

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2018- 000692
Circuit Court Case No. 2015-CP-10-06684

RECEIVED
APR 15 2019
SC Court of Appeals

Zurich American Insurance Company of Illinois Respondent,

v.

Palmetto Contract Services, Inc. Appellant.

RESPONDENT'S RETURN TO APPELLANT'S
MOTION TO EXCLUDE CERTAIN DOCUMENTS IN RESPONDENT'S
DESIGNATION OF MATTERS

Appellant Palmetto Contract Services, Inc. ("Palmetto") has appealed an interlocutory order finding that it waived its right to a jury trial. Respondent Zurich American Insurance Company of Illinois ("Zurich"), has filed its Initial Brief and Respondent's Designation of Matters to be included in the Record on Appeal ("Zurich's Designation"). A true and correct copy of Respondent Zurich's Designation is attached hereto as Exhibit "A" and incorporated herein by reference. Appellant Palmetto has moved to exclude certain documents in Zurich's Designation. Specifically, Appellant Palmetto has moved to exclude the following matters designated by Respondent Zurich:

- I. Transcript of Hearing on Defendant Palmetto's Motion to Amend Answer and Assert

Counterclaim, dated January 5, 2017, before The Honorable W. Jeffrey Young (R-12);

II. Letter dated August 24, 2017 from William A. Scott, attorney for Defendant Palmetto to The Honorable Roger M. Young, Sr. [sic] and Defendant Palmetto's proposed Order to Amend Answer and Assert Counterclaim [submitted by Defendant Palmetto to Judge W. Jeffrey Young] [Plaintiff Zurich's proposed Order is omitted] (R-14);

III. Transcript of Hearing on Defendant Palmetto's Motion to Amend Answer and Assert Counterclaim, dated September 19, 2017, before the Honorable J. C. Nicholson, Jr. (R-16) [Respondent's Designation No. 16. is erroneously referred to as "Respondent's Designation No. 17" in Appellant Palmetto's Motion to Exclude]

Respondent Zurich contends that each of the matters designated by Respondent Zurich and to which Appellant Palmetto objects, is relevant to this appeal and either supports legal positions and salient facts alleged by Respondent Zurich or controverts legal positions and allegations made by Appellant Palmetto. Further, Zurich asserts that official court hearing transcripts in the lower court are relevant and as official documents in this proceeding should be part of the record on appeal. All of the documents including both lower court hearing transcripts pertain to this matter on appeal.

I. **Transcript of Hearing on Defendant Palmetto's Motion to Amend Answer and Assert Counterclaim, dated January 5, 2017, before The Honorable W. Jeffrey Young (R-12)**

The Transcript dated January 5, 2017, of the Hearing on Defendant's Motion to Amend Answer and Assert Counterclaim, reveals the incompatible positions taken by Appellant Palmetto concerning whether new issues of fact are raised by its Counterclaim. A true and correct copy of the Transcript of the Hearing before Judge Young on January 5, 2017 is attached hereto as Exhibit "B" and incorporated herein by reference. When Appellant Palmetto seeks to amend its answer and

assert a counterclaim, it argues to the trial court that Respondent Zurich will not be prejudiced by the issues of fact alleged in its counterclaim. (Exhibit "B," P. 3, Lines 2-23). According to Appellant Palmetto's argument before Judge Young, its initial Answer put Respondent Zurich on notice of the issues of fraud and misrepresentation raised by its Counterclaim. In support of its motion to amend its answer, Appellant's counsel argued to the trial court, "[p]rejudice usually is where they don't have time to prepare and answer or to prepare the defendant. That can't be the case here. They know about the issues with fraud and negligent misrepresentation from the original answer." (Exhibit "B," P. 3, Lines 19-23) Appellant Palmetto made this admission when it only sought leave of court to amend its answer to allege a counterclaim but not a jury trial. This is the same answer and counterclaim which on appeal Appellant Palmetto now contends creates new issues of fact entitling it to a jury trial.

II. Letter dated August 24, 2017 from William A. Scott, attorney for Defendant Palmetto to The Honorable Roger M. Young, Sr. [sic] and Defendant Palmetto's proposed Order to Amend Answer and Assert Counterclaim [Plaintiff Zurich's proposed Order is omitted] (R-14);

Several months after the hearing before Judge W. Jeffrey Young on Appellant Palmetto's Motion to Amend Answer to Assert Counterclaim, Appellant Palmetto submitted to Judge Young a letter along with its proposed Order granting its Motion to Amend and Assert Counterclaim. True and correct copies of Appellant Palmetto's letter and proposed Order Granting its Motion to Amend and Assert Counterclaim are attached hereto as Exhibit "C" and incorporated herein by reference.

Appellant Palmetto's proposed order contains a finding that, "Zurich has failed to show how it might be prejudiced by the amendment. In fact, Zurich has been on notice since the Defendant filed the original answer that there were issues of fraud and misrepresentation." (Exhibit "C,"

proposed Order, P. 4, ¶ 2). This is the same answer and counterclaim that Appellant Palmetto now contends on appeal creates new issues of fact entitling it to a jury trial.

III. Transcript of Hearing on Defendant Palmetto's Motion to Amend Answer and Assert Counterclaim, dated September 19, 2017, before the Honorable J. C. Nicholson, Jr. (R-16) [Respondent's Designation No. 16. is misidentified as "Respondent's Designation No. 17" in Palmetto's Motion to Exclude]

Judge Young never ruled on Appellant Palmetto's Motion to Amend Answer and Assert Counterclaim. While the matter was under advisement, Judge Young left the bench.

On September 19, 2017, a second hearing on Appellant Palmetto's Motion to Amend and assert Counterclaim was held before The Honorable J. C. Nicholson, Jr. A true and correct copy of the Transcript of the Hearing before Judge Nicholson is attached hereto as Exhibit "D" and incorporated herein by reference. At the second hearing on the same issue as heard previously by Judge Young, Judge Nicholson granted Appellant Palmetto's Motion to Amend and Assert Counterclaim. Based on the proposed Order submitted to Judge Nicholson by Appellant Palmetto, Judge Nicholson found "[t]here is no prejudice to Zurich. Palmetto put Zurich on notice of allegations of fraud in the original answer. . ." (Exhibit "D," P. 3, ¶ 2, P. 4, ¶ 2).

Judge Nicholson did not rule on whether Appellant Palmetto was entitled to a jury trial. (Exhibits "D" and "E") Appellant Palmetto's entitlement to a jury trial was not an issue before Judge Nicholson. The proposed Amended Answer and Counterclaim filed by Appellant Palmetto with its Motion to Amend did raise the jury trial issue. Appellant Palmetto never included the words "Jury Trial" in the case caption of its Amended Answer and Counterclaim until after Judge Nicholson's Order was entered granting it leave to amend its Answer was entered by the Charleston County Clerk of Court. (Exhibit "F") Appellant Palmetto never alleged at the hearing before Judge

Nicholson that it was entitled to a jury trial. (Exhibit “D”) Rather, Appellant Palmetto offered to consent to a jury trial if Respondent Zurich desired a jury trial. (Exhibit “D,” P. 6, Lines 21-23) The purpose of Palmetto’s consent to a jury trial was to remove the issue of possible prejudice to Respondent Zurich. At the hearing, Judge Nicholson directed Appellant Palmetto, “[a]ll right I’ll grant [the motion to amend]. Put it in the order that you consent to a jury trial if the plaintiff [Zurich] desires a jury trial, all right?” (Exhibit “D,” P. 6, Lines 24-25 and P. 7, Lines 1-2).

