legally practical without making any effort to collect any amount from the releasees.

The undersigned warrants that no other persons or entities have any rights or interest in the undersigned's claim or claims against Walter Tedder and Mary Tedder by assignment, subrogation, or otherwise, and that no person has asserted any such claims and that no assignment or grant or subrogation of the undersigned's claim or claims against Walter Tedder and Mary Tedder will be made that will result in assignment or subrogation of any claims that the undersigned may have against Walter Tedder and Mary Tedder, or any other party on account of any alleged fault or liability of Walter Tedder and Mary Tedder in connection with the injuries sustained by Jonathan Teal and Stacie Teal, or growing out of the aforesaid collision, and the undersigned further agrees to protect, save, defend and hold harmless Walter Tedder and Mary Tedder and the Allstate Property and Casualty Insurance Company, there from and will indemnify Walter Tedder and Mary Tedder and the Allstate Property and Casualty Insurance Company, for any expenses incurred in connections therewith.

The undersigned understands and further agrees that this agreement shall constitute a release of any lien upon property that may otherwise arise by reason of entry of a judgment against the releasees, and that the Clerk of Court of any county in whose office such judgment is enrolled is authorized and directed to note the release of all such liens. The undersigned will file such certification with the appropriated Clerk of Court or do such other things as may be necessary to effectuate such release of all liens.

By entering this agreement, Walter Tedder and Mary Tedder and the Allstate Property and Casualty Insurance Company, do not make any representation as to the effect of this agreement on the undersigned's claim for underinsured motorist benefits and the undersigned and their attorney expressly acknowledge this disclaimer.

The undersigned expressly represents and warrants that he has consulted with his attorney and understands the effect of the things herein agreed to and that no statements or representations made by any of the persons, firms or corporations released herein nor his agents or representatives have influenced him or induced him to execute and deliver this release.

It is further understood and agreed that the payment of the above said amount is not to be construed as an admission of liability on the part of the persons, firms and corporations released, liability by them being expressed denied.

I have read the foregoing, Covenant Not To Execute and Settlement Agreement and understand it to be a binding agreement..

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 30th day of October, 2011.

WITNESS:

Ken B. [Signature]

Jonathan Teal (SEAL)
Stacie Teal (SEAL)

EXHIBIT C

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Scott B. Suggs

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DARLINGTON COUNTY, S.C.

Beid

STATE OF South Carolina)
) COVENANT NOT TO EXECUTE
COUNTY OF Darlington)

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Stacie Teal and Jonathan E. Teal, individually and as husband and wife, (hereinafter, 'Covenantor') in consideration of the sum of twenty-five Thousand dollars (\$25,000.00) paid to them, on behalf of Stacie Teal and Jonathan E. Teal, and/or Government Employees Insurance Company, the receipt of which is hereby acknowledged, for injuries or damages to person or property resulting or to result to the undersigned from an accident that occurred on or about Old Society Hill Hwy on June 29, 2010, in or near Society Hill, South Carolina. In consideration of the payment of the aforesaid sum, the undersigned, for themselves, their heirs, personal representatives and assigns, does hereby covenant and agree as follows:

1. That they will accept the sum of twenty-five thousand dollars(\$25,000.00) in satisfaction of their claim against Stacie Teal and Jonathan E. Teal and will never at any time execute or attempt to execute any judgment in excess of twenty-five thousand dollars(\$25,000.00) against Stacie Teal and Jonathan E. Teal their heirs, personal representatives, or assigns, insurers or indemnitors, for personal injuries arising out of the accident of Old Society Hill on June 29, 2010 in Society Hill, South Carolina. However, nothing in this Covenant Not to Execute shall in any way affect the rights of Covenantor to recover any underinsured motorist benefits awarded by their own policy or any other policy by virtue of which they may be insured for underinsured motorist coverage and/or excess liability coverage. To the extent any language in this Covenant Not to Execute is construed to defeat ability to collect any applicable insurance coverage, including any other liability insurance coverage, such language in this Covenant is void to the extent necessary to allow Covenantor to collect such coverage.

2. Covenantor will not execute or otherwise attempt to collect from or against Stacie Teal and Jonathan E. Teal and/or Government Employees Insurance Company in satisfaction of any claims arising out of the accident any amounts for which coverage is not afforded under applicable motor vehicle insurance policies, it being expressly understood and agreed that Covenantees' personal or estate assets are off limits and hereby protected from a judgment arising out of aforesaid automobile accident.
3. Upon receipt of all such underinsured motorist benefits and/or excess liability coverage determined to be available and to which the said Covenantor may be entitled, they will refrain from instituting, prosecuting, commencing, or in any way aiding any claim or suit against Covenantees or Government Employees Insurance Company and/or any other persons connected therewith, and all heirs, personal representatives, agents successors and assigns thereof, for and on account of any injuries, damage to person, property or both, for loss of time, loss of service, expenses, impairments or loss of any right or for any other loss, costs or damages in any and every nature whatsoever, sustained by or accrued by the said Covenantor, whether known or unknown, resulting from or in any manner connected with, related to, or growing out of the accident of June 29, 2010.

Covenantor understands and represents that if it becomes necessary to institute or continue with an action against Stacie Teal and Jonathan E. Teal, the undersigned Covenantor will instruct his attorney or attorneys to serve the underinsured motorist carrier simultaneously with the institution of said action as provided by law, so it might defend any action brought against Stacie Teal and Jonathan E. Teal. Further, Covenantor and their attorney expressly agree to keep Stacie Teal and Jonathan E. Teal, and Government Employee's Insurance Company informed of developments in their attempts to collect underinsured motorist benefits, including specific notice as to the date

of the trial, the amount of the verdict, the status of underinsured motorist coverage and/or excess liability coverage and whether a settlement of underinsured motorist benefits and/or excess liability coverage had been obtained.

4. The Covenantor, upon receipt of all underinsured motorist benefits and/or excess liability coverage determined to be available, will, for themselves, their heirs, personal representatives and assigns, execute any and all documents, including, but not limited to, a complete release and/or releases as may be necessary to fully and forever release Stacie Teal and Jonathan E. Teal and Government Employees Insurance Company from all liability for any and all injuries whatsoever resulting to the said Covenantor as a result of the aforesaid collision and satisfy any such judgments that may be obtained against Stacie Teal and Jonathan E. Teal and Government Employees Insurance Company. In connection therewith, in the event that the Covenantor fails to satisfy any judgment, they hereby authorize the Clerk of Court for any county in which such judgment may be filed, upon presentment of a copy of this Covenant Not to Execute, to satisfy as paid in full any and all judgments against Stacie Teal and Jonathan E. Teal arising out of the aforesaid accident.

5. . Covenantor understands that they are responsible for the payment of all outstanding medical expenses and satisfaction of all liens for health care services provided and/or health care benefits paid, and he expressly agrees to indemnify and hold Stacie Teal and Jonathan E. Teal and Government Employees Insurance Company harmless of and from any and all claims, demands, damages, actions or causes of action by any person, firm, governmental entity for medical expenses or liens for health care services provided and/or health insurance benefits paid. This

agreement to indemnify includes the payment of all costs and reasonable attorneys fees incurred defending any and all such claims or suits.

6. It is understood and agreed that Stacie Teal and Jonathan E. Teal expressly denies any negligence on his/her/their part, causing or contributing to the accident referred to herein and any liability therefore, and that this agreement is entered for the purpose of preserving the personal assets of Stacie Teal and Jonathan E. Teal while at the same time preserving any and all rights of the Covenantor to collect by any manner, including direct actions against Government Employees Insurance Policy number 4190952129 issued in the name of Jonathan E. Teal, additional liability coverage and/or underinsured motorist coverage afforded by any policy or policies that may be applicable to the accident referred to herein.

The undersigned expressly represents and warrants that they have consulted with their attorney and understand the effect of the things herein agreed to and that no statements or representations made by any of the persons, firms or corporations on whose behalf this covenant is entered into, nor their agents or representatives have influenced them or induced them to execute and deliver this covenant. Finally, it is agreed that the terms hereof are contractual and not merely a recital and are to be constructed pursuant to the laws of the state of South Carolina.

It is further understood and agreed that the payment of the above said amount is not to be construed as an admission of liability on the part of the persons, firms and corporations released, liability by them being expressly denied.

THE UNDERSIGNED HAS READ THE FOREGOING COVENANT NOT TO EXECUTE AND SETTLEMENT AGREEMENT AND UNDERSTAND IT TO BE A BINDING AGREEMENT.

IN WITNESS WHEREOF, the undersigned has set their hands and seals this the May

day of 12th, 2011.

WITNESS:

Lyndee Neff
Walter L. Phillips
STATE OF South Carolina

Jonathan E. Teal
Jonathan E. Teal Claimant
Stacie Teal
Stacie Teal Claimant

COUNTY OF Florence ss.

On this 12th day of May, 2011 before me personally appeared Jonathan & Stacie Teal to me known to

be the person(s) named in and who executed the above release and acknowledged that they executed the same as

their own free act and deed.

William H. N. Oke
SC Notary Public
(OFFICIAL TITLE)
6/21/14

EXHIBIT D

FILED

2013 APR 15 PM 1:19

SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

Scott B. Suggs

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

Nationwide

****RELEASE****
UNDERINSURED MOTORIST COVERAGE

Know all men by these presents: That, for the sole consideration of the sum of Fifty Thousand and 00/100 Dollars (\$50000.00), the receipt of which from the Nationwide Mutual Insurance Company (hereinafter called "Nationwide") is hereby acknowledged, the undersigned hereby releases, discharges, and for his/her self, his/her executors, administrators, successors and assigns, does forever release and discharge Nationwide of and from all claims of whatsoever kind and nature prior to and including the date hereof growing out of the Underinsured Motorist Coverage of an Automobile Insurance Policy number 768619 issued by Nationwide to Stacie B Teal, and resulting or to result from an accident which occurred on 06-29-2010 at or near 133/95 SOCIETY SC29583DARLINGTON.

This release constitutes permission from Nationwide to the insured to settle with the Underinsured Motorist, and contains the ENTIRE AGREEMENT of the parties hereto, and the terms of this release are contractual and not merely a recital.

The undersigneds are responsible for payment of any outstanding medical liens and will indemnify and hold Nationwide harmless from any such liens.

I/We further state that I/we have carefully read the foregoing release and know the contents thereof, and I/we sign the same as my/our own free act.

WITNESS his Hand and seal this 20th day of June, 2011.

In the presence of:

CAUTION! READ BEFORE SIGNING

Witness Signature

Your Signature

Witness Signature

Your Signature

State of Sc, County of Florence.

On this 20th day of June, 2011. Before me personally appeared Jonathan Teal, to me known to be the person...described herein, and who executed the foregoing instrument and ~~he~~she acknowledged that ~~he~~she voluntarily executed the same.

My term expires June 2, 2014

Shannon N. Coker
Notary Public

CLAIM NUMBER: 61 39 J 768619 06292010 01 & 02

EXHIBIT E

FILED

2013 APR 15 PM 1:19
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

Scott B. Suggs

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
Case No.:2011-CP-16-416

JONATHAN TEAL AND STACIE
TEAL,)
)
)
Plaintiffs,)

STIPULATION OF DISMISSAL

vs.)
)
)

MARY ELIZABETH HICKMAN-
TEDDER,)
)
)
Defendant.)

It is hereby stipulated by and between counsel for all parties to this action that this action be and hereby is dismissed, discontinued, and forever ended with prejudice pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure.

TRIP OFFICER CLERK

525 B. Sign
CLERK OF COURT

William J. Rivers, III
SCHURLKNIGHT & RIVERS, P.A.
Post Office Box 6589
Florence, SC 29502-6589
(843) 662-7826
ATTORNEYS FOR PLAINTIFF

June 12, 2012

Florence, South Carolina

2012 JUN 13 AM 11:02
SCOTT & SHERES
CLERK OF COURT/RJG
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)

Jonathan Teal and Stacie Teal,)

Plaintiffs,)

versus)

Mary Elizabeth Hickman-Tedder,)
Allstate Property and Casualty)
Insurance Company, Government)
Employees Insurance Company and)
Nationwide Mutual Insurance)
Company,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
Case No. 2013-CP-16-317

ANSWER OF
MARY ELIZABETH HICKMAN-TEDDER
(Jury Trial Requested)

The Defendant, Mary Elizabeth Hickman-Tedder (hereinafter "Hickman-Tedder"), subject to any motions and preserving all defenses under Rule 12 of the South Carolina Rules of Civil Procedure, by way of Answer to the Complaint herein, would respectfully allege and show:

FOR A FIRST DEFENSE

1. That Defendant Hickman-Tedder is informed and believes that the Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action. Therefore, the Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE

2. That Defendant Hickman-Tedder is informed and believes that there has been insufficiency of process and insufficiency of service of process of the Summons and Complaint and, therefore, this action should be dismissed pursuant to Rule 12(b)(4) and/or (5) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

3. That Defendant Hickman-Tedder is informed and believes that this court lacks jurisdiction over the parties and subject matter and, therefore, the Complaint should be dismissed pursuant to Rule 12(b)(1) and (2) of the South Carolina Rules of Civil Procedure.

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FOR A FOURTH DEFENSE

4. That Defendant Hickman-Tedder, without any admission of liability on her part, has previously paid the Plaintiffs on or about March 30, 2011, TWENTY FIVE THOUSAND AND 00/100 (\$25,000.00) DOLLARS for their bodily injury claims in exchange for a Release and Covenant Not to Execute. Therefore, Defendant Hickman-Tedder pleads accord and satisfaction as to the Plaintiffs' claim for bodily injuries and would request that the Complaint be dismissed on that basis.

FOR A FIFTH DEFENSE

5. That Defendant Hickman-Tedder denies each and every allegation set forth in the Complaint not hereinafter admitted, qualified or explained and demands strict proof thereof.

6. That the portion of the Complaint captioned "INTRODUCTION" either contains legal conclusions to which no response is required, or Defendant Hickman-Tedder is without sufficient information to form a belief as to the remaining allegations and, therefore, denies the same. To the extent said paragraph can be construed to allege any wrongdoing by or on behalf of Defendant Hickman-Tedder, said allegations are denied.

7. That Defendant Hickman-Tedder admits, upon information and belief, the allegations set forth in paragraph 1 of the Complaint.

8. That Defendant Hickman-Tedder admits the allegations set forth in paragraph 2 of the Complaint.

9. That Defendant Hickman-Tedder admits, upon information and belief, the allegations set forth in paragraphs 3, 4 and 5 of the Complaint.

10. That Defendant Hickman-Tedder denies the allegations set forth in paragraph 6 of the Complaint.

11. That Defendant Hickman-Tedder admits the allegations set forth in paragraphs 7 and 8 of the Complaint.

12. That, as to the allegations set forth in paragraph 9 of the Complaint, Defendant Hickman-Tedder admits so much of said paragraph as may be construed to allege that a collision occurred between the vehicle driven Defendant Hickman-Tedder and the vehicle driven by Plaintiff

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Jonathan Teal and that said collision occurred, but Defendant Hickman-Tedder denies all remaining or inconsistent allegations of paragraph 9, including, but not limited to, any allegations which may be construed to allege that Defendant Hickman-Tedder was in any way careless, negligent, grossly negligent, reckless, heedless, willful, wanton or unlawful.

13. That Defendant Hickman-Tedder denies the allegations set forth in paragraphs 10, 11 and 12 of the Complaint.

14. That Defendant Hickman-Tedder admits, upon information and belief, the allegations set forth in paragraphs 13, 14 and 15 of the Complaint, and craves reference to the document attached to the Complaint as Exhibit A.

15. That Defendant Hickman-Tedder is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 16 of the Complaint and, therefore, demands strict proof thereof.

16. That Defendant Hickman-Tedder admits, upon information and belief, the allegations set forth in paragraphs 17 and 18 of the Complaint.

17. That Defendant Hickman-Tedder is without sufficient knowledge and information to admit or deny the allegations set forth in paragraphs 19, 20 and 21 of the Complaint and, therefore, demands strict proof thereof.

18. That Defendant Hickman-Tedder admits, upon information and belief, the allegations set forth in paragraphs 22, 23 and 24 of the Complaint and craves reference to applicable Orders of the Supreme Court of South Carolina.

19. That Defendant Hickman-Tedder is without sufficient knowledge and information to admit or deny the allegations set forth in paragraphs 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 41 of the Complaint, and, therefore, demands strict proof thereof.

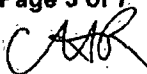
20. That as to paragraph 42 of the Complaint, Defendant Hickman-Tedder reiterates all previous allegations of the Answer above as fully as if repeated verbatim herein.

21. That Defendant Hickman-Tedder admits the allegations set forth in paragraph 43 of the Complaint.

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22. That Defendant Hickman-Tedder denies the allegations set forth in paragraphs 44, 45 and 46 of the Complaint.

23. That Defendant Hickman-Tedder is without sufficient knowledge and information to admit or deny the allegations set forth in paragraph 47 of the Complaint, and therefore, demands strict proof thereof.

24. That Defendant Hickman-Tedder denies the allegations set forth in paragraphs 48 and 49 of the Complaint.

25. That as to paragraph 50 of the Complaint, Defendant Hickman-Tedder reiterates all previous allegations of the Answer above as fully as if repeated verbatim herein.

26. That Defendant Hickman-Tedder denies the allegations set forth in paragraphs 51, 52, 53, 54 and 55 of the Complaint.

FOR A SIXTH DEFENSE

27. That the collision and damages complained of in the Complaint, if any, were caused solely and proximately by one or more of the following careless, negligent, grossly negligent, reckless, heedless, willful, wanton and unlawful acts of omission or commission on the part of the Plaintiff, Jonathan Teal, in the operation and management of the vehicle he was driving, to wit:

- a) In driving and operating said vehicle at a rate of speed too fast for the conditions then and there existing;
- b) In driving and operating said vehicle at a rate of speed in excess of the posted speed limits;
- c) In failing to yield the right-of-way;
- d) In failing to properly apply the brakes upon said vehicle;
- e) In failing to keep a proper lookout for others using the highway;
- f) In failing to observe and heed the road and traffic conditions then and there existing;
- g) In failing to stop said vehicle so as to avoid said collision;
- h) In failing to turn said vehicle so as to avoid said collision;

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- i) In failing to burn the headlights and utilize the windshield wipers on said vehicle under circumstances when the same was required;
- j) In failing to sound the horn on said vehicle as a warning to Defendant Hickman-Tedder;
- k) In failing to have and keep said vehicle in proper working order and in a safe condition;
- l) In failing to take any evasive action so as to avoid said collision;
- m) In driving and operating said vehicle with reckless disregard for the safety of others;
- n) In failing to use that degree of care and caution as a reasonable and prudent person would have under the same or similar circumstances;
- o) In being otherwise careless, negligent, grossly negligent, reckless, heedless, willful, wanton and unlawful in the operation, management and control of said vehicle, and in violation of the Regulations and Statutes governing the use of highways in South Carolina generally, and in violation of the cases made and provided.

FOR A SEVENTH DEFENSE

28. That if Defendant Hickman-Tedder was careless, negligent, grossly negligent, reckless, heedless, willful, wanton or unlawful in the operation, management and control of said vehicle, which she specifically denies, then Plaintiff Jonathan Teal was likewise careless, negligent, grossly negligent, reckless, heedless, willful, wanton or unlawful in the operation and management of the vehicle he was driving in one or more of the particulars enumerated in Defendant Hickman-Tedder's Sixth Defense above, the same being incorporated herein and made a part of these allegations by reference thereto, and that said acts of omission and commission on the part of Plaintiff Jonathan Teal were proximate, contributing causes of the aforesaid collision and constitute a greater degree of negligence than any negligence on the part of Defendant Hickman-Tedder. Therefore, the Plaintiffs are barred from recovery from Defendant Hickman-

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Tedder, or in the alternative, the Plaintiffs' damages should be reduced by the percentage of negligence attributable to the Plaintiff Jonathan Teal.

FOR AN EIGHTH DEFENSE

29. That the collision complained of and damages of the Plaintiffs, if any, were caused solely and proximately by the negligent, careless, grossly negligent, reckless, heedless, willful, wanton and unlawful acts of omission and commission on the part of some person or entity other than Defendant Hickman-Tedder. Therefore, as to Defendant Hickman-Tedder, the Plaintiffs are barred from recovery.

FOR A NINTH DEFENSE

30. That if the Plaintiffs have any injuries or damages, of which strict proof is required, then Defendant Hickman-Tedder is informed and believes that such injuries and complaints resulted from other actions, injuries and/or medical conditions of the respective Plaintiffs which occurred either prior or subsequent to the collision forming the basis of the Complaint. Therefore, the Plaintiffs should not recover from Defendant Hickman-Tedder.

FOR A TENTH DEFENSE

31. That the collision complained of was unavoidable.

FOR AN ELEVENTH DEFENSE

32. That on the date, time and place as generally set forth in the Complaint, Defendant Hickman-Tedder was placed in a sudden emergency, through no fault of her own, and Defendant Hickman-Tedder acted as a reasonable and prudent person would have under the same or similar circumstances. Therefore, Defendant Hickman-Tedder pleads sudden emergency as a complete bar to this action.

FOR A TWELFTH DEFENSE

33. That the evidence of recklessness and/or any degree of fault, as alleged by the Plaintiffs in seeking punitive damages from Defendant Hickman-Tedder, would not be, upon information and belief, clear and convincing as required by S.C. Code Ann. § 15-33-135, as amended. Further, the imposition of punitive damages against Defendant Hickman-Tedder in the context of this lawsuit

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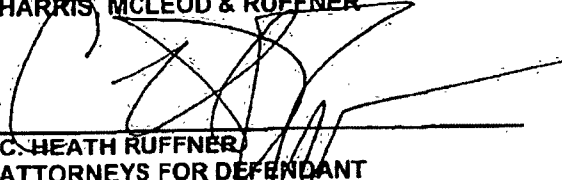
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is unconstitutional under both the Constitutions of the State of South Carolina and the United States of America. Therefore, the Plaintiffs' request for punitive damages should be stricken from the Complaint.

WHEREFORE, having fully answered the Plaintiffs' Complaint, Defendant Hickman-Tedder demands that the Complaint be dismissed with prejudice, for the costs and disbursements of this action and for such other and further relief as the Court deems just and proper.

HARRIS, MCLEOD & RUFFNER

BY:


C. HEATH RUFFNER
ATTORNEYS FOR DEFENDANT
MARY ELIZABETH HICKMAN-TEDDER
POST OFFICE DRAWER 1449
222 MARKET STREET
CHERAW, SC 29520
(843) 537-5204

May 10, 2013
Cheraw, South Carolina.

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON

CIVIL ACTION NO: 2013-CP-16-00317

Jonathan Teal and Stacie Teal,

Plaintiffs,

v.

Mary Elizabeth Hickman-Tedder, Allstate
Property & Casualty Insurance Company,
Government Employees Insurance Company
and Nationwide Mutual Insurance Company,

Defendants.

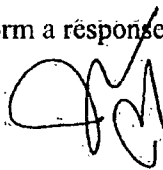
**ANSWER ON BEHALF OF DEFENDANT
NATIONWIDE MUTUAL INSURANCE
COMPANY**

**TO: J. ASHLEY TWOMBLEY, ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO
THE PLAINTIFF ABOVE NAMED:**

The Defendant, Nationwide Mutual Insurance Company (hereinafter "Nationwide")
answering the Plaintiff's Complaint herein without waiving any defenses and subject to the
Motion to Dismiss filed concurrently herewith, would respectfully show unto the Court that:

FOR A FIRST DEFENSE

1. This Defendant denies each and every allegation of the Plaintiff's Complaint not hereinafter specifically admitted.
2. In response to Plaintiff's introduction paragraph, the paragraph states conclusions of law to which no response is required. To the extent that a response is required the Introduction paragraph is denied.
3. Paragraph one (1) is admitted upon information and belief.
4. In response to the allegations in paragraph two (2), this Defendant is without sufficient knowledge and information to form a response and therefore denies the same.
5. In response to the allegations in paragraph three (3), this Defendant is without sufficient knowledge and information to form a response and therefore denies the same.



6. In response to the allegations in paragraph four (4), this Defendant is without sufficient knowledge and information to form a response and therefore denies the same.

7. In response to Paragraph five (5), Nationwide admits that it is an insurance company organized and existing under the laws of the State of Ohio with its principal place of business in Ohio. Nationwide further admits that it is so situated that the disposition of Plaintiffs' fraud on the court claim may impact Nationwide's interests and that Nationwide is allowed to participate. However, Nationwide denies that it is a properly named party to Plaintiffs' claim for negligence.

8. Paragraph six (6) is denied.

9. In response to paragraphs seven (7) through nine (9), this Defendant lacks sufficient knowledge and information to form a response and therefore denies the same.

10. Paragraphs ten (10), eleven (11) and twelve (12) are denied.

11. In response to paragraphs thirteen (13), fourteen (14) and fifteen (15), this Defendant admits only that the contract attached as Exhibit A to Plaintiffs' Complaint speaks for itself. Otherwise, this Defendant lacks sufficient knowledge and information to form a response and therefore denies the remaining allegations in paragraphs thirteen (13), fourteen (14) and fifteen (15).

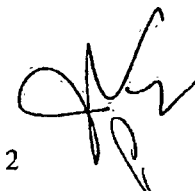
12. Paragraph sixteen (16) is denied.

13. Paragraph seventeen (17) is admitted.

14. Paragraph eighteen (18) is admitted.

15. Paragraph nineteen (19) is denied.

16. Paragraph twenty (20) is denied.

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17. Paragraph twenty-one (21) is denied.
18. Paragraph twenty-two (22) is admitted.
19. Paragraph twenty-three (23) is admitted.
20. Paragraph twenty-four (24) is admitted.
21. In response to paragraph twenty-five (25), this Defendant lacks sufficient knowledge and information and therefore denies the same.
22. In response to paragraph twenty-six (26), this Defendant lacks sufficient knowledge and information and therefore denies the same.
23. Paragraph twenty-seven (27) is denied.
24. Paragraph twenty-eight (28) is admitted upon information and belief.
25. Paragraph twenty-nine (29) is denied.
26. Paragraph thirty (30) is admitted upon information and belief.
27. Paragraph thirty-one (31) is denied.
28. Paragraph thirty-two (32) is admitted upon information and belief.
29. Paragraph thirty-three (33) is admitted upon information and belief.
30. In response to paragraph thirty-four (34), this Defendant admits only that the covenant Not to Execute attached as Exhibit C to Plaintiffs' Complaint speaks for itself. The remaining allegations of paragraph thirty-four (34) are denied.
31. In response to paragraph thirty-five (35), this Defendant admits that Schurlknight & Rivers negotiated a settlement in the amount of fifty thousand (\$50,000.00) dollars with Nationwide Mutual Insurance Company as the underinsured motorist carrier in exchange for a Release and dismissal of the underlying tort action with prejudice. Otherwise, the allegations in paragraph thirty-five (35) are denied.

32. In response to paragraph thirty-six (36), this Defendant admits that the release attached as Exhibit D to Plaintiff's Complaint is the release entered into in settlement of Plaintiff's potential underinsured motorist claim with Nationwide. Nationwide lacks any information that the signatures are forged.

33. Paragraph thirty-seven (37) is denied.

34. Paragraph thirty-eight (38) is denied.

35. Paragraph thirty-nine (39) is admitted.

36. Paragraph forty (40) is denied.

37. Paragraph forty-one (41), including all sub-parts therein are denied.

FOR A FIRST DEFENSE TO THE FIRST CAUSE OF ACTION

38. In response to paragraph forty-two (42), this Defendant repeats and realleges its responses to paragraphs one (1) through forty-one (41) above as if set forth fully verbatim herein.

39. Paragraph forty-three (43) is admitted.

40. Paragraph forty-four (44) is denied.

41. Paragraph forty-five (45) is denied.

42. Paragraph forty-six (46) is denied.

43. Paragraph forty-seven (47) is denied.

44. Paragraph forty-eight (48) is denied.

45. Paragraph forty-nine (49) is denied.

FOR A FIRST DEFENSE TO THE SECOND CAUSE OF ACTION

46. In response to paragraph fifty (50), this Defendant repeats and realleges its responses to paragraphs one (1) through forty-nine (49) above as if set forth fully verbatim herein.



47. Paragraphs fifty-one (51) through fifty-five (55), including all sub-parts therein, are denied.

48. Plaintiffs' prayer for relief is denied.

FOR A SECOND DEFENSE

49. This Defendant would show, upon information and belief, that the Complaint fails to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and, therefore, the Plaintiffs' Complaint should be dismissed with costs.

FOR A THIRD DEFENSE

50. This Defendant would show, upon information and belief that the Plaintiffs agreed to settle their underinsured motorist claim with this Defendant. The underinsured motorist claim was settled for fifty thousand (\$50,000.00) dollars. Therefore, the Defendant pleads Accord and Satisfaction, Release and Waiver as a complete defense to the Plaintiff's Claim.