At the hearing before Judge Harrington on March 6, 2018 on Respondent’s Motion to Strike Demand for Jury Trial, a number of references were made by both parties to the arguments made before Judge Nicholson. (Exhibit “G,” P. 4, Lines 4-25 and P. 5 Lines 1-9). A true and correct copy of the Transcript of Hearing before Judge Harrington on March 6, 2018 is attached hereto as Exhibit “G.”

The Transcript of the Hearing before Judge Nicholson is not only relevant and supports salient facts alleged by Respondent Zurich in its Initial Brief, but is also referenced numerous times by Appellant Palmetto in its Briefs. The following are cites to references in Appellant Palmetto’s Initial and Reply Briefs to the hearing before Judge Nicholson:

1. Appellant’s Initial Brief Page 1, Paragraph 1;
2. Appellant’s Initial Brief Page 4, Paragraph 2;
3. Appellant’s Initial Brief Page 5, Paragraph 1;
4. Appellant’s Initial Brief Page 10, Paragraph 1;
5. Appellant’s Reply Brief Page 4, Paragraph 1; and
6. Appellant’s Reply Brief Page 4, Paragraph 2.

Despite Appellant Palmetto’s six references in its Initial and Reply Briefs to the hearing before Judge

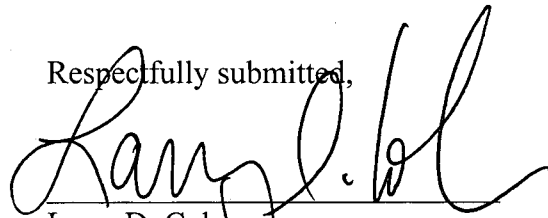
Nicholson, it now seeks to exclude the official transcript of the hearing before Judge Nicholson from the record.

CONCLUSION

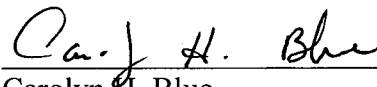
Appellant Zurich requests that this Court deny Appellant Palmetto's Motion to Exclude Certain Documents in Respondent's Designation of Matters and grant Respondent Zurich any other relief it may show itself entitled.

Charleston, South Carolina
April 10, 2019

Respectfully submitted,



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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS**

Kristi Lea Harrington, Circuit Court Judge

**Appellate Case No. 2018- 000692
Circuit Court Case No. 2015-CP-10-06684**

Zurich American Insurance Company of Illinois Respondent,

v.

Palmetto Contract Services, Inc. Appellant.

**RESPONDENT'S EXHIBIT LIST FOR ITS RETURN TO APPELLANT'S
MOTION TO EXCLUDE CERTAIN DOCUMENTS IN RESPONDENT'S
DESIGNATION OF MATTERS**

- Exhibit A Respondent Zurich's Designation of Matters to be included in the Record on Appeal
- Exhibit B Transcript of Hearing on Defendant Palmetto's Motion to Amend Answer and Assert Counterclaim, dated January 5, 2017, before The Honorable W. Jeffrey Young
- Exhibit C Letter dated August 24, 2017 from William A. Scott, attorney for Defendant Palmetto to The Honorable Roger M. Young, Sr. [sic] and Defendant Palmetto's proposed Order to Amend Answer and Assert Counterclaim [Plaintiff Zurich's proposed Order is omitted].
- Exhibit D Transcript of Hearing on Defendant Palmetto's Motion to Amend Answer and Assert Counterclaim, dated September 19, 2017, before the Honorable J. C. Nicholson, Jr.

Exhibit E Order granting Defendant's Motion to Amend dated September 22, 2017

Exhibit F Notice of Motion and Motion to Amend Answer and Assert a Counterclaim Against Plaintiff dated July 12, 2016 and proposed Amended Answer and Counterclaim

Exhibit G Transcript of Record of Hearing before Judge Kristi Lea Harrington on Plaintiff Zurich's Objection to Transfer to Jury Trial Roster and Motion to Strike Jury Trial Demand dated March 6, 2018

EXHIBIT "A"



THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

RECEIVED

Kristi Lea Harrington, Circuit Court Judge

FEB 20 2018

SC Court of Appeals

Appellate Case No. 2018- 000692
Circuit Court Case No. 2015-CP-10-06684

Zurich American Insurance Company of Illinois Respondent,

v.

Palmetto Contract Services, Inc. Appellant.

**RESPONDENT'S DESIGNATION OF MATTERS
TO BE INCLUDED IN THE RECORD ON APPEAL**

1. Order granting Plaintiff's Motion to Strike Defendant's Jury Trial Demand dated March 13, 2018.
2. Complaint dated December 11, 2015.
3. Defendant's Answer to Plaintiff's Complaint dated February 16, 2016.
4. Notice of Motion and Motion to Amend Answer and Assert a Counterclaim Against Plaintiff dated July 12, 2016.
5. Plaintiff's Response in Opposition to Defendant's Motion to Amend Complaint and File Counterclaim dated November 7, 2016.
6. Order granting Defendant's Motion to Amend dated September 22, 2017.

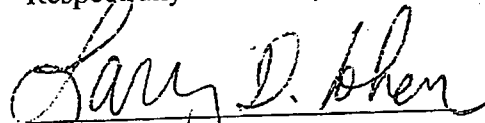
7. Defendant's Amended Answer and Counterclaim dated September 29, 2017.
8. Plaintiff Zurich American Insurance Company's Reply to Defendant's Amended Answer and Counterclaim dated October 26, 2017.
9. Plaintiff Zurich's Objection to Transfer to Jury Trial Roster and Motion to Strike Demand for Jury Trial dated October 26, 2017.
10. Plaintiff Zurich's Memo in Support of Its Objection to Transfer to Jury Trial Roster and Motion to Strike Defendant Palmetto Contract Services Inc.'s Demand for Jury Trial dated March 5, 2018.
11. Transcript of Record of Hearing on Plaintiff Zurich's Objection to Transfer to Jury Trial Roster and Motion to Strike Jury Trial Demand dated March 6, 2018.
12. Transcript of Hearing on Defendant Palmetto's Motion to Amend Answer and Assert a Counterclaim, dated January 5, 2017, before The Honorable W. Jeffrey Young.
13. Form 4 Order entered on January 6, 2017 on Defendant Palmetto's Motion to Amend and Assert a Counterclaim taken under advisement by Court and parties ordered to submit proposed Orders.
14. Letter dated August 24, 2017 from William A. Scott, attorney for Defendant Palmetto to The Honorable Roger M. Young, Sr. [sic] and Defendant Palmetto's proposed Order to Amend Answer and Assert Counterclaim [Plaintiff Zurich's proposed Order is omitted].
15. Charleston County Clerk of Court's Notice to Parties, dated March 8, 2017, that the case is on the trial court's backup non-jury trial roster for week of March 20, 2017 to March 24, 2017.
16. Transcript of Hearing on Defendant Palmetto's Motion to Amend Answer and Assert

a Counterclaim, dated September 19, 2017, before the Honorable J. C. Nicholson, Jr.

17. Charleston County Clerk of Court's Notice to Parties, dated October 5, 2017 that case is on the Jury Trial Roster for period from October 9, 2017 to October 13, 2017.

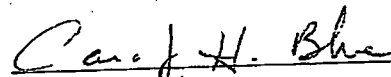
I certify that Respondent's Designation of Matters contains no matter which is irrelevant to this appeal.