FOR A FOURTH DEFENSE

51. Plaintiffs have an adequate remedy at law and therefore this action in equity is improper.

FOR A FIFTH DEFENSE

52. Nationwide would show, upon information and belief, that this action is barred by the Doctrine of Res Judicata based on the filing of a Stipulation of Dismissal with prejudice by Plaintiffs' attorney in the Darlington County Court of Common Pleas case *Jonathan Teal and Stacie Teal v. Mary Elizabeth Hickman-Tedder* with civil action number 2011-CP-16-00416. Said action arose out of the same transaction and occurrence as the Plaintiffs' current claim in

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negligence against Hickman-Tedder and the dismissal of that case with prejudice bars the current action.

FOR A SIXTH DEFENSE

53. The Complaint improperly combines an action for the determination of tort liability with an action in equity to disavow a contractual release which arose under an entirely separate transaction or occurrence and whose terms and conditions were formed and are governed according to wholly unrelated facts and entirely different substantive law. It would be improper to mix before the same factfinder the entirely separate questions of the potential availability of underinsured motorist coverage for the subject automobile accident and of tort liability for the subject automobile accident. These actions should be severed.

FOR A SEVENTH DEFENSE

54. This Defendant alleges that the Plaintiffs' Complaint fails to plead a cause of action for fraud with sufficient particularity.

FOR AN EIGHTH DEFENSE

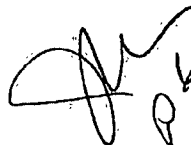
55. This Defendant pleads the doctrine of "unclean hands" as a complete defense to the Complaint.

FOR A NINTH DEFENSE

56. This Defendant would show, upon information and belief that the initiation of this action, by the Plaintiffs, was after an unreasonable delay. This Defendant pleads the doctrine of "laches" as a complete defense to this action.

FOR A TENTH DEFENSE

57. This Defendant is entitled to an offset for all funds paid to Plaintiffs or Plaintiffs' agent.

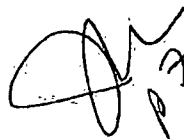
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FOR AN ELEVENTH DEFENSE

58. This Defendant would show, upon information and belief, that the Plaintiffs' claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that this Defendant could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because this Defendant can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiff's claim for punitive damages violates this Defendant's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills this Defendant's exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

FOR A TWELFTH DEFENSE

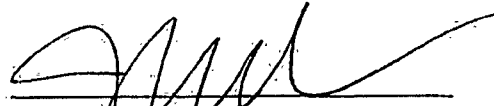
59. This Defendant specifically reserves the right to assert any further defenses as may be revealed by additional information acquired during discovery or otherwise from any



other party herein. This Defendant further reserves the right to amend this Answer to the Complaint to assert any other applicable defenses, to assert any applicable cross and/or counterclaims, and to implead any other applicable parties.

WHEREFORE, having fully answered, the Defendant Nationwide Mutual Insurance Company, prays that the Plaintiffs' Complaint be dismissed with costs.

MURPHY & GRANTLAND, P.A.



J.R. Murphy, Esquire

Wesley B. Sawyer, Esquire

PO Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for the Defendant Nationwide Mutual Insurance Company

Columbia, South Carolina
May 20, 2013

58

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)

Jonathan Teal and Stacie Teal,)

Plaintiffs,)

versus)

Mary Elizabeth Hickman-Tedder,)
Allstate Property and Casualty)
Insurance Company, Government)
Employees Insurance Company and)
Nationwide Mutual Insurance)
Company,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
Case No. 2013-CP-16-317

NOTICE OF MOTION
AND MOTION TO DISMISS

TO: J. ASHLEY TWOMBLEY, ATTORNEY FOR THE PLAINTIFFS ABOVE NAMED:

YOU WILL PLEASE TAKE NOTICE That the undersigned, C. Heath Ruffner, as attorney for Defendant Mary Elizabeth Hickman-Tedder, will move before the presiding judge of the Fourth Judicial Circuit at the Darling County Courthouse located in Darlington, South Carolina, not less than ten (10) days hence, or at such time as may be scheduled by the Court, for an Order dismissing the Plaintiffs' Complaint against said Defendant based upon the following:

1. Pursuant to Rule 12(b)(4) and/or (5) of the South Carolina Rules of Civil Procedure inasmuch as the Plaintiffs have failed to properly serve said Defendant;
2. Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure inasmuch as the Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action; and
3. The Court lacks jurisdiction as the underlying tort action (Case Number: 2011-CP-16-416) was dismissed with prejudice.

Therefore, the Plaintiffs' Complaint against Defendant Mary Elizabeth Hickman-Tedder should be dismissed with prejudice.

Law Offices

Harris, McLeod &
Ruffner

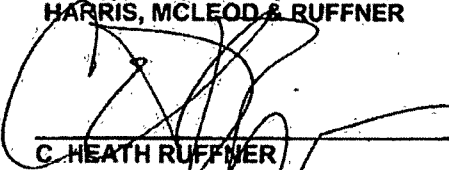
Post Office Drawer 1449
222 Market Street
Cheraw, South Carolina
(843) 537-5204

7639

Page 1 of 2

HARRIS, MCLEOD & RUFFNER

BY:


C. HEATH RUFFNER
ATTORNEYS FOR DEFENDANT
MARY ELIZABETH HICKMAN-TEDDER
POST OFFICE DRAWER 1449
222 MARKET STREET
CHERAW, SC 29520
(843) 537-5204

May 10, 2013
Cheraw, South Carolina.

Law Offices

Harris, McLeod &
Ruffner

Post Office Drawer 1449
222 Market Street
Cheraw, South Carolina
(843) 537-5204

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON

CIVIL ACTION NO: 2013-CP-16-0317

Jonathan Teal and Stacie Teal,

Plaintiffs,

v.

**DEFENDANT NATIONWIDE MUTUAL
INSURANCE COMPANY'S MOTION TO
DISMISS**

Mary Elizabeth Hickman-Tedder, Allstate
Property and Casualty Insurance Company,
Government Employees Insurance Company,
and Nationwide Mutual Insurance Company,

Defendants.

**TO: J. ASHLEY TWOMBLEY, ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO
THE PLAINTIFF ABOVE NAMED:**

YOU WILL PLEASE TAKE NOTICE that the Defendant, Nationwide Mutual Insurance Company, by its undersigned attorney, will move before the Presiding Judge of the Darlington County Court of Common Pleas at the Darlington County Courthouse at 10:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard for an Order dismissing the Plaintiffs' Complaint pursuant to South Carolina Rules of Civil Procedure 12(b)(6) on the grounds that the Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against this Defendant. The basis for this motion is more clearly set out in the attached memorandum of law.

[SIGNATURE ON FOLLOWING PAGE]

MURPHY & GRANTLAND, P.A.

A handwritten signature in dark ink, appearing to be 'J.R. Murphy', written over a horizontal line.

J.R. Murphy, Esquire
Wesley B. Sawyer, Esquire
PO Box 6648
Columbia, South Carolina 29260
(803) 782-4100
Attorneys for Defendant Nationwide Mutual
Insurance Company

Columbia, South Carolina
May 21, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DARLINGTON	)	C/A No. 13-CP-16-0317
JONATHAN TEAL and STACIE TEAL,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	DEFENDANTS', ALLSTATE PROPERTY
MARY ELIZABETH HICKMAN-	)	AND CASUALTY INSURANCE
TEDDER, ALLSTATE PROPERTY AND	)	COMPANY AND GOVERNMENT
CASUALTY INSURANCE COMPANY,	)	EMPLOYEES INSURANCE COMPANY,
GOVERNMENT EMPLOYEES	)	NOTICE OF MOTION AND MOTION
INSURANCE COMPANY and	)	TO DISMISS
NATIONWIDE MUTUAL INSURANCE	)	
COMPANY,	)	
	)	
Defendants.	)	
	)	

PLEASE TAKE NOTICE that the Defendants, Allstate Property and Casualty Insurance Company ("Allstate") and Government Employees Insurance Company ("GEICO"), respectfully move this Honorable Court pursuant to Rules 12(b)(1), 12(b)(6) and/or 12(c) of the South Carolina Rules of Civil Procedure for a dismissal of, and judgment on the pleadings in, this action on the following grounds:

1. The Plaintiffs' complaint fails to state facts sufficient to constitute any cause of action against either Allstate or GEICO;
2. The Plaintiffs' second cause of action fails to state facts sufficient to constitute a cause of action against any defendant;
3. The Plaintiffs' claims are barred as a matter of law by the doctrines of payment, accord and satisfaction, and settlement;

4. The Plaintiffs' claims are barred by the doctrine of res judicata; and
5. The Plaintiffs lack standing to prosecute any claims against Allstate or GEICO.

In support of this motion, Allstate and GEICO rely upon the pleadings filed in this action and such memoranda and oral argument as may be allowed by the Court.

WHEREFORE, the Defendants, Allstate Property and Casualty Insurance Company and Government Employees Insurance Company, respectfully pray that this Honorable Court dismiss this action pursuant to Rule 12(b) and/or enter judgment in their favor pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure.

KING, LOVE & SMITH, LLC

By:



ROBERT T. KING #066237

PO Box 1764

Florence, SC 29503-1764

(843) 407-5525 - Tel

(843) 407-5782 - Fax

rking@klslawfirm.com

ATTORNEY FOR ALLSTATE PROPERTY AND
CASUALTY INSURANCE COMPANY AND
GOVERNMENT EMPLOYEES INSURANCE
COMPANY

May 22, 2013

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

Jonathan Teal and Stacie Teal,

Plaintiffs,

vs.

Mary Elizabeth Hickman-Tedder, Allstate
Property and Casualty Insurance Company,
Government Employees Insurance Company,
and Nationwide Mutual Insurance Company,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

C.A. No. 2013-CP-16-0317

**DEFENDANT ALLSTATE PROPERTY
AND CASUALTY INSURANCE
COMPANY'S AMENDED MOTION TO
DISMISS OR IN THE ALTERNATIVE TO
SEVER**

Defendant Allstate Property and Casualty Insurance Company ("Allstate"), respectfully moves this Honorable Court pursuant to South Carolina Rule of Civil Procedure 12(b)(1), 12(b)(6), and/or 12(c) for a dismissal of, and judgment on the pleadings in, this action, or in the alternative, for an order, pursuant to South Carolina Rules of Civil Procedure 18(a) and (c), 20(a) and (b), and/or 21, severing the claims against Allstate from the claims against Defendant Mary Elizabeth Hickman-Tedder. In support this Motion, Allstate states as follows:

1. The Plaintiffs' complaint fails to state facts sufficient to constitute any cause of action against Allstate.
2. The Plaintiff's second cause of action fails to state facts sufficient to constitute a cause of action against any Defendant.
3. The Plaintiffs' claims are barred as a matter of law by the doctrines of payment, accord and satisfaction, and settlement.
4. The Plaintiffs' claims are barred by the doctrine of res judicata.
5. The Plaintiffs lack standing to prosecute any claims against Allstate.
6. Pursuant to Rule 18(c), SCRCP, the Court has discretionary power to order the

severance of independent or disassociated claims, such as the ones in this case. The claims in this case are independent or dissociated because the claims against Defendant Mary Elizabeth Hickman-Tedder are for her alleged negligence in operating her vehicle while the claims against Allstate would presumably arise out of the duties and obligations under an insurance policy.¹

7. Alternatively, pursuant to Rule 20(b), SCRPC, the Court has discretionary power to order severance of claims that do not arise out of the same transaction, occurrence, or series of transactions or occurrences and/or lack common questions of fact. Severance is proper here because the claims against Defendant Mary Elizabeth Hickman-Tedder do not arise out the same transaction, occurrence, or series of transactions because, as noted above, the claims against Defendant Mary Elizabeth Hickman-Tedder are related to the alleged negligence in operating a vehicle while the claims against Allstate are related to coverage under an insurance policy.

8. Alternatively, pursuant to Rule 21, SCRPC, the Court has discretionary power to drop parties "at any stage of the action and on such terms as are just." Justice requires the severance of claims in this case due to the risk of unfair prejudice from the joining of claims against an alleged tortfeasor and an insurer. If these unrelated claims remain joined in this case, there is a risk of unfairly prejudicial reference to the existence of insurance.

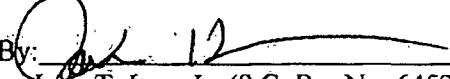
9. Allstate specifically reserves the right to add additional grounds in support of this Motion.

10. This Motion is also based on the pleadings in this action, including any exhibits, the South Carolina Rules of Civil Procedure, supporting case law, a supporting memorandum of law, and oral argument as may be allowed by the Court.

¹ Plaintiffs fail to include any specific allegations regarding Allstate related to the causes of actions alleged in their Complaint, which clearly demonstrates that Plaintiffs have failed to state facts sufficient to constitute any cause of action against Allstate. For purposes of Allstate's motion to sever, the only allegations that may possibly arise regarding Allstate would necessarily be related to the policy of insurance at issue.

WHEREFORE, Defendant Allstate Property and Casualty Insurance Company respectfully prays that this Honorable Court dismiss this action pursuant to Rule 12(b), SCRPC and/or enter judgment in its favor pursuant to Rule 12(c), SCRPC, or in the alternative, sever the claims against Defendant Mary Elizabeth Hickman-Tedder from the claims against Allstate Property and Casualty Insurance Company.

GALLIVAN, WHITE & BOYD, P.A.

By: 
John T. Lay, Jr. (S.C. Bar No. 64526)
A. Johnston Cox (S.C. Bar No. 09081)
Janice Holmes (S.C. Bar No. 75038)
1201 Main Street, Suite 1200
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jlay@GWBlawfirm.com
jcox@GWBlawfirm.com
jholmes@GWBlawfirm.com

Attorneys for Allstate Property and Casualty Insurance Company

Columbia, South Carolina
August 8, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DARLINGTON	)	CIVIL ACTION NO: 2013-CP-16-0317
	)	
JONATHAN TEAL AND STACIE TEAL,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	MEMORANDUM IN OPPOSITION TO
	)	MOTIONS TO DISMISS
MARY ELIZABETH HICKMAN-TEDDER,	)	
ALLSTATE PROPERTY AND CASUALTY	)	
INSURANCE COMPANY, GOVERNMENT	)	
EMPLOYEES INSURANCE COMPANY	)	
AND NATIONWIDE MUTUAL	)	
INSURANCE COMPANY,	)	
	)	
Defendants.	)	

INTRODUCTION

This matter is before the Court on Defendants' Motions to Dismiss Plaintiffs' lawsuit. The lawsuit raises causes of action for fraud upon the court and negligence. Fraud upon the court occurs where a party or an attorney tampers with the judicial system by deceiving the Court and undermining the integrity of the judicial process. An attorney's loyalty to the Court, as an officer thereof, demands integrity and honest dealing with the Court, and when the attorney departs from that standard in the conduct of a case, he perpetrates fraud on the court. Attorney fraud calls into question the basic function of the judicial system and erodes public confidence in the fairness of our system of justice. Plaintiffs are requesting that the Court undo the fraud perpetrated on this Court.

FACTUAL BACKGROUND

Plaintiffs were involved in a traffic accident that occurred on June 29, 2010, involving Defendant Hickman-Tedder who was charged as the at-fault driver. Plaintiff Jonathan Teal sustained serious and life changing injuries as a result of the collision, including a traumatic brain injury.

On or about September 3, 2010, Plaintiffs retained and employed William J. Rivers, III (hereinafter "Rivers") and Schurlnknight & Rivers, P.A. (hereinafter "Schurlnknight & Rivers") to represent them in a claim for the injuries sustained as set forth above (hereinafter "Claim"). Plaintiffs entered into a contract (hereinafter "Contract") with Rivers and Schurlnknight & Rivers dated September 3, 2010 that governed Plaintiffs' relationship with the firm regarding their Claim. The Contract specifically provides that Rivers and Schurlnknight & Rivers would "**make no settlement without consent of claimant.**" Plaintiffs never gave consent to anyone to settle their Claim and never spoke with anyone from Schurlnknight & Rivers about settling their case.

On or about June 16, 2011, Rivers and Schurlnknight & Rivers filed a lawsuit related to Plaintiffs' Claim in the Darlington County Court of Common Pleas (Civil Action No. 2011-CP-16-00416). Plaintiffs consistently contacted Schurlnknight & Rivers asking for a status of their Claim but were never informed that their Claim had settled or that settlement negotiations were even taking place.

On November 15, 2012, Nicholas W. Lewis, Esquire, was appointed by the South Carolina Judicial Department, Office of Disciplinary Counsel, to assume responsibility for Mr. Schurlnknight's client files. On November 20, 2012, Rivers was suspended from the practice of law by the South Carolina Supreme Court. On November 20, 2012, Nicholas W. Lewis, Esquire,

was appointed by the South Carolina Judicial Department, Office of Disciplinary Counsel, to assume responsibility for Rivers' client files.

On or about December 10, 2012, Plaintiffs received a letter from Nicholas W. Lewis, the Attorney/Trustee appointed by the South Carolina Judicial Department, Office of Disciplinary Counsel, to protect Plaintiffs' interests related to their Claim. Lewis advised Plaintiffs that Schurlnight & Rivers would no longer be serving as Plaintiffs' attorneys, that Lewis had Plaintiffs' Schurlnight & Rivers' file related to their Claim, and that they should come pick it up. Plaintiffs picked up their file a few days later. After reviewing the file, Plaintiffs discovered that Rivers and Schurlnight & Rivers had perpetrated a fraud on the Court by fraudulently settling Plaintiffs' Claim without their knowledge, consent or authorization, and furthermore, had filed a fraudulent stipulation of dismissal with the Court. Plaintiffs further discovered that their names had been forged on all of the settlement paperwork, including the settlement checks and release documents.

Rivers and Schurlnight & Rivers perpetrated fraud on the Court by fraudulently representing that they had the authority to execute and file a stipulation of dismissal related to Plaintiffs' claims and fraudulently representing to the Court that the parties to the Claim had reached a satisfactory resolution of the issues related to the case.

Plaintiffs have filed an action for fraud upon the court, which requests that this Court undo the fraud that occurred and allow Plaintiffs to proceed on their underlying claims. Defendants have moved to dismiss Plaintiffs' complaint and allow the fraud to stand. Defendants further seek to retain the benefits of the fraud. For the reasons stated below, Defendants' Motions to Dismiss should be denied, and Plaintiffs should be allowed to proceed on their underlying claims.

ARGUMENT

A. Fraud on the court is recognized as a serious breach of trust that must be addressed to restore confidence in the system of justice.

In Chewning v. Ford Motor Co., the South Carolina Supreme Court addressed the concept of “fraud upon the court” by citing with approval Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), which is the United States Supreme Court’s leading “fraud upon the court” decision. In Hazel-Atlas, the Court noted the significance of fraud upon the Court and the rationale for taking decisive action to remedy it.

Hazel involved an attorney for Hartford who drafted an article in support of a particular glass manufacturing process, had an officer of the glass-workers’ union sign the article as its author, and then had the article published, which was used in support of a patent application. The patent was granted, and Hartford successfully initiated a patent infringement suit against Hazel-Glass. Ultimately, the true identity of the author was discovered, and Hazel-Glass moved to set aside the judgment against it due to fraud upon the court. In upholding Hazel-Glass’ suit, the United State Supreme Court emphasized:

This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed to have been guilty of perjury. Here . . . we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals **This matter does not concern only private parties.** There are issues of great moment to the public in a patent suit. Furthermore, **tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.**

Chewning v. Ford Motor Co., 354 S.C. 72, 79, 579 S.E.2d 605, 609 (2003) (emphasis added) citing Hazel-Atlas Glass Co.

All of Defendants' arguments and theories in support of dismissal are self-serving and geared to protect their financial best interest. However, as recognized by the United States Supreme Court, fraud on the court "does not concern only private parties. There are issues of great moment to the public Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944).

The rationale and policy behind remedying fraud on the court (irrespective of how the remedy might affect a single litigant) is solid because it recognizes that the orderly administration of justice through a reliable and trustworthy legal system is simply more important to society than ensuring an innocent litigant receives a perfectly fair outcome. In other words, safeguarding the integrity of the Court is more important than the financial considerations of a defendant who seeks to retain the benefits of the fraud on the court (irrespective of whether or not the litigant participated in the fraud). The significance of fraud on the court is also evident in the fact that there "is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court" and that "a litigant who has been defrauded need not establish prejudice." Chewning v. Ford Motor Co., 354 S.C. 72, 84, 579 S.E.2d 605, 611 (2003). In other words, the Court will act whenever it has to (even when it hurts a litigant) to protect itself from a fraud perpetrated on the Court. Put another way, when a judgment is shown to have been procured by fraud upon the court, "no worthwhile interest is served in protecting the judgment." Restatement (Second) of Judgments § 70 cmt. b (1982).

B. Lawyer Fraud has been recognized as fraud upon the court.

The South Carolina Supreme Court has expressly recognized that lawyer fraud qualifies as fraud upon the court. "Attorney fraud calls into question the integrity of the judiciary and

erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting a fraud upon the court occurs.” Chewning v. Ford Motor Co., 354 S.C. 72, 83-84, 579 S.E.2d 605, 611 (2003).

Other jurisdictions addressing whether lawyer fraud in connection with a stipulated judgment qualifies as fraud upon the Court have found that it does. Specifically, the Nevada Supreme Court found as follows:

The question thus comes down to whether lawyer fraud in connection with a stipulated final judgment can qualify as a fraud upon the court The district court found that Davidson committed a “fraud upon the court” when he signed and submitted a stipulated judgment for dismissal with prejudice to the court, which the court then signed and entered, terminating the Garners’ claims. “Fraud upon the court” has been recognized for centuries as a basis for setting aside a final judgment, sometimes even years after it was entered. Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 24 (1944) (discussing “the historic power of equity to set aside fraudulently begotten judgments” and canvassing cases and treatises and vacating a judgment entered nine years earlier), overruled on other grounds by Standard Oil Co. of Cal. v. United States, 429 U.S. 17, 18 (1976). It is, of course, true that “in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered.” *Id.* at 244. For this reason, a final judgment, once entered, normally is not subject to challenge. However, the policy of repose yields when “the court finds after a proper hearing that fraud has been practiced upon it, or the very temple of justice has been defiled.” Universal Oil Co. v. Root Rfg. Co., 328 U.S. 575, 580(1946). “[A] case of fraud upon the court [calls] into question the very legitimacy of the judgment.” Calderon v. Thompson, 523 U.S. 538, 557 (1998). Put another way, “[w]hen a judgment is shown to have been procured” by fraud upon the court, “no worthwhile interest is served in protecting the judgment.” Restatement (Second) of Judgments § 70 cmt. b (1982).

NC-DSH, Inc. v. Garner, 125 Nev. 647, 653, 218 P.3d 853, 858 (2009); *see also* Blakney v. Leathers, 867 N.Y.S.2d 145 (App. Div. 2d Dep’t 2008) (finding that vacation of general release

and stipulation of discontinuance, and restoration of action to active calendar were warranted, where plaintiff asserted that he neither authorized nor consented to a settlement, that signature on the general release and endorsement on settlement check were forgeries, and that he never received any of the proceeds).

While no South Carolina case has specifically recognized fraud upon the court is the context of a fraudulent stipulation of dismissal, South Carolina courts have recognized that attorney fraud can constitute fraud upon the court, and there is no basis in South Carolina law or logic not to apply the fraud upon the court analysis here.

C. An attorney's settlement actions are not binding on a client in the case of fraud.

The general rule in South Carolina is that the settlement actions of an attorney are binding on a client, and that if the client is unhappy with the settlement, he must take that up with his attorney. Motley v. Williams, 374 S.C. 107, 111, 647 S.E.2d 244, 246 (Ct. App. 2007) ("It is a long-standing and well-settled rule that an attorney may settle litigation on behalf of his client and that the client is bound by his attorney's settlement actions.").

However, it is equally well settled that the general rule does not apply in cases of fraud. Id. (citing Arnold v. Yarborough, 281 S.C. 570, 572 316 S.E.2d 416, 417 (Ct.App.1984) ("**Absent fraud** or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement. . . . Litigants must necessarily be held bound by the acts of their attorneys in the conduct of a cause in court, **in the absence, of course, of fraud.**") (emphasis added); Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 70, 488 S.E.2d 334 (1997) ("In South Carolina, an attorney may settle litigation on behalf of his client, **and absent fraud** or mistake, such a settlement is binding on the client.") (emphasis added); Shelton v. Bressant, 312 S.C. 183, 208, 439 S.E.2d 833, 834 (1993) ("We uphold and reaffirm the long standing rule that

a client is bound by his attorney's actions in the settlement of a case. Acts of an attorney are directly attributable to and binding upon the client. **Absent fraud** or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement.") (emphasis added).

In Motley v. Williams, Arnold v. Yarborough, Crowley v. Harvey & Battey and Shelton v. Bressant, former clients all argued that their attorneys had committed some type of negligence or similarly exceeded authority given by a client. The South Carolina Supreme Court and the Court of Appeals found in all four cases that the attorneys' actions were all binding on the clients because the negligence of the attorney was directly attributable to the client. However, the Court recognized in each case that a settlement would not be binding in the case of fraud.

Numerous other jurisdictions have specifically addressed the settlement fraud/forgery issue in cases involving facts virtually identical to this one. In NC-DSH, Inc. v. Garner, 218 P.3d 853 (Nev. 2009), a plaintiffs' attorney settled plaintiffs' case against defendant without plaintiffs' knowledge or approval for \$160,000, forged the necessary settlement papers, and disappeared with the money. After finding fraud upon the court, the Court then went on to find that a settlement agreement fraudulently signed by a claimant's attorneys was not enforceable. Other jurisdictions specifically addressing this issue have reached the same conclusion. See e.g., Nehleber v. Anzalone, 345 So.2d 822 (Fla. App. 1977) (finding that in case where "former attorney, who, without the knowledge or consent of his client, negotiated a settlement with . . . insurance company, accepted a \$6,000.00 check, forged his client's endorsement, cashed the check, and absconded with the funds," such a settlement "is of no effect and may be repudiated or ignored and treated as a nullity by the client"); Henderson v. Great Atlantic and Pacific Tea Co., 374 Mich. 142, 132 N.W.2d 75 (1975) (in answering the following question: "Where a

check is given for settlement of a claim in good faith by a defendant to an attorney at law who purports to represent a claimant, and that attorney wrongfully forges the client's name to said check, and keeps the entire proceeds thereof, is a later suit by the client against the defendant barred because of the wrongful acts of the attorney?" court found that the settlement was not binding and that plaintiff should "be allowed to proceed with her claim in the circuit court . . ."); Blakney v. Leathers, 867 N.Y.S.2d 145 (App. Div. 2d Dep't 2008) (finding that vacation of general release and stipulation of discontinuance, and restoration of action to active calendar were warranted, where plaintiff asserted that he neither authorized nor consented to a settlement, that signature on the general release and endorsement on settlement check were forgeries, and that he never received any of the proceeds); Coates v. Drake, 346 N.W.2d 858 (Mich.App.1984) (holding that when a plaintiffs' attorney forged the clients' names to a settlement check and absconded with the funds, "the settlement is not binding on the client."); Miotk v. Rudy 4 Kan App 2d 296, 605 P.2d 587 (1980) (holding "that the trial court abused its discretion in denying plaintiff's motion . . . to set aside the judgment of dismissal" where plaintiff's attorney forged plaintiff's endorsement to the draft made payable to the plaintiff and received the proceeds himself); Perkins v. Philbrick 443 A.2d 73, 34 UCCRS 210 (Me 1982) (finding that the parties' obligations to "have not been discharged by the forged release and drafts"); Walker v. Stephens, 3 Ark App 205, 626 SW2d 200 (1981) (finding that settlement documents forged by plaintiff's counsel in automobile accident case were not binding); Liquori v. Giordano, 42 Conn.Supp. 122, 603 A.2d 782, 5 Conn.L.Rptr. 121 (1991) (finding that it "would be harsh justice . . . to bar an injured person who had never authorized or received the fruits of a settlement from having a day in court against an alleged tortfeasor, simply because that person had engaged an attorney who turned out to be criminally dishonest"); Ball v. Teissonniere, 2000 WL 1868243 (Conn. Super.

2000) (finding that allowing a plaintiff to re-litigate claim fraudulently settled by prior counsel was “admittedly harsh, but the balance is more fairly struck by maintaining the plaintiffs’ right of access to the courts in order to pursue their underlying claim.”); Humphreys v. Chrysler Motors Corp., 399 S.E.2d 60 (W.Va. 1990) (pointing out that a definite meeting of the minds of the parties is essential to a valid compromise, the court stated that there was no meeting of the minds because the plaintiffs did not approve of the compromise made by their lawyer without their authority. Concluding that the settlement was unauthorized by the purchasers and that their lawyer lacked authority to settle the case, the court refused to enforce the settlement agreement).