Respectfully submitted,



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Charleston, South Carolina
February 15, 2019



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Attorneys for Respondent
Zurich American Insurance Company of Illinois

EXHIBIT “B”

1	STATE OF SOUTH CAROLINA)	
)	Court of Common Pleas
2	COUNTY OF CHARLESTON)	Case No. 2015-CP-10-06684
)	
3	<hr/>		
)	
4	ZURICH AMERICAN INSURANCE)	
	COMPANY OF ILLINOIS,)	
)	
5	Plaintiff,)	
)	
6	vs.)	Transcript of Record
)	
7	PALMETTO CONTRACT SERVICES, INC.))	
)	
8	Defendant.)	DATE: January 5, 2017
)	
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B E F O R E:

THE HONORABLE W. JEFFREY YOUNG

A P P E A R A N C E:

LARRY COHEN and CAROLYN BLUE
Attorney for the Plaintiff

WILLIAM A. SCOTT
Attorney for the Defendant

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

1 THE COURT: Who are we?

2 MR. SCOTT: Your Honor, my name is Bill Scott.

3 I represent the defendant, Palmetto Contract
4 Services, Inc.

5 MR. COHEN: Your Honor, Larry Cohen, for plaintiff,
6 Zurich American Insurance Company, along with Attorney
7 Carolyn Blue.

8 THE COURT: What do we have?

9 MR. SCOTT: Your Honor, this is my motion on behalf
10 of the defendants. It's a motion to amend the answer to add
11 a counterclaim for breach of contract and for negligent
12 misrepresentation and fraud.

13 And to give you a brief background, Your Honor, my
14 client is a boatyard/shipyard. They purchased workers'
15 compensation, both state and federal, through the plaintiff
16 Zurich.

17 After a year, they do an audit, and there's either
18 an additional premium owed or not. Zurich filed -- after
19 the year was over, an audit was done. My client -- and this
20 was in, I think, 2013.

21 After the audit was done -- they actually did two
22 audits. After the second one was done, my client sent a
23 letter saying, I think you need to review your audit. That
24 was in June of 2013.

25 The next thing that was done was in December of

1 2015, the complaint was filed by Zurich against my client
2 demanding additional premiums. We filed an answer. And one
3 of the defenses in that -- it was a general denial, but one
4 of the defenses was plaintiff's claims were barred as a
5 result of plaintiff's fraud and misrepresentation concerning
6 the policy in the audit.

7 As time went on, in July of this year, I filed a
8 motion to amend to add a claim for breach of contract,
9 because we determined that not only did we not owe them
10 money, but they owed us money.

11 So I filed a motion to amend, alleged breach of
12 contract, and to go further with the negligent
13 misrepresentation in the counterclaim. They would not
14 consent. So we are here.

15 Your Honor, as you know, under 15A, motions to
16 amend are freely given. In the interest of justice and if
17 there's no prejudice, then the obligation to show prejudice
18 is on the plaintiff in this case.

19 Prejudice usually is where they don't have time to
20 prepare for an answer or to prepare the defendant. That
21 can't be the case here. They knew about the issues with
22 fraud and negligent misrepresentation from the original
23 answer.

24 Also, the complaint -- the amendment relates back
25 to the timing of the original filing. I understand their

1 argument is that the statute of limitations has run because
2 we should have known that there was a claim in 2013 in June
3 when we sent the letter back.

4 But, Your Honor, that would be an issue that, even
5 though I don't think it's appropriate or it would succeed,
6 it's an issue of fact which should be brought up after the
7 amendment on a motion for summary judgment. For that
8 reason, Your Honor, we request that the motion to amend be
9 granted.

10 THE COURT: Mr. Cohen or Ms. Blue?

11 MR. COHEN: Yes, Your Honor. As opposing counsel
12 has stated, his client knew about these claims back in April
13 2013 after the second audit, April 6th, 2013.

14 THE COURT: That may come about, but all he's
15 asking is to amend.

16 MR. COHEN: There's case law that I've cited, *Scott*
17 *vs. McClain*, that says that a defective complaint to the
18 statute of limitations should not be allowed to be amended
19 after a period for filing has occurred. And that's
20 basically our position, Your Honor.

21 THE COURT: What say you?

22 MR. SCOTT: Your Honor, the statute of limitations,
23 whether it applies, is an issue of fact. And in the facts
24 of this case, I can't even submit affidavits at this point
25 based on issues in front of the Court.

1 If they want to argue that, what they are saying is
2 that June 17th letter states that this glitch caused statute
3 of limitations to begin. We didn't say they owed us any
4 money or anything at that time. That letter says they
5 requested our audit be amended. But it doesn't say that we
6 know there's a claim or anything else. That's an issue of
7 fact.

8 And even if it did, the amendment relates back to
9 the timing of the original filing, which was in December
10 2012. We would claim the statute of limitations would not
11 be an issue.

12 THE COURT: I'm going to have to look at that.
13 Y'all want to send me proposed orders and I will review it
14 at that time and make a ruling?

15 MR. COHEN: Yes, Your Honor.

16 MR. SCOTT: Thank you very much, Your Honor.

17 THE COURT: If you can send me those proposed
18 orders within 10 days.

19 MR. SCOTT: To your e-mail address and to your
20 clerk?

21 THE COURT: That's fine. I don't have a clerk.
22 She's my sit-in clerk.

23 (Whereupon, proceedings are adjourned.)
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CERTIFICATE OF REPORTER

1
2
3 I, Karen V. Andersen, Registered Merit Reporter,
4 Certified Realtime Reporter for the State of South Carolina
5 at Large, do hereby certify that the foregoing transcript is
6 a true, accurate and complete Transcript of Record of the
7 proceedings.

8 I further certify that I am neither related to nor
9 counsel for any party to the cause pending or interested in
10 the events thereof.

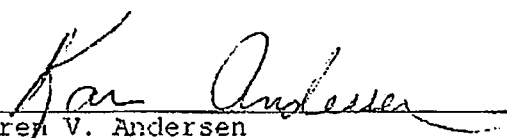
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16 Karen V. Andersen
17 Registered Merit Reporter
18 Certified Realtime Reporter
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EXHIBIT “C”

PEDERSEN & SCOTT, P.C.
ATTORNEYS AT LAW

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August 24, 2017

Via Email: ryoungi@sccourts.org
and First-Class Mail

The Honorable Roger M. Young, Sr.
Charleston County Judicial Center
100 Broad Street, Suite 368
Charleston, SC 29401

Re: **Zurich American Insurance Company of Illinois**
v. Palmetto Contract Services, Inc.
Civil Action No. 15-CP-10-6684

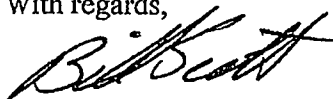
Dear Judge Young:

On July 18, 2017, the Defendant filed a Motion to Amend Answer and Assert Counterclaim in this matter. The motion was heard on January 6, 2017, and at that time, you took the motion under advisement and requested that the parties provide you with proposed orders for your consideration. On January 17, 2017, I provided you with the Defendant's proposed order granting the Motion. Counsel for Plaintiff also provided a proposed order for your consideration. Both proposed orders are attached.

The court has now scheduled this matter for a Roster Meeting on September 1, 2017. In order for this matter to proceed, I respectfully request your decision on the outstanding motion.

Your assistance in this matter is greatly appreciated. Please call me if you have any questions.

With regards,



William A. Scott

WAS/teb
Enclosures
cc w/enc.:

Larry D. Cohen, Esq.
Carolyn H. Blue, Esq.
Palmetto Contract Services, Inc.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CASE NO.: 2015-CP-10-6684

ZURICH AMERICAN INSURANCE
COMPANY OF ILLINOIS,

Plaintiff,

v.

PALMETTO CONTRACT SERVICES,
INC.,

Defendant.

ORDER

This matter came before the court on January 5, 2017, on the motion of the Defendant, Palmetto Contract Services, Inc. (hereinafter "Palmetto") to amend its answer to add a counterclaim for breach of contract and for fraud and negligent misrepresentation. The Plaintiff, Zurich American Insurance Company of Illinois (hereinafter "Zurich"), filed a complaint for breach of contract relating to the payment of premiums for workers' compensation insurance. Palmetto filed an answer denying all of the allegations in the complaint and alleged defenses, including Plaintiff's fraud and misrepresentation. (Answer, Par. 9). For the reasons set forth below, Palmetto's motion to amend is granted.

According to the complaint, this matter involves insurance premiums allegedly due for the time period of February 20, 2012, through February 20, 2013. Zurich made a demand for payment in the amount of \$158,744.00 on June 18, 2013. (Complaint, Par. 8). By letter dated June 17, 2013, Palmetto sent a letter to Zurich contesting the audit and requested that the audit be amended. (See, Exhibit 2 to Plaintiff's Response in Opposition to Defendant's Motion to Amend). Zurich filed the complaint on December 11, 2015. Palmetto filed an answer on February 12, 2016.

Palmetto contends that it is entitled to amend its answer to add a counterclaim pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. Zurich contends that the motion should be denied based on the statute of limitations because Palmetto knew or should have known about the counterclaim as of June 17, 2013, but did not file the motion to amend until July 12, 2016, more than three years after the June 17, 2013 letter.

Rule 15(a) provides that “a party may amend his pleading ... by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.” Rule 15(a), SCRPC. “The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. [citations omitted]” City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232–33, 599 S.E.2d 462, 465–66 (Ct. App. 2004). The party opposing the motion has the burden of establishing prejudice. Id.

Rule 15(c) provides that any amendment under this rule “relates back to the original pleadings.” Rule 15(c), SCRPC. If there is a question relating to the statute of limitations, “the issue then becomes whether the amended claim was time-barred at the time the action was commenced.” Arant v. Kressler, 327 S.C. 225, 228, 489 S.E.2d 206, 208 (1997). The statute of limitations runs “from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996).” McAlhany v. Carter, 415 S.C. 54, 63, 781 S.E.2d 105, 110 (Ct. App. 2015), reh'g denied (Jan. 28, 2016). However, “[w]hen there is conflicting testimony regarding the time of discovery, it becomes an issue for the jury to decide.” Arant, 327 S.C. at 229, 489 S.E.2d at 208.

In Collins v. Sigmon, 299 S.C. 464, 385 S.E.2d 835 (1989), the SC Supreme Court provided helpful guidance regarding motions to amend.

A motion to amend an Answer should be contested primarily by procedural arguments, not arguments concerning the substance and merits of the counterclaims and/or defenses proposed. For example, one might argue that it is too late in the case to allow an amendment, and that prejudice would result from such an amendment. Arguments going to the legal merits of a proposed defense or counterclaim are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56 motion for summary judgment. It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage.

Id. at 466, 385 S.E.2d at 836. See also, City of N. Myrtle Beach, 360 S.C. at 232–33, 599 S.E.2d at 465–66.

Palmetto is entitled to amend the complaint to add a counterclaim. First, Rule 15(a) provides that a motion to amend shall be freely given. Second, there is no prejudice to Zurich. Palmetto put Zurich on notice of allegations of fraud in the original answer. Further, there is no evidence that Zurich does not have adequate time to prepare and defend against the counterclaim. Therefore, both requirements of 15(a) are met.

I also find that Zurich's statute of limitations argument fails based on the plain language of Rule 15(c). Zurich bases its statute of limitations argument on the assertion that Palmetto knew or should have known about the causes of action against Zurich as of the June 17, 2013 letter. However, Rule 15(c) provides that an amendment relates back to the time the original filing, in this case, December 11, 2015. Therefore, for the purposes of this motion, the fact that Palmetto filed the motion to amend more than three (3) years after the letter dated June 17, 2013, is irrelevant. Pursuant to the language in Rule 15(c), the counterclaim would have been appropriate, and could have been asserted at the time the answer was filed.

I find Zurich's reliance on the case of Arant v. Kressler, 327 S.C. 225, 228, 489 S.E.2d 206, unpersuasive.¹ In Arant, the amendment attempted to add causes of action that were time-

¹Zurich also cites Scott v. McCain, 272 S.C. 198, 250 S.E.2d 118 (1978). That case actually supports the Defendant's argument that the amendment should be allowed. In Scott, the amendment was allowed where the statute had run, but there was a general allegation in the completing that related to the

barred at the time the original complaint was filed. That does not appear to be the case here. At the time the complaint was filed on December 11, 2015, the statute had not run on Palmetto's counterclaim. Since amendments relate back to the time of the original complaint, the issue is: did the statute of limitations run on the Palmetto's counterclaim as of December 11, 2015? Based on Palmetto's June 17, 2013 letter, that Zurich contends starts the statute of limitations, it does not appear to be the case here.

Further, the question of whether the statute of limitations had run is best left to a motion for summary judgment when all of the facts can be sorted out. At this juncture, the court is not in a position to determine as a matter of law that the statute had run. Palmetto's June 17, 2013, letter does not make any demand on Zurich, it does not demand any payment from Zurich, nor does it make any allegations of fraud or negligent misrepresentation. Since the statute of limitations is a question of fact, that issue is not before the court, and should not be considered in this motion to amend.

Under the circumstances here, there is no basis for denying the motion. Zurich has failed to show how it might be prejudiced by the amendment. In fact, Zurich has been on notice since the Defendant filed the original answer that there were issues of fraud and misrepresentation. Further, even if the statute of limitations is a defense available to Zurich, it is free to assert that defense in the answer to the counterclaim and in any subsequent motions for summary judgment. As discussed above, if there is a dispute as to when the statute of limitations began, it is an issue for a later motion.

amendment. That is the case here. The Plaintiff was put on notice of the fraud and misrepresentation in the original Answer.

For all the foregoing reasons, Palmetto's motion to amend the answer to add counterclaims is granted. The amended answer and counterclaims shall be filed within 10 days of receipt of this court's order.

AND IT IS SO ORDERED.

Honorable W. Jeffrey Young

Dated: January __, 2017

EXHIBIT “D”

1 (September 19, 2017.)

2 THE COURT: All right. Who is here
3 representing who?

4 MR. SCOTT: Your Honor, my name is Bill
5 Scott. I represent Palmetto Contracting Services,
6 and I filed a motion to amend.

7 THE COURT: And who's here for the
8 plaintiff?

9 MS. BLUE: I'm Carolyn Blue, and my
10 co-counsel, Larry Cohen, we're here representing
11 Zurich.

12 THE COURT: Okay. Mr. Scott, you want
13 to amend -- what are you adding to or what are you
14 changing?

15 MR. SCOTT: Your Honor, what we're
16 adding is a counterclaim for fraud and for
17 misrepresentation. The original complaint -- my
18 client is a smaller shipyard that operates up on
19 the Cooper River. Zurich provides workers'
20 compensation insurance and longshoreman insurance.
21 They filed a complaint for breach of contract.

22 We filed an answer and asserted a
23 defense of fraudulent inducement. Since that
24 time, it's come to light that not only do we not
25 owe them the money, but they owe us money back, so

1 we filed the motion to amend to add causes of
2 action so we can get the overpayment back. Their
3 argument is, as I understand it --

4 THE COURT: Let's hear the argument.
5 What's your argument?

6 MS. BLUE: Your Honor, we filed suit for
7 lack of premium payment on December 12, 2015, and
8 Mr. Scott's client answered February the 12th,
9 2016. The statute of limitations has run on the
10 counterclaim, which is what he's trying to have
11 amended, and this does prejudice us if he is
12 allowed to amend the counterclaim.