Because it is well recognized that fraudulent actions of an attorney are not binding on a client, the fraudulent actions of Rivers cannot be binding on Plaintiffs.

D. Agency rule regarding two innocent parties does not apply in lawyer/client/third party relationship.

The general rule in agency recognized in South Carolina is that as between two innocent parties, the risk of loss from the unauthorized acts of a dishonest agent falls on the principal who selected the agent. Spence v. Spence, 368 SC 106 (2006). While no South Carolina Court has addressed this rule in the lawyer/client/third-party context, other jurisdictions have found that the rule does not apply when there had been lawyer fraud on the Court. Capital Dredge & Dock Corp. v. City of Detroit, 800 F.2d 525, 533 (6th Cir. 1986) (“in the settlement context, if the attorney is serving only his own interest in absconding with the settlement proceeds . . . under this general principle of agency the client is not bound by the settlement”); NC-DSH, Inc. v. Garner, 125 Nev. 647, 656, 218 P.3d 853, 860 (2009) (“We recognize the substantial countervailing argument that a client who hires a lawyer establishes an agency relationship and that, ordinarily, the sins of an agent are visited upon his principal, not the innocent third party with whom the dishonest agent dealt. However, courts do not treat the attorney-client

relationship as they do other agent-principal relationships . . . when the question is whether a settlement agreed to by the attorney binds the client.”).

Because Rivers attempted to settle this case without Plaintiffs’ knowledge, forged their names to the settlement papers and settlement check, and kept 100% of the settlement proceeds, the settlement actions of Rivers fall within those acts that are recognized as not to be binding on clients. While this is an “admittedly harsh” result for Defendants, “the balance is more fairly struck by maintaining the plaintiffs’ right of access to the courts in order to pursue their underlying claim.” Ball v. Teissonniere, 2000 WL 1868243 (Conn. Super. 2000).

E. Whether or not Plaintiffs have adequate legal remedies is a question of fact that cannot be resolved at this stage of the litigation.

Defendants argue that Plaintiffs’ claims should be dismissed because Plaintiffs have other legal remedies. “An ‘adequate’ remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity.” Milliken & Co. v. Morin, 386 S.C. 1 (Ct. App. 2009) aff’d as modified, 399 S.C. 23 (2012).

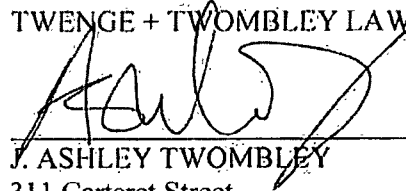
It is not possible to make a determination of whether or not Plaintiffs may have other remedies without looking beyond the complaint. Because a trial court must base its ruling on a motion to dismiss solely upon allegations set forth on the face of the complaint, this ground for dismissal is without merit. Flateau v. Harrelson, 355 S.C. 197, 201-02 (Ct. App. 2003).

CONCLUSION

For the reasons stated above, Defendants’ Motions are due to be denied and Plaintiffs should be allowed to continue to proceed with the prosecution of their underlying claims.

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Beaufort, South Carolina

November 20, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DARLINGTON

CIVIL ACTION NO: 2013-CP-16-0317

Jonathan Teal and Stacie Teal,

Plaintiffs,

v.

**MEMORANDUM IN SUPPORT OF
DEFENDANT NATIONWIDE MUTUAL
INSURANCE COMPANY'S MOTION TO
DISMISS**

Mary Elizabeth Hickman-Tedder, Allstate
Property and Casualty Insurance Company,
Government Employees Insurance Company,
and Nationwide Mutual Insurance Company,

Defendants.

Defendant Nationwide Mutual Insurance Company (Nationwide) submits this memorandum of law in support of its Motion to Dismiss:

SUMMARY

In this action, Plaintiffs seek to set aside settlements entered into between Defendants and Plaintiffs, by and through their chosen attorney, on the basis that Plaintiffs' attorney entered into the settlements without Plaintiffs' consent, forged their signatures on the settlement documents and settlement drafts, and filed a Stipulation of Dismissal with prejudice. The Complaint does not allege any knowledge or wrongdoing on the part of any of the defendants. Because Plaintiffs have adequate remedies at law, this equity action for fraud upon the court is improper. Moreover, under well-established rules of agency, when two parties to an agreement are equally innocent victims of an agent's fraud, the loss must be borne by the principal of the agent. Therefore, Plaintiffs are bound by their attorney's agreement to settle the case, acceptance of the settlement funds, signature on the release, and filing of the Stipulation of Dismissal.

FACTS

Plaintiff's Complaint seeks two separate and distinct causes of action. The first cause of action is a legal action for negligence against Mary Elizabeth Hickman-Tedder arising out of an automobile accident that allegedly occurred on or about June 29, 2010. There are no allegations against Nationwide in this cause of action and Nationwide, as the purported underinsured motorist carrier, is not a proper named party to the negligence cause of action.

The second cause of action is an equity action for "fraud upon the court." Plaintiffs admit that they hired William J. Rivers, III and Schurknight & Rivers, P.A. to represent them in their claim for injuries arising out of the accident. (Complaint ¶ 13). As their attorney, Rivers filed suit in the Darlington County Court of Common Pleas, captioned *Jonathan Teal and Stacie Teal v. Mary Elizabeth Hickman-Tedder* with civil action number 2011-CP-16-00416. (Complaint ¶¶ 17-18).

Rivers entered three separate settlements. First, Rivers – representing the Plaintiffs – agreed to settle their claim against Hickman-Tedder for receipt of twenty-five thousand (\$25,000.00) dollars from Allstate Property and Casualty Insurance Company (Allstate), Hickman-Tedder's liability insurer, in exchange for a Covenant Not to Execute. (Complaint ¶¶ 27-28). Second, Rivers – representing the Plaintiffs – agreed to settle Plaintiff's claim for underinsured motorist coverage from Government Employees Insurance Company (GEICO) for receipt of twenty-five thousand (\$25,000.00) dollars in exchange for a separate Covenant Not to Execute. (Complaint ¶¶ 32-34). Third, Rivers – representing the Plaintiffs – agreed to settle Plaintiff's claim for underinsured motorist coverage from Nationwide for receipt of fifty thousand (\$50,000.00) dollars in exchange for a Release. (Complaint ¶¶ 35-36).

Rivers signed and filed a Stipulation of Dismissal pursuant to Rule 41(a)(1)(A) on June 13, 2012 dismissing Plaintiffs' suit against Hickman-Tedder with prejudice. (Complaint ¶ 39 and Exhibit E to the Complaint). Plaintiffs allege that they never signed any of the covenants, the release, or any settlement drafts and that they never consented to the settlements or dismissal of their claim. Importantly, Plaintiffs do not allege in their Complaint that Rivers ever made any representations to the Court in the underlying case and they do not allege that any defendant was aware of or participated in Rivers' fraud.

ARGUMENT

An action for "fraud upon the court" lies in equity. Plaintiffs have multiple adequate remedies at law and therefore are not entitled to equitable relief in this matter. Moreover, Nationwide is an innocent victim of the actions of Plaintiff's agent. Under agency law principles, Plaintiffs bear the risk of their chosen agent's misconduct. By filing suit with Plaintiff's permission, Rivers had apparent authority to enter into settlements with Nationwide and file a Stipulation of Dismissal. Because the rules of conduct and law prevented Nationwide or its attorneys from dealing directly with Plaintiffs after receiving notice of representation, Nationwide must – as a matter of public policy – be able to rely upon the representations of Plaintiffs' retained counsel in negotiating and entering into settlement agreements.

I. Plaintiffs have adequate remedies at law and therefore cannot seek the equitable remedy of setting aside a binding Release and Stipulation of Dismissal.

"The basis for granting equitable relief is the impracticability of obtaining full and adequate compensation at law." *Nutt Corp. v. Howell Road, LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011) (citing *Monteith v. Harby*, 190 S.C. 453, 3 S.E.2d 250, 2551 (1939)). Therefore, "[w]here a party possesses an adequate remedy at law, equity will not intervene."

Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co., 272 S.C. 127, 128-29, 249 S.E.2d 744, 745 (1978) (citations omitted). “An ‘adequate’ remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity.” *Id.* at 328, 721 S.E.2d at 450 (quoting *Milliken & Co. v. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009)).

In this case, Plaintiffs have multiple remedies at law. First, Plaintiffs have a cause of action against Rivers and the Schurlknight & Rivers law firm for breach of contract, breach of fiduciary duty, negligence, malpractice, fraud, conversion, violation of the Unfair and Deceptive Trade Practice Act, or any other legal cause of action established under South Carolina law. *See generally RFT Management Co. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 732 S.E.2d 166 (2012) (setting forth the elements for a cause of action for legal malpractice and holding that the UTPA applies to the legal profession); *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011) (recognizing that attorneys owe fiduciary duties to their clients). Through these actions, Plaintiffs can pursue the properly culpable party – Rivers and his law firm – for any amounts they should have received in the underlying lawsuit.

Plaintiffs allege that they never signed any check and that no one had authority to forge their names on any settlement checks. (Complaint ¶ 38). Therefore, Plaintiffs also can pursue the banks that negotiated any checks naming them as joint payees without proper endorsements. *See S.C. Code Ann. § 36-3-420(a)*.

Lastly, Plaintiffs can seek relief through the Lawyers’ Fund for Client Protection. *See Rule 411, SCRAP* (Providing a Lawyers’ Fund for Client Protection to help clients recover losses due to an attorney’s dishonesty).

Equity does not exist as an alternative to adequate legal remedies. The Court can only resort to equity when the law fails to provide an adequate remedy. An equitable remedy should not be used to permit one party to submit another innocent party to additional liability when the law provides adequate remedies against the actual wrongdoers. In this case, the law provides multiple causes of action against Rivers and his law firm, an action for conversion against the banks that negotiated any checks bearing forged endorsements, and recovery through the Lawyers' Fund for Client Protection. These legal remedies are adequate and efficient means of attaining the ends of justice as Plaintiffs' requested equitable relief. Therefore, Plaintiffs' are not entitled to equitable relief and the Complaint should be dismissed as a matter of law.

II. Plaintiffs are bound by the acts of their chosen agent.

Rivers, acting as the agent for Plaintiffs and carrying the apparent legal authority to settle their claims, entered into a settlement agreement with Nationwide, returned an executed Release, negotiated the settlement checks, and filed a Stipulation of Dismissal with prejudice. To the extent that Rivers acted fraudulently, Nationwide is an innocent victim of the fraud. Therefore, as between Nationwide and Plaintiffs, Plaintiffs – who selected Rivers as their agent – are bound by Rivers' conduct and must bear the loss of his actions.

A. Where one of two innocent persons suffer loss from an agent's fraudulent or unauthorized act, the principal of the dishonest agent must bear the loss.

Under well-established agency principles, "where one of two innocent persons must suffer, the loss should fall upon him who put it in the power of a third person to cause such a loss." *Bolton v. Wharton*, 163 S.C. 242, 161 S.E. 454 (1931); *see also* 3 Am. Jur. 2d Agency § 274 (Stating that a principal should bear the risk of an agent's infidelity rather than innocent third parties.). This rule is founded upon the agent's apparent authority and promotes settlement and

business dealings by allowing parties who are forced to deal with another party's agent to have confidence in the finality of their transaction. The Supreme Court explained this principle in *Spence v. Spence*, 368 S.C. 106, 126-27, 628 S.E.2d 869, 880 (2006):

The rule "is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency. . . . *Seeing that some one must be loser by the deceit, it is more reasonable that he who employs and confides in the deceiver should be the loser than a stranger.*"

(emphasis added).

Plaintiffs chose to hire Rivers as their attorney. Once hired, Nationwide could no longer communicate directly with Plaintiffs and was required to deal with Rivers as Plaintiffs' agent and attorney. Because Nationwide was required to deal with Plaintiffs' attorney, it was entitled to rely upon his statements as both truthful and authorized. Plaintiffs' Complaint does not allege any wrongdoing on the part of Nationwide or any of the other named defendants because Nationwide and the other named defendants are innocent. Therefore, because Plaintiffs selected Rivers as their agent, they must bear the loss. Although this rule may seem harsh, greater harm would result if multiple parties who were forced to deal with Rivers by Plaintiffs' selection of him as their agent lose the benefit of settlements for which they paid substantial funds. Not only is this the less offensive rule, but it then requires Plaintiffs – who selected Rivers – to pursue an action against him for his misconduct rather than strangers who had no choice but to deal with him. This is by far the better rule.

B. Once Rivers filed suit on behalf of the Plaintiffs, he had authority to settle the case on their behalf.

Once an attorney files suit on behalf of a client, he gains the authority to settle or dismiss the case. "Acts of an attorney are directly attributable to and binding upon the client." *Arnold v. Yarborough*, 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct. App. 1984) (citation omitted). "In South Carolina, an attorney may settle litigation on behalf of his client, absent fraud or mistake, such a settlement is binding on the client." *Crowley v. Harvey & Battey, P.A.*, 327 S.C. 68, 70, 488 S.E.2d 334, 334 (Ct. App. 1997) (citations omitted). Although Plaintiffs allege that their written agreement with Rivers did not give him permission to settle their claims without their consent, they do not allege that this limitation was communicated to Nationwide.

In *Arnold*, the Court of Appeals held that a client was bound by his attorney's agreement to settle a case even when the client never authorized his attorney to settle on the terms reached and was not aware of the settlement. *Id.* The Court of Appeals recognized "a vast distinction between the acts of an attorney within his general authority in a matter not in court and his acts during the conduct and progress of a suit in court." *Id.* (citing *Ex parte Jones*, 47 S.C. 393, 25 S.E. 285 (1896). "Upon this distinction in a large measure rest the certainty, verity, and finality of every judgment of a court." *Id.* (quoting *Ex Parte Jones*, 47 S.C. at 397, 25 S.E. at 286).

Once Rivers filed suit on behalf of Plaintiffs and with their permission, Rivers had the authority to settle the case on their behalf pursuant to South Carolina law. Without communicating any unusual limitations on that authority to Nationwide, it was entitled to deal with Rivers in reliance upon that apparent authority. If Rivers went beyond his authority, Plaintiffs' cause of action is one against Rivers for breach of contract, but they are still bound by his conduct. *See Spence*, 368 S.C. at 126, 628 S.E.2d at 879 ("The doctrine of apparent authority provides that the principal is bound by the acts of his agent when he has placed the agent in such

a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption.”) Relying upon that authority, Nationwide entered into a settlement agreement, tendered a settlement draft for fifty thousand (\$50,000.00) dollars, and received an executed Release waiving and releasing Nationwide from any subsequent claims for underinsured motorist coverage. Plaintiffs are bound by the actions of their agent and the Release is binding upon them.

III. Plaintiffs fail to plead a cause of action for fraud upon the court.

South Carolina has formally recognized an equitable action for fraud upon the court, but only in the context of fraud committed by an opposing party. *See Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d 605 (2003) (Attorneys allegedly suborned perjury and concealed documents.); *Ray v. Ray*, 374 S.C. 79, 647 S.E.2d 237 (2007) (Wife concealed payment for non-compete agreement in dividing marital property). In this case, there is no allegation that any opposing party or insurer participated in the alleged fraud. Rather, the Complaint alleges fraudulent acts perpetrated solely by Plaintiffs’ own attorney.

Furthermore, Rule 41(a)(1)(A) permits a Plaintiff to dismiss a cause of action, with or without prejudice, by filing and serving a notice of dismissal before service of any answer by an adverse party. Rule 41, SCRPC. Rule 41 does not require a plaintiff’s personal signature. Moreover, the rule does not require any action on the part of the Court. Therefore, by permitting Rivers to file suit on their behalf, Plaintiffs’ dressed Rivers with the apparent authority to dismiss their claim with or without prejudice. Rivers exercised that authority and Plaintiffs are bound by the dismissal. Moreover, Rivers never made any misrepresentations *to the court* such that would justify setting aside a judgment for “fraud *upon the court*.”

Although fraudulent conduct on the part of an opposing party or his attorney may justify a claim for fraud upon the court, Plaintiffs cannot bring an equitable action to set aside the actions of their own agent when four other parties relied upon the representations of Plaintiffs' agent. No South Carolina court has recognized an equitable action for fraud upon the court in this context and this Court should not open the door for Plaintiffs to set aside their own settlements and Stipulations of Dismissal to the detriment of other settling parties. The courts have a strong public and judicial policy favoring settlement. *See Chester v. South Carolina Dept. of Public Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 561 (2010) (rejecting a rule that would erode South Carolina's "strong public policy favoring the settlement of disputes."). Permitting actions to set aside judgments and settlements in this context would undermine the finality of judgments and the confidence parties gain from early settlement of disputes.

CONCLUSION

Plaintiffs chose Rivers as their agent to handle prosecution and settlement of their lawsuit. Nationwide had no choice but to deal with Rivers and, in order to protect the public policy favoring settlements, must be able to rely upon Rivers' representations as Plaintiffs' agent. Nationwide did rely upon those representations and issued a settlement check in the amount of fifty thousand (\$50,000.00) dollars. Plaintiffs have multiple adequate remedies at law and this Court cannot resort to equitable remedies when such legal remedies are sufficient. Moreover, as the party that selected Rivers to be their agent, Plaintiffs must bear the loss of Rivers' misconduct rather than Nationwide, who had no choice but to deal with Rivers. Therefore, the settlement, release, and dismissal are all binding and Plaintiffs' Complaint should be dismissed.

[SIGNATURE ON FOLLOWING PAGE]

MURPHY & GRANTLAND, P.A.

A handwritten signature in dark ink, appearing to be 'J.R. Murphy', written over a horizontal line.

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Insurance Company

Columbia, South Carolina
May 2, 2013

FILED

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Jonathan Teal and Stacie Teal

Plaintiffs,

vs.

Mary Elizabeth Hickman-Tedder, Allstate
Property and Casualty Insurance Company,
Government Employees Insurance Company,
and Nationwide Mutual Insurance Company,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

2013 AUG 13 PM 1:39

SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

C.A. No. 2013-CP-16-0317

**DEFENDANT ALLSTATE PROPERTY
AND CASUALTY INSURANCE
COMPANY'S MEMORANDUM OF LAW
IN SUPPORT OF AMENDED MOTION
TO DISMISS OR IN THE ALTERNATIVE
TO SEVER**

Defendant Allstate Property and Casualty Insurance Company ("Allstate") has moved pursuant to South Carolina Rule of Civil Procedure 12 for entry of an Order dismissing Plaintiffs' Complaint because Plaintiffs have failed to state facts sufficient to constitute a cause of action against Allstate. In the alternative, Allstate has also moved for an order, pursuant to South Carolina Rules of Civil Procedure 18(a) and (c), 20(a) and (b), and/or 21, severing the claims against Allstate from the claims against Defendant Mary Elizabeth Hickman-Tedder. Defendant Nationwide Mutual Insurance Company ("Nationwide") filed its Memorandum of Law in Support of its Motion to Dismiss on May 22, 2013, and Allstate adopts the statement of facts and arguments presented in Nationwide's Memorandum of Law and provides the following in further support of its Motion to Dismiss, or in the alternative, to Sever.

A. Plaintiffs are bound by the actions of their attorney.

Like South Carolina courts, other jurisdictions have determined that plaintiffs are bound by the actions of their attorney. For example, in *Purcell International Textile Group, Inc. v. Algemene AFW N.V.*, 647 S.E.2d 667 (N.C. App. 2007), the court addressed a very similar issue.

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Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

COPY

The plaintiff brought suit against defendants for breach of contract, unfair and deceptive trade practices, and fraud. As the date for trial approached, the attorney for defendants began settlement negotiations, and he was able to reach a settlement agreement with the plaintiff by telephone. Thereafter, "the parties announced the agreement in open court on the trial date." *Purcell Int'l*, 647 S.E.2d at 670. While the attorney represented to the plaintiff that he had the defendants' approval of the settlement amount, in fact he did not and the total amount of the settlement exceeded the authority he was given to settle the case. "In fact, [he] never informed any of the defendants of the agreement, never sent defendants the written agreement, never produced a signed confession of judgment, and forged all of the signatures forwarded to plaintiff." *Id.* at 670. The defendants contended they had no knowledge of the settlement agreement until after the court entered judgment against them. At that point, they retained new counsel and moved for relief from the judgment. The trial court denied the motion.

On appeal, the court affirmed the trial court's denial. The court explained that "[s]etting aside judgments pursuant to Rule 60(b)(6) is only appropriate if (1) extraordinary circumstances exist, (2) there is a showing that justice demands it, and (3) the movant shows a meritorious defense." *Id.* Further, the court explained that "[r]elief from attorney fraud on the court 'is to be granted only where the judgment was obtained by the improper conduct of the party in whose favor it was rendered.'" *Id.* (quoting *Henderson v. Wachovia Bank of N.C., N.A.*, 551 S.E.2d 464, 468 (2001)). The court reasoned it could "grant relief on the basis of attorney fraud only when the adverse party's attorney commits the fraud." *Id.* at 671. The court also explained that "North Carolina presumes an attorney has the authority to act for a client he represents, and that presumption must be rebutted by proving to the satisfaction of the court that the attorney's actions were unauthorized" and further stated:

An act is within the power of an agent if the agent has the legal ability to bind the principal to a third person thereby, even though the acts constitutes a violation of the agent's duty to the principal....When a[n]...agent acts within the scope of his apparent authority, and the third party has no notice of the limitation on such authority, the [principal] will be bound by the acts of the agent, and...where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur, must bear the loss.

Id. (quotations omitted).

The court reasoned that the attorney “worked as defendants’ attorney, and the court did not rely on any representations he made to render a judgment in favor of his clients[, and t]herefore, defendants [were] not entitled to relief from any fraud [he] may have committed.” *Id.* Further, the court reasoned that “plaintiff could have reasonably assumed that offer was within [the attorney’s] authority and had no reason to know that [he] had exceeded his limits.” *Id.* The court determined “the agreement negotiated by [the attorney] bound defendants despite the fact that [he] exceeded his authority and violated his duty to defendants.” *Id.* Finally, the court explained that the “circumstances were not extraordinary, but dealt with basic North Carolina agency law” and that “[b]ecause [he] acted with apparent authority as defendants’ agent, defendants fail to meet the criteria for setting aside the judgment.” *Id.*

See also Petty v. Timken Corp., 849 F.2d 130, 133 (4th Cir. 1988) (“A litigant who enters the judicial process through the agency of freely chosen counsel always assumes a certain risk that the result achieved will not be satisfactory. Defeated expectations do not, therefore, entitle the litigant to repudiate commitments made to opposing parties or to the court.”); *In re Dreiler LLP*, 450 B.R. 452, 459-460 (Bankr. S.D.N.Y. 2011) (determining that the parties who hired the attorney “must bear the loss” and that “[a]s a rule, payment to an attorney of a claim which he is employed to recover or collect operates as payment to the client himself, absent specific contrary arrangements [and i]f the attorney absconds with the cash without paying it over to his client, the

client may not thereafter compel the debtor or tort-feasor to pay a second time.”) (internal quotations omitted); *L.R. Wilson v. N.E. Isaacson of Georgia, Inc.*, 229 S.E.2d 29, 30 (Ga. App. 1976) (“The agreement by and consent of counsel of record to dismiss a pending case is binding upon his client even though the client may not have known of his attorney’s consent or agreement and did not assent thereto.....Where one retains an attorney at law to represent him in bringing and prosecuting an[] action against certain defendants, and the attorney appears as attorney of record in such action, and...the attorney by letter authorizes or directs the clerk of the court in which the action is pending to dismiss the case...and the case is dismissed pursuant to said letter, the plaintiff in the case, in absence of any fraud...is...bound by the act of the attorney in dismissing the case, and can not thereafter have his case reinstated on the ground that the dismissal was [unauthor]ized.”) (quotations omitted); and *Cohen v. Goldman*, 132 A.2d 414, 417 (R.I. 1957) (“[W]e believe that i[n] a case such as this where two innocent parties are involved, justice requires that of the two the least culpable should not be made to suffer. Where either party to a transaction made with an agent is to suffer by his neglect, it should be his principal.”))

Here, Plaintiffs are bound by the actions of their attorney. Rivers acted with apparent legal authority in negotiating the settlement, agreeing to the terms of the settlement, accepting the proceeds in satisfaction of the agreement to settle the claims, and filing the Stipulation of Dismissal representing to the Court that the lawsuit was being dismissed with prejudice. Therefore, Plaintiffs have no valid cause of action against Allstate, and their Complaint should be dismissed.

- B. In the alternative, severance is warranted under Rule 20(a), SCRPC, because Plaintiffs’ claims against Allstate and Hickman-Tedder do not arise out of the same transaction or occurrence, nor do they implicate common questions of law or fact.**

Rule 20(a), SCRPC, permits the joinder of defendants only if Plaintiffs have asserted against them a right to relief “arising out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all defendants will arise in the action.” SCRPC 20(a)(emphasis added). Thus, joinder of Plaintiffs’ claims against Allstate and Hickman-Tedder is proper only if Plaintiffs establish both prongs of the permissive joinder analysis. Neither requirement is satisfied in this case.

1. Courts in this jurisdiction and other jurisdictions have found that similarly-postured claims are not properly joined under Rule 20(a).

Rule 20(a) governs the permissive joinder of claims and provides that “[a]ll persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.” The notes to Rule 20(a) provide that the rule “is substantially the same as the Federal Rule.” Therefore, in addition to considering South Carolina law, this court should look to federal law in determining whether Allstate and Hickman-Tedder are properly joined defendants in this case.

The requirements for joinder under Rule 20 “is cumulative, and the plaintiff must show a right to relief presenting common questions of law or fact *and* involving the same transaction, occurrence or series of transactions or occurrences.” *Philadelphia Dressed Beef Co. v. Wilson & Co.*, 19 F.R.D. 198, 200 (E.D.Pa. 1956) (italics in original). In previous decisions, South Carolina courts have found that a plaintiff’s claims against an insurer and an alleged tortfeasor do *not* arise out of the same transaction or occurrence or implicate common questions of law or fact. For example, in *Palmetto Health Alliance v. South Carolina Electric & Gas Company*, Civ. No. 2011-CP-40-4363, slip op. (S.C. Cir. June 28, 2012) the court determined

that severing the plaintiff's claims against the defendant that allegedly caused a power outage that resulted in damage to the plaintiff from its claims against the insurer that allegedly failed to pay the claim was proper under Rule 20. A copy of this opinion is attached as Exhibit A. The court recognized that "[w]hile both claims stem[med] from property damage allegedly suffered by Plaintiff, that is where the similarities end and the trial complications begin." *Palmetto Health Alliance*, Civ. No. 2011-CP-40-4363, slip op. at 1.

The court explained its determination was supported by the reasoning employed by other courts as follows:

- *Rodriguez v. Cruz*, Civil Action No. 3:05cv1193-MPJ, Order (D.S.C. Sept. 1, 2005) (finding that Plaintiff's joinder of claims against defendants was an improper attempt to combine an automobile wreck case with a direct claim against an insurance company);
- *Pollock v. Goodwin*, C/A/ No. 3:07-3983-CMC, 2008 WL 216381, at *5 (D.S.C. Jan. 23, 2008) (holding that negligence-type claims arising out of an accident do not arise from the same transaction or occurrence as do claims based upon an alleged breach of an insurance contract);
- *Beaulieu v. Concord Group Ins. Co.*, 208 F.R.D. 478 (D.N.H. 2002) (holding that Plaintiff's claim against insured for negligent driving were separate and independent from its claims against the insurer for bad faith);
- *Pena v. McArthur*, 889 F. Supp. 403 (E.D. Cal. 1994) (finding that Plaintiff's claim against uninsured driver was improperly joined with Plaintiff's claims against its insurer for bad faith);
- *Gruening v. Sucic*, 89 F.R.D. 573 (E.D. Pa. 1981) (finding that Plaintiff's claims for negligent driving were improperly joined with claims against its insurer for breach of fiduciary duty).

The court determined that severance under Rule 20 was proper.¹

¹ The same result was reached by the Lexington County Court of Common Pleas. By ordered entered March 29, 2013, the Court ordered that the plaintiff's claims for breach of contract and bad faith against the insurer be severed from the claims for negligence against the other defendants. A copy of this order is attached as Exhibit B. The opinions from the other cases cited above are also attached as Exhibit C.

Here the same result should be reached. Plaintiffs' allegations against Hickman-Tedder all arise from her alleged negligent operation of the vehicle. However, while the exact nature of the claims against Allstate is not clear, the only cause of action Plaintiffs could possibly have with regard to Allstate would arise out of the insurance policy. Any obligations that Allstate would have with respect to Plaintiffs arising from the insurance policy are "wholly distinct in character from the events leading to the accident and would be tested under distinct legal standards." *See Pollock*, 2008 WL 216381, at *3. These claims arise out of separate transactions or occurrences and should not be joined. Thus, applying the requirements of Rule 20(a), it is clear that Plaintiffs improperly joined their claims against Allstate with their claims against Hickman-Tedder—the claims against Hickman-Tedder do not arise out of the same transaction or occurrence as the claims against Allstate, nor do these claims involve common questions of law or fact. Severance is the proper remedy to cure the Rule 20(a) misjoinder in this case.