13 When he filed the counterclaim, there
14 was no compelling reason of why he missed the
15 statute of limitation, and therefore, because of
16 the length of time since the suit has been filed,
17 more than 18 months has gone past, this would
18 prejudice us because at this point, we would not
19 be able to make a motion to move this to a jury
20 roster if we so desired.

21 We're not saying that that's what we
22 want to do, but if the counterclaim goes forth,
23 we've lost that right under the law.

24 THE COURT: You've lost the right to a
25 jury trial?

1 MS. BLUE: Yes, sir --

2 THE COURT: Because of his amended
3 counterclaim?

4 MS. BLUE: Because of his delay, because
5 it's past the statute of limitations, and because
6 of the time the suit was originally filed, you
7 have 18 months, and we are now past the 18 months,
8 Your Honor.

9 THE COURT: Well, the amended
10 counterclaim gives you another opportunity to
11 answer. The time starts running all over again.
12 You can file your motion then, can't you?

13 I mean, if he amends it and files a
14 counterclaim against you, you get to answer it,
15 and in the answer, you can ask for a jury trial.
16 I don't understand why you don't think you can ask
17 for a jury trial.

18 Maybe I'm missing your point. Educate
19 me a little bit please, ma'am.

20 MS. BLUE: Okay.

21 THE COURT: I mean, you get to answer
22 his counterclaim, right, if I allow the amendment?

23 MS. BLUE: If you allow the amendment,
24 but we contend that the statute of limitations has
25 run because not only --

1 THE COURT: Well, the statute of
2 limitations hasn't run -- you think he should have
3 sued you separately so you can claim the statutes?

4 MR. COHEN: No, sir. We feel that he
5 should have filed the counterclaim within a timely
6 manner, and his client, which, if you look at
7 Exhibit 2 in our response, made the same --

8 THE COURT: When did he find out in his
9 opinion that you owe him money? When was that
10 determined?

11 MS. BLUE: That has not been determined.

12 THE COURT: He said --

13 MS. BLUE: I know, Your Honor, but that
14 has not been determined.

15 THE COURT: I'm not saying that's a
16 factual fact, but when did he make that
17 determination, do you know?

18 MS. BLUE: He alleged -- his client
19 alleged that in April 2013 in response to our
20 audit. He also alleged that in his response,
21 which was filed in -- which was filed in --
22 January 14th, 2016.

23 THE COURT: Okay. Well, that hasn't
24 answered my question.

25 Mr. Scott, when did you learn that you

1 possibly had a counterclaim against the plaintiff
2 in this case for, as you stated, money they may
3 owe your client? When was that determined?

4 MR. SCOTT: Your Honor, it actually came
5 up after this claim was filed. This is one of two
6 complaints. The first one was against the
7 subsidiary insurance.

8 My client looked at these as owing money
9 on one, not owing them money. They offset. That
10 case has been settled, but they got what they
11 wanted. We didn't offset anything that was owed
12 in this case, and that's when that came about.

13 THE COURT: How long ago was that?

14 MR. SCOTT: Within the last year,
15 year-and-a-half, I think, Your Honor, even less,
16 but even then, under the rules, a counterclaim or
17 a defense relates back to the time of the original
18 filing.

19 THE COURT: I understand that. That's
20 just not a problem.

21 MR. SCOTT: The statute is not a
22 problem, and we'll consent to a jury trial. We'll
23 consent.

24 THE COURT: All right. I'll grant it.
25 Put it in the order that you consent to a jury

1 trial if the plaintiff desires a jury trial, all
2 right?

3 MR. SCOTT: Thank you very much, Your
4 Honor.

5 THE COURT: Thank you.

6 - - -

7 (Whereupon, the proceedings were concluded.)

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I, the undersigned, Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 9th of September 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 18, 2018

Amanda K. Haffenden

Circuit Court Reporter

EXHIBIT “E”

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CASE NO.: 2015-CP-10-6684

ZURICH AMERICAN INSURANCE
COMPANY OF ILLINOIS,

Plaintiff,

v.

PALMETTO CONTRACT SERVICES,
INC.,

Defendant.

ORDER
GRANTING DEFENDANT'S
MOTION TO AMEND.

2017 SEP 22 PM 12:46

FILED

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This matter came before the court on September 19, 2017, on the motion of the Defendant, Palmetto Contract Services, Inc. (hereinafter "Palmetto"), to amend its answer to add a counterclaim for breach of contract and for fraud and negligent misrepresentation. The Plaintiff, Zurich American Insurance Company of Illinois (hereinafter "Zurich"), filed a complaint for breach of contract relating to the payment of premiums for workers' compensation insurance. Palmetto filed an answer denying all of the allegations in the complaint and alleged defenses, including Plaintiff's fraud and misrepresentation. (Answer, Par. 9). For the reasons set forth below, Palmetto's motion to amend is granted.

According to the complaint, this matter involves insurance premiums allegedly due for the time period of February 20, 2012, through February 20, 2013. Zurich made a demand for payment in the amount of \$158,744.00 on June 18, 2013. (Complaint, Par. 8). By letter dated June 17, 2013, Palmetto sent a letter to Zurich contesting the audit and requested that the audit be amended. (See, Exhibit 2 to Plaintiff's Response in Opposition to Defendant's Motion to Amend). Zurich filed the complaint on December 11, 2015. Palmetto filed an answer on February 12, 2016.

Palmetto contends that it is entitled to amend its answer to add a counterclaim pursuant to Rule 15 of the South Carolina Rules of Civil Procedure. Zurich contends that the motion should be denied for two reasons: (1) that it would be prejudiced because it does not now have an opportunity to demand a jury trial, and (2) because the amendment is untimely. Zurich contends that the statute of limitations has run because Palmetto knew or should have known about its counterclaim as of June 17, 2013, but did not file the motion to amend until July 12, 2016, more than three years after the June 17, 2013, letter.

Rule 15(a) provides that "a party may amend his pleading ... by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRPC. "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. [citations omitted]" City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232-33, 599 S.E.2d 462, 465-66 (Ct. App. 2004). The party opposing the motion has the burden of establishing prejudice. Id. During the hearing, Palmetto consented to a jury trial, therefore there can be no prejudice.

Rule 15(c) provides that any amendment under this rule "relates back to the original pleadings." Rule 15(c), SCRPC. If there is a question relating to the statute of limitations, "the issue then becomes whether the amended claim was time-barred at the time the action was commenced." Arant v. Kressler, 327 S.C. 225, 228, 489 S.E.2d 206, 208 (1997). The statute of limitations runs "from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. Dean v. Ruscon Corp., 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996)." McAlhany v. Carter, 415 S.C. 54, 63, 781 S.E.2d 105, 110 (Ct. App. 2015), reh'g denied (Jan. 28, 2016). However, "[w]hen there is

conflicting testimony regarding the time of discovery, it becomes an issue for the jury to decide.”

Arant, 327 S.C. at 229, 489 S.E.2d at 208.

In Collins v. Sigmon, 299 S.C. 464, 385 S.E.2d 835 (1989), the S.C. Supreme Court provided helpful guidance regarding motions to amend.