C. Alternatively, severance is appropriate under the broad discretionary authority granted to this court by Rule 21.

Alternatively, pursuant to Rule 21, which governs "Misjoinder . . . of Parties," this Court has broad discretionary power to "drop[] or add[] [parties] by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Further, the rule provides that "[a]ny claim against a party may be severed and proceeded with separately." The discretion to sever is broad. *See Saval v. BL Ltd.*, 710 F.2d 1027, 1031-32 (4th Cir. 1983). Although Rule 21 does not describe a standard for determining misjoinder, "[c]ourts have routinely held that parties are misjoined when either of the preconditions set forth in Rule 20(a) have not been satisfied." *Hard Drive Productions, Inc. v. Does 1-30*, 2011 WL 4915551, at *2 (E.D. Va. 2011). As with Rule 20, the Notes to Rule 21 indicate: "This Rule 21 is the same as the Federal Rule."

“[T]he cases make it clear that misjoinder of parties arises when the failure to satisfy any of the conditions of permissive joinder under Rule 20(a), [and t]hus, Rule 21 applies when the claims asserted do not arise out of the same transaction or occurrence or do not present some common question of law or fact.” *Am. Fid. Fire Ins. Co. v. Construcciones Werl, Inc.*, 407 F. Supp. 164, 190 (D.C. Virgin Islands 1975) (citations omitted). As demonstrated above, Plaintiffs’ claims against Allstate and Hickman-Tedder do not arise out of the same transaction or occurrence and do not present common questions of law or fact. If these claims are allowed to proceed as joined in the Complaint, the risk of confusion is great – the fact the Complaint contains different claims based upon different alleged obligations to Plaintiffs illustrates the need for severance of these claims. *See Palmetto Health Alliance*, Civ. No. 2011-CP-40-4363, slip op. at 5-6 (determining severance was proper under Rule 21 because of the “potential for jury confusion...[and] risk of unfairly prejudicial reference to the existence of insurance.”).

Accordingly, this Court should exercise its broad discretion under Rule 21 to sever the claims against Allstate from the claims against Hickman-Tedder because they fail to meet the Rule 20(a) joinder standard and because justice requires it.

D. In the alternative, severance is warranted under Rule 18(c), SCRPC, because the claims in this case are independent and/or disassociated.

Rule 18(c) gives the Court discretionary power to sever the claims against Allstate from the claims against Hickman-Tedder in this case. Rule 18(c) provides that “[t]he court may make such orders as will prevent a party from being [] delayed or put to unnecessary expense by the joinder of independent or disassociated claims, and may order separate trials....” In addition, the notes to Rule 18 explain that “[u]nder Rule 18(c), the court does have power to grant separate trials on the different claims when it would be more convenient or fair.”

As demonstrated above the claims against Allstate are separate and distinct from those

claims against Hickman-Tedder. There is no association between these claims. The claims against Allstate could only arise from the insurance policy and Allstate's obligations and duties thereunder. This is distinct and separate from the alleged negligence of Hickman-Tedder. The complained-of actions allegedly taken by Allstate all occurred after the accident happened. The claims are independent. As demonstrated above the claims against these two defendants are separate and distinct, and the Court should order separate trials to prevent confusion of the issues and to avoid the likelihood of unnecessary expense in allowing these claims to remain joined. Therefore, the Court should order severance.

E. Conclusion

For all of the reasons outlined above, this Court should dismiss Plaintiffs' Complaint because Allstate, in accordance with the parties' settlement agreement, paid the agreed upon amount of \$25,000 in exchange for a release of any and all claims and accordingly, the Plaintiffs dismissed their lawsuit with prejudice. In the alternative, pursuant to South Carolina Rules of Civil Procedure 18(c), 20(a), and/or Rule 21, this Court should enter an Order sever the claims against Allstate from the claims against Hickman-Tedder because the claims are not properly joined.

[SIGNATURE PAGE FOLLOWS]

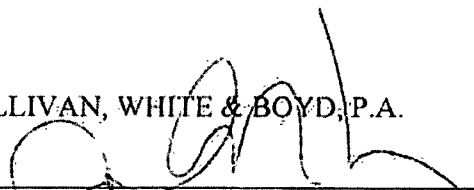
TRUE CERTIFIED COPY,

Scott B. Suggs

**CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.**

FILED
2013 AUG 13 PM 1:39
SCOTT B. SUGGS
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

GALLIVAN, WHITE & BOYD, P.A.

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Attorneys for Allstate Property and Casualty
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Columbia, South Carolina
August 9, 2013

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2013 AUG 13 PM 1:39
SCOTT B. SUGGS
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CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

PALMETTO HEALTH ALLIANCE,
Plaintiff,

vs.

SOUTH CAROLINA ELECTRIC &
GAS COMPANY and FIREMAN'S
FUND INSURANCE COMPANY,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE
FIFTH JUDICIAL CIRCUIT

Civil Action Number 2011-CP-40-4363

ORDER GRANTING
MOTION TO SEVER

JEANETTE M. McBRIDE
C.C.P. & G.S.

2012 JUN 20 PM 12:37

FILED

RICHLAND COUNTY

Pending before the Court is Defendant Fireman's Fund Insurance Company's ("Fireman's Fund") Motion to Sever Plaintiff's claims against it from those claims alleged against South Carolina Electric & Gas Company ("SCE&G"). A hearing on the motion was held on June 4, 2012, and the Court heard argument from counsel from Plaintiff, James L. Bruner, Esquire, and counsel for Fireman's Fund, John T. Lay, Esquire.¹

Fireman's Fund seeks severance of the claims against it, which arise from its denial of coverage under a property damage policy issued to Plaintiff, from the claims against SCE&G, which arise out of allegations that SCE&G caused a power outage that resulted in damage to Plaintiff's property. While both claims stem from property damage allegedly suffered by Plaintiff, that is where the similarities end and the trial complications begin. As outlined below, permitting Plaintiff to join its first-party insurance claims against Fireman's Fund with its tortfeasor-type claims against SCE&G not only runs afoul of the Rule 20(a) joinder requirements, but it unnecessarily complicates what would otherwise be two separate, and straight-forward, cases.

¹ Also present was counsel for SCE&G, James B. Lybrand, Jr., Esquire, who stated that SCE&G has no position on the motion.

Indeed, the broad discretion allotted to this Court by Rule 21 warrants severance of the misjoined claims in this case.

Factual Background

The facts according to Plaintiff's Amended Complaint are as follows. On July 10, 2008, SCE&G allegedly caused an unexpected interruption and surge in the power supply to the Hospital, which damaged components in the Hospital's HVAC system and contaminated Operating Room supplies when the HVAC system failed to circulate cool conditioned air. (Am. Compl. ¶¶ 9, 11, 18-19, 22-34). As a result of this incident, Plaintiff claims damages including reimbursement for non-reusable surgical supplies, repairs to components of the Hospital systems, and overtime paid to staff, among other things. (Am. Compl. ¶¶ 32-33). Plaintiff has alleged causes of action against SCE&G for negligence, gross negligence, breach of implied warranties, breach of contract, and negligence per se, based on SCE&G's alleged conduct that caused damage to Plaintiff. (Am. Compl. ¶¶ 43-73.)

At some point after Plaintiff suffered the damages allegedly resulting from the power interruption, Plaintiff filed a claim for coverage under its property damage policy with Fireman's Fund. (Am. Compl. ¶ 41). Fireman's Fund denied coverage, citing several exclusions. (Am. Compl. ¶ 42). Based upon that denial of coverage, Plaintiff alleges causes of action against Fireman's Fund for a declaratory judgment that coverage exists, for breach of contract, and for bad faith refusal to pay. (Am. Compl. ¶¶ 74-86.)

Fireman's Fund's motion to sever, which is currently before the Court, seeks severance of the claims against SCE&G from the claims against it under the authority of South Carolina Rules of Civil Procedure 20 and 21.²

² Although Fireman's Fund's initial motion also relied upon Rule 18(c), SCRPC, as a source of authority for severance in this case, Fireman's Fund has chosen to focus on the authority provided by Rules 20(a) and 21, SCRPC.

I. Joinder of Plaintiff's Claims Against Fireman's Fund And SCE&G In One Action Runs Afoul Of Rule 20, SCRPC.

Severance is not only appropriate in this case, but warranted under the "same transaction" and "common issue of law or fact" tests of Rule 20(a), SCRPC. Rule 20(a) permits the joinder of defendants *only if* Plaintiff has asserted against them a right to relief "arising out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all defendants will arise in the action." SCRPC 20(a)(emphasis added). This two-part test, both elements of which must be met, is simply not satisfied in this case.

The claims against SCE&G and the claims against Fireman's Fund arise from separate events which are legally and factually distinct. If one were to draw a timeline with Plaintiff's alleged property damage at the midpoint, all facts relevant to SCE&G's liability would entirely pre-date the damage, while all facts relevant to Fireman's Fund's liability would completely post-date the damage. There is no factual overlap in these claims. In fact, even the damages sought against each Defendant will differ - the "damages" attributable to SCE&G's alleged negligence are completely distinct from the types of "loss" that may be covered, or even that can be claimed, under the definitions and exclusions of Fireman's Fund's policy. Likewise, there is no overlap between the legal standards applicable to the negligence/warranty claims against SCE&G and the bad faith/breach of contract claims against Fireman's Fund. These matters require a wholly separate analysis, yet provide fertile ground for potential jury confusion should these claims arising from disparate transactions be allowed to proceed in the same case.³

³ Indeed, the independence of Plaintiff's claims is illustrated by the allegations of two different breach of contract claims in Plaintiff's Amended Complaint - one against SCE&G regarding an agreement to "supply a reasonable, adequate, and safe supply of electricity" and an entirely different breach of contract claim against Fireman's Fund alleging breach of a property damage insurance policy. (Compare Am. Compl. at ¶¶65-66 with Am. Compl. at 77-80). Plaintiff has misjoined two different breach of contract claims against separate defendants that do not arise out of the same transaction or occurrence.

This analysis is consistent with that adopted by the District of "South Carolina" and other courts across the country, which have found that a claim against an insurer for bad faith or breach of an insurance contract does not arise from the same transaction or occurrence as the tortious event allegedly giving rise to coverage. See *Rodriguez v. Agustin Cruz*, Civil Action No. 3:05cv1193-MPJ, Order of September 1, 2005 (finding that Plaintiff's joinder of claims against defendants was an improper attempt to combine an automobile wreck case with a direct claim against an insurance company); *Pollock v. Goodwin*, 2008 WL 216381, at *5 (D.S.C. 2008) (holding that negligence-type claims arising out of an accident do not arise from the same transaction or occurrence as do claims based upon an alleged breach of an insurance contract); see also *Pena v. McArthur*, 889 F.Supp. 403 (E.D. Cal. 1994) (finding that Plaintiff's claim against uninsured driver was improperly joined with Plaintiff's claims against its insurer for bad faith); *Beaulieu v. Concord Group Ins. Co.*, 208 F.R.D. 478 (D.N.H. 2002) (holding that Plaintiff's claim against insured for negligent driving were separate and independent from its claims against the insurer for bad faith); *Gruening v. Susic*, 89 F.R.D. 573 (E.D. Pa. 1981) (finding that Plaintiff's claims for negligent driving were improperly joined with claims against its insurer for breach of fiduciary duty).

The Court is not persuaded by Plaintiff's citation to two federal cases from the Middle District of North Carolina and the Southern District of Illinois in support of its position that joinder is appropriate in this case. Indeed, the cases cited by Plaintiff provide further illustration why joinder is *inappropriate* here, as they involved coverage questions under Commercial General Liability ("CGL") policies that, by the very nature of CGL coverage, are inextricably intertwined with questions of fault. Joinder of an alleged tortfeasor with a plaintiff's first-party CGL carrier is a

⁴ As Plaintiff acknowledges, because "[t]here are only a few cases [in South Carolina] construing Rule 20 and none discuss the joinder test or raise problems of interpretation or application," we must look to federal jurisprudence for guidance as "SCRCP 20(a) is substantially the same as its federal equivalent." (Plaintiff's Opposition Brief, at p. 5).

logical marriage – whether faulty construction has occurred is a common issue applicable to the claims against the carrier and the tortfeasor alike. That is not the case, however, in a property damage coverage case like this one, where the question of fault has virtually no impact on the coverage analysis. Even if SCE&G is at fault for the power interruption, Fireman's Fund still may not be liable because it denied coverage on other valid grounds: a property damage coverage claim requires multiple layers of analysis that are totally unrelated to fault, including whether Plaintiff's damages are a "covered loss" under the policy and what, if any, exclusions apply to preclude coverage. Although joinder may be proper under Rule 20(a) in the context of a CGL insurer and an alleged tortfeasor given the common "fault" inquiry, the same cannot be said in the context of property damage insurance.

Because neither of the requirements of Rule 20(a), SCRCp, is met by the joinder of defendants in this case, severance is warranted.

II. Severance Of Plaintiff's Claims Against SCE&G And Fireman's Fund Is An Appropriate Exercise Of The Court's Discretion Under Rule 21.

Moreover, justice requires the severance of Plaintiff's claims against these two defendants given the unique posture of this case. This Court has broad discretion under Rule 21, SCRCp, which governs "Misjoinder ... of Parties," to "drop[] or add[] [parties] by order if the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." SCRCp 21. Here, there is not only the potential for jury confusion (as noted earlier), but there is a risk of unfairly prejudicial reference to the existence of insurance. Indeed, given that Fireman's Fund is the *Plaintiff's* insurer, joinder of the alleged tortfeasor therewith sets the stage for a jury to impermissibly conclude: (1) that either defendant can be liable for the same losses without consideration of the policy nuances; or (2) that Fireman's Fund must be liable for any service interruption damages if SCE&G is not, regardless of whether Fireman's Fund had other valid

reasons to deny coverage. While it is certainly possible that special interrogatories to the jury may mitigate some of these concerns, there is simply no need to take that chance as Rule 21 grants this Court *broad discretion to sever any and all claims as it sees fit for any reason*. As a final note, the Court observes that should these separate cases remain together, both Plaintiff and SCE&G could find themselves in an unsavory predicament: Fireman's Fund has suggested that it has a subrogation right should Plaintiff prevail against SCE&G. The probability that a subrogation claim would further complicate this case is yet another reason why these cases should proceed separately.

The joinder of Fireman's Fund and SCE&G in this case presents a thorny thicket of potential prejudice and inefficiency. Rules 20 and 21, however, vest this Court with broad discretion to prevent just this sort of situation from going forward. For all of the reasons cited above, the Court **GRANTS** Defendant Fireman's Fund Insurance Company's Motion to Sever.

AND IT IS SO ORDERED.


J. Ernest Kinard, Jr.
Presiding Judge

June ~~22~~ 2012

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Scott Spencer,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC
Plaintiff,

vs.

Auto-Owners Insurance Company, Puro Clean
Disaster Restoration Services, and Half Moon
Contractors, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-32-03690

ORDER

This matter came before the Court on the motion of Auto-Owners Insurance Company ("Auto-Owners") to sever the claims included in Plaintiff's Complaint against it and co-defendants Puro Clean Disaster Restoration Services ("Puro Clean") and Half Moon Contractors, LLC ("Half Moon") pursuant to South Carolina Rules of Civil Procedure 18, 20, and 21.

A hearing was held before me on February 13, 2013, in the Lexington County Court of Common Pleas. Appearing for Plaintiff was Kathleen M. McDaniel of the firm Callison Tighe & Robinson, LLC and appearing for Auto-Owners was A. Johnston Cox of the firm Gallivan, White, and Boyd, P.A.

Based upon the arguments of counsel, pleadings, applicable law, memoranda supplied by counsel and the record in this case, the Court finds that Plaintiff's claims for breach of contract and bad faith against Auto-Owners do not arise out of the same transaction or occurrence as the claims for negligence against Defendants Puro Clean and Half Moon. Further, the Court finds that Plaintiff's claims against Auto-Owners are separate and distinct from Plaintiff's claims against Defendants Puro Clean and Half Moon. Accordingly, pursuant to South Carolina Rules of Civil Procedure 18, 20, and 21, Auto-Owners' Motion to Sever is granted.



WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that Auto-Owners Insurance Company's Motion to Sever is hereby GRANTED. Plaintiff Scott Spencer is ordered to file separate amended pleadings against Auto-Owners and against Puro Clean and Half Moon to effectuate the Court's Order granting the Motion to Sever and to obtain a new case number for the action against Auto-Owners within 20 days of the entry of this Order. The separate cases may be consolidated for the limited purpose of discovery if the parties consent.

IT IS SO ORDERED.



Judge R. Knox McMahon
Circuit Court Judge

Lexington, South Carolina
March 28th 2013.

FILED
2013 MAR 29 P 1:16
BETH A. CARRIG
CLERK OF COURT
LEXINGTON, SC

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FRANCISCO RODRIGUEZ,) Civil Action No. 3 05 1193
Plaintiffs,)
vs.) ORDER
AGUSTIN CRUZ and STATE FARM)
MUTUAL AUTOMOBILE INSURANCE)
COMPANY,)
Defendants.)

On August 24, 2005 this Court heard the Motion of State Farm Mutual Automobile Insurance Company ("State Farm") to sever the plaintiff's case against the Defendant Cruz from the plaintiff's case against State Farm. Also on August 24, 2005 this Court heard the plaintiff's motion to remand this entire case to State Court. For the following reasons State Farm's motion to sever the case against State Farm from the case against Cruz is granted and the plaintiff's motion to remand the entire case to State Court is denied. The plaintiff's case against the Defendant Cruz will be returned to State Court, while this Court will retain jurisdiction of the plaintiff's case against State Farm.

BACKGROUND

On December 7, 2003 the plaintiff was a passenger in a car operated by Agustin Cruz at which time the car operated by Cruz was involved in a one car accident. Cruz's automobile was uninsured. Neither the plaintiff's car nor any car owned by the plaintiff's brother Leon Rodriguez was involved in the December 7, 2003 accident. The plaintiff claims

that at the time of the accident he was a resident relative of Leon Rodriguez's household and, by virtue of this status, is entitled to receive uninsured motorist coverage under policies issued to Leon Rodriguez by State Farm. State Farm denies it owes uninsured motorist benefits to the plaintiff under policies State Farm issued to Leon Rodriguez.

In November 2004 the plaintiff received \$30,000 in uninsured motorist benefits from his own insurance company, New South Insurance Company. In March 2005 the plaintiff filed this action in State Court. State Farm then timely removed this case to Federal Court on the basis of diversity jurisdiction as State Farm maintained Agustin Cruz was improperly joined in the plaintiff's lawsuit against State Farm and that absent the improperly joined defendant Cruz, diversity jurisdiction existed. In June 2005 State Farm filed a motion to sever the case against State Farm from the case against Cruz. In response, the plaintiff moved to remand this case to State Court.

**STATE FARM'S MOTION TO SEVER AND THE
PLAINTIFF'S MOTION TO REMAND**

State Farm's motion to sever the case against it from the case against Cruz and the plaintiff's motion to remand both concern the same issue: namely, whether Cruz was improperly joined as a defendant in the plaintiff's case against State Farm. The removal statute for diversity jurisdiction, 28 U.S.C. § 1441(b), requires diversity for properly joined defendants by stating:

Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought. (emphasis added)

Stated another way, a plaintiff cannot destroy diversity jurisdiction by improperly joining a non-diverse defendant.

Parties are misjoined when the conditions for permissive joinder in F.R.C.P. 20(a) are not met. Beaulieu v. The Concord Group Insurance Company, 208 F.R.D. 478 (D. N.H. 2002) Rule 20(a) contains a two part test for joinder, both of which must be satisfied. First, the claim against the defendants must arise out of the same transaction, occurrence or series of transactions or occurrences. Second, there must be questions of law or fact common to all defendants which will arise in the action. Pena v. McArthur, 889 F.Supp. 403, 405 (E.D. Cal. 1994) Here, the plaintiff has satisfied neither condition of Rule 20(a).

Cruz and State Farm are not joint tortfeasors. The plaintiff's first cause of action pertains only to Cruz, while the plaintiff's second, third and fourth causes of action pertain only to State Farm. Cruz appears to have driven an automobile off a road into a tree and he certainly played no role in the decision to deny the plaintiff uninsured motorist benefits under policies issued to Leon Rodriguez. In contrast, there is no contention by the plaintiff that State Farm caused the automobile accident of December 7, 2003.

This case is similar to Pena v. McArthur, 889 F.Supp. 403 (E.D. Cal. 1993), Gruening v. Sucic, 89 F.R.D. 573 (E.D. Penn. 1981) and Beaulieu v. The Concord Group Insurance Company, 208 F.R.D. 478 (D. N.H. 2002) All of these cases involved an improper attempt by the plaintiff to combine an automobile wreck case with a direct claim against an insurance company. The analysis in Pena is dispositive of the issues before this Court:

[T]here were two occurrences or transactions - the automobile accident between plaintiff and McArthur and the alleged breach of fiduciary duty by State Farm in handling plaintiff's claim.

These are two distinct torts (negligence and bad faith claim) committed by different defendants at different times, and they resulted in the invasion of separate legal interests. 889 F.Supp. at 406.

The Court in Pena further explained that:

Although *some* similar factual issues may exist between the claims, plaintiff is attempting to join different defendants in two different actions presenting different factual and legal issues; Rule 20 does not contemplate such a joinder. 889 F.Supp. at 406.

The issues in the plaintiff's case against Cruz will be whether Cruz properly operated his automobile and the amount of the plaintiff's damages proximately resulting from Cruz's operation of his automobile. In contrast, the issues in the plaintiff's case against State Farm will be whether State Farm should provide uninsured motorist coverage to the plaintiff under policies issued by State Farm to Leon Rodriguez. These disparate claims do not arise out of the same transaction or occurrence and will involve separate and distinct evidence. Separating these two cases involves absolutely no risk of duplicative litigation or inconsistent verdicts.

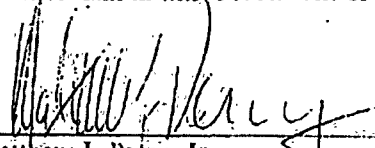
State Farm's motion to sever involves much the same analysis as the plaintiff's motion to remand. As stated in Gruening, supra, cases should be severed where the requirements of Rule 20(a) are not met because the plaintiff has combined in one case two distinct torts committed by different defendants at different times resulting in the invasion of separate legal interests. Also, here as in Gruening, supra, "joinder would allow the jury to

learn that the Sucics were insured. But in a negligence action this is irrelevant and highly prejudicial..." 89 F.R.D. at 574. See also, Pena, supra, that "plaintiff's case may be prejudiced because the jury will know that he was insured...joinder would also create problematic evidentiary issues." 889 F.Supp. at 407.

In addition to the evidentiary problem of liability insurance which precludes the case against Cruz being tried at the same time and before the same jury as the case against State Farm, another reason exists why the plaintiff's claims against Cruz and State Farm cannot be tried jointly. The policy issued by State Farm to Leon Rodriguez provides that if uninsured motor vehicle coverage is available to a relative from another insurer and the relative sustains a bodily injury while occupying a motor vehicle other than the insured's car, State Farm's uninsured motorist coverage is excess. Here, it is undisputed that other uninsured coverage did exist; namely, the \$30,000 the plaintiff collected in uninsured motorist benefits from his own insurance carrier, New South Insurance Company. Additionally, it is undisputed that neither Leon Rodriguez's nor Francisco Rodriguez's car was involved in the accident of December 7, 2003. Thus, State Farm's coverage would be excess to the \$30,000 coverage available to the plaintiff from his own insurance carrier. Accordingly, to be entitled to any State Farm coverage the plaintiff first needs to have a jury establish his damages at above \$30,000 (the amount the plaintiff received from his own insurance carrier in uninsured motorist benefits) and the obligation, if any, of State Farm to pay the plaintiff uninsured motorist benefits will not arise unless and until the plaintiff has established damages in excess of \$30,000. Because the plaintiff must first try the case against Cruz and establish in that case that the plaintiff's damages exceed \$30,000 before the plaintiff can make a claim for uninsured motorist benefits under a State Farm policy, the plaintiff's case against Cruz and the plaintiff's

case against State Farm cannot be tried at one time before one jury. For this reason, and because trying the two cases together would involve evidence of liability insurance and because the attempted joinder of Cruz and State Farm as defendants does not satisfy Rule 20(a), State Farm's motion to sever is granted.

For the foregoing reasons, it is ordered that State Farm's motion to sever the plaintiff's case against Agustin Cruz from the plaintiff's case against State Farm is granted and the plaintiff's motion to remand this entire case to State Court is denied. Because the severed case of Francisco Rodriguez v. Agustin Cruz does not involve parties who are residents of different states there is no diversity jurisdiction for that case. Therefore, the case of Francisco Rodriguez v. Agustin Cruz is remanded to State Court. The case of Francisco Rodriguez v. State Farm Mutual Automobile Insurance Company will remain in this Court. All of which is so ORDERED.


Matthew J. Petry, Jr.
Senior United States District Court Judge

Columbia, South Carolina

September 1, 2005.

Westlaw.

Page 1

Not Reported in F.Supp.2d, 2008 WL 216381 (D.S.C.)
(Cite as: 2008 WL 216381 (D.S.C.))

C

Only the Westlaw citation is currently available.

United States District Court,
D. South Carolina,
Columbia Division.
Carolyn POLLOCK, Plaintiff,

v.

David Samuel GOODWIN, Rhonda H. Rayfield,
and State Farm Mutual Automobile Insurance Com-
pany, Defendants.

C/A No. 3:07-3983-CMC.
Jan. 23, 2008.

James Marvin Mullis, Jr., Pamela R. Mullis, Mullis
Law Firm, Columbia, SC, for Plaintiff.

Charles R. Norris, Nelson Mullins Riley and Scar-
borough, Charleston, SC, Robert W. Whelan, Nel-
son Mullins Riley and Scarborough, Charleston,
SC, for Defendants.

OPINION AND ORDER GRANTING MOTION TO REMAND

CAMERON MCGOWAN CURRIE, District Judge.

*1 This matter is before the court on Plaintiff's motion to remand (Dkt. No. 9) which motion and supporting memorandum also serve as Plaintiff's response to this court's rule to show cause order (Dkt. No. 5). Whether the motion to remand should be granted turns on application of the fraudulent joinder doctrine. For the reasons set forth below, the court concludes that the doctrine does not apply to this action. The motion to remand is, therefore, granted.

I. BACKGROUND

Through this action Plaintiff asserts claims against three Defendants. The claims against two of the Defendants arise directly from a motor vehicle accident. Specifically, Plaintiff alleges that Defendant David Samuel Goodwin (Goodwin) was negligent in operating a motor vehicle and that this neg-

ligence caused an automobile accident which, in turn, caused Plaintiff to suffer personal injuries and property damage. Plaintiff further alleges that Defendant Rhonda H. Rayfield (Rayfield), the owner of the vehicle driven by Goodwin, was negligent in entrusting the vehicle to Goodwin. Neither Rayfield nor Goodwin carried insurance.

The claims against the third Defendant, State Farm Mutual Automobile Insurance Company (State Farm), are founded on the uninsured motorist provisions of an automobile insurance policy issued to Plaintiff by State Farm. Plaintiff alleges that State Farm breached that contract and acted in bad faith in its dealings relating to Plaintiff's claim under the uninsured motorist provisions of the policy. Specifically, Plaintiff asserts that State Farm failed to "fully investigate, evaluate and determine the loss" and "failed to make a timely and proper offer to Plaintiff" to settle the claim. Although the complaint refers to Plaintiff having filed a lawsuit relating to the underlying claim, the only specific indication of a lawsuit against Goodwin and Rayfield is their inclusion as Defendants in the present litigation.

Plaintiff and Defendants Goodwin and Rayfield are all citizens of South Carolina. Defendant State Farm is incorporated in and has its principal place of business in a state other than South Carolina.

In its removal papers and in response to Plaintiff's motion to remand, Defendant State Farm maintains that the two individual (nondiverse) Defendants were fraudulently joined in this action. It, therefore, asserts that the citizenship of the individual Defendants should be disregarded for purposes of determining diversity jurisdiction because their claims were improperly joined with the claims against State Farm.