A motion to amend an Answer should be contested primarily by procedural arguments, not arguments concerning the substance and merits of the counterclaims and/or defenses proposed. For example, one might argue that it is too late in the case to allow an amendment, and that prejudice would result from such an amendment. Arguments going to the legal merits of a proposed defense or counterclaim are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56 motion for summary judgment. It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage.

Id. at 466, 385 S.E.2d at 836. See also, City of N. Myrtle Beach, 360 S.C. at 232-33, 599 S.E.2d at 465-66.

Palmetto is entitled to amend the complaint to add a counterclaim. First, Rule 15(a) provides that a motion to amend shall be freely given. Second, there is no prejudice to Zurich. Palmetto put Zurich on notice of allegations of fraud in the original answer, and Palmetto consented to a jury trial. Further, there is no evidence that Zurich does not have adequate time to prepare and defend against the counterclaim. Therefore, both requirements of 15(a) are met.

I also find that Zurich's statute of limitations argument fails based on the plain language of Rule 15(c). Zurich bases its statute of limitations argument on the assertion that Palmetto knew or should have known about the causes of action against Zurich as of the June 17, 2013 letter. However, Rule 15(c) provides that an amendment relates back to the time the original filing, in this case, December 11, 2015. Therefore, for the purposes of this motion, the fact that Palmetto filed the motion to amend more than three (3) years after the letter dated June 17, 2013, is irrelevant. Pursuant to the language in Rule 15(c), the counterclaim would have been appropriate, and could have been asserted at the time the answer was filed.

Further, the question of whether the statute of limitations had run is best left to a motion for summary judgment when all of the facts can be sorted out. At this juncture, the court is not in a position to determine as a matter of law that the statute had run. Since the statute of limitations is a question of fact, that issue is not before the court, and should not be considered in this motion to amend.

Under the circumstances here, there is no basis for denying the motion. Zurich has failed to show how it might be prejudiced by the amendment. Zurich has been on notice since the Defendant filed the original answer that there were issues of fraud and misrepresentation. Further, even if the statute of limitations is a defense available to Zurich, it is free to assert that defense in the answer to the counterclaim and in any subsequent motions for summary judgment. As discussed above, if there is a dispute as to when the statute of limitations began, it is an issue for a later motion.

For all the foregoing reasons, Palmetto's motion to amend the answer to add counterclaims is granted. The amended answer and counterclaims shall be filed within ten (10) days of receipt of this court's order. Plaintiff shall have thirty (30) days to answer upon receipt of the amended answer and counterclaims.

AND IT IS SO ORDERED.

Dated: _____, 2017

9/20

2017

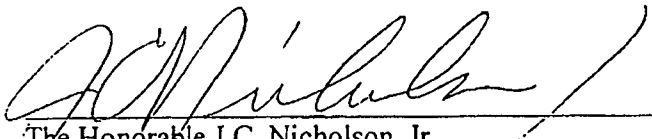

The Honorable J.C. Nicholson, Jr.

EXHIBIT “F”

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CASE NO.: 2015-CP-10-6684

ZURICH AMERICAN INSURANCE
COMPANY OF ILLINOIS,

Plaintiff,

v.

PALMETTO CONTRACT SERVICES,
INC.,

Defendant.

NOTICE OF MOTION AND
MOTION TO AMEND ANSWER AND
ASSERT A COUNTERCLAIM AGAINST
PLAINTIFF

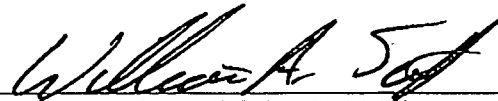
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JUL 18 2 12:39 PM
CLERK OF COURT

TO: LARRY D. COHEN, ESQ. and CAROLYN H. BLUE, ESQ.

YOU PLEASE TAKE NOTICE that the Defendant, Palmetto Contract Services, Inc., by and through its undersigned counsel, pursuant to Rules 13 and 15 of the South Carolina Rules of Civil Procedure, hereby requests that the Court allow the Defendant to amend its Answer and assert a counterclaim against Plaintiff, Zurich American Insurance Company of Illinois ("Zurich"), to conform to the evidence.

Respectfully submitted,

PEDERSEN & SCOTT, P.C.



William A. Scott (SC Bar #15148)

775 St. Andrews Blvd.

Charleston, SC 29407

Tel. (843) 556-5656

Fax. (843) 556-5635

Email: bscott@pslawpc.com

Attorney for Defendant,

Palmetto Contract Services, Inc.

July 12, 2016

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-10-6684

ZURICH AMERICAN INSURANCE
COMPANY OF ILLINOIS,

Plaintiff,

v.

PALMETTO CONTRACT SERVICES,
INC.,

Defendant.

**DEFENDANT'S AMENDED ANSWER
AND COUNTERCLAIM**

The Defendant, Palmetto Contract Services, Inc. (hereinafter "Palmetto"), answering the Complaint of Plaintiff, Zurich American Insurance Company of Illinois (hereinafter "Zurich" or "Plaintiff"), would show as follows:

FOR A FIRST DEFENSE

(General Denial)

1. Any allegations contained in the Plaintiff's Complaint not specifically admitted, denied or otherwise modified are expressly denied and strict proof demanded thereof. To the extent any allegation or part thereof may not be expressly referred to and specifically answered, it is hereby denied and legal proof thereof is requested.

FOR A SECOND DEFENSE

(Specific Responses)

2. Upon information and belief, Palmetto admits Paragraph 1 of the Complaint
3. Palmetto admits the allegations contained in Paragraphs 2 through 5 of the Complaint.
4. Palmetto denies the allegations contained in Paragraph 6 of the Complaint.

5. Palmetto denies the allegations contained in Paragraph 7 of the Complaint as written. Palmetto is not required to pay amounts not due under the terms of the policy.

6. Palmetto denies the allegations contained in Paragraphs 8 through 12 of the Complaint.

FOR A THIRD DEFENSE
(Failure to Mitigate Damages)

7. The Plaintiff has failed to mitigate damages as required by law.

FOR A FOURTH DEFENSE
(Waiver, Estoppel, Laches)

8. The Plaintiff's claims are barred by the doctrine of waiver, estoppel and/or laches.

FOR A FIFTH DEFENSE
(Fraud and Fraud in the Inducement)

9. The Plaintiff's claims are barred as a result of the Plaintiff's fraud and misrepresentations concerning the policy and audit.

FOR A SIXTH DEFENSE
(Full Accord and Satisfaction)

10. The Plaintiff's claims are barred due to full accord and satisfaction by the Defendant.

FOR A SEVENTH DEFENSE
(Setoff)

11. The Plaintiff's claims must be reduced by the amount paid for the value of the work performed.

FOR A EIGHTH DEFENSE AND BY WAY OF A COUNTERCLAIM
(Negligent Representation and Fraud)

12. On or about January 12, 2012, Zurich and Palmetto entered into a contract whereby Plaintiff agreed to provide certain workers' compensation and employer's liability insurance coverage to Palmetto for which the Palmetto agreed to pay the premiums.