Plaintiff argues that the claims of all three Defendants are properly joined in a single action because they arise out of the same transaction and oc-

Not Reported in F.Supp.2d, 2008 WL 216381 (D.S.C.)
(Cite as: 2008 WL 216381 (D.S.C.))

currence (the automobile accident) and because there are common issues of law and fact (relating to liability and damages in the automobile accident). She further argues that State Farm cannot satisfy the high standard of establishing fraudulent joinder because she does, in fact, have valid claims against both of the individual Defendants.^{FN1}

FN1. Plaintiff also relies on 28 U.S.C. Section 1441(b) which prohibits removal based on the existence of diversity jurisdiction if any Defendant is a resident of the state in which the district sits. This argument does not, however, add to resolution of the present motion as the court could properly disregard the failure of these Defendants to join in the removal if they were fraudulently joined. See 29A Federal Procedure, Lawyers Edition § 69:49 ([Westlaw] 2007).

II. STANDARD

A. Standard for Removal-Assertion of Subject Matter Jurisdiction

*2 The party removing an action bears the burden of demonstrating that jurisdiction properly rests with the court at the time the petition for removal is filed. See *St. Paul Mercury Indem. Co. v. Reid Cab. Co.*, 303 U.S. 283, 291, 58 S.Ct. 586, 82 L.Ed. 845 (1938); *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir.1994). Removal jurisdiction is strictly construed. *Mulcahey*, 29 F.3d at 151. If federal jurisdiction is doubtful, remand is necessary. *Id.*

To be removable to federal court, a state action must be within the original jurisdiction of the district court. See 28 U.S.C. § 1441. District courts have original jurisdiction "where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between ... citizens of different states." 28 U.S.C. § 1332(a)(1).

A. Fraudulent Joinder Standard

When a plaintiff has fraudulently joined a non-diverse defendant, a district court may retain juris-

diction and disregard the nondiverse party. See *Mayes v. Rapaport*, 198 F.3d 457, 461 (4th Cir.1999). To show fraudulent joinder of a party, a removing party "must demonstrate either 'outright fraud in the plaintiff's pleading of jurisdictional facts' or that 'there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court.'" *Hartley v. CSX Transportation, Inc.*, 187 F.3d 422, 424 (4th Cir.1999) (quoting *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232 (4th Cir.1993)). "The party alleging fraudulent joinder bears a heavy burden-it must show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff's favor." *Hartley*, 187 F.3d at 424.

The Fourth Circuit has described this standard as "even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(6)." *Id.* (citations omitted). All the plaintiff needs to show is that there is a "glimmer of hope," *Mayes*, 198 F.3d at 466, or a "slight possibility of a right to relief" in state court. *Hartley*, 187 F.3d at 426.

III. DISCUSSION

A. Are the Nondiverse Defendants Improperly Joined?

State Farm has made a strong showing that Plaintiff's joinder of her claims against the individual Defendants with her claims against State Farm is impermissible under both the South Carolina and Federal Rules of Civil Procedure. Fed.R.Civ.P. 20(a); S.C. R. Civ. P. 20(a). As explained below, the two sets of claims are legally distinct, arising from separate transactions or series of transactions.

The claims against Goodwin and Rayfield arise from an automobile accident and are pursued solely under negligence theories. The facts relevant to proving liability necessarily involve events predating or concurrent with the accident itself and relate to the ownership and operation of Rayfield's vehicle. While facts relevant to damages will largely post-date the accident, those facts will relate

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to the property damage caused by the accident and any personal injuries Plaintiff suffered as a result of the collision.

*3: The claims against Goodwin and Rayfield might properly be combined in a single action because the alleged separate negligent acts of these Defendants arguably combined to cause a single set of injuries (those arising from the motor vehicle accident). Further, while Plaintiff may prove her claim against Goodwin without proving her claim against Rayfield, the reverse is not true. Thus, it is appropriate to combine the claims against the driver and owner of the vehicle as the negligence of one or both of them led to a single wrong: the accident itself.

The claims against State Farm, however, are based on the alleged breach of a contract of insurance. Whether State Farm breached its contractual duties or committed the tort of bad faith in its processing of Plaintiff's uninsured motorist (UM) claim rests on events which, necessarily, occurred *after* the underlying accident. They are, moreover, wholly distinct in character from the events leading to the accident and would be tested under distinct legal standards.^{FN2} Thus, while the fact that the motor vehicle accident occurred may give rise to the claim for insurance coverage, it cannot fairly be said that the accident itself is part of the "transaction" which gives rise to the claim against State Farm.

FN2. To the extent any negligence standards may apply to the bad faith claim, those standards relate to an insurer's duties of good faith and reasonable procedures in the processing of claims. These claims standards have no overlap with the standards applicable to the owner and driver of a vehicle.

It is certainly not necessary to name State Farm as a defendant in the negligence action against the driver and owner of the vehicle. Statutory provisions governing uninsured motorist claims suggest a

contrary approach:

(B) No action may be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the uninsured motorist provision. The insurer has the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record.

S.C.Code Ann. § 38-77-150(B). The last sentence in this provision, prohibiting inclusion of proof of service on the insurer in the record, is indicative of an intent that the actions not be combined. *See also Williams v. Selective Ins. Co. of Southeast*, 315 S.C. 532, 446 S.E.2d 402, 404 (S.C.1994) (noting that analogous provisions applicable to underinsured motorist claims are intended "to protect an insurance carrier's right to contest its liability for underinsured benefits" and that the insured's failure to pursue an action against the at-fault driver within the applicable statute of limitations frustrated that purpose, consequently resulting in loss of the insured's right to pursue recovery from the UIM carrier).

Case law also supports the conclusion that the actions should be tried separately and sequentially. *See, e.g., Criterion Insur. Co. v. Hoffman*, 258 S.C. 282, 188 S.E.2d 459, 463 (S.C.1972) (noting, in discussing the service requirement in an earlier version of the statute, that "[t]he statute creating the right has set forth the procedure for enforcing the right"). As explained in *Laird v. Nationwide Insur. Co.*, 243 S.C. 388, 134 S.E.2d 206 (S.C.1964):

*4 Recovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist. Such an action is one *ex delicto* and the only issues to be determined therein are the liability and the amount of damage. After judgment is

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entered against the uninsured motorist, a direct action *ex contractu* can be brought to recover from the insurance company on its endorsement, and policy defenses may be properly raised by the insurance company.

Id., 134 S.E.2d at 209 (discussing policy issued under earlier version of uninsured motorist law). See also *Lawson v. Porter*, 256 S.C. 65, 180 S.E.2d 643, 644 (S.C.1971) (paraphrasing the above-quoted excerpt from *Laird*).

Two district court decisions have predicted that the South Carolina Supreme Court would recognize that an insurer's duty of good faith extends to uninsured and underinsured motorist coverage. See *Myers v. State Farm Mut. Auto. Ins. Co.*, 950 F.Supp. 148 (D.S.C.1997) (predicting that South Carolina Supreme Court would not require "an insured ... to obtain judgment against an at-fault driver before the insured's carrier's duty arises to exercise good faith and deal fairly with the insured regarding underinsured benefits" but acknowledging that statute and case law may delay the date on which the duty arises until suit is filed against the underinsured driver and served on the insurer); *Jefferson v. Allstate Ins. Co.*, 673 F.Supp. 1401 (D.S.C.1987) (denying motion to dismiss bad faith claim against UM carrier based on similar rationale). The *Myers* decision also predicted that the state courts would allow an insured to bring a tort action against the insurer before the litigation against the driver/owner is concluded. It acknowledged, nonetheless, that obtaining a judgment against the underinsured driver was a prerequisite to suit on the contract claim.^{FN3} Neither does that case suggest that the claims should be combined in a single action.

FN3. This distinction may raise practical concerns as the insured, by filing a tort action prior to the date on which her or she may file the contract claim may be deemed to have waived the right to file a contract claim.

Evidentiary and other concerns, likewise, sug-

gest that claims against an insurer relating to handling of an uninsured motorist claim (including regarding events preceding suit against the uninsured motorist) should not be joined with claims against the uninsured motorist. The risk of unfairly prejudicial reference to the existence of insurance would, for example, likely require separate trial in virtually every instance.^{FN4}

FN4. In researching the present issue, the court has come across some older South Carolina cases which hold that an injured party may seek recovery, in the same action, against an alleged tortfeasor and the tortfeasor's liability insurer where the insurance at issue is required by law. See, e.g., *Vanderford v. Smith*, 235 S.C. 448, 111 S.E.2d 777 (S.C.1960); *Brown v. Quinn*, 220 S.C. 426, 68 S.E.2d 326 (S.C.1951). These decisions rest, in part, on the conclusion that the defendants will not be unfairly prejudiced by introduction of evidence relating to insurance coverage because the jury is presumably aware of the legal requirement that insurance be obtained. E.g., *Brown*, 68 S.E.2d at 328-29. More recent cases indicate that such actions against a third-party insurer are allowed only when expressly authorized by law and then only if the insured is joined in the action. *Major v. National Indem. Co.*, 267 S.C. 517, 229 S.E.2d 849 (1976). The present action involves first-party insurance benefits, thus there is privity allowing a direct action. See *id.* (noting that direct actions may be brought where there is privity). This does not, however, suggest that a claim which the legislature has expressly indicated should be filed as a separate and prerequisite action (the claim against the uninsured motorist) may be combined with a direct claim founded on the insurance contract and duties of good faith arising from that contract.

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Combining discovery, likewise, would pose substantial if not insurmountable difficulties as the insurer would, during the motorist-liability phase of the case, likely have the right to protect its files from discovery. By contrast, in determining whether the insurer acted with bad faith, Plaintiff may well have a right of access to the same files. At the very least, the arguments for and against discovery of the insurer's files would be vastly different depending on whether viewed in the context of the claims against the driver and owner or in the context of the claims against State Farm.

*5 These difficulties must be balanced against the benefits of a common proceeding. The undersigned finds none. First, the factual and legal bases of the claims are sufficiently distinct that there is no benefit in common trial. If anything, common trial risks substantial confusion of the legal and factual issues.^{FN5}

FN5. Plaintiff offers confusing and novel arguments as to: (1) why both claims arise from the same transaction; (2) why the possible availability of punitive damages against the uninsured driver supports an award of punitive or extra-contractual damages against the insurer; and (3) why the *Tyger River* doctrine should be applied in this novel (UM claim) context. None of these arguments would require resolution in an action pursued solely against Goodwin and Rayfield. At least some of them would not need resolution in a subsequent action against the insurer, either because they are irrelevant to a separate action or because the decision in the action against the individuals mooted the issue (for instance if the amount awarded was less than the UM coverage). In any event, separate handling of such distinct issues would avoid unfair prejudice and minimize the risk of juror confusion.

Second, a common trial is not necessary to avoid inconsistent verdicts. The sequential proceed-

ings contemplated by the statute and explained in *Laird* provide Plaintiff with a full opportunity to present her case against the uninsured motorist (and owner) while also allowing the insurer a full opportunity to step into the shoes of the uninsured motorist to defend, all without joining the insurer in the action. Any judgment in the action against the uninsured motorist would, therefore, be binding on both the insured and insurer (assuming the proper notice is given). Should a dispute then arise as to the extent to which the judgment against the uninsured motorist is covered by the insurance contract or whether any claims handling procedure was improper, that dispute may be handled in a separate action with no need to involve the uninsured motorist.

For all of these reasons, it appears that Plaintiff's claims against State Farm do not arise from the same transaction or occurrence or series of transactions or occurrences as do Plaintiff's claims against the individual Defendants. This court, therefore, concludes that joinder does not satisfy Rule 20 of the Federal Rules of Civil Procedure and predicts that a state court would reach the same conclusion applying its corresponding rule.^{FN6}

FN6. Plaintiff relies on a state trial court decision which denied a motion to dismiss when presented with a case similar to this one. See *Labod v. Hoover*, C.A.No. 05-CP-26-1847 (Horry, S.C. County Court of Common Pleas Nov. 3, 2005) (attached as Dkt No. 9-2 in this action). That decision is not on point as the court was not presented with motion to sever. See generally S.C. R. Civ. P. 21 (noting that misjoinder is not a ground for dismissal of an action and indicating that severance is the proper remedy).

B. Does Misjoinder of Claims Support a Finding of Fraudulent Joinder?

For reasons set forth in the preceding section, the court concludes that the claims against State Farm have been improperly joined with the claims

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against Goodwin and Rayfield. The next question is whether this misjoinder rises to the level of fraudulent joinder.

As noted above, State Farm may establish fraudulent joinder by demonstrating either: (1) outright fraud in the pleading of jurisdictional facts; or (2) that there is no possibility that Plaintiff will be able to establish a cause of action against the in-state Defendants. See *Hartley*, 187 F.3d at 424. Neither of these standards is met here. There is no suggestion that the jurisdictional facts are falsely pled and Plaintiff has clearly stated a claim against both of the non-diverse individual Defendants.

The problem is not that there is no valid claim against these parties. It is that the claims against them do not belong in the same case as the claim against Defendant State Farm. State Farm has not, therefore, satisfied the fraudulent joinder standard as expressed in *Hartley* and *Mayer*.

C. Is Removal Allowed Based on Separate and Independent Claim Status

For reasons discussed in Section III.A. above, it appears that the complaint asserts what might fairly be characterized as "separate and independent claims." See 29A Federal Procedure, Lawyers Edition § 69:47 ([Westlaw] 2007) ("Whether the complaint discloses a single wrong or multiple wrongs to the plaintiff is the test of the existence of a separate and independent claim or cause of action under 28 U.S.C.A. § 1441(c)."). Removal of separate and independent claims is allowed despite the joinder of those claims with a non-removable claim but *only* when the court's subject matter jurisdiction is founded on 28 U.S.C. § 1331 (federal question jurisdiction). See 28 U.S.C. § 1441(c). This results from a 1990 amendment which restricted the reach of Section 1441(c). 29A Federal Procedure, Lawyers Edition § 69:41 ("Since its 1990 amendment, 28 U.S.C.A. § 1441(c) does not permit the removal of a separate and independent claim based on diversity of the parties.")

*6 It appears, therefore, that Congress intended

to restrict removal in situations comparable to the present. As no other apparent grounds for removal exist, the undersigned concludes that the action must be remanded.^{FN7} Remand is without prejudice to a second removal in the event the claims of the non-diverse Defendants are severed prior to the expiration of one year from institution of the action. See 28 U.S.C. § 1446(b) (imposing time limit on removal).

FN7. This does not preclude removal. Instead, it precludes removal unless and until Defendant State Farm obtains a severance order from the state court.

IV. CONCLUSION

For the reasons set forth above, Plaintiff's motion is granted and this matter is remanded to the state court from which it was removed. The court declines to award fees, costs or expenses under 28 U.S.C. § 1447(c).

IT IS SO ORDERED.

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United States District Court,
D. New Hampshire.
Patti A. BEAULIEU

v.

THE CONCORD GROUP INSURANCE COM-
PANY and Judy Y. Huang.

Civ. No. 02-185-JM.
July 25, 2002.

Auto accident victim brought bad faith claim against auto insurer for refusing to pay underinsured motorist (UIM) benefits in connection with first accident and against driver for negligence in causing second accident. Driver moved to sever. The District Court, Muirhead, United States Magistrate Judge, held that claims that did not arise out of same transaction or involve possibility of concurrent liability were misjoined.

Motion granted.

West Headnotes

[1] Federal Civil Procedure 170A ⚡ 387.1

170A Federal Civil Procedure

170AII Parties

170AII(J) Defects, Objections and Amend-
ments

170Ak387 Misjoinder

170Ak387.1 k. In General. Most Cited

Cases

Parties are misjoined when the preconditions for permissive joinder in are not met. Fed.Rules Cr.Proc.Rules 20(a), 21, 18 U.S.C.A.

[2] Federal Civil Procedure 170A ⚡ 241

170A Federal Civil Procedure

170AII Parties

170AII(F) Permissive Joinder

170AII(F)I In General

170Ak241 k. In General. Most Cited

Cases

Preconditions for permissive joinder are construed liberally in order to promote the broadest scope of action consistent with fairness to the parties. Fed.Rules Cr.Proc.Rule 20(a), 18 U.S.C.A.

[3] Federal Civil Procedure 170A ⚡ 387.1

170A Federal Civil Procedure

170AII Parties

170AII(J) Defects, Objections and Amend-
ments

170Ak387 Misjoinder

170Ak387.1 k. In General. Most Cited

Cases

Determination of whether parties have been misjoined lies within the sound discretion of the district court. Fed.Rules Civ.Proc.Rule 21, 28 U.S.C.A.

[4] Federal Civil Procedure 170A ⚡ 388

170A Federal Civil Procedure

170AII Parties

170AII(J) Defects, Objections and Amend-
ments

170Ak387 Misjoinder

170Ak388 k. Striking Out or Dropping
Parties: Most Cited Cases

Accident victim's claim against automobile insurer, for bad faith failure to pay underinsured motorist (UIM) claim arising out of first accident, and claim against driver involved in second accident, for negligence, were misjoined, entitling driver to severance, where claims did not arise out of same transaction or occurrence; defendants did not act in concert and could not be held concurrently liable; accidents involved different drivers, and accidents were temporally separated by 15 months. Fed.Rules Cr.Proc.Rules 20(a), 21, 18 U.S.C.A.

*478 W. John McNally, III, Hanover, NH, for plaintiff.

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R. Matthew Cairns, Ransmeier & Spellman, Concord, NH, Dennis T. Ducharme, Wiggin & Nourie, Manchester, NH, for defendants.

ORDER

MUIRHEAD, United States Magistrate Judge.

On June 11, 2002, Defendant Judy Y. Huang ("Huang") filed a Motion to Sever (document no. 6) seeking an order severing the plaintiff's claim against Huang from the plaintiff's claim against The Concord Group Insurance Company ("Concord Group"). For the reasons set forth below, Huang's motion is granted.

Background

This is an action based on breach of contract and negligence. The Plaintiff Patti A. Beaulieu ("Plaintiff") asserts that this Court has jurisdiction to hear this matter based on diversity of citizenship. See 28 U.S.C. § 1332. The following facts are taken from the Complaint and are assumed to be true for the purposes of Huang's motion.

On September 15, 1998, Plaintiff's car was struck from the rear by a car driven by Melchoir H. Joseph ("Joseph") as Plaintiff was exiting off Interstate Highway 91 in Vermont. Plaintiff suffered serious injuries as a result of this accident. On that date, Plaintiff had automobile insurance with Concord Group that provided coverage against uninsured and underinsured motorists. At the time of the accident Joseph had \$25,000 of automobile liability coverage through his insurer.

At some unspecified point, Plaintiff agreed to accept the \$25,000 available under Joseph's insurance policy in exchange for a \$479 liability release. Prior to accepting this settlement, Plaintiff explicitly preserved her right to pursue coverage from Concord Group under her insurance policy for underinsured motorist bodily injury claims.

While traveling in Hanover, New Hampshire on February 9, 2000, Plaintiff's car was struck from the rear by a car driven by Huang. As a result of

this accident, Plaintiff's injuries from the accident with Joseph were aggravated and Plaintiff suffered additional injuries.

On May 7, 2001, Concord Group informed Plaintiff that it took the position that Plaintiff's injuries arising from the accident with Joseph did not have significant value beyond the \$25,000 settlement that Plaintiff received from Joseph's insurer. Plaintiff disputed Concord Group's assertion. She sought to arbitrate her claim with Concord Group, but Concord Group denied her arbitration request.

Plaintiff commenced this action on April 24, 2002 naming Concord Group and Huang as defendants.

Discussion

I. Legal Standard

[1] Misjoinder of parties is addressed in Rule 21 of the Federal Rules of Civil Procedure.^{FN1} The rule does not define the grounds for misjoinder, but it is well-settled that parties are misjoined when the preconditions for permissive joinder in Rule 20(a) are not met. *Maldonado Cordero v. AT & T*, 190 F.R.D. 26, 28 (D.P.R. 1999); *Pacific Indem. Co. v. Connecticut Light & Power Co.*, No. 3:94CV01658, 1997 WL 409522 at *1 (D.Conn. June 13, 1997); *Glendora v. Malone*, 917 F.Supp. 224, 227 (S.D.N.Y. 1996).

FN1. The rule provides in relevant part that:

Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Fed.R.Civ.P. 21.

[2][3] To properly join two or more defendants in one action, the plaintiff must allege facts that show: (1) that the right to relief asserted against the defendants arises out of the same transaction, oc-

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currence, or series of transactions or occurrences, and (2) that a question of law or fact in common to both defendants will arise in the action. See Fed.R.Civ.P. 20(a). When appropriate, the joinder rules result in beneficial economies of scale and judicial efficiency by resolving related issues in a single lawsuit. See *Pujol v. Shearson/Am. Express Inc.*, 877 F.2d 132, 134 (1st Cir.1989). Therefore, the preconditions for permissive joinder are construed liberally in order to promote the broadest scope of action consistent with fairness to the parties. See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). However, the determination of whether parties have been misjoined lies within the sound discretion of the district court. *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1082 (2d Cir.), cert. denied, 488 U.S. 848, 109 S.Ct. 128, 102 L.Ed.2d 101 (1988); *Pacific Indemnity Company*, 1997 WL 409522 at *1; *Glendora*, 917 F.Supp. at 227. In the instant action, Plaintiff does not meet the preconditions for permissive joinder because Plaintiff's claims against Concord Group and Huang do not arise from the same transaction or occurrence.

II. The Requirement of Transactional Relatedness

[4] A review of the most factually analogous federal authorities on misjoinder show that Plaintiff cannot meet the requirement of transactional relatedness required for permissive joinder. In *Pena v. McArthur*, 889 F.Supp. 403 (E.D.Cal.1994), State Farm Mutual Automobile Insurance Company ("State Farm") moved to sever the plaintiff's negligence claim against McArthur from the plaintiff's bad faith claim against State Farm. The court granted State Farm's motion finding that two occurrences, or transactions were involved. *Id.* at 406. The court found that these were "two distinct torts (negligence and bad faith claim) committed by different defendants at different times, and they resulted in the invasion of separate legal interests." *Id.* The court also noted that "480 there was no allegation that the defendants acted in concert." *Id.*

Similarly, in *Gruening v. Sucic*, 89 F.R.D. 573 (E.D.Pa.1981), the plaintiff brought suit against the Sucics for personal injuries and against State Farm for malicious breach of its fiduciary duty to plaintiff in representing both the plaintiff and the Sucics with respect to the car accident in question. The court granted the individual defendants' motion for severance. *Id.* at 574. The court found that the plaintiff stated two distinct torts committed by different defendants at different times, and that they resulted in the invasion of separate legal interests. *Id.* Additionally, the court noted that there was no allegation that the defendants acted in concert, and that State Farm's alleged misconduct had no legal effect on the cause of action asserted against the Sucics. *Id.*

The reasoning of *Pena* and *Gruening* applies with even greater force to the instant case. Plaintiff's claims against Concord Group and Huang seek remedies for deprivations of two separate legal interests—contractual coverage for accidents caused by underinsured motorists, and a remedy for alleged negligent driving. Moreover, unlike in *Pena* and *Gruening*, Plaintiff's claims arise out of two distinct car accidents. These two car accidents, although similar in nature, involve two different drivers, in two different locations, separated by a span of nearly fifteen months. And, like *Pena* and *Gruening*, there is no allegation that the defendants acted in concert. Plaintiff's claims do not meet the transactional relationship test for permissive joinder under Rule 20(a).

The cases cited by Plaintiff in support of her opposition to Huang's Motion to Sever are inapposite. Most notably, Plaintiff cites *Poster v. Central Gulf Steamship Corp.*, 25 F.R.D. 18 (E.D.Pa.1960), and *McNeil v. American Export Lines, Inc.*, 166 F.Supp. 427 (E.D.Pa.1958), in support of her contention that joinder of Concord Group and Huang in a single action is proper. In both *Poster* and *McNeil*, the court found that a plaintiff could sue two defendants in the same action for allegedly committing similar negligent acts at different times.

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Poster, 25 F.R.D. at 20; *McNeil*, 166 F.Supp. at 428. In those cases, the courts found that the defendants might be concurrently liable for the harm suffered by the plaintiffs. *Poster*, 25 F.R.D. at 20; *McNeil*, 166 F.Supp. at 428. Those cases are distinguishable from the instant case because Plaintiff's claims here seek remedies for deprivations of two separate legal interests. Although Plaintiff will need to establish the underlying facts of her car accident with Joseph and her injuries from that accident to recover on her breach of contract claim, that does not make her claim against Concord Group a negligence claim. See *Pena*, 889 F.Supp. at 406 (finding that the necessity for "analysis" of an underlying negligence claim in a bad faith claim against an insurer does not make the bad faith claim identical to the underlying negligence claim). The ultimate issue in Plaintiff's claim against Concord Group is not whether Joseph was negligent, but whether Plaintiff is entitled to compensation under her insurance policy for the injuries she incurred in the accident.^{FN2}

FN2. Joseph's alleged negligence is a subsidiary issue in Plaintiff's action against Concord Group.

The Court also finds it significant that the two incidents alleged by Plaintiff are separated by a span of nearly fifteen months. Even in cases where the plaintiff contends that the defendants are successive joint tortfeasors, which is not the case here, at some point a lapse in time makes the logical relationship between the acts too attenuated to find that the acts are part of the same transaction or occurrence. See *Gruening*, 89 F.R.D. at 574 (finding that there must be some systematic pattern or logical relation between tortious events before there is a requisite "series of transactions or occurrences"). So it is here.

The Court appreciates Plaintiff's motivation for joining Concord Group and Huang in the same suit—to combat the possibility of either defendant seeking to avoid liability for Plaintiff's injuries by pointing the finger at the absent defendant. Under

the circumstances alleged in this action, however, it is fair to all parties and reasonable to require the Plaintiff to separately prove the defendants' liability.

*481 Conclusion

For the foregoing reasons, Huang's Motion to Sever (document no. 6) is granted. The clerk is instructed to drop Defendant Judy Y. Huang as a defendant in this case and to open a separate case for the Plaintiff against Huang.

SO ORDERED.

D.N.H., 2002.
Beaulieu v. Concord Group Ins. Co.
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United States District Court,
E.D. California.

Guadalupe PENA, Beatriz Pena, Maria G. Rodriguez,
and Jorge A. Pena, a minor, by and through his
Guardian Ad Litem Guadalupe Pena, Plaintiffs,
v.

Eric Michael McARTHUR, State Farm Mutual
Automobile Insurance Company, an Illinois corporation;
Ana Walters, and Does 1-50, inclusive. Defendants.

No. CV-F-94-5921 REC/SSH.
Nov. 23, 1994.

Insured driver and passengers brought negligence state-court action against uninsured motorist and brought bad faith claim against uninsured motorist (UM) carrier. Insurer removed case and filed motion to sever driver. The District Court, Coyle, Chief Judge, held that joinder was improper.

Motion granted.

West Headnotes

[1] Federal Civil Procedure 170A ⚡82.1

170A Federal Civil Procedure

170A1 In General

170A1(E) Joinder of Claims and Remedies

170Ak82 Grounds of Claims

170Ak82.1 k. In General. Most Cited

Cases

Federal Civil Procedure 170A ⚡259

170A Federal Civil Procedure

170A11 Parties

170A11(F) Permissive Joinder

170A11(F)2 Particular Parties Who May
Be Joined

170Ak259 k. Insurers and Insureds.

Most Cited Cases

Negligence action against uninsured motorist could not be joined with insured's bad faith claim against uninsured motorist (UM) carrier, even if bad faith claim would require analysis of underlying negligence claim; claims involved distinct torts committed by different defendants at different times and resulted in invasion of separate legal interests, focus of bad faith claim was conduct of insurer when it presented release to insured, and severance would not cause unnecessary delay and expense since no trial date was set, scheduling conference had not been held, and discovery had not begun. Fed.Rules Civ.Proc.Rules 20(a), 21, 28 U.S.C.A.

[2] Federal Civil Procedure 170A ⚡81

170A Federal Civil Procedure

170A1 In General

170A1(E) Joinder of Claims and Remedies

170Ak81 k. In General. Most Cited Cases

Fairness is critical consideration in determining whether severance of claims is appropriate. Fed.Rules Civ.Proc.Rule 21, 28 U.S.C.A.

[3] Antitrust and Trade Regulation 29T ⚡290

29T Antitrust and Trade Regulation

29T111 Statutory Unfair Trade Practices and
Consumer Protection

29T111(E) Enforcement and Remedies

29T111(E)1 In General

29Tk287 Persons Entitled to Sue or
Seek Remedy

29Tk290 k. Private Entities or Individuals. Most Cited Cases

(Formerly 92Hk32 Consumer Protection)

Private litigant may plead cause of action for injunctive or restitutionary relief under California Unfair Business Practices Act. West's Ann.Cal.Bus. & Prof.Code § 17200.

*404 Federico Castelan Sayre, Law Offices of Fed-

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erico Castelan Sayre, Newport Beach, CA, for plaintiffs.

James Patrick Wagoner, McCormick BarstowShepard Wayte and Carruth, Fresno, CA, for defendants.

**ORDER RE DEFENDANTS' MOTIONS TO
DROP, DISMISS AND SEVER**
COYLE, Chief Judge.

On October 17, 1994, this Court heard defendants' motions to drop, dismiss, and sever. Upon consideration of the oral and written record, this Court grants defendants' motions.

I. BACKGROUND

This action arises from an automobile accident involving plaintiffs and uninsured motorist McArthur, which led to a dispute concerning plaintiff Pena's agreement with State Farm Mutual Automobile Insurance Company ("State Farm") to settle her claim for uninsured motorist benefits under a State Farm insurance policy.

Guadalupe Pena ("Pena") was involved in an automobile accident with Defendant McArthur on May 22, 1993. Pena was driving the car, and passengers included plaintiffs Beatrice Pena, Maria Rodriguez, and Jorge Pena.^{FNI} McArthur's car collided with Pena's at 55 miles per hour. The police report cited defendant McArthur as the cause of the accident and as driving under the influence.

FNI. Plaintiffs are referred to as "Pena" and/or "plaintiff," based on that party's moving papers.

At the time of the incident, McArthur was uninsured. Pena was insured under a State Farm policy. According to Pena, State Farm and its employee, Walters, had him sign a release agreement written in English which was not translated or interpreted for Pena by an official translator or interpreter, knowing that Pena was Spanish-speaking. Specifically, plaintiff asserts that on May 26, 1993, Pena met with Walters (the State Farm employee)

and was provided with a "Release and Trust Agreement." State Farm provided an "interpreter" who apparently was the estimator in the body shop. The Agreement stated that Pena would agree to release all of her bodily injury claims for the sum of \$750.00. The Agreement states that the accident was caused by "an unknown driver."

According to plaintiff, Pena's medical bills exceed \$6000.00 and State Farm paid out approximately \$5000.000 in Med-Pay benefit claims of Pena. However, plaintiff contends that State Farm did not adequately investigate the claim before forcing Pena to ostensibly release all her rights in exchange for the sum of \$750.00. Pena alleges that the amount received pursuant to the release agreement was less than the amount in fact due under the policy.

The complaint, filed in state court by Pena and the passengers in the car, alleges negligence and various legal theories against McArthur, the uninsured motorist who caused the collision, and against State Farm and its employee Walters for breach of the duty of good faith and fair dealing, insurance bad faith, violation of California Business and Professions Code § 17200 et seq., and various other theories.

In the complaint, Pena seeks rescission of the release agreement, a declaration that the agreement may be rescinded based upon the alleged fraud of State Farm and Walters, and a declaration as to the parties' respective rights and duties under the State Farm policy issued to Pena.

The defendants gave notice of removal to federal court by motion under 28 U.S.C. § 1441(a). This notice for removal does not *405 join McArthur, contending that he is an improper party for joinder. The notice does not include Walters, claiming that she is fraudulently joined because plaintiff has no viable claim against her.

Defendants now move to dismiss Walters, to sever the negligence claim alleged against McAr-

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thur, and to dismiss the unfair business practice claim for failure to state a cause of action.

II. DEFENDANTS' MOTIONS TO DROP, DISMISS AND SEVER

A. The individual defendant, Walters, is dismissed.

Plaintiff does not oppose dismissal unless State Farm plans to claim that Walters acted outside her scope of employment, thereby reducing State Farm's liability. Since State Farm submits an affidavit accepting full responsibility for all of Walters' actions, the defendant Walters is dismissed.

B. Defendants' motion to sever the claim against McArthur is granted.

[1] Defendants argue for severance of plaintiff's negligence claim against McArthur because defendants McArthur and State Farm have been misjoined. They contend that the requirements of permissive joinder, Fed.R.Civ.P. 20(a) have not been met. Thus, they seek a severance under Fed.R.Civ.P. 21 which gives the court the power to remedy the misjoinder of parties on motion of a party.^{FN2}

FN2: Rule 20(a) provides in pertinent part: "All persons ... may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

Rule 21 provides: "Misjoinder of parties is not ground for dismissal of an action.

Parties may be dropped or added by order of court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately."

In *Gruening v. Suncie and State Farm Mutual Insurance Company*, 89 F.R.D. 573 (E.D.Pa.1981), the court addressed the issue of severance pursuant to Rule 21 in a very similar factual scenario: There, plaintiffs brought suit against individual defendants for personal injury resulting from an automobile accident, and against their insurer, State Farm, for malicious failure to inform plaintiff of the conflict of interest present because State Farm also insured the other drivers involved, who were the individual defendants. The court held that the individual defendants were entitled to severance in order to remedy misjoinder of parties for the following reasons.

"Rule 20(a) permits the joinder of defendants when there is asserted against them any right to relief arising out of the same transaction, occurrence or series of transactions or occurrences and if any questions of law or fact common to all defendants will arise in the action ... Although this joinder provision should be construed liberally, ... both parts of this test must be satisfied ...

There were two occurrences or transactions here—the automobile accident and the alleged malicious failure by State Farm later to inform plaintiff of the conflict of interest. The issue, then, is whether there was a "series of transactions or occurrences".... Plaintiff need not seek the same relief against each defendant. *Kuechle v. Bishop*, 64 F.R.D. 179, 180 (N.D. Ohio 1974). Nevertheless, there must be some "systematic pattern" or logical relation between the tortious events before there is the requisite "series of transactions or occurrences." *Mosley v. General Motors*, 497 F.2d [1330] at 1333 [8th Cir.1974].... Such a pattern or relation is absent here. There were two distinct torts committed by different defendants at different times, and they res-

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ulted in the invasion of separate legal interests. There is no allegation that the parties were acting in concert or that the Sucics knew of State Farm's misconduct. Moreover, *406 State Farm's alleged misconduct had no legal effect on the cause of action asserted against the Sucics. State Farm may have hindered plaintiff's attempts to settle their claim with the Sucics. But that is insufficient to support permissible joinder. See *Trail Realty, Inc., v. Beckett*, 462 F.2d 396 (10th Cir.1972); *Wilkinson v. Hamel*, 381 F.Supp. 766 (W.D.Va.1974)."

Similarly in this case, there were two occurrences or transactions—the automobile accident between plaintiff and McArthur and the alleged breach of fiduciary duty by State Farm in handling plaintiff's claim. These are two distinct torts (negligence and bad faith claim) committed by different defendants at different times, and they resulted in the invasion of separate legal interests. Additionally, there is no allegation that the named defendants acted in concert or that McArthur knew of State Farm's alleged misconduct. Accordingly, joinder is improper.

Plaintiff does *not* argue that joinder is proper. Instead, she argues that even if joinder is improper, this Court should retain ancillary jurisdiction over the negligence claim in the interests of judicial economy. The plaintiff argues that establishment of plaintiff's bad faith claim against State Farm will require analysis of the underlying claim. To prove the underlying claim, plaintiff plans to call defendant McArthur and the investigating officer to demonstrate the clear liability of the negligence claim. The same witnesses will be necessary in terms of the bad faith action, in order to establish that the claim was one of clear liability which had been investigated by the police and for which a police report had been generated.

Joinder of parties promotes trial convenience and expediency. *Gruening*, supra 89 F.R.D. at 574; *Horton Co. v. International Telephone & Telegraph Corp.*, 85 F.R.D. 369, 371 (W.D.Pa.1980). "In as-

sessing joinder under this rule [FRCP 20] the Court is operating in an area of considerable discretion." *Kuechle v. Bishop*, 64 F.R.D. 179, 180 (N.D. Ohio 1974). "In determining the propriety of joinder, then, a trial court must analyze the complaint to determine what has been alleged and what claims are made. Then the Court must decide whether or not both requirements of Rule 20 have been met; i.e., is there a common transaction or series of transactions and will there arise a common question of fact or law." *Id.* at 180. However, Rule 20 "does not contemplate joinder, where ..., an existing attempt is made to incorporate into an existing action a different action against different parties and presenting entirely different factual and legal issues." *Trail Realty, Inc., v. Beckett*, 462 F.2d 396, 400 (10th Cir.1972).

Here, plaintiff argues that proof of the bad faith claim will require analysis of the underlying negligence claim. However, "analysis" of the underlying claim in the bad faith action is not identical to the underlying negligence claim itself. The gravamen of a bad faith action "is found in the *unreasonable* conduct of the carrier measured against its duty arising under the implied covenant of good faith and fair dealing present in every insurance contract." *Blake v. Aetna Life Ins. Co.*, 99 Cal.App.3d 901, 160 Cal.Rptr. 528 (1979). Thus, the focus of the bad faith claim is the conduct of State Farm when it presented the Release Agreement to Pena. Relevant facts will include the extent of liability of the other driver that State Farm knew or should have known about—not the actual negligence of the other driver as determined by the jury after a full trial. Although some similar factual issues may exist between the claims, plaintiff is attempting to join different defendants in two different actions presenting different factual and legal issues; Rule 20 does not contemplate such a joinder.

Moreover, plaintiff's reliance on *Bailey v. Scholler*, 630 F.Supp. 337 (D.Mont.1986), is misplaced. There, the court held that a motorist's claim against her insurer for bad faith was "separate and

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independent" from her negligence claim against defendant individual motorist, within 28 U.S.C.A. § 1441(c), providing that the entire case may be removed where separate and independent claim which would be removable is joined with a claim that is not removable. However, the district court held that it would continue ancillary jurisdiction over the negligence claim in the interests of judicial economy.

Bailey is distinguishable. While plaintiff quotes the court's language regarding "the *407 reluctance of federal courts to split actions so that one part is in federal court and the remaining part is remanded to state court," *Bailey*, 630 F.Supp. at 340, she fails to mention the details upon which the court specifically relied in reaching its finding that retention of the claim promoted judicial economy. There, discovery was complete. Trial was less than one week away. All pretrial motions had been heard. Both parties were ready for trial. Therefore, remand of the negligence claim would cause unnecessary delay and expense. Here, none of these factors are present. No trial date has been set, the scheduling conference has not been held, and discovery has not begun.^{FN3}

FN3. Similarly, plaintiff's reliance on *Jonas v. Conrath*, 149 F.R.D. 520 (S.D.W.Va.1993) is not compelling because that case is factually distinguishable. There, the insured asserted a medical malpractice claim against its ophthalmologist and a claim to compel payment for expenses incurred after consultation with this ophthalmologist. Indeed, in footnote 10, the *Jonas* court distinguished *Gruening* by its facts, noting that joinder under different facts creates different risks of prejudice.

[2] Fairness is a critical consideration in determining whether severance is appropriate. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724, 86 S.Ct. 1130, 1137, 16 L.Ed.2d 218 (1966). Although the plaintiff here seeks to keep both the uninsured motorist and the insurance company to-

gether, note that in *Gruening*, supra, the court found that joinder would unfairly allow the jury to consider the fact that the defendant was insured in determining negligence. Here, plaintiff's case may be prejudiced because the jury will know that he was insured, albeit inadequately, and that the defendant McArthur is uninsured which may render him more sympathetic to the jury as they consider negligence and damages. Moreover, joinder may prejudice the defendant because the jury may confuse evidence showing McArthur's negligence with the evidence State Farm knew or should have known about at the time the Release Agreement was signed.

Joinder would also create problematic evidentiary issues. For instance, the individual defendant McArthur will seek to exclude the police report generated by the accident which states he was driving under the influence, and the plaintiff will argue that the police report document is a critical fact that shows State Farm should have further investigated her claim.

C. Defendants' motion to dismiss the fourth cause of action based on California Business and Professions Code § 17200 is granted.

[3] A private litigant may plead a cause of action under the § 17200 of the Unfair Business Practices Act only for injunctive or restitutionary relief. *Industrial Indemnity Co. v. Superior Court*, 209 Cal.App.3d 1093, 257 Cal.Rptr. 655 (1989). Plaintiff, however, has not prayed for either injunctive or restitutionary relief in the complaint. Plaintiff now requests leave to amend the complaint.

However, even if plaintiff does amend to include such relief, the complaint is still insufficient to state a cause of action upon which relief can be granted. In *State of California ex rel. Van de Kamp v. Texaco, Inc.*, 46 Cal.3d 1147, 252 Cal.Rptr. 221, 762 P.2d 385 (1988), the California Supreme Court held that a complaint by the Attorney General challenging a merger between two competing oil companies which attacked only the merger, and no on-

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going conduct, did not state a cause of action under § 17200. The court stated:

"As we have said, the statute is directed at "ongoing wrongful business conduct'...." (*People v. McKale* (1979) 25 Cal.3d 626 [159 Cal.Rptr. 811, 602 P.2d 731]) ... Thus the 'practice' requirement envisions something more than a single transaction, as in this case; it contemplates a 'pattern' ... of 'conduct.' (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 108 [101 Cal.Rptr. 745, 496 P.2d 817]) ..., 'ongoing ... conduct' (id., at p. 111 [101 Cal.Rptr. 745, 496 P.2d 817]), 'a pattern of behavior' (id., at p. 113 [101 Cal.Rptr. 745, 496 P.2d 817]), or 'a course of conduct.' (Ibid.)" [emphasis added]

The court found that complaint's mere allegation that defendants had engaged in certain*408 unlawful practices in the past and may do so in the future was not enough to state a cause of action under § 17200. A complaint must attack ongoing conduct to be sufficient.

Here, the complaint contains allegations regarding State Farm's conduct with respect to a *single claim*. Plaintiff has failed to allege sufficient ongoing conduct to state a cause of action under § 17200, and the claim is dismissed.

ACCORDINGLY IT IS ORDERED THAT defendants' motion to dismiss Walters is granted.

IT IS FURTHER ORDERED THAT defendants' motion to sever the claim against McArthur is granted.

IT IS FURTHER ORDERED THAT defendants' motion to dismiss the fourth cause of action is granted.

E.D.Cal., 1994.
Pena v. McArthur
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United States District Court, E. D. Pennsylvania.
Reinhold GRUENING

v.

Nannette SUCIC and Nicholas Sucic
and
State Farm Mutual Insurance Company.

Civ. A. No. 80-1880.
March 19, 1981.

Plaintiffs brought suit against individual defendants for personal injuries resulting from alleged negligent operation of their motor vehicle and against insurer of both plaintiff and defendants alleging malicious failure by insurer to inform plaintiff of conflict of interest. On individual defendants' motion for severance, the District Court, Joseph S. Lord, III, Chief Judge, held that individual defendants were entitled to severance to remedy misjoinder of parties.

Motion granted.

West Headnotes

Federal Civil Procedure 170A ◀1

170A Federal Civil Procedure

170A1 In General

170A1(A) In General

170A1 k. In General. Most Cited Cases

Defendants were entitled to severance to remedy misjoinder of cause of action against them for personal injuries resulting from alleged negligent operation of their motor vehicle and action against insurer of both plaintiff and defendants for alleged malicious failure to inform plaintiff of conflict of interest, since there was no "systematic pattern" or logical relation between two tortious events and joinder would allow jury to learn that defendants were insured. Fed.Rules Civ.Proc. Rules 20(a), 21, 28 U.S.C.A.

*573 William L. Kinsley, Philadelphia, Pa., for plaintiff.

Albert L. Bricklin, Philadelphia, Pa., for Sucic's.

James P. McCabe, Jr., Philadelphia, Pa., for State Farm.

MEMORANDUM

JOSEPH S. LORD, III, Chief Judge.

Plaintiff's complaint states two causes of action. Count I is an action against defendants Sucic for personal injuries resulting from the alleged negligent operation of their motor vehicle. Count II is an action against defendant State Farm Mutual Insurance Company (State Farm) insurer of both plaintiff and the Sucics in which plaintiff seeks punitive damages. Plaintiff alleges that State Farm maliciously breached its fiduciary relationship with him when *574 the same insurance adjuster represented both plaintiff and the Sucics, and then used all the information it learned against plaintiff, thereby prejudicing his valid claim against the Sucics.

The Sucics contend that the requirements of permissive joinder, Fed.R.Civ.P. 20(a), have not been met. They therefore seek a severance under Fed.R.Civ.P. 21 which gives the court the power to remedy the misjoinder of parties on motion of a party. For the reasons that follow, I shall grant this motion.

Rule 20(a) permits the joinder of defendants when there is asserted against them any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. See, e. g., *League To Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914 (9th Cir. 1977); *Mosley v. General Motors Corp.*, 497 F.2d 1330 (8th Cir. 1974); *Trail Realty, Inc. v. Beckett*, 462 F.2d 396 (10th Cir. 1972). Although this joinder provision should be

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construed liberally, *Kedra v. City of Philadelphia*, 454 F.Supp. 652, 661 (E.D.Pa.1978), both parts of this test must be satisfied, *Mesa Computer Utilities, Inc. v. Western Union Computer Utilities, Inc.*, 67 F.R.D. 634, 636 (D.Del.1975) (citing cases).

There were two occurrences or transactions here the automobile accident and the alleged malicious failure by State Farm later to inform plaintiff of the conflict of interest. The issue, then, is whether there was a "series of transactions or occurrences," Fed.R.Civ.P. 20(a). Plaintiff need not seek the same relief against each defendant: *Kuechle v. Bishop*, 64 F.R.D. 179, 180 (N.D. Ohio 1974). Nevertheless, there must be some "systematic pattern" or logical relation between the tortious events before there is the requisite "series of transactions or occurrences." *Mosley v. General Motors Corp.*, 497 F.2d at 1333; *Kedra v. City of Philadelphia*, 454 F.Supp. at 662. Such a pattern or relation is absent here. There were two distinct torts committed by different defendants at different times, and they resulted in the invasion of separate legal interests. There is no allegation that the parties were acting in concert or that the Sucics knew of State Farm's misconduct.[FN1] Moreover, State Farm's alleged misconduct had no legal effect on the cause of action asserted against the Sucics. State Farm may have hindered plaintiffs' attempts to settle their claim with the Sucics. But that is insufficient to support permissive joinder. See *Trail Realty, Inc. v. Beckett*, supra; *Wilkinson v. Hamel*, 381 F.Supp. 766 (W.D.Va.1974). I therefore conclude that plaintiff has not satisfied the first prong of the joinder test. [FN2] Joinder of the defendants is therefore improper.

FN1. Plaintiff argues that the Sucics and State Farm may have acted in concert. However, there is no such allegation in the complaint. See *Kuechle v. Bishop*, 64 F.R.D. at 180.

FN2. Since plaintiff must satisfy both requisites, see supra, it is unnecessary to discuss the second element.

Even if plaintiff demonstrated that he met both aspects of rule 20(a), severance would still be appropriate. Although the joinder of parties promotes trial convenience and expediency, *Horton Co. v. International Telephone & Telegraph Corp.*, 85 F.R.D. 369, 371 (W.D.Pa.1980); *Vulcan Society v. Fire Department of City of White Plains*, 82 F.R.D. 379, 390 (S.D.N.Y.1979); *Fair Housing Development Fund Corp. v. Burke*, 55 F.R.D. 414, 422 (E.D.N.Y.1972), fairness is a critical consideration, *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724, 86 S.Ct. 1130, 1137, 16 L.Ed.2d 218 (1966); *King v. Pepsi Cola Metropolitan Bottling Co.*, 86 F.R.D. 4, 5 (E.D.Pa.1979); *Kuechle v. Bishop*, 64 F.R.D. at 180. In the present case, joinder would allow the jury to learn that the Sucics were insured. But in a negligence action this is irrelevant and highly prejudicial since

the jury may be tempted to assess liability where none exists or to arrive at an excessive verdict based on sympathy for an injured plaintiff with the thought that it is not the defendant personally, but an insurance company, which will ultimately *575 be called upon to bear the burden of payment of the verdict.

Nicholson v. Garris, 418 Pa. 146, 151, 210 A.2d 164, 166 (1965). The Sucics should not have to confront this danger at trial since their claim of prejudice is well founded. Cf. *Republic of the Philippines v. Pfizer, Inc.*, C.A. No. 78-1158 (E.D.Pa. Feb. 20, 1981) (no foundation for plaintiff's claim of prejudice). I will grant the motion for a severance.

D.C.Pa., 1981.
Gruening v. Sucic
89 F.R.D. 573, 31 Fed.R.Serv.2d 1043

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STATE OF SOUTH CAROLINA	2014 JAN 10 AM 11:12
COUNTY OF DARLINGTON	CIVIL ACTION NO: 2013-CP-16-0317
SCOTT B. SUGGS CLERK OF COURT/R.O.D. DARLINGTON COUNTY, S.C.	
JONATHAN TEAL AND STACIE TEAL,	)
Plaintiffs,	)
vs.	)
MARY ELIZABETH HICKMAN-TEDDER,	)
ALLSTATE PROPERTY AND CASUALTY	)
INSURANCE COMPANY, GOVERNMENT	)
EMPLOYEES INSURANCE COMPANY	)
AND NATIONWIDE MUTUAL	)
INSURANCE COMPANY,	)
Defendants.	)
NOTICE OF MOTION AND MOTION TO RECONSIDER, ALTER, OR AMEND ORDER DATED DECEMBER 13, 2013	
2014 JAN -2 PM 12:16 SCOTT B. SUGGS CLERK OF COURT/R.O.D. DARLINGTON COUNTY, S.C.	

Plaintiffs hereby move the Honorable Paul M. Burch, pursuant to Rule 59, SCRPC, requesting that he reconsider his Order dated December 13, 2013. In the alternative, Plaintiffs request that he amend his findings pursuant to Rule 52(e), SCRPC. Counsel for Plaintiffs received written notice of the entry of the Order on December 20, 2013.

I. The Order dated December 13, 2013, should be altered or amended to deny the Motion to Dismiss of Defendant Mary Elizabeth Hickman-Tedder.

The Order dismissing the Complaint against Defendant Mary Elizabeth Hickman-Tedder (Hickman-Tedder) based on the Statute of Limitations and/or Rule 3, SCRPC, is procedurally improper and substantively incorrect.

First, a review of Defendant Hickman-Tedder's Motion, Memorandum in Support of her Motion, correspondence with counsel, and emails with counsel reveals that Hickman-Tedder never moved to dismiss Plaintiff's Complaint for failing to serve the complaint on the statute

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 Scott B. Suggs
 CLERK OF COURT/RMC
 DARLINGTON COUNTY, SC

of limitations. In fact, the words “statute of limitations” do not appear anywhere, and Rule 3 is not cited or otherwise referenced in Defendant Hickman-Tedder’s Answer or her Motion to Dismiss.

Rule 7(b)(1), SCRCP, requires that a moving party state with particularity the grounds of a motion. Because Defendant Hickman-Tedder’s motion did not comply with Rule 7(b)(1), Plaintiffs did not have notice that Defendant Hickman-Tedder was planning to raise a Rule 3 or statute of limitations argument. Plaintiff’s Counsel wrote the Court carefully explaining this situation and objecting to any such findings. However, the Court appears to have signed Defendants’ proposed order *in toto* and before the Court had the opportunity to review Plaintiff Counsel’s letter.

Moreover, it is impossible that Defendant Hickman-Tedder’s Motion to Dismiss could have included the Rule 3/statute of limitations argument. Even under the incorrect analysis raised by Defendant Hickman-Tedder and adopted by the Court, the statute of limitations arguably expired on June 29, 2013. The 120-day period expired on August 13, 2013. These timelines had not run on May 10, 2013, the date of Defendant Hickman-Tedder’s Motion to Dismiss. In fact, at the time the Motion to Dismiss was filed, the only possible Rule 12(b)(4) and/or Rule 12(b)(5) argument that could have been made was that Defendant Hickman-Tedder had not yet been served at all. Of course, prior to the time of the hearing, Defendant Hickman-Tedder was served, mooted any possible ground related to Rule 12(b)(5).

Second, Defendant Hickman-Tedder did not even raise the statute of limitations as an affirmative defense in her Answer also dated May 10, 2013. As the Court is aware, a statute of limitations defense is an affirmative defense that “shall [be] set forth affirmatively.” See Rule 8(c), SCRCP. The words “statute of limitations” do not appear in Hickmann-Tedder’s Answer.

Third, the underlying statute of limitations and Rule 3 arguments raised by Defendant Hickman-Tedder are without merit. In their Complaint, Plaintiffs seek to set aside the order dismissing Teal v. Hickman-Tedder, 2011-CP-16-00416, and to reopen the 2011 case due to fraud on the court. For example, in Paragraph 49, Plaintiffs allege “[t]herefore, the Court should enter an order dismissing or otherwise voiding the dismissal entered in Civil Action 2011-CP-16-00416, and allow Plaintiffs to litigate their claims in the normal course.” Based on the allegations of their Complaint, Plaintiffs are seeking to reopen a Complaint that was already filed and already served on Defendant Hickman-Tedder. More importantly, the South Carolina Supreme Court has found “there is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court” and that “a litigant who has been defrauded need not establish prejudice.” Chewning, 354 S.C. at 84, 579 S.E.2d at 61.

Finally, even if the within suit did have to be filed and served within three years of the automobile collision at issue, factual issues need to be resolved to determine whether or not equitable tolling would apply. Equitable tolling is a judicial creation that “stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.” Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 371-372 725 S.E.2d 112, 125 (Ct. App. 2012). In this case, justice may demand that Plaintiffs be allowed to have their day in court, a right denied to them by their former counsel's fraud.

For the reasons contained herein, the Order dated December 13, 2013, should be altered or amended to hold that the Motion to Dismiss of Defendant Hickman-Tedder based on Rule 12(b)(4) and/or Rule (12)(b)(5) is denied.

II. The Court made an incorrect factual finding, outside of the pleadings, that Plaintiffs have adequate remedies at law.

The Court dismissed Plaintiffs' cause of action for fraud on the court and negligence finding that Plaintiffs had multiple adequate remedies at law. "A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the claim. The motion cannot be sustained if the acts alleged and the inferences reasonably deductible therefrom would entitle the plaintiff to **any** relief on **any** theory of the case." Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009) (emphasis added and internal citations omitted). Further, when considering a Rule 12(b) motion, "the trial court must base its ruling solely upon allegations set forth on the face of the complaint." Ashley River Properties I, LLC, v. Ashley River Properties II, LLC, 374 S.C. 271, 277, 648 S.E.2d 295, 299 (Ct. App. 2007). In other words, "[t]he question is whether, viewing the allegations in the light most favorable to the plaintiff, the complaint states any valid claim for relief, even if the court doubts that the plaintiff will prevail." Clearwater Trust v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). In the light most favorable to the Plaintiff means that every possible doubt must be resolved in the Plaintiff's favor. Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

In Paragraph 48, Plaintiffs specifically allege that they "do **not** have an adequate remedy at law." (emphasis added). Therefore, the Court did not view the allegations of the Complaint in the light most favorable to Plaintiffs and did not resolve every possible doubt in Plaintiffs' favor. Instead, the Court made a ruling in direct contravention of the allegations of the Complaint and ruled that there were adequate remedies at law. This was an error as a matter of law. Accordingly, Plaintiffs ask the Court to apply the appropriate standard of review for a Motion to Dismiss and alter or amend its decision accordingly.

III. The Court incorrectly found that Chewning v. Ford Motor Co. applies only to fraud committed by an opposing party.

This Court found that Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003) applies only to factual scenarios where the fraud is committed by the opposing party. This was in error. In Chewning, the South Carolina Supreme Court quotes several definitions of fraud on the court such as “that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication[,]” “[f]raud upon the court is a serious allegation . . . involving corruption of the judicial process itself[,]” and “fraud on the court, whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court.” Id. at 78, 579 S.E.2d at 608. Nothing in these definitions limits fraud on the court only to fraud committed by an opposing party.

To support its holding, the Order cites the North Carolina Court of Appeals’ opinion in Purcell Intern. Textile Group, Inc., v. Algemene AFW NV, 647 S.E.2d 667 (N.C. App. 2003). In Purcell Intern., the North Carolina Court of Appeals states that “Henderson[v. Wachovia Bank of N.C. N.A., 625, 551 S.E.2d 464, 468 (2001)] allows a court to grant relief on the basis of attorney fraud only when the adverse party’s attorney commits the fraud.” However, the North Carolina Court of Appeals in Henderson held that:

Defendant’s attorneys did not bribe or improperly influence the court, nor did their conduct constitute a fraud upon the court or upon defendant. At most the affidavits show that defendant’s attorneys did not fully apprise defendant of court orders to appear for depositions. **Without so holding today, there may be situations so egregious that would entitle a party to be relieved of fraud on it by its own attorney, but this is not one of those situations.**

Id. at 469 (emphasis added). North Carolina courts clearly contemplate situations where a party would be entitled to be relieved of fraud on by its own attorney. While the facts of Henderson may not have supported such a finding, the facts of the instant case certainly do, especially under the standard of review for a motion to dismiss.

Further, nothing in the definition of extrinsic fraud limits extrinsic fraud only to fraud committed by the other party. The Court in Chewning defined extrinsic fraud as “fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.” Id. at 81, 579 S.E.2d at 610. In this case, the fraud of Plaintiffs’ former attorney prevented them from fully trying their case. To date, there has never been a real contest before a court on the subject matter of Plaintiffs’ action, and Plaintiffs simply seek that true adjudication.