13. The agreement entered into between Zurich and Palmetto was similar to agreements entered into between Assurance Company of America, a subsidiary of the Plaintiff, and/or Zurich, for the years 2009 through 2010, 2010 through 2011, and 2011 through 2012.
14. For each of the aforesaid policy periods, Zurich and/or Assurance agreed to provide coverage under NCCI Class Codes 3040, 3040U, 6824F, 6834, 7842, and 8810.
15. During each of the aforesaid policy periods, Zurich and/or Assurance had charged Palmetto premiums and assigned employees to the different class codes, specifically including 3046.
16. In connection with the policy period for 2012 through 2013, Zurich represented that it would provide insurance and invoice Palmetto based on the class codes set forth in the agreement, as it had done during the previous three policy periods.
17. On or around April 4, 2013, after the policy period, Zurich performed an audit of Palmetto's books.
18. The audit was performed by Evelyn Wyatt on behalf of Zurich.
19. The audit summary separated the work performed by Palmetto into different work categories corresponding to the different class codes, including workers under class codes 3040, 6824F, 8742, and 8810, as it had done during previous policy periods.
20. The audit summary was provided to Palmetto on or around April 4, 2013.
21. On or around April 6, 2013, Zurich revised the audit summary and took all of the labor originally classified under 3040 and added it under code 6824F and made a minor change to the work under class code 8810.
22. The summary of audit review from Zurich review states that, "Class code 3040 does not apply to [Palmetto's] operations."

23. During the policy periods of 2009 through 2010, 2010 through 2011, 2011 through 2012, Zurich and/or its subsidiaries took the position that class code 3040 did apply to Palmetto's operations.
24. In 2012, Assurance Company of America, a subsidiary of Zurich (hereinafter "Assurance"), filed a complaint, case no. 2012-CP-10-284, in which it took the position that a portion of Palmetto's operations were covered under class code 3040.
25. On or around June 18, 2013, Zurich invoiced Palmetto \$158,744.00, as a result of the revised audit and the change from listing work under 6824F as opposed to 3040.
26. The representation that Zurich would properly classify people under 3040 and bill Palmetto accordingly was false.
27. The representations in the agreement including that Zurich would classify work under 3040 and invoice Palmetto accordingly were material.
28. Zurich knew the representations in the agreement were false.
29. Zurich intended that the representations be acted upon.
30. Palmetto did not know that the representations were false, and relied on the representations as set forth in the agreement.
31. Zurich had a pecuniary interest in making the false representations as set forth herein.
32. Zurich had a duty of due care to provide truthful information to Palmetto, and breached its duty by failing to properly communicate information regarding class codes to Palmetto, and changing the audit in direct violation of the contract requirements and prior dealings with the parties.
33. Palmetto had a right to rely on the representations in the agreement and on the prior dealings with Zurich and its subsidiaries regarding the classification of employees.

34. As a direct and proximate result of the aforesaid negligent misrepresentations and fraud, which were intentional, willful, reckless, and grossly negligent, Palmetto has been overbilled, and has incurred actual, incidental, and unspecified damages all in the amount to be determined by the trier of fact.

FOR A NINTH DEFENSE AND BY WAY OF A COUNTERCLAIM
(Breach of Contract)

35. Zurich breached the contract by failing to classify operations properly and improperly billing Palmetto.
36. As a direct and proximate result of the breach of contract, Zurich overbilled Palmetto, and Palmetto is entitled to a refund for actual damages in an amount to be determined by the trier of fact.

RESERVATION AND NON-WAIVER

Palmetto reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, the Defendant, Palmetto Contract Services, Inc., requests that the Court issue an Order dismissing the Plaintiff's Complaint with prejudice, and for judgment against the Plaintiff in excess of \$100,000.00, for actual, incidental, and consequential damages, for punitive damages in an amount to be determined by the trier of fact, for the cost of this action and for such and further relief as this Court deems just and proper.

[SIGNATURE ON NEXT PAGE]

Respectfully submitted,

PEDERSEN & SCOTT, P.C.

William A. Scott (SC Bar #15148)
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Fax. (843) 556-5635
Email: bscott@pslawpc.com
*Attorney for Defendant,
Palmetto Contract Services, Inc.*

July 12, 2016

EXHIBIT “G”

1 STATE OF SOUTH CAROLINA)
 2 COUNTY OF CHARLESTON) Court of Common Pleas
) Case No. 2015-CP-10-06684
 3 _____)
 4 ZURICH AMERICAN INSURANCE)
 COMPANY OF ILLINOIS,)
 5 Plaintiff,)
 6 vs.) Transcript of Record
 7 PALMETTO CONTRACT SERVICES, INC.)
 8 Defendant.) DATE: March 6, 2018
 9 _____)

10 B E F O R E:

11 THE HONORABLE KRISTI LEA HARRINGTON
12

13
14 A P P E A R A N C E:

15 LARRY COHEN and CAROLYN BLUE
16 Attorney for the Plaintiff

17 WILLIAM A. SCOTT
18 Attorney for the Defendant

19
20 Karen V. Andersen, RMR, CRR
Circuit Court Reporter
21
22
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24
25

1 THE COURT: Good afternoon. How are you?

2 MR. SCOTT: Pretty well.

3 THE COURT: Good. What are we doing here today?

4 MR. SCOTT: Your Honor, we are here, I think, on
5 three motions. This is Zurich case against Palmetto
6 Contracting. I represent Palmetto. I had filed a motion to
7 withdraw. I was able to work things out with my client this
8 morning, and that was withdrawn.

9 THE COURT: You are withdrawing your motion to
10 withdraw?

11 MR. SCOTT: Yes, Your Honor. There was also a
12 motion to quash a notice of a 30(b)(6) deposition. That is
13 also withdrawn. I filed that because it was filed while --
14 when I did not think I would be continuing to represent
15 Palmetto. So my two motions are withdrawn.

16 THE COURT: All right.

17 MR. SCOTT: And the motion -- I received a notice
18 of that 30(b)(6) deposition to take place in April. I think
19 the only other motion is a motion by Zurich to strike a
20 demand for a jury trial in my amended answer and
21 counterclaim.

22 THE COURT: All right. Thank you.

23 MR. COHEN: Hi, Your Honor. I'm Larry Cohen. I
24 represent plaintiff Zurich Insurance Company, along with my
25 co-counsel, Carolyn Blue. Can we proceed with our motion?

1 THE COURT: Sure.

2 MR. COHEN: My client filed this motion because the
3 time for the defendant to demand a jury trial passed in
4 February 2016, 10 days after it filed its initial answer.
5 After filing its initial answer, approximately five months
6 later, the defendant filed a motion to amend its complaint
7 and attached a copy of the proposed -- I'm sorry, amended
8 answer, and asserted a counterclaim along with its answer.

9 In September, I think it was September 2017, the
10 answer to amend or the motion to amend the answer and assert
11 a counterclaim was granted. At that time, the first time,
12 defendant put a notation on its amended answer and
13 counterclaim, the words "jury trial", no actual demand for a
14 jury trial as required by Rule 38.

15 And the other problem with the defendant's request
16 for a jury trial is that it's based on the same issues that
17 were raised previously in its initial answer to the
18 plaintiff's complaint. In fact, if you look at Judge
19 Nichols's (sic) order granting the motion to amend, he
20 references one of the reasons he's granting the defendant's
21 motion to amend is that there's no surprise because it's
22 based on the same facts as in the original answer, which
23 were affirmative defenses for misrepresentation and fraud.

24 So we don't believe that the defendant is entitled
25 to a jury trial because it's waived. It's waived its right

1 to a jury trial by failing to file the request timely. And
2 just because they filed amended answers and counterclaims,
3 it doesn't resuscitate their right to request a jury trial.

4 THE COURT: All right. Mr. Scott.

5 MR. SCOTT: Your Honor, I sort of find this whole
6 motion strikingly odd, because when we argued, or Ms. Blue
7 argued against the motion to amend in front of Judge
8 Nicholson, she actually argued that it would be prejudicial
9 to grant that motion to amend because they couldn't ask for
10 a jury trial. And in the order, I consented and said, we
11 will consent to a jury trial.