Therefore, the Order should be altered or amended accordingly.

IV. The Court incorrectly found that it is doubtful that the conduct of Plaintiffs’ former counsel would rise to fraud on the court.

In support of its Order, the Court found “[t]herefore, it is doubtful that the conduct of Plaintiff’s counsel would even constitute fraud on the court.” However, the standard of review for motions to dismiss clearly requires a court to deny motions to dismiss even if the judge believes plaintiffs will not ultimately prevail on the causes of action. Ashley River Properties, 374 S.C. at 278, 648 S.E.2d at 299. Thus, when deciding a Motion to Dismiss, the Court, after viewing the allegations in the light most favorable to the plaintiff, must determine whether “the complaint states any valid claim for relief, even if the court doubts that the plaintiff will prevail.” Clearwater Trust, 367 S.C. at 343, 626 S.E.2d at 335 (emphasis added).

Here, Plaintiffs clearly raised a cause of action for fraud on the court, thus stating a valid claim for relief. The fact that the Court doubts that Plaintiffs will ultimately prevail on their fraud on the court claim is not a reason to dismiss the action. Accordingly, the Plaintiffs ask this Court to apply the appropriate standard of review for a Motion to Dismiss and alter or amend its decision to deny the Motion to Dismiss on this ground.

V. The Court incorrectly found that normal agency principles apply to the allegations of fraud on the court and attorney fraud.

The Court found that normal agency principles require the dismissal of Plaintiffs' Complaint. However, normal agency principals do not apply in cases of fraud on the court and attorney fraud as raised in Plaintiffs' Complaint.

"In South Carolina, an attorney may settle litigation on behalf of his client, **and absent fraud** or mistake, such a settlement is binding on the client." Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 70, 488 S.E.2d 334 (1997) (emphasis added). See also Motley v. Williams, 374 S.C. 107, 111, 647 S.E.2d 244, 246 (Ct. App. 2007) (after specifically finding that Williams made no allegations of fraud, holding that attorney had authority to settle case on behalf of client); Arnold v. Yarborough, 281 S.C. 570, 572 316 S.E.2d 416, 417 (Ct.App.1984) ("**Absent fraud** or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement. . . . Litigants must necessarily be held bound by the acts of their attorneys in the conduct of a cause in court, **in the absence, of course, of fraud.**") (emphasis added); Shelton v. Bressant, 312 S.C. 183, 208, 439 S.E.2d 833, 834 (1993) ("We uphold and reaffirm the long standing rule that a client is bound by his attorney's actions in the settlement of a case. Acts of an attorney are directly attributable to and binding upon the client. **Absent fraud** or mistake, where attorneys of record for a party agree to settle a case, the party cannot later

repudiate the agreement.”) (emphasis added). Thus, in South Carolina, when fraud is alleged and exists, litigants are not bound by the acts of their attorney in the conduct of a case.

While no South Carolina Court has directly addressed this rule in the lawyer/client/third-party context, South Carolina has created an exception to normal agency rules for attorney fraud. Moreover, to the extent Plaintiffs’ Complaint contains novel issues, these novel issues should not be decided on a Motion to Dismiss. This is especially true since the Complaint raises important issues relating to the relationship between lawyers and their clients. See, e.g., Evans v. State, 344 S.C. 60, 543 S.E.2d 547 (2001); Keiger v. Citgo, Coastal Petroleum, Inc., 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997).

Finally, cases from other jurisdictions support the fact that normal agency principles do not apply in cases of fraud on the court and attorney fraud. E.g., Capital Dredge & Dock Corp. v. City of Detroit, 800 F.2d 525, 533 (6th Cir. 1986) (“in the settlement context, if the attorney is serving only his own interest in absconding with the settlement proceeds . . . under this general principle of agency the client is not bound by the settlement”) Walker v. Stephens, 626 S.W.2d 200 (Ark. 1981) (finding that settlement documents forged by plaintiff’s counsel in automobile accident case were not binding); Ball v. Teissonniere, 2000 WL 1868243 (Conn. Super. 2000) (finding that allowing a plaintiff to re-litigate claim fraudulently settled by prior counsel was “admittedly harsh, but the balance is more fairly struck by maintaining the plaintiffs’ right of access to the courts in order to pursue their underlying claim.”); Liquori v. Giordano, 603 A.2d 782 (Conn. Super. 1991) (finding that it “would be harsh justice . . . to bar an injured person who had never authorized or received the fruits of a settlement from having a day in court against an alleged tortfeasor, simply because that person had engaged an attorney who turned out to be criminally dishonest”); Nehleber v. Anzalone, 345 So.2d 822 (Fla. App. 1977) (finding that in

case where “former attorney, who, without the knowledge or consent of his client, negotiated a settlement with . . . insurance company, accepted a \$6,000.00 check, forged his client’s endorsement, cashed the check, and absconded with the funds,” such a settlement “is of no effect and may be repudiated or ignored and treated as a nullity by the client”); Miotk v. Rudy, 605 P.2d 587 (Kan. 1980) (holding “that the trial court abused its discretion in denying plaintiff’s motion . . . to set aside the judgment of dismissal” where plaintiff’s attorney forged plaintiff’s endorsement to the draft made payable to the plaintiff and received the proceeds himself); Perkins v. Philbrick 443 A.2d 73 (Me 1982) (finding that the parties’ obligations to “have not been discharged by the forged release and drafts”); Henderson v. Great Atlantic and Pacific Tea Co., 132 N.W.2d 75 (Mich. 1975) (in answering the following question: “Where a check is given for settlement of a claim in good faith by a defendant to an attorney at law who purports to represent a claimant, and that attorney wrongfully forges the client’s name to said check, and keeps the entire proceeds thereof, is a later suit by the client against the defendant barred because of the wrongful acts of the attorney?” court found that the settlement was not binding and that plaintiff should “be allowed to proceed with her claim in the circuit court . . .”); Coates v. Drake, 346 N.W.2d 858 (Mich.App.1984) (holding that when a plaintiffs’ attorney forged the clients’ names to a settlement check and absconded with the funds, “the settlement is not binding on the client.”); NC-DSH, Inc. v. Garner, 218 P.3d 853 (Nev. 2009) (finding fraud upon the court, holding that a settlement agreement fraudulently signed by a claimant’s attorneys was not enforceable and stating “[w]e recognize the substantial countervailing argument that a client who hires a lawyer establishes an agency relationship and that, ordinarily, the sins of an agent are visited upon his principal, not the innocent third party with whom the dishonest agent dealt. However, courts do not treat the attorney-client relationship as they do other agent-principal

relationships . . . when the question is whether a settlement agreed to by the attorney binds the client.”); Blakney v. Leathers, 867 N.Y.S.2d 145 (App. Div. 2d Dep’t 2008) (finding that vacation of general release and stipulation of discontinuance, and restoration of action to active calendar were warranted, where plaintiff asserted that he neither authorized nor consented to a settlement, that signature on the general release and endorsement on settlement check were forgeries, and that he never received any of the proceeds); Humphreys v. Chrysler Motors Corp., 399 S.E.2d 60 (W.Va. 1990) (pointing out that a definite meeting of the minds of the parties is essential to a valid compromise, the court stated that there was no meeting of the minds because the plaintiffs did not approve of the compromise made by their lawyer without their authority. Concluding that the settlement was unauthorized by the purchasers and that their lawyer lacked authority to settle the case, the court refused to enforce the settlement agreement).

Since Plaintiffs allege attorney fraud and fraud on the Court in their Complaint, their case is not governed by the general agency principles cited in the Order. Therefore, the Order should be altered or amended to deny the Motion to Dismiss on these grounds.

CONCLUSION

For the reasons contained herein, as may be raised in any Supporting Memoranda, and as may be raised in the hearing on this Motion, the Plaintiffs’ Motion to Alter or Amend the Order dated December 13, 2013, should be granted and the Motions to Dismiss filed by the Defendants should all be denied.

[Signature Block on Next Page]

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DARLINGTON COUNTY, S.C.

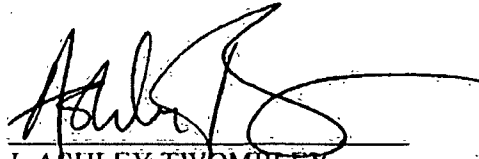
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TWENGE + TWOMBLEY LAW FIRM

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December 30, 2013

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STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-16-0317

JONATHAN TEAL AND STACIE TEAL,

Plaintiffs,

vs.

MARY ELIZABETH HICKMAN-TEDDER,
ALLSTATE PROPERTY AND CASUALTY
INSURANCE COMPANY, GOVERNMENT
EMPLOYEES INSURANCE COMPANY
AND NATIONWIDE MUTUAL
INSURANCE COMPANY,

Defendants.

**NOTICE OF MOTION AND MOTION
FOR A HEARING ON PLAINTIFFS'
MOTION TO RECONSIDER, ALTER,
OR AMEND ORDER DATED
DECEMBER 13, 2013**

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DARLINGTON COUNTY, S.C.

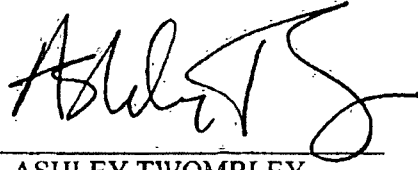
YOU WILL PLEASE TAKE NOTICE that Plaintiffs, by and through their undersigned attorney, hereby move for an Order that the Honorable Paul M. Burch, Presiding Judge for the Fourth Judicial Circuit, pursuant to Rule 59, SCRCP, hold a hearing on Plaintiffs' Notice of Motion and Motion to Reconsider, Alter or Amend the Order dated December 13, 2013, filed contemporaneously with this Motion. Plaintiffs request this hearing because the Motion to Reconsider, Alter or Amend raises multiple issues, and a hearing will be beneficial to ensure all grounds are fully explained and heard.

For the reasons contained herein, as may be raised in any Supporting Memoranda, and as may be raised in the hearing on this Motion, the Plaintiffs' Motion for a Hearing on Plaintiffs' Motion to Alter or Amend the Order dated December 13, 2013, should be granted.

TRUE CERTIFIED COPY,
Scott B. Suggs
**CLERK OF COURT/RMG
DARLINGTON COUNTY, SC**

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SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

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December 30, 2013

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STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

AFFIDAVIT OF SERVICE

Jonathan Teal and
Stacie Teal

case# 13 CP 16 0317

Vs

Mary Elizabeth Hickman-Tedder
AllState Property and Casualty Insurance
Company, Government Employee Insurance
Company and Nationwide Mutual Insurance Company

Personally appeared before me, Donna S. Robertson, who being duly sworn, says that she served the:
Civil Action Coversheet, Summons, Verified Complaint, and Verification in this action on

Mary Elizabeth Hickman-Tedder

☒ By delivering to him/her personally

☐ By delivering to _____, a person of discretion and age residing at
The resident of the Defendant and being at said residence at the time of service.

☐ By delivering to _____, a person of discretion employed
At the place of business of the Defendant and being at said place of business at time of service.

Place of Service: 1330 Mechanicsville Hwy. Darlington, SC.

Date of Service: November 20, 2013 Time: 8:00 p.m.

Deponent is not a party to this action, and has no interest therein or connection therewith.

Sworn to me this 20th day of Nov, 2013

Donna S. Robertson

Notary Public of South Carolina

My commission expires 7-16-2014

Donna S. Robertson

Deponent

Attorney: J. Ashley Twombly

Robertson Process Service
Hartsville, SC 843-861-0653

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DARLINGTON COUNTY, S.C.

1 STATE OF SOUTH CAROLINA) IN GENERAL SESSIONS
2 COUNTY OF RICHLAND) COURT
3)
4 JONATHAN TEAL, ET AL.,)
5) TRANSCRIPT
6 -V-) OF
7) RECORD
8 MARY HICKMAN TEDDER, ET AL,) 2013-CP-16-00317
9 DEFENDANT.)
10

11 NOVEMBER 21, 2013
12 RICHLAND, SOUTH CAROLINA
13

14 B-E-F-O-R-E:

15 HONORABLE PAUL BURCH, JUDGE;
16

17 A-P-P-E-A-R-A-N-C-E-S:

18 FOR THE PLAINTIFF:

19 JAMES TWOMBLEY, ESQ.

20 FOR THE DEFENDANT:

21 ALFRED COX, ESQ.

22 C. HEATH RUFFNER, ESQ

23 ROBERT KING, ESQ.
24
25

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1 (The following proceedings were held on
2 November 21, 2013.)

3 MR. MURPHY: May it please the Court, Your Honor.
4 J.R. Murphy here for Nationwide. I'm not sure I am the
5 first listed motion, but I believe to expedite things, we
6 kind of talked it out. I'm going to address the Court first
7 if that's okay. The Defendants' motions are all similar.
8 There are some slight differences. I don't want to repeat
9 anyone else's argument.

10 Your Honor, this is a very significant matter for
11 this Court. It arises out of misconduct on behalf of
12 Sherlock & Rivers Law Firm in the handling of the prior
13 litigating matters.

14 The Teals were clients of that firm and Bill
15 Rivers is the individual lawyer handling an automobile wreck
16 case against Ms. Mary Elizabeth Hickman Tedder, who was the
17 alleged tortfeasor at-fault motorist. And the insurance
18 companies that are listed there provided either liability
19 coverage or underinsured coverage for that accident.
20 Nationwide provided underinsured coverage to the Teals. And
21 we have set forth in our memorandum a synopsis of the
22 allegations. We know these are motions to dismiss, Your
23 Honor. This is an appropriate juncture because we're going
24 to be talking about matters of law and public policy in the
25 way that the Teals allege they were defrauded by the

1 Sherlock & Rivers Law Firm and the way it's set forth in
2 their claims against these particular Defendants.

3 When the case was filed, Mr. Rivers was the
4 attorney of record in the case and he entered into several
5 settlements. The first \$25,000 from Allstate was the
6 liability insurer. It was a policy limit settlement and it
7 was in exchange for covenant not to execute and to protect
8 their insurer, Ms. Hickman Tedder.

9 Second, they had underinsured motorist coverage
10 under the policy from Geico, again, for another \$25,000 in
11 exchange for a similar cover -- my brief may be wrong. I'll
12 let the Geico attorneys -- perhaps, it was excess liability
13 coverage. I'm not sure. That's how I wrote it up. I could
14 be wrong. But it was in excess next layer of coverage. And
15 then Nationwide did provide underinsured motorist coverage
16 under their policy to the Teals. And they also paid their
17 liability limits of one -- of \$50,000 for a total of
18 \$100,000.

19 And so as result of those documents and
20 settlements this -- the pending underlying case of the Teals
21 against Ms. Hickman Tedder was dismissed on June 13th of
22 2012 under Rule 41(a)(1)(a) that Mr. Rivers signed in his
23 own capacity. It has been alleged that the signatures on
24 the settlement documents reported to be the Teals are
25 forgeries and that all of the settlement funds, which were

1 properly issued to both the Teals and their attorney, were
2 negated by forgery and that no settlement monies were ever
3 given to the Teals.

4 So the question is, are the Teals allowed the
5 relief they've sought in this complaint to set aside the
6 prior stipulation of dismissal, the prior covenant, the
7 prior releases on the basis of their own attorneys's
8 misconduct under Rule 60 as a fraud upon the Court?

9 So that is a legal issue. It's a very important
10 issue because, regrettably, this is not the only case
11 involving this particular firm and this particular issue,
12 but this is a very important one and we appreciate the Court
13 hearing us on this at this juncture in the case.

14 Your Honor, the key issue legally is the fact that
15 South Carolina reposes a different standard on an attorney
16 who represents a client in litigation than other states.
17 And the legal standard in South Carolina is that an attorney
18 who is representing a client in litigation, in a lawsuit, is
19 placed with apparent authority to conduct all matters
20 necessary to the litigation. Consummating a settlement in
21 writing as required by Rule 43 and entering into a dismissal
22 of a case based upon the settlement pursuant to Rule 41
23 would fall within that apparent authority. And there's
24 nothing on the face of the settlement itself that would
25 indicate any fraud on the Court or any party. The policy

1 limits were paid, the case -- normal regular documents were
2 signed and a regular stipulation of dismissal was signed and
3 filed. All of the fraud in this case occurred as a result
4 of a failure to notify the client of the settlement and to
5 disperse them their rightfully due settlement funds.

6 So as a first issue, based on that agency law, I
7 would submit there has been no fraud upon the Court. There
8 has been no suborn perjury. There has been no discovery
9 concealment abuse. There has been no fabrication of
10 evidence or exhibits that would give that drastic of a
11 remedy which would expose all of these parties a second
12 time. Parties that are, in fact, under the law of South
13 Carolina more innocent than the Teals -- as innocent as the
14 Teals are in all of this. And, of course, there's no
15 allegation that these parties are involved. So that would
16 be the first issue.

17 The second is that fraud upon the Court to enable
18 this relief would be fraud committed by your opponents to
19 gain some advantage. The supreme court cases in both briefs
20 makes that extremely clear in that there were no intervening
21 sales of a patent that arose out of a fraudulently obtained
22 patent to an innocent party. Here, this matter does involve
23 innocent parties. So the fraud upon the Court committed by
24 one's own attorney -- if it even is fraud upon the Court,
25 which I submit that it is not, would not entitle someone to

1 that particular relief that's been adopted under Rule 60
2 over the years because it has to be by an adverse party.

3 South Carolina in the Chewning vs. Ford Motor
4 Company case was based upon the alleged egregiousness
5 comment of the opponent, which defrauded not only the
6 plaintiffs, but also defrauded the entire process of the
7 court. This unfortunate matter did not have to do with the
8 process or integrity of the judicial system and our trial
9 system but of the handling of the money, which is a matter
10 between the Teals and their formal attorneys. And so those
11 are the key aspects.

12 And I just wanted to read you briefly a quote --
13 two different quotes. One, which appears in our brief, and
14 this is from -- this is from, I believe, the Percel case.
15 This is actually a North Carolina case, which is very
16 similar. And it says, Even if the acts constitute a
17 violation of the agent's duty to the principle that this
18 fraud was outside of what they were authorized to do, when
19 the agent acts within the scope of his apparent authority
20 and the third party has no notice of any limitation, the
21 principle, in this case the Teals, would be bound by the
22 acts of the agent. And where one of two persons must suffer
23 loss by the fraud or misconduct of the agent, the one who
24 first reposes the confidence or by his negligent conduct
25 made it possible for the loss to occur must bear the loss.

1 In other words, the equities of this situation require that
2 the Teals, who hired Sherlock & Rivers, bear the loss for
3 their fraud or misconduct which was perpetrated on them and
4 for which none of Defendants in this case participated in at
5 all. And that is the -- in accord with our public policy
6 of favoring settlements of cases. If insurance companies
7 and litigants cannot trust an attorney to enter into an
8 otherwise bona fide arms-length settlement, then no
9 settlement will be safe. If you require the person to show
10 up in person, an attorney bent on fraud could bring in an
11 imposter, so we'd be no better off. And so, certainly, that
12 is the issue.

13 The North Carolina and Georgia cases have been
14 consistent in that regard because their law of agency is
15 similar to ours. And that as an attorney who represents a
16 litigate in a matter is clothed with apparent authority.

17 The Nevada case as set forth in the Teals' brief
18 has two -- has that key difference. I disagree with their
19 analysis, but the difference is the agency law in Nevada is
20 not the same. The same in the New York case they cite.
21 Those states do not provide apparent authority for the
22 attorney handling the matter. And one other key note from
23 the Nevada case is that the Nevada case recognizing the
24 equity situation did grant the settling party an offset for
25 the amounts previously paid.

1 So, at most, that case would stand for that
2 proposition, which in this case would avail the Teals of
3 nothing other than a right to pursue Ms. Hickman Tedder
4 setting aside her covenant, but not requiring the insurance
5 companies to pay any more money. So the equity of placing
6 the deep pocket in the position to take the brunt of the
7 adverse attorney's misconduct would be extremely misplaced
8 in South Carolina. It would be extremely misplaced in this
9 case because in all of these cases, even if you follow the
10 Nevada ruling, the persons who would end up being on the
11 hook for any additional monies would be the insurers
12 themselves who were sought to be protected by their own
13 insurance companies.

14 So we're asking the Court to dismiss this case, to
15 not allow the relief requested because the fraud of the
16 Sherlock & Rivers Firm must be born by their clients who do
17 have adequate remedies at law against their lawyers, against
18 the banks for allowing some of the transactions to occur and
19 allowed the fraud to be perpetrated. The equity does not
20 allow the remedy that's sought here. Thank you, Your Honor.

21 MR. COX: Your Honor, Johnston Cox here on behalf
22 of Allstate Insurance Company, who is also a named Defendant
23 and was the liability carrier for Ms. Tedder Hickman in
24 this -- in the underlying -- Ms. Hickman Tedder in the
25 underlying action.

1 Mr. Murphy really laid it out pretty well and I
2 only have a couple of things to add. You know, one of the
3 things in law that's stated -- Mr. Murphy stated in South
4 Carolina is the Arnold case, which he cited in his brief.
5 And, you know, one of the main reasons for that decision in
6 that case, which is very similar in that the Defendants were
7 not told the settlement. The lawyers went out on his own
8 and forged documents, the whole nine yards, just like this
9 case. Said, look, if we allow this, you know, when
10 attorneys got apparent authority, then no judgment is final
11 because anybody can later, any client can later come down
12 the path and say I didn't give them permission to do that.
13 So that's why our law is the way it is in South Carolina.

14 In this case, if this -- if this type of action is
15 actionable, that the Defendants in a case are required to
16 pay twice, essentially, is what they're asking to happen
17 here, because of the Plaintiff lawyer's fraud, what -- what
18 that happens is the Defendants not only get sued, but then
19 there's also the insurer of the actions of the Plaintiff's
20 lawyer. And that, clearly, can't be -- is an absurd
21 result in any circumstance, and especially in this case
22 where there really was fraud upon the Court at all. He
23 was -- he had authority to sign the stipulation of
24 dismissal. The Court did not rely on any misrepresentations
25 or any pertinent testimony. He had the authority to do

1 that. And so, therefore, just to echo what Mr. Murphy
2 stated.

3 We raised an additional ground -- and I would also
4 like to indicate that Ms. Hickman Tedder paid \$25,000 to
5 have her personal assets not be -- she should be able to get
6 the benefit of that. To be able to strip her of that
7 protection after money has been paid would not be equitable,
8 it just wouldn't. How in anyway is that equitable when
9 she's an innocent the party? She's paid money and now she
10 doesn't get that protection anymore? That's not equitable
11 under the circumstances of this case.

12 But the other ground we raised is even if the case
13 is not dismissed or you rule against us in this, at the very
14 least, the allegations against the insurance company should
15 be severed. This case is a wreck case combined with this
16 issue of the fraud of the Plaintiff's attorneys. Clearly,
17 those two matters don't arise out of the same currency
18 transaction. So if the case does go forward, we would ask
19 that the -- there needs to be a separate lawsuit. These two
20 things can't be in the same lawsuit. They can't be tried
21 together. It's improper to enjoin the insurance companies
22 in this action because under South Carolina law, it's just
23 improper. So thank you very much.

24 MR. KING: Thank you, Your Honor. Rob King on
25 behalf of Geico, which is also a named Defendant. I don't

1 have much to add to what Mr. Murphy and Mr. Cox have. I,
2 obviously, join in their motion and their memorandum.

3 A couple additional points that I would like to
4 bring to the attention of the Court is in addition to what
5 they've argued, there is no direct action in South Carolina
6 by a third party insurer. It's entirely improper to name an
7 insurance company in what amounts to a tort action. He
8 needs to -- if this case is going to go forward, it really
9 should go forward against Ms. Hickman Tedder only. And the
10 reasons that they both stated, we don't think it ought to go
11 forward, but, clearly, it works a prejudice to Ms. Hickman
12 Tedder as well as to the insurance companies as to all of
13 the insurance companies named as Defendants on the
14 pleadings.

15 Insofar as the UYM carriers are concerned, which
16 is both Geico, even though it was -- the payment on Geico's
17 UYM limits was made on the covenants that should have been
18 made on a policy release, but that's sort of neither here
19 nor there.

20 Inclusion of Nationwide and Geico on this violates
21 38-77-160, which provides evidence of service on the UYM
22 carrier not to be made party of the record. So even if this
23 case does go forward, in part, it should not go forward
24 against the insurance companies.

25 In addition, Your Honor, to reiterate a point that

1 Mr. Cox just made, insofar as the claim of fraud upon the
2 Court really only concerns the stipulation of dismissal that
3 was filed. And if Your Honor will take a look at the
4 stipulation of dismissal, which was an exhibit to
5 Mr. Twombly's complainant, there is no misrepresentation
6 made in that. There is no representation that Mr. Rivers
7 made that this case had been settled. There was no
8 representation made upon which the Court relied in entering
9 a judgment because no judgment was entered. It was a
10 straightforward Rule 41 stipulation of dismissal, which
11 every attorney in this state who is an attorney of record is
12 vested with the authority to file.

13 They're trying to set aside a document which
14 Mr. Rivers had both apparent and actual authority to sign on
15 his own without the needed consent of his client. If there
16 was any excess of overstepping of authority in that case,
17 that was a matter between the Teals and Sherlock & Rivers.
18 That is not a matter between the Teals and the Defendant
19 innocent -- might be a possibility of tort fees or
20 negligent -- but an innocent party to that transaction. So
21 there was no misrepresentation made. There was no fraud
22 upon which the Court was asked to rely or upon which the
23 Court would rely on. For that reason, we would think the
24 action should be dismissed. And they have plenty of
25 remedies. I understand that they are, in fact, pursuing

1 that. Thank you, Your Honor.

2 MR. RUFFNER: Thank you, Your Honor. May it
3 please the Court. I'm here today representing the
4 individual Defendant, Ms. Hickman Tedder. And we join in
5 the other Defendants' motion to dismiss and adopt those
6 arguments as our own.

7 Just briefly about that, Your Honor. The
8 Plaintiff's attorney is going to stand up and tell the Court
9 we want to undo this fraud. We want to fix it. That's not
10 what they're going to ask the Court to do. It's not about
11 undoing the fraud. If you want to undo the fraud, go back
12 to Sherlock & Rivers and get the money back. What they're
13 wanting to do is transfer the loss that resulted from the
14 fraud to my innocent client. They're the ones who chose
15 their attorney. We had to deal with their attorney in
16 consummating this settlement. There's nothing fair now
17 about transferring the loss that occurred as a result of
18 their choice of attorney onto my client. That's not fair.
19 That's not equitable. That's not fixing the problem. All
20 that's doing is instead of Sherlock & Rivers stealing the
21 money from his client, they're now going to be stealing it
22 from my client and my client's insurer. There's nothing
23 fair, there's nothing equitable about that, Your Honor. And
24 I would just add that to the argument that the other
25 Defendants have made.

1 As an additional ground, Your Honor, in regard to
2 my client, Ms. Hickman Tedder, as of Tuesday of this week,
3 she had not been served with this lawsuit. I want to hand
4 up to the Court and make a part of the record in this matter
5 a letter that I faxed to Mr. Twombly on May 7 of 2013.

6 (Defendant's Exhibit 1 admitted into
7 evidence. Letter dated May 7, 2013.)

8 This lawsuit was filed on April 15th of 2013. So
9 as soon as I got the suit, within three weeks of it being
10 filed, I wrote to Mr. Twombly. Reading from that letter:
11 I have been contacted by Allstate to defend Mary Elizabeth
12 Hickman Tedder in the above-captioned matter. It is my
13 understanding that Ms. Hickman Tedder has not been served.
14 If that is incorrect, please, let me know and forward a copy
15 of your proof of service to me as soon as possible. I never
16 got any response to that letter. Knowing that the suit had
17 been filed on April 15 of 2013, and in an abundance of
18 caution, I went ahead and filed my answer on May 13 of 2013.
19 In my answer as a second defense, I included insufficiency
20 to process. In my motion to dismiss that I filed at the
21 same time as my first grounds for dismissal, I included
22 insufficiency of process. Plaintiffs have failed to
23 properly serve the Defendant. Never got any response to any
24 of that. Ms. Hickman Tedder has not been served as of
25 Tuesday of this week.

1 Under Rule 3, Your Honor, as I'm sure you're
2 aware, if a suit is served outside the statute of
3 limitations, which in this case would be June 29 of 2013,
4 the Plaintiff has 120 days after filing in which to get it
5 served. As we've said, this suit was filed April 15 of
6 2013. That would put the 120 days sometime around the
7 middle of August. We're now into the middle of November.
8 The suit still hasn't been served, Your Honor. So as an
9 additional ground, under 12(b)(4), we believe we're entitled
10 to a dismissal at this point because the suit has not been
11 served. Even if it's served now -- if she was served
12 yesterday, still outside the 120 days, then it's got to be
13 dismissed. Hasn't complied with the rules. Obviously, we
14 now understand that that's going to create a statute issue
15 but, I mean, that's not before the Court today. All we're
16 asking is that the suit be dismissed based on the failure of
17 the Plaintiff to serve.

18 THE COURT: All right.

19 MR. TWOMBLEY: Thank you, Your Honor. First of
20 all, it's my understanding Ms. Hickman Tedder is an elderly
21 lady. We didn't want to have her served personally. We
22 figured that everyone would -- that the insurance companies
23 would accept service for her. I contacted Mr. Ruffner about
24 that. He told me that he couldn't accept service, so she
25 was personally served last night. And so I think we can

1 dispense with that ground.

2 The more important issue, Your Honor -- oh, wait,
3 before I leave that ground, the 120-day rule and the Rules
4 of Civil Procedure only applies if the statute of
5 limitations has -- statute of limitations has expired and
6 the statute of limitations has not expired here. So I don't
7 even think that rule is applicable in any way.

8 Your Honor, this -- this is a very significant
9 issue and it is one that could potentially have some far-
10 reaching implications. And so I -- and other courts,
11 including the United States Supreme Court, have looked at
12 this. And the Defendants' arguments all focus on the
13 equities between the Plaintiff and the Defendant. What is
14 fair between a Plaintiff and a Defendant? Who should bear
15 this burden? The Plaintiffs selected the agent, so their
16 argument they should. That analysis has been rejected by
17 the United States Supreme Court.

18 And we filed a memorandum, Your Honor. I don't
19 know if you have a copy. We e-mailed it to your chambers
20 yesterday, but I've got a couple. One for you and one for
21 your clerk, if you would like one. But this matter was most
22 recently addressed by the United States Supreme Court. And
23 in addressing this issue or a very similar issue, what the
24 United States Supreme Court said on page four of our brief,
25 it says, This matter does not concern only private parties.

1 Tampering with the administration of justice in the manner
2 indisputably shown here involves far more than an injury to
3 a single litigant.

4 And what the Court is saying here is we have this
5 judicial system and it's based on fairness and honesty. And
6 when a lawyer manipulates the system and, essentially, dukes
7 the Court that the courts are going to address that and
8 they're not going to let it -- they're not going to let it
9 stand. And the Supreme Court and the South Carolina Supreme
10 Court have both given compelling policy reasons for the
11 reasons behind that.

12 The South Carolina Supreme Court has addressed in
13 numerous cases, Motley versus Williams, Arnold versus
14 Yarborough, Crawley versus Harvey and Battey -- and none of
15 the Defendants addressed this. They didn't mention this
16 fact that in every one of those cases that have come before
17 the South Carolina court of appeals and the South Carolina
18 Supreme Court, the Courts have universally said, Yes, an
19 attorney does have the authority to bind his client and yes,
20 the client's remedy is generally only with the attorney,
21 except in the cases of fraud. Every single South Carolina
22 published case who has addressed this issue carves out an
23 exception when there -- when -- when there is fraud and when
24 the attorney has committed fraud.

25 Now, the Defendants may take the position, and I

1 think one argued that, well, that has to involve fraud on
2 behalf of the other party. That doesn't -- they weren't --
3 the Supreme Court was not referring to fraud on behalf of
4 your own lawyer. But if you look in these cases, these
5 cases are -- they're dealing with a client who's unsatisfied
6 with the actions of his lawyer. They're not dealing with a
7 client who's unsatisfied or thinks that opposing counsel has
8 committed fraud. I mean, those -- that factual scenario is
9 just not addressed in any of the cases that have come before
10 the Court.

11 Your Honor, this -- the issue of whether or not a
12 settlement action is binding on an attorney through agency
13 principles, that issue has been litigated. And there are
14 various courts across the country who have addressed this
15 specific issue and the general rule in an agency is that one
16 -- that the principle who selects the agent is responsible
17 if the agent commits a wrongdoing. But in addressing that
18 issue in the context of an attorney and a client and when an
19 attorney has committed fraud on the Court, there are cases
20 that say that rule does not apply in -- in this context.
21 And we've cited several cases that stand for that
22 proposition.

23 Your Honor, the final point I would like to make
24 is that the Defendants talk about the end remedy and what
25 the end remedy might be in this type of situation if the

1 Court would -- if the didn't grant the motion to dismiss.
2 And, Your Honor, I would submit that that's really not the
3 issue before the Court. The standard for a motion to
4 dismiss is whether or not our cause of action is possible
5 under South Carolina law or can the Court say with such
6 certainty that I don't think you can prove any of your
7 causes of action under any of the facts alleged. And I
8 respectfully don't think that this Court, even if you don't
9 agree with the analysis from the other Courts, can say based
10 on South Carolina law that it is impossible that the
11 Plaintiffs are going to be able to prevail. That's all I've
12 got. Thank you.

13 MR. MURPHY: Your Honor, if I may just briefly,
14 the United States Supreme Court case from 1944 had this
15 quote that the Plaintiffs conveniently overlooked. And it
16 said, A party's attorney who obtained a patent by fraud, the
17 detriment of the other party seeking to set aside the patent
18 and the judgment. So it's, clearly, the adverse pulling the
19 wool over your eyes by their attorney's fraud. And
20 reversing it said, No equities have intervened through
21 transfer of the fraudulently procured patent or judgment to
22 an innocent purchaser. So that's why they could grant the
23 relief in that case.

24 In this case, equities have intervened through the
25 transfer of \$100,000 from the Defendants to the Plaintiffs.

1 The Defendants would be the innocent purchaser of the
2 fraudulently obtained monies. Again, the settlement is not
3 being fraudulently obtained. The failure to disburse being
4 fraudulent.

5 South Carolina Supreme Court is very similar to
6 that. And the fraud that they're talking about is fraud
7 that induces the agent to settle the case by the adverse,
8 not his own fraud. And I cite from Spence versus Spence, a
9 2006 case, it says, In every such case, the principle holds
10 out his agent as competent and fit to be trusted and
11 thereby, in effect, he warrants his fidelity and good
12 conduct in all matters within the scope of the agency.
13 Seeing that someone must be the loser by the deceit, it is
14 more reasonable that he who employs and confides in the
15 deceiver should be the loser than a stranger. So South
16 Carolina does require it to be your opponent's deceit, not
17 your own attorney's deceit that allows you to recover.

18 And lastly, Your Honor, dismissal is proper
19 because the allegations are very straight up. And they are
20 that the attorneys employed by the Teals defrauded them out
21 of the monies that the Defendants innocently and bona fide
22 paid to them in exchange for proper settlement documents and
23 dismissal of this case. That does not need further
24 development. It is proper at this stage. It's a way to if
25 the appellate courts want to weigh in on this, it's the best

1 way to get them to weigh in on this because everything they
2 allege if true would not be sufficient to give them the
3 relief requested, which is equitable in nature, and
4 therefore, we believe dismissal is the appropriate remedy at
5 this time.

6 MR. COX: Your Honor, just to add real briefly.
7 Arnold is a case where fraud -- supposed fraud was committed
8 by the -- by the Plaintiffs in that case own lawyer -- or
9 the Defendants in that case. The Defendants were saying you
10 went and settled this case, you didn't have our authority to
11 do that. And the Court said, Well, that's tough. He was
12 your lawyer. He represented you in court. So it is
13 impossible the way this case has been plead for it to be an
14 actionable case in South Carolina. Mr. Read for his mother
15 in the fourth circuit has found a litigant who enters in the
16 judicial process with an agency with freely chosen counsel
17 always assumes a certain risk as a result of the cheating
18 will not be satisfactory. Expectations do not entitle the
19 litigant to repudiate commitments made to opposing parties
20 or the Court.

21 New York -- District Court New York, as a rule,
22 payment to an attorney in a claim which he is employed to
23 recover or reflect operates as a payment of the client
24 himself, absent specific contrary arrangements. And if the
25 attorney absconds with the cash without paying it over to

1 his client, the client may not thereafter compel the debtor
2 or tortfeasor to pay a second time. Pretty clear. And
3 that's the same law as South Carolina's law in the Arnold
4 case and the cases that have been cited by Mr. Murphy.

5 I also, Your Honor, I don't know if you received a
6 copy of the brief that we filed, but I have it before you.
7 It should be in the Court's file and there's some
8 attachments. Just some cases that -- regarding the severing
9 issue. But thank you very much.

10 MR. RUFFNER: Your Honor, going back to the
11 service issue. This accident occurred on June 29 of 2010.
12 I don't claim to be a mathematician, but three years from
13 June 29 of 2010 is June 29 of 2013. Rule 3 says, if not
14 served within the statute of limitations, so we're outside
15 of the statute of limitations, June 29, 2013, actual service
16 much be accomplished not later than 120 days after filing.
17 I don't think it can be any clearer. The 120-day rule does
18 apply. This is exactly the kind of case that that rule was
19 designed to address. Complaints filed shortly before the
20 statute of limitations runs. It, actually, gives you
21 additional time after the statute of limitations in which to
22 get it served.

23 There was never any indication by me, as far as I
24 know, any carrier that they were going to accept service.
25 That why I want that letter to be a part of the file, Your

1 Honor. Nobody was trying to hide the ball. I wrote him
2 three weeks after he filed the suit and said, My client
3 hasn't been served.

4 I filed my motion and my answer, said, My client
5 hasn't been served. He waits until the week -- this week to
6 contact me about this issue of service. It's too late. The
7 time has passed and she hasn't been served. The case has
8 got to be dismissed under the rule.

9 MR. TWOMBLEY: I just have two quick points, Your
10 Honor. The issue of the statute in these cases, that's come
11 up before and it's already been heard by one circuit court
12 judge. And the finding was that equitable tolling may apply
13 and that's an issue of fact. And so -- but the more
14 important point I wanted to make, Your Honor, is the Arnold
15 versus Yarborough case that we cited on page seven and
16 that's what Mr. Cox referred to. And I just want to read
17 this quote to you: Absent fraud where attorneys of record
18 for a party agree to settle a case, the party cannot later
19 repudiate the settlement, absent fraud. And then it goes on
20 to say, Litigants must necessarily be bound by the acts of
21 their attorneys in the core -- in the conduct of a cause in
22 court in the absence of course of fraud. And what -- what
23 the cases say is that when the attorney stops representing
24 the Plaintiff totally and is, essentially, not doing
25 anything for their benefit, then he is solely acting on

1 behalf of himself and he is perpetrating a fraud on the
2 Court, the Courts have drawn a line there and said, wait a
3 minute. That's too much. We're got to maintain some order
4 in the judicial system and when someone perpetrates a
5 fraudulent scheme on the Court, the Courts are not going to
6 allow it to stand. And every one of these South Carolina
7 cases say in the absence of fraud. And we, certainly,
8 allege that fraud occurred in our complaint. Thank you,
9 Your Honor.

10 MR. MURPHY: Your Honor, you know, my wife accused
11 me of getting the last word, but that is fraud depositive on
12 the agent, not by the agent. It's just like someone's
13 signature is binding on them unless it was procured by
14 fraud. So the attorney's conduct, if it's procured by fraud
15 by the adverse party, then a party can be relieved on it.
16 That's what it's talking about. You're not going to find
17 any case in South Carolina that does not impose the deceit,
18 as I read in the Spence case, by one's own attorney to give
19 you relief against the innocent party. So Mr. Twombly is
20 just reading the case backward. But it's fraud deposited
21 against the agent which would allow that agent's otherwise
22 binding action of negotiating or agreeing to a release to be
23 not imposed upon his party. That's -- that's what that
24 means.

25 THE COURT: All right. Gentleman, 20 days for

1 proposed orders. The four of you will have to decide if you
2 want to go under it on your order or whether you want to do
3 separate --

4 MR. MURPHY: We'll do it together and circulate
5 it.

6 THE COURT: It will be one order from the
7 Plaintiff's side.

8 MR. MURPHY: Thank you.

9 THE COURT: Exchange them with each other.

10 MR. MURPHY: Yes, sir. Thank you, Your Honor.

11 MR. RUFFNER: Thank you, sir.

12 THE COURT: Thank you.

13

14 END OF PROCEEDINGS

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1 COUNTY OF RICHLAND)

2 CERTIFICATE OF REPORTER

3 I, Crystal Holmes, hereby certify that I reported
4 the preceding case entitled Jonathan Teal et al V. Mary
5 Hickman Tedder et al Case No. 2013-CP-16-00317, at the
6 Darlington County Courthouse, November 21,, 2013.

7 I FURTHER CERTIFY that the foregoing pages 1
8 through 27 constitute a true, accurate and full transcript
9 of said hearing.

10 I FURTHER CERTIFY that I am not employed by any of
11 the parties hereto and I have no financial interest in the
12 outcome of said case.

13 IN WITNESS WHEREOF, I have heretofore set my hand
14 and seal at Richland County on this 20th day of May, 2014.

15

16

Crystal Holmes, Court Reporter

17

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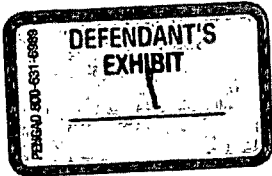
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May 7, 2013

VIA FACSIMILE ONLY (843-982-0103)

J. Ashley Twombly, Attorney at Law
Twenge & Twombly Law Firm

Re: Jonathan Teal and Stacie Teal v. Mary Elizabeth Hickman-Tedder, Allstate Property and Casualty Insurance Company, Government Employees Insurance Company and Nationwide Mutual Insurance Company
Our File: 7639

Dear Mr. Twombly:

I have been contacted by Allstate to defend Mary Elizabeth Hickman-Tedder in the above captioned matter. It is my understanding that Mrs. Hickman-Tedder has not been served. If that is incorrect, please let me know that and forward a copy of your proof of service to me as soon as possible.

With kind regards, I am

Sincerely yours,

C. Heath Ruffner

CHR/jbs

TWENGE + TWOMBLEY LAW FIRM, P.A.

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J. ASHLEY TWOMBLEY
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ATTORNEYS AT LAW
IN SOUTH CAROLINA

December 13, 2013

Via U.S. Mail

The Honorable Paul M. Burch
P.O. Box 276
601 West McGregor Street
Pageland, SC 29728-0276

**RE: Jonathan Teal and Stacie Teal v. Mary Elizabeth Hickman-Tedder, Allstate Property and Casualty Insurance Company, Government Employees Insurance Company and Nationwide Mutual Insurance Company
Civil Action No.: 2013-CP-16-0317**

Dear Judge Burch:

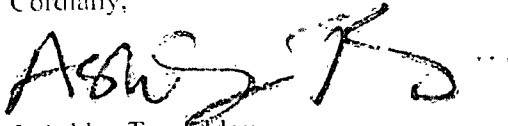
I appeared in front of you in Darlington on November 21, 2013 for a hearing on Defendants' Motions to Dismiss and Sever. At the conclusion of the hearing, you asked for counsel to provide you with proposed orders. To that end, please find enclosed Plaintiffs' proposed Order. I am serving the same on opposing counsel.

Please note that in Plaintiffs' proposed Order I address the statute of limitation argument that was made during the hearing by counsel for Hickman-Tedder. As noted in the proposed order, a review of Hickman-Tedder's Motion and Notice of Motion reveals that she did not move for dismissal based on the statute of limitations. Because Plaintiffs had no notice of such an argument and because it was not mentioned in Hickman-Tedder's Notice or Motion, Plaintiffs' would respectfully request that the Court not make any rulings on the statute of limitations at this time. Aside from the procedural objection, we would also note that the South Carolina Supreme Court has found that there "is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court." Chewning v. Ford Motor Co., 354 S.C. 72, 84, 579 S.E.2d 605, 611 (2003).

Thank you for your consideration in this matter. If you have any questions, or need anything further, please do not hesitate to contact me.

With kindest regards, I remain

Cordially,

A handwritten signature in dark ink, appearing to read 'J. Ashley Twombly', with a stylized flourish at the end.

J. Ashley Twombly

cc: Mr. and Mrs. Jonathan Teal
C. Heath Ruffner, Esquire
J.R. Murphy, Esquire
Robert T. King, Esquire
John T. Lay, Jr., Esquire
A. Johnston Cox, Esquire
Janice Homes, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DARLINGTON	)	CIVIL ACTION NO: 2013-CP-16-0317
	)	
JONATHAN TEAL AND STACIE TEAL,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	ORDER ON DEFENDANTS'
MARY ELIZABETH HICKMAN-TEDDER,	)	MOTIONS TO DISMISS
ALLSTATE PROPERTY AND CASUALTY	)	
INSURANCE COMPANY, GOVERNMENT	)	
EMPLOYEES INSURANCE COMPANY	)	
AND NATIONWIDE MUTUAL	)	
INSURANCE COMPANY	)	
	)	
Defendants.	)	
	)	

This matter was before me on November 21, 2013, on Defendants' Motions to Dismiss pursuant to Rule 12 and Motion to Sever pursuant to Rules 18, 20 and 21 of the South Carolina Rules of Civil Procedure. Present before the Court were J. Ashley Twombly on behalf of Plaintiffs, C. Heath Ruffner on behalf of Defendant Mary Elizabeth Hickman-Tedder, A. Johnston Cox on behalf of Allstate Property and Casualty Insurance Company, Robert T. King on behalf of Government Employees Insurance Company, and J.R. Murphy on behalf of Nationwide Mutual Insurance Company. After carefully reviewing the record before the Court, reviewing evidence submitted by the parties, and hearing argument from counsel for and against the motions to dismiss, I find that Defendants' Motions are due to be denied.

For purposes of resolving a motion to dismiss, the Court must accept as true the facts alleged in Plaintiffs' complaint and must also draw all reasonable inferences from the facts in favor of Plaintiffs. Plaintiffs alleged that their previous attorney fraudulently settled their lawsuit

without their knowledge or consent, and ultimately filed a fraudulent stipulation of dismissal with this Court. Finally, Plaintiffs allege that their previous attorney stole the settlement funds. Plaintiffs do not allege that any of the Defendants participated in the fraud; however, Plaintiffs note that no discovery has been done at this time.

In Chewning v. Ford Motor Co., the South Carolina Supreme Court addressed the concept of “fraud upon the court” by citing with approval Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). In Hazel-Atlas, the Court noted the significance of fraud upon the Court and the rationale for taking decisive action to remedy it:

[Fraud on the Court] is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed to have been guilty of perjury. Here . . . we find a deliberately planned and carefully executed scheme to defraud . . . the Circuit Court of Appeals This matter does not concern only private parties. . . . [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

Chewning v. Ford Motor Co., 354 S.C. 72, 79, 579 S.E.2d 605, 609 (2003) citing Hazel-Atlas Glass Co. The significance of fraud on the court is also evident in the fact that there “is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court” and that “a litigant who has been defrauded need not establish prejudice.” Chewning v. Ford Motor Co., 354 S.C. 72, 84, 579 S.E.2d 605, 611 (2003).

The South Carolina Supreme Court has also recognized that lawyer fraud can qualify as fraud upon the court. “Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud

constituting a fraud upon the court occurs.” Chewning v. Ford Motor Co., 354 S.C. 72, 83-84, 579 S.E.2d 605, 611 (2003).

Other jurisdictions addressing whether lawyer fraud in connection with a stipulated judgment/dismissal qualifies as fraud upon the Court have found that it does. Specifically, the Nevada Supreme Court found as follows:

The question thus comes down to whether lawyer fraud in connection with a stipulated final judgment can qualify as a fraud upon the court The district court found that Davidson committed a “fraud upon the court” when he signed and submitted a stipulated judgment for dismissal with prejudice to the court, which the court then signed and entered, terminating the Garners’ claims. Fraud upon the court has been recognized for centuries as a basis for setting aside a final judgment, sometimes even years after it was entered. It is, of course, true that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. For this reason, a final judgment, once entered, normally is not subject to challenge. However, the policy of repose yields when “the court finds after a proper hearing that fraud has been practiced upon it, or the very temple of justice has been defiled. A case of fraud upon the court calls into question the very legitimacy of the judgment. Put another way, when a judgment is shown to have been procured by fraud upon the court, no worthwhile interest is served in protecting the judgment.

NC-DSH, Inc. v. Garner, 125 Nev. 647, 653, 218 P.3d 853, 858 (2009).

The general rule in South Carolina is that the settlement actions of an attorney are binding on a client, and that if the client is unhappy with the settlement, he must take that up with his attorney. Motley v. Williams, 374 S.C. 107, 111, 647 S.E.2d 244, 246 (Ct. App. 2007) (“It is a long-standing and well-settled rule that an attorney may settle litigation on behalf of his client and that the client is bound by his attorney’s settlement actions.”). However, it is equally well settled that the general rule does not apply in cases of fraud. Id. (citing Arnold v. Yarborough, 281 S.C. 570, 572 316 S.E.2d 416, 417 (Ct.App.1984) (“Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the

agreement. . . . Litigants must necessarily be held bound by the acts of their attorneys in the conduct of a cause in court, in the absence, of course, of fraud.”); Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 70, 488 S.E.2d 334 (1997) (“In South Carolina, an attorney may settle litigation on behalf of his client, and absent fraud or mistake, such a settlement is binding on the client.”); Shelton v. Bressant, 312 S.C. 183, 208, 439 S.E.2d 833, 834 (1993) (“We uphold and reaffirm the long standing rule that a client is bound by his attorney’s actions in the settlement of a case. Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement.”).

Other jurisdictions have specifically addressed the settlement fraud/forgery issue in cases involving facts virtually identical to this one and found that the fraud was not binding on the client. See e.g., NC-DSH, Inc. v. Garner, 218 P.3d 853 (Nev. 2009); Nehleber v. Anzalone, 345 So.2d 822 (Fla. App. 1977); Henderson v. Great Atlantic and Pacific Tea Co., 374 Mich. 142, 132 N.W.2d 75 (1975); Blakney v. Leathers, 867 N.Y.S.2d 145 (App. Div. 2d Dep’t 2008); Coates v. Drake, 346 N.W.2d 858 (Mich.App.1984); Miotk v. Rudy 4 Kan App 2d 296, 605 P.2d 587 (1980); Perkins v. Philbrick 443 A.2d 73, 34 UCCRS 210 (Me 1982); Walker v. Stephens, 3 Ark App 205, 626 SW2d 200 (1981); Liquori v. Giordano, 42 Conn.Supp. 122, 603 A.2d 782, 5 Conn.L.Rptr. 121 (1991); Ball v. Teissonniere, 2000 WL 1868243 (Conn. Super. 2000); Humphreys v. Chrysler Motors Corp., 399 S.E.2d 60 (W.Va. 1990).

Because it is well recognized that fraudulent actions of an attorney are not binding on a client under the appropriate circumstances, this Court must decline to dismiss this case as a matter of law..

Defendants also argue that the general rule in agency recognized in South Carolina is that as between two innocent parties, the risk of loss from the unauthorized acts of a dishonest agent falls on the principal who selected the agent. Spence v. Spence, 368 SC 106 (2006). While no South Carolina Court has addressed this rule in the lawyer/client/third-party context, other jurisdictions have found that the rule does not apply when there had been lawyer fraud on the Court. Capital Dredge & Dock Corp. v. City of Detroit, 800 F.2d 525, 533 (6th Cir. 1986) (“in the settlement context, if the attorney is serving only his own interest in absconding with the settlement proceeds . . . under this general principle of agency the client is not bound by the settlement”); NC-DSH, Inc. v. Garner, 125 Nev. 647, 656, 218 P.3d 853, 860 (2009) (“We recognize the substantial countervailing argument that a client who hires a lawyer establishes an agency relationship and that, ordinarily, the sins of an agent are visited upon his principal, not the innocent third party with whom the dishonest agent dealt. However, courts do not treat the attorney-client relationship as they do other agent-principal relationships . . . when the question is whether a settlement agreed to by the attorney binds the client.”). Accordingly, this ground in support of dismissal must also be denied.

Defendants Allstate and GEICO’s move the Court to sever the claims against them from the claims against Hickman-Tedder. Plaintiffs have asserted claims for fraud on the court and negligence against all Defendants. All of Plaintiffs’ claims arise of the same traffic accident, the same prior lawsuit, and the same fraudulent actions of Plaintiffs’ prior counsel. Allstate and GEICO will be directly impacted by the outcome of the claims against Hickmann-Tedder. The Court finds that the claims asserted by Plaintiffs against all of the Defendants should remain in the same action with the negligence claims because the benefits of keeping the claims together

are outweighed by the benefit of severing the claims. Accordingly, Defendants' Allstate and GEICO's Motion to Sever is denied.

Finally, Defendant Hickman-Tedder moves to dismiss the complaint for lack of service of process. Prior to the hearing, Hickman-Tedder was served with the Summon and Complaint. Therefore, the Motion to Dismiss for lack of service of process is also denied.¹

AND IT IS SO ORDERED!

PAUL M. BURCH
Presiding Judge

Pageland, South Carolina

December ____, 2013

¹ Hickman-Tedder also gave oral argument in support of dismissal based upon a statute of limitations argument. A review of Hickman-Tedder's Motion and Notice of Motion reveals that she did not move for dismissal based on the statute of limitations. Because Plaintiff had no notice of such an argument and because it was not mentioned in Hickman-Tedder's Notice or Motion, the Court finds that the statute of limitations issue was not properly before the Court.

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+Of Counsel

December 13, 2013

Via Electronic and U.S. Mail

The Honorable Paul M. Burch
P.O. Box 276
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pburch@sccourts.gov
pburchlc@sccourts.gov

**RE: Jonathan Teal and Stacie Teal v. Mary Elizabeth Hickman-Tedder, Allstate Property and Casualty Insurance Company, Government Employees Insurance Company and Nationwide Mutual Insurance Company
Civil Action No.: 2013-CP-16-0317**

Dear Judge Burch:

Earlier this week, I forwarded to you a proposed Order in the referenced matter related to the Defendants' Motions to Dismiss. At that time, I had not had the opportunity to review the proposed Order prepared by the Defendants. When you review the parties' proposed Order, you will see that the Defendants have included a lengthy section wherein the Court rules on a statute of limitations argument. I have reviewed all of the notices, motions, memoranda, correspondence, and emails between the attorneys related to the Motions to Dismiss, and I am not able to find where Defendants even mentioned a statute of limitations as a ground for their Motions to Dismiss. I also talked to Counsel for various Defendants prior to the hearing, and no one ever mentioned to me or gave me any notice whatsoever that they intended to argue in support of a dismissal based on the statute of limitations. While Defendant Hickman-Tedder did move for dismissal based on lack of service of process, she did not move on dismissal based on statute of limitations. Defendant Hickman-Tedder was served with process on November 20, 2013, and that mooted the lack of service of process issue.

Because the matter was not raised in any of the Defendants' notices, motions or memoranda, Plaintiffs respectfully object to the Court making any ruling on an issue that was not properly before the Court. Defendants can certainly file another motion raising the statute of limitations issue, and that matter can be briefed by counsel and argued to the Court. However, I do not believe the Court has the jurisdiction to enter dismissal on a ground that was not properly noticed as a ground for dismissal. In Plaintiffs' proposed Order, we have simply stated that the statute of limitations was raised at the motion hearing but not properly before the Court.

Notwithstanding the above, should your honor disagree with me and feel that it is necessary to address the statute of limitations issue, I would ask that the Court review Chewning v. Ford Motor Co., 354 S.C. 72, 84, 579 S.E.2d 605, 611 (2003), wherein the South Carolina Supreme Court found "there is no statute of limitations when a party seeks to set aside a judgment due to fraud upon the court" and that "a litigant who has been defrauded need not establish prejudice." In addition, I would point out that this case was initially filed on June 16, 2011, and we are attempting to reopen that action. Of course, the original action was filed within the statute of limitations. The Plaintiffs would certainly have arguments and evidence in support of equitably tolling the statute of limitations.

Again, I believe all parties should have the opportunity to brief these issues and properly argue them before the Court makes a decision.

Finally, I am emailing to your law clerk Plaintiffs' proposed Order in Word format in case Your Honor would like to make any changes.

Thank you for your consideration in this matter. If you have any questions, or need anything further, please do not hesitate to contact me.

With kindest regards, I remain

Cordially,



J. Ashley Twombly

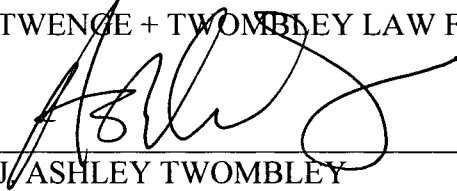
cc: The Honorable Scott B. Suggs
Mr. and Mrs. Jonathan Teal
C. Heath Ruffner, Esquire
J.R. Murphy, Esquire
Robert T. King, Esquire
John T. Lay, Jr., Esquire
A. Johnston Cox, Esquire
Janice Homes, Esquire

CERTIFICATE OF COUNSEL

The undersigned, J. Ashley Twombly, hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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November 20, 2014

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