12 THE COURT: I thought that's what it says on page 3
13 of the order, that jury trial was consented to.

14 MR. COHEN: Yes, Your Honor. Part of our argument
15 was that it would be prejudicial to our client to not be
16 able to even consider being able to request a jury trial,
17 but we never actually requested or demanded a jury trial in
18 writing or verbally.

19 THE COURT: If we were here -- you were here in
20 front of Judge Nicholson and, evidently, somebody stated
21 that there was a consent to a jury trial or wouldn't have
22 been an order --

23 MR. COHEN: Well, what happened was, we argued that
24 the motion to amend was prejudicial to our case. And one of
25 the reasons was because our time had passed of requesting a

1 jury trial. But we made clear that we were not requesting a
2 jury trial.

3 Well, at that hearing, Mr. Scott stood up and said,
4 well, we will consent to the jury trial. But we never
5 actually requested a jury trial. So when you read that, you
6 have to read it in the light that we didn't request it, but
7 that Mr. Scott consented to something that we never
8 requested. It was just an issue raised to show possible
9 prejudice to our client.

10 MR. SCOTT: Your Honor, while I find that odd, I
11 don't think that's the determinative issue in this case.

12 THE COURT: All right.

13 MR. SCOTT: A party is entitled to a jury trial as
14 a matter of right. And your decision here is really
15 discretionary. We agree that the case in here that rules is
16 *King v. Shorter*. If I may, it's cited in their memorandum.
17 And it's what I have, would rely on also.

18 Your Honor, what's interesting is, if -- it's your
19 discretion. If you grant this motion, this matter is
20 immediately appealable. If you deny their motion, it's not
21 appealable. And that's only significant to trying to get
22 this thing resolved. I would have to appeal it just because
23 of the issues. However, if you look at Rule 38(b) in *King*
24 *v. Shorter*, the operative language that *King* states is, does
25 the amended counterclaim create new issues of fact? And

1 that's really what the case is all about.

2 The original complaint or answer did not assert a
3 counterclaim. It asserted an offense of fraud and
4 misrepresentation. The amended complaint asserts a
5 complaint for breach of contract and affirmative claim for
6 fraud and negligent misrepresentation. And there are
7 damages, including actual and consequential damages and
8 punitive damages, all of which are issues of fact or new
9 issues of fact that were not in the original pleading.

10 And, therefore, I believe the rule is, we can ask
11 for that when we amend the complaint. That is what the *King*
12 *v. Shorter* case says. And that's what we are relying on.

13 THE COURT: So wasn't that what you argued in front
14 of Judge Nicholson and, in essence, it was the consent?

15 MR. SCOTT: I consented and said, yes, they want a
16 jury trial, we will have a jury trial.

17 MR. COHEN: Judge, he didn't argue -- he didn't
18 even request a jury trial until he filed his formal amended
19 answer and counterclaim. There was no issue about him
20 requesting or his client requesting a jury trial in any of
21 his motions prior to the time period until after Judge
22 Nichols (sic) granted that. So that wasn't even an issue.

23 In fact, we weren't even given the opportunity by
24 the defendant to review the proposed order submitted to the
25 judge before it was submitted. It was submitted at 6:45 in

1 the morning by e-mail to the court. So we didn't even --

2 THE COURT: But you did have an opportunity to file
3 a motion to reconsider a final order, right?

4 MR. COHEN: We could have, yes, but we didn't.
5 Well, at that time, there was no issue about a jury demand.
6 So that wasn't an issue. And the fact that the defendant is
7 now seeking a -- instead of having affirmative defenses of
8 negligence -- I'm sorry, negligent misrepresentation,
9 misrepresentation, fraud, versus having a counterclaim on
10 the same issues, it's still the same facts. The facts
11 haven't changed. There are no new facts in this case. And
12 new facts are the basis for Mr. Scott's client being able to
13 assert a demand for a jury trial.

14 MR. SCOTT: Your Honor, just briefly, the new facts
15 include breach of contract claim that was not asserted in
16 the original answer, the damages. Even if you assume for
17 the purpose of this argument that the facts are the same for
18 the negligence and fraud in the defense, versus affirmative
19 claims, the damages are clearly different and are issues for
20 a jury. And the issue of whether punitive damages are
21 appropriate, those are clearly issues for the jury.

22 MR. COHEN: But the damages are still based on
23 facts arising from alleged misrepresentation and fraud..

24 THE COURT: Who do you want to decide your issues?

25 MR. COHEN: We want the Court to.

1 THE COURT: Ms. Blue, anything you wish tell you
2 the Court?

3 MS. BLUE: Your Honor, I think that there's been
4 some misunderstanding. I argued before Judge Nicholson the
5 fact that we wanted to be able to look at the option of a
6 jury trial. And I didn't want our client to be prejudiced.
7 I did not request a jury trial. And Judge Nicholson
8 understood that. I have not been able to get a transcript;
9 otherwise, we would have submitted that.

10 But what happened was, opposing counsel submitted
11 the order to the court without our being able to see it in
12 advance. And it was submitted at 6:42 a.m. on October the
13 5th. As soon as I saw it at 9:33 that morning, I e-mailed
14 opposing counsel to say that was not the language that had
15 been agreed to in the courtroom and what Judge Nicholson
16 said.

17 I copied -- because I was so concerned about it --

18 THE COURT: It was filed in September, not October.
19 I'm sorry.

20 MS. BLUE: Right. But October the 5th is when
21 opposing counsel submitted the order. I'm sorry. He
22 submitted the order without giving it to us to review what
23 it meant. And I immediately e-mailed him and copied Carolyn
24 Leonard, as well as Judge Nicholson, to make sure --
25 normally, I would not copy the court. But I was so

1 concerned that the order -- we had not seen it in advance,
2 and it said consented to a jury trial. And that was not
3 what was agreed to.

4 And my co-counsel here attempted to call Judge
5 Nicholson's law clerk. And Judge Nicholson's law clerk said
6 Judge Nicholson already signed the order. And we were just
7 like, oh, my gracious, because we had not seen an advanced
8 copy or had not been given it until it was submitted at 6:45
9 in the morning.

10 And so that's where I think there has been some
11 confusion. But I argued that we wanted to have the option.
12 We didn't want to be prejudiced, but I did not make a
13 written demand for a jury trial.

14 THE COURT: Anything else, Mr. Scott?

15 MR. SCOTT: Your Honor, I just will say that Judge
16 Nicholson asked that we submit an order, proposed order. I
17 did. At the same time I submitted to him, I submitted it to
18 opposing counsel. They didn't like it. They told the judge
19 that. The judge opted, for whatever reason, to sign the
20 order I presented. And that's where we are, Your Honor.

21 THE COURT: All right. I will take the matter
22 under advisement. Good luck to you both. Thank you.

23 MR. SCOTT: Your Honor, I will be out of the
24 country for the next -- pretty much until the end of this
25 month. So I'm just -- if there's something that comes up,

1 you won't be able to get in touch with me.

2 THE COURT: All right. . Thank you.

3 MR. SCOTT: Thank you very much.

4 (Whereupon, proceedings are adjourned.)

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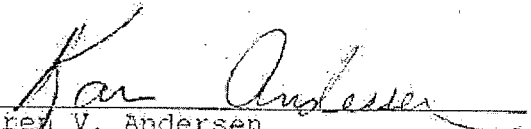
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CERTIFICATE OF REPORTER

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I, Karen V. Andersen, Registered Merit Reporter,
Certified Realtime Reporter for the State of South Carolina
at Large, do hereby certify that the foregoing transcript is
a true, accurate and complete Transcript of Record of the
proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.


Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter