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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

IN CASE NO. 15-CP-10-6684, THE HONORABLE KRISTI LEA HARRINGTON

Case No. 2018-000692

Zurich American Insurance Company of Illinois,Respondent,

v.

Palmetto Contract Services, Inc.Appellant.

RECORD ON APPEAL

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JUL 30 2019

SC Court of Appeals

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**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

IN CASE NO. 15-CP-10-6684, THE HONORABLE KRISTI LEA HARRINGTON

Case No. 2018-000692

Zurich American Insurance Company of Illinois,Respondent,

v.

Palmetto Contract Services, Inc.Appellant.

RECORD ON APPEAL

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Attorneys for Respondent

July 25, 2019

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-6684

ZURICH AMERICAN INSURANCE COMPANY
OF ILLINOIS,
 PLAINTIFF(S)

PALMETTO CONTRACT SERVICES, INC.

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> 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), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; 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.

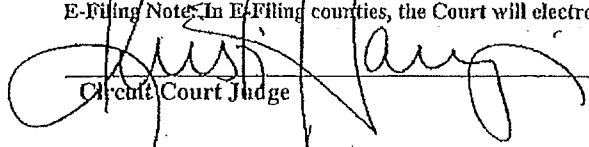
IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Defendant's Motion for Withdrawal of Appearance, filed 1/12/18, is granted. Defendant shall have 30 days from the date of this Order to obtain new counsel. Plaintiff's Motion to Strike Defendant's Jury Trial Demand is granted pursuant to SCRPC 38(d) and *King v. Shorter*, 291 S.C. 501. The counterclaims raised in Defendant's Amended Pleading do not create new issues of fact.

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.
 E-filing Note: In E-filing counties, the Court will electronically sign this form using a separate electronic signature page.


 Circuit Court Judge

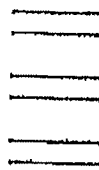
2151
 Judge Code

3/8/18
 Date

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 100
CHARLESTON, SC 29401-2288
RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org



48



RECEIVED JAN 17 2017

WILLIAM A. SCOTT
775 SAINT ANDREWS BLVD
CHARLESTON SC 29407-7167

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/defnt not to amend answer is taken under advisement

CASE NO: 2015CP1006684

Zurich American Insurance Company Of Illinois VS Palmetto Contract Services Inc

This judgment was entered on the 06th day of January, 2017, and notice mailed first class on Tuesday, January 10, 2017, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2015- CP-10-6684

ZURICH AMERICAN INSURANCE COMPANY OF ILLINOIS

PALMETTO CONTRACT SERVICES INC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> 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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 42, SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; 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

FILED
 2017 JAN -6 PM 11:28
 CLERK OF COURT
 CHARLESTON COUNTY
 SOUTH CAROLINA

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; Defendant motion to amend answer (07/18/2016) is taken under advisement and parties will submit proposed orders.

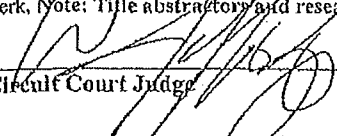
ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC 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)
n/a		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

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 2156

Date 6 Jan 2017

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:

Carolyn Blue

William Scott

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Karen Anderson

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

gm
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.

gm
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.

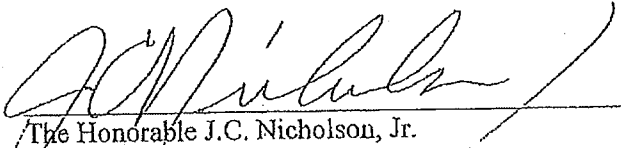
I also find that Zurich's statute of limitations argument fails based on the plain language of Rule 15(c). Zurich bases its statute of limitations argument on the assertion that Palmetto knew or should have known about the causes of action against Zurich as of the June 17, 2013 letter. However, Rule 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.


The Honorable J.C. Nicholson, Jr.

Dated: 9/20, 2017

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 ZURICH AMERICAN INSURANCE)
 COMPANY OF ILLINOIS,)
)
 Plaintiff,)
)
 vs.)
)
 PALMETTO CONTRACT SERVICES,)
 INC.,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 CASE NUMBER 2015-CP-10-12684

VERIFIED COMPLAINT
 (Breach of Contract)
 (Non-Jury)

 COPY

2015 DEC 11 PM 1:46
 CLERK OF COURT

Now comes Plaintiff Zurich American Insurance Company of Illinois (Zurich) complaining of Defendant Palmetto Contract Services, Inc. ("Palmetto"), and shows the court as follows:

1. Plaintiff Zurich is an Illinois Corporation authorized to do business in South Carolina.
2. Plaintiff is informed and believes that Defendant Palmetto is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business located in Charleston County, South Carolina.
3. This Court has subject matter jurisdiction and venue is proper by virtue of §15-07-30, S.C. Code Ann. (1976).
4. On or about February 20, 2012, Plaintiff Zurich and Defendant Palmetto entered into a contract whereby Plaintiff Zurich agreed to provide certain workers compensation and employers liability insurance coverage to Defendant Palmetto, for which Defendant Palmetto agreed to pay the premiums.
5. Plaintiff Zurich issued Workers Compensation and Employers Liability Insurance

Policy WC9595139-02 (the "Policy"), with coverage for the time period February 20, 2012 through February 20, 2013.

6. After a premium audit, it was determined that an additional premium amount was owed by Defendant Palmetto to Plaintiff Zurich for the insurance coverage provided.

7. Based on the terms of Policy, Defendant Palmetto is required to pay all premiums when due, including audit and retrospective premiums.

8. After all offsets and credits, Defendant Palmetto owes Plaintiff Zurich for past due audit premiums in the amount of One Hundred Fifty-Eight Thousand Seven Hundred Forty-Four and 00/100 (\$158,744.00) Dollars as of June 18, 2013. A true and correct copy of the "Final Invoice" is attached hereto as Exhibit "A" and incorporated herein by reference.

9. Demand has been made by Plaintiff Zurich on Defendant Palmetto but Defendant Palmetto has failed and refused to pay as agreed.

10. The amount of Plaintiff Zurich's claim is based on an agreement as to a sum certain amount.

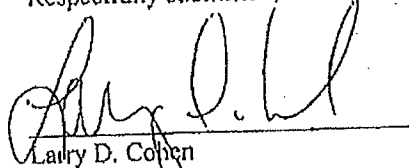
11. Plaintiff Zurich is informed and believes that it is entitled to interest on the unpaid balance of \$158,744.00, after June 18, 2013 to the date of entry of judgment, at the rate of 8.75% per annum, as provided for in S.C. Code Ann. §34-31-20 (1976).

12. All conditions precedent to Plaintiff Zurich's recovery of judgment against Defendant Palmetto have been performed or have occurred.

WHEREFORE, Plaintiff Zurich prays that this Court grant judgment in its favor against Defendant Palmetto in the following particulars:

- a. For the unpaid principal amount of \$158,744.00;
- b. For accrued interest after June 18, 2013 to the date of the entry of judgment, calculated at the rate of 8.75% per annum, on the unpaid principal amount;
- c. The costs and disbursements of this action;
- d. Post-judgment interest at the prevailing statutory rate; and
- e. Any other relief to which Plaintiff Zurich may show itself entitled.

Respectfully submitted,



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Larry D. Cohen, LLC
Attorneys at Law
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Charleston, South Carolina 29417
Phone: (843) 225-4445
Fax: (843) 225-2009
ldcohen@ldcohenlaw.com

John J. O'Brien
Attorney at Law
4862 Marshwood Drive
Hollywood, SC 29449
Tel. (843) 571-0407
lionsthree@aol.com

ATTORNEYS FOR PLAINTIFF
ZURICH AMERICAN INSURANCE
COMPANY OF ILLINOIS

Charleston, South Carolina
December 11, 2015

EXHIBIT "A"

P.O. BOX 5387
Jacksonville, FL 32247-5387

INVOICE

AGENT: ALL RISKS, LTD
CODE: 09178000



ZURICH

PAYOR NAME AND ADDRESS

PALMETTO CONTRACT SERVICES INC
616 KING STREET
MOUNT PLEASANT, SC 29464

JUNE 03, 2013

ACCOUNT NUMBER
M019382706-001-00001

ACCOUNT NAME
PALMETTO CONTRACT SERVICES INC

The above account is no longer active. However, a premium amount of \$158,744.00 is still due. We would like to bring closure to your account in a timely and positive manner.

To avoid possible credit bureau reporting, your payment must be received in our office no later than 06/18/13. Please use the enclosed envelope to send your payment with the coupon below.

If you dispute the amount owed, please advise us in writing by the due date of this invoice at the following address: P.O. Box 10400, Jacksonville, FL 32247-0400.

If you have any questions about your account, please call our Customer Accounting Department at 1-800-332-6611 between the hours of 7:30 a.m. and 7:30 p.m. Eastern Time Monday through Friday.

Policy Number	Coverage Dates	Premium Type	Amount Due
NC 959E139	02/20/12 - 02/20/13	AUDIT	\$158,744.00

UNPAID FEES \$0.00

PLEASE DETACH AND RETURN THIS PORTION WITH YOUR PAYMENT

ACCOUNT NUMBER	DUE DATE	TOTAL AMOUNT DUE
M019382706-001-00001	06/18/13	\$158,744.00
PAYOR NAME	PALMETTO CONTRACT SERVICES INC	
		AMOUNT ENCLOSED
		\$

PLEASE INCLUDE YOUR ACCOUNT NUMBER ON YOUR CHECK

Make Check Payable To:

ZURICH NORTH AMERICA
PO BOX 4664
CAROL STREAM, IL 60197-4664



130000000158744002000000000001938270600100001030016

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
ZURICH AMERICAN INSURANCE)
COMPANY OF ILLINOIS,)
)
Plaintiff,)
)
PALMETTO CONTRACT SERVICES,)
INC.,)
)
)
Defendant.)


IN THE COURT OF COMMON PLEAS
CASE NUMBER 2015-CP-10-16684

VERIFICATION

 COPY BY

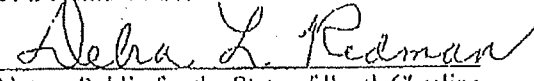
2015 DEC 11 PM 12:48
CLERK OF COURT

The undersigned, having been duly sworn, deposes and says that he is an attorney for Plaintiff Zurich American Insurance Company of Illinois, and as such, he has read the foregoing Summons and Verified Complaint and he knows the facts stated therein to be true of his own knowledge, except to those matters stated upon information and belief and as to those matters he believes them to be true.



Larry D. Cohen
Attorney for Plaintiff

SWORN to before me this 11th Day
of December 2015



Notary Public for the State of South Carolina
My Commission Expires: 5/7/17

COPY

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 ANSWER TO
PLAINTIFF'S COMPLAINT

FILED
2016 FEB 16 PM 4:15
JULIE ANN SHAW
CLERK OF COURT
SC

The Defendant, Palmetto Contract Services, Inc. (hereinafter "Palmetto"), answering the Complaint 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.

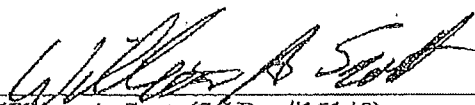
RESERVATION AND NON-WAIVER

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., prays that the Complaint be dismissed with prejudice, attorney's fees as may be allowed at law, the cost of defending this action, and for such other and further relief as this Court deems just and proper.

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.

February 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.

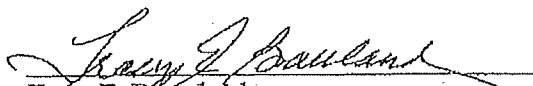
CERTIFICATE OF SERVICE

FILED
2016 FEB 15 PM 4:15
COURT OF COMMON PLEAS
BY

The undersigned paralegal at Pedersen & Scott, P.C., hereby certifies that a copy of the Defendant's Answer to Plaintiff's Complaint in the above-captioned action has been placed in an envelope, prepaid, addressed and mailed via US Mail to:

Larry D. Cohen, Esq.
Larry D. Cohen, LLC
P.O. Box 30547
Charleston, SC 29417
ldcohen@ldcohenlaw.com

John J. O'Brien, Esq.
4862 Marshwood Drive
Hollywood, SC 29449
lionsthree@aol.com


Tracy B. Braceland
Paralegal

Dated this 12th day of February, 2016

COPY

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
(Jury Trial)

2015 SEP 29 AM 10:50
CLERK OF COURT
COURT OF COMMON PLEAS
CHARLESTON COUNTY

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

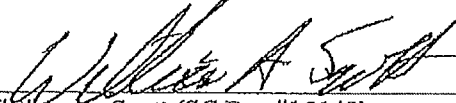
Palmetto reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

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)

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.

September 27, 2017

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.,

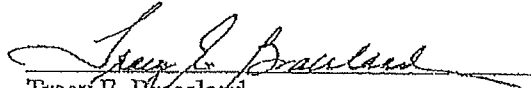
Defendant.

CERTIFICATE OF SERVICE

The undersigned paralegal at Pedersen & Scott, P.C., hereby certifies that a copy of the Defendant's Amended Answer and Counterclaim in the above-captioned action has been placed in an envelope, prepaid, addressed and mailed via US Mail to:

Larry D. Cohen, Esq.
Larry D. Cohen, LLC
P.O. Box 30547
Charleston, SC 29417

Carolyn H. Blue, Esq.
P.O. Box 30845
Charleston, SC 29417


Tracy E. Braceland
Paralegal

Dated this 27th of September, 2017

 COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON	)	CASE NUMBER 2015-CP-10-6684
)	
ZURICH AMERICAN INSURANCE)	
COMPANY OF ILLINOIS,	)	PLAINTIFF ZURICH
	)	AMERICAN INSURANCE
Plaintiff,	)	COMPANY'S REPLY TO
	)	DEFENDANT'S AMENDED
	)	ANSWER AND COUNTER-
PALMETTO CONTRACT SERVICES,	)	CLAIM
INC.,)	
)	
Defendant.)	

Plaintiff Zurich American Insurance Company of Illinois ("Zurich") files this its Reply to the Amended Answer and Counterclaim filed by Defendant Palmetto Contract Services, Inc.

("Palmetto") and replies as follows:

FIRST DEFENSE

1. All allegations contained in Palmetto's Amended Answer and Counterclaim (collectively referred to as "Counterclaim") not specifically admitted by Zurich are denied.
2. Paragraphs 1 through 11 of Palmetto's Counterclaim are Palmetto's amended answer to Zurich's Verified Complaint and do not require a response from Zurich. However, to the extent that Paragraphs 1 through 11 are inconsistent with Zurich's Verified Complaint, reply and affirmative defenses asserted herein, Zurich denies the allegations in Paragraphs 1 through 11.
3. Zurich admits Paragraph 12 of Palmetto's Counterclaim.
4. Zurich denies Paragraphs 13, 14, 15, 16, 17, 18 and 19 of Palmetto's Counterclaim.
5. Zurich admits Paragraph 20 of Palmetto's Counterclaim.
6. Zurich denies Paragraphs 21, 22 and 23 of Palmetto's Counterclaim.
7. Zurich admits Paragraph 24 of Palmetto's Counterclaim.

8. Zurich admits in Paragraph 25 of Palmetto's Counterclaim that it invoiced Palmetto for \$155,744.00, but denies the remainder of Paragraph 25.

9. Zurich denies Paragraphs 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 of Palmetto's Counterclaim.

10. The remainder of the Counterclaim is Palmetto's prayer for relief, to which no reply is required. However, to the extent that Palmetto's prayer for relief is inconsistent with Zurich's Verified Complaint, Reply and affirmative defenses asserted herein, Zurich denies Palmetto's prayer for relief.

AFFIRMATIVE DEFENSES

SECOND DEFENSE

11. Zurich incorporates the allegations of its previous defenses which are consistent with this defense.

12. Some or all of Palmetto's claims are barred because of Palmetto's failure to state a claim upon which relief can be granted.

THIRD DEFENSE

13. Zurich incorporates the allegations of its previous defenses which are consistent with this defense.

14. Some or all of Palmetto's claims are barred by misrepresentation.

FOURTH DEFENSE

15. Zurich incorporates the allegations of its previous defenses which are consistent with this defense.

16. Some or all of Palmetto's claims are barred by fraud.

FIFTH DEFENSE

17. Zurich incorporates the allegations of its previous defenses which are consistent with this defense.

18. Some or all of Palmetto's claims are barred by equitable estoppel.

SIXTH DEFENSE

19. Zurich incorporates the allegations of its previous defenses which are consistent with this defense.

20. Some or all of Palmetto's claims are barred by the applicable statute of limitations.

SEVENTH DEFENSE

21. Zurich incorporates the allegations of its previous defenses which are consistent with this defense.

22. Some or all of Palmetto's claims are barred by the doctrines of estoppel, waiver and release.

EIGHTH DEFENSE

23. Zurich incorporates the allegations of its previous defenses which are consistent with this defense.

24. Some or all of Palmetto's claims are barred by laches.

NINTH DEFENSE

25. Zurich incorporates the allegations of its previous defenses which are consistent with this defense.

26. If Palmetto suffered damages as alleged in its Counterclaim (which damages Zurich

specifically denies), this incident and Palmetto's resulting damages, if any, were caused solely by the negligent, grossly negligent, reckless, wilful and wanton or intentional conduct on the part of Palmetto in failing to exercise the degree and care of caution that a reasonably prudent person would have used under the circumstances then and there existing.

27. Zurich alleges that this negligent grossly negligent, reckless, wilful and wanton or intentional conduct on the part of Palmetto is the sole proximate cause of the incident and Palmetto's alleged injuries and damages. Accordingly, Palmetto's counterclaims against Zurich are barred.

TENTH DEFENSE

28. Zurich incorporates the allegations of its previous defenses which are consistent with this defense.

29. Zurich denies that Palmetto has incurred any damages. However, as to any damages Palmetto alleges were incurred, Palmetto voluntarily and knowingly assumed the risk, therefore, Palmetto is not entitled to recover from Zurich.

ELEVENTH DEFENSE

30. Zurich incorporates the allegations of its previous defenses which are consistent with this defense.

31. Palmetto's claims are barred, in whole or in part, by the comparative negligence of Palmetto; in the alternative, any award to Palmetto should be reduced by the percentage that Palmetto's conduct caused its damages.

TWELFTH DEFENSE

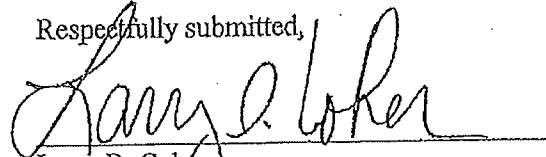
32. Zurich incorporates the allegations of its previous defenses which are consistent with this defense.

33. If Palmetto suffered damages as alleged in its Counterclaim (which damages Zurich specifically denies), the alleged damages did not result, directly or indirectly, from any act or omission of Zurich. Any damages alleged by Palmetto, resulted from the acts or omissions of persons other than Zurich, and Zurich is in no way liable for the alleged damages.

WHEREFORE, PREMISES CONSIDERED, Plaintiff Zurich prays as follows:

1. That Defendant Palmetto have and recover nothing from Plaintiff Zurich and that Palmetto's Counterclaim be dismissed with prejudice;
2. That the costs of this action be taxed to Defendant Palmetto; and
3. That the Court order such other and further relief as it deems just and proper.

Respectfully submitted,



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ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
October 26, 2017

1	STATE OF SOUTH CAROLINA)	
		)	Court of Common Pleas
2	COUNTY OF CHARLESTON	)	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: 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.

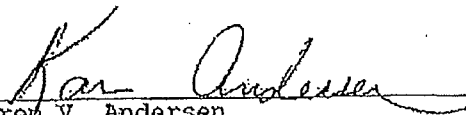
23 (Whereupon, proceedings are adjourned.)
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CERTIFICATE OF REPORTER

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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

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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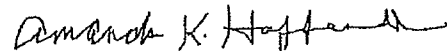
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I, the undersigned, Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings 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



Circuit Court Reporter

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1	STATE OF SOUTH CAROLINA)	
)	Court of Common Pleas
2	COUNTY OF CHARLESTON)	Case No. 2015-CP-10-06684
)	
3)	
	ZURICH AMERICAN INSURANCE)	
4	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

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Karen V. Andersen, RMR, CRR
Circuit Court Reporter

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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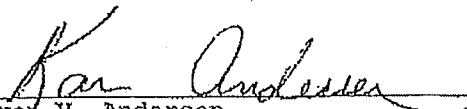
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CERTIFICATE OF REPORTER

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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

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

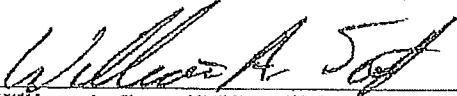
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TO: LARRY D. COHEN, ESQ. and CAROLYN H. BLUE, ESQ.

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.


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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.

CERTIFICATE OF SERVICE

FILED
2016 JUL 19 PM 12:39
CLERK OF COURT
SOUTH CAROLINA

The undersigned paralegal at Pedersen & Scott, P.C., hereby certifies that a copy of the Notice of Motion and Motion to Amend Answer and Assert a Counterclaim Against Plaintiff in the above-captioned action has been placed in an envelope, prepaid, addressed and mailed via US Mail to:

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Tracy E. Beaceland
Paralegal

Dated this 12th day of July, 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)
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.

CERTIFICATE OF SERVICE

The undersigned paralegal at Pedersen & Scott, P.C., hereby certifies that a copy of the Defendant's Amended Answer and Counterclaim in the above-captioned action has been placed in an envelope, prepaid, addressed and mailed via US Mail to:

Larry D. Cohen, Esq.
Larry D. Cohen, LLC
P.O. Box 30547
Charleston, SC 29417

Carolyn H. Blue, Esq.
P.O. Box 30845
Charleston, SC 29417

Tracy E. Braceland
Paralegal

Dated this 12th day of July, 2016

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CASE NUMBER 2015-CP-10-6684
ZURICH AMERICAN INSURANCE)	
COMPANY OF ILLINOIS,)	
Plaintiff,)	
)	
PALMETTO CONTRACT SERVICES,)	
INC.,)	
Defendant.)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION TO AMEND AND FILE COUNTERCLAIM

NOW comes Plaintiff Zurich American Insurance Company of Illinois ("Zurich"), and files this its response in opposition to the Motion to Amend Answer and Counterclaim filed by Defendant Palmetto Contract Services, Inc. ("Palmetto"), and shows the Court as follows:

1. Zurich filed its Summons and Complaint alleging breach of contract against Palmetto on December 12, 2015.
2. Palmetto was served with Zurich's Summons and Complaint, First Set of Interrogatories, First Requests for Admission and First Request for Production of Documents and Things on January 14, 2016.
3. Palmetto served its Answer to Zurich's Summons and Complaint on February 12, 2016.
4. On July 12, 2016, Palmetto moved pursuant to Rules 13 and 15 SCRPC to amend its Answer and assert a counterclaim against Zurich (the "Motion"). Palmetto seeks to amend its Answer to assert counterclaims against Zurich for negligent misrepresentation, fraud and breach of

contract.

5. Palmetto's Motion should be denied by this Court based on at least three grounds: (1) the basis alleged by Palmetto for asserting counterclaims does not exist; (2) the causes of action alleged by Palmetto in its Counterclaim are barred by South Carolina's three-year statute of limitation; and (3) Palmetto has failed to comply with Rule 13(f) SCRCF.

**NO EVIDENCE HAS BEEN
SHOWN TO EXIST NECESSITATING
PALMETTO TO CONFORM ITS PLEADINGS**

6. Palmetto requests in its Motion that ". . . the Court allow it to amend its Answer and assert a counterclaim [against Zurich] to conform to the evidence." Palmetto has failed to submit any evidence to the Court that support the allegations in Palmetto's proposed Counterclaim (the "Counterclaim"). In Paragraphs 12 through 36 of its Counterclaim, Palmetto alleges negligent misrepresentation, fraud and breach of contract against Zurich. Palmetto's allegations are apparently based upon amendments made by Zurich to Workers Compensation Insurance Policy No. WC 9595139-02 (the "Policy"). The Policy has a coverage period from February 12, 2012 to February 12, 2013. The Policy is referred to in Palmetto's Counterclaim as the contract or agreement. Whether or not Palmetto read or reviewed the Policy during the policy period, the terms of the Policy explicitly state that the classifications, rates and premiums are subject to change. Based on the terms of the Policy, amendments were made by Zurich to the Policy's Information Page, Item 4, Classification of Operations. The amendments to the Policy complained of by Palmetto are anticipated under the terms of the Policy. The Policy provides notice to Palmetto of the possibility of amendments to the Policy. The portion of the Policy on Page 5, entitled, "Part Five-Premium,

Section B, Classifications," reads as follows:

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an *estimate* of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy. [emphasis added]

Based on Part 5, Section B of the Policy, Palmetto was on notice that at the end of the policy period that the estimated classifications, rates and premiums may change. The following excerpts from the Policy are attached hereto as Exhibit "1," and incorporated herein by reference: the "Information Page, Item 4"; and Page 5, Part Five-Premium, Section B, entitled, "Classifications." Based on the language of the Policy, the Court should deny Palmetto's Motion.

**PALMETTO'S COUNTERCLAIMS ARE
BARRED BY SOUTH CAROLINA'S THREE-YEAR
STATUTE OF LIMITATION**

7. Palmetto asserts counterclaims against Zurich for negligent misrepresentation, fraud and breach of contract (collectively referred to as the "Counterclaims"). The Counterclaims are barred by S.C. Code Ann. § 15-3-530 (1976). Actions for fraud, negligent misrepresentation and breach of contract must be commenced within three years from the date that a reasonable person discovered or should have discovered that a cause of action arose. On June 17, 2013, the President of Palmetto, W.R. Detyens, Jr. ("Detyens"), wrote a letter (the "Letter") to All Risks Ltd., disputing the classifications, rates and premiums assigned by Zurich based on an audit performed by Zurich after the policy period. Detyens raises the exact same "points" in the Letter that Palmetto raises in its Counterclaims. The Letter is written more than three years prior to the filing of the Counterclaims by Palmetto. A true and correct copy of the Letter is attached hereto as Exhibit "2," and incorporated

herein by reference.

8. A defective complaint cannot be amended to state a new or different cause of action after the statute of limitations has run. *Arant v. Kessler*, 327 S.C. 225, 228, 489 S.E.2d 206, 208 (1997), citing, *Scott v. McCain*, 272 S.C. 198, 250 S.E.2d 118 (1978). Accordingly, the Court should deny Palmetto's Motion.

**PALMETTO'S MOTION FAILS TO
COMPLY WITH RULE 13(f)**

9. Palmetto has known the facts which give rise to its alleged Counterclaims since at least June 17, 2013, based on Deytens's Letter on behalf of Palmetto to All Risks, LTD. Palmetto served its Answer to Zurich's Summons and Complaint on February 12, 2016, but failed to assert any counterclaim. Five months later, Palmetto filed its Motion seeking to assert counterclaims. Palmetto has made no attempt to excuse its delay.

10. Under Rule 13(f), Palmetto must show that delay was due to oversight, inadvertence, excusable neglect or that justice requires that the court grant leave to Palmetto to assert an omitted counterclaim. Palmetto has failed to show that its delay in filing counterclaims is due to an oversight, inadvertence, excusable neglect or that justice requires the court to grant its Motion. Palmetto has exhibited a lack of due diligence in moving to file its Counterclaim. Palmetto has known for over three years of the underlying facts allegedly supporting its Motion. Accordingly, the Court should deny Palmetto's Motion.

CONCLUSION

No evidence of misrepresentation, fraud or breach of contract by Zurich has been submitted so as to support Palmetto's request to assert an omitted counterclaim to conform to the evidence.

At the time the Policy or contract was entered into, the premiums, job classifications and rates were only estimates. The language in the Policy anticipates possible amendments to the premiums, job classifications and rates after the end of the policy period. It is the nature of workers compensation insurance coverage to estimate the premiums, job classifications and rates prior to the beginning of the policy period. Page 5, Part Five-Premium, Section B, Classifications, of the Policy plainly states that amounts in Item 4 are estimates. Zurich's amendment of the estimates as provided in the Policy does not give rise to counterclaims for misrepresentation, fraud or breach of contract when the estimates prove incorrect.

Over three years after Palmetto learned of the underlying facts for its Counterclaim, it filed its motion for leave to amend. South Carolina's three-year statute of limitations bars the claims asserted by Palmetto. The Court should deny Palmetto's Motion.

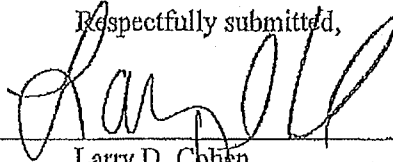
Finally, Palmetto's Motion to assert omitted counterclaims fails to comply with Rule 13(f). Palmetto has failed to show that its delay in setting up its omitted counterclaims was due to oversight, inadvertence, excusable neglect or that justice requires that this Court grant leave to Palmetto to assert omitted counterclaims. The Court should deny Palmetto's Motion.

Wherefore, premises considered, Plaintiff Zurich American Insurance Company prays that this Court deny Defendant Palmetto Contract Services, Inc.'s Motion to Amend Answer and Assert Counterclaim and, grant any other relief that Plaintiff may show itself entitled.

[signature on following page]

Charleston, South Carolina
November 3, 2016

Respectfully submitted,



Larry D. Cohen
Larry D. Cohen, LLC
Attorneys at Law
P.O. Box 30547
Charleston, South Carolina 29417
Phone: (843) 225-4445
Fax: (843) 225-2009
ldcohen@ldcohenlaw.com

Carolyn H. Blue
Attorney at Law
P.O. Box 30845
Charleston, SC 29417
Tel. (843) 860-8076
carolyn.blue@ymail.com

**ATTORNEYS FOR PLAINTIFF
ZURICH AMERICAN INSURANCE
COMPANY OF ILLINOIS**

EXHIBIT "1"

papers related to the injury, claim, proceeding or suit.

4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.

PART FIVE—PREMIUM

A. Our Manuals

All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

B. Classifications

Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.

C. Remuneration

Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:

1. all your officers and employees engaged in work covered by this policy; and
2. all other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis. This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.

D. Premium Payments

You will pay all premium when due. You will pay the premium even if part or all of a workers compensation law is not valid.

E. Final Premium

The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than the premium you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.

If this policy is canceled, final premium will be determined in the following way unless our manuals provide otherwise:

1. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final premium will not be less than the pro rata share of the minimum premium.
2. If you cancel, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short-rate cancellation table and procedure. Final premium will not be less than the minimum premium.

F. Records

You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.

G. Audit

You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.

WORKERS COMPENSATION CLASSIFICATION SCHEDULE

Insurance for this coverage part provided by:
**ZURICH AMERICAN INSURANCE COMPANY
 OF ILLINOIS**

Policy Number WC 9595139-02

ITEM 4. CLASSIFICATION OF OPERATIONS		PREMIUM BASIS		RATES	
LOC.	Entry in this item, except as specifically provided elsewhere in this policy, does not modify any of the other provisions of this policy.	Code No.	Total Estimated Annual Remuneration	Per \$100 of Remuneration	Estimated Annual Premium
	PALMETTO CONTRACT SERVICES INC FBN # 57-1125420 NAIC CODE 332323 277 SHIPYARD LANE GOOSE CREEK SC 29445				
	IRON OR STEEL - FABRICATION - IRONWORKS - SHOP - ORNAMENTAL & DRIVERS.	3040	\$ 100,000	19.62	\$ 13,620.00
	IRON OR STEEL - FABRICATION - IRONWORKS - SHOP - ORNAMENTAL & DRIVERS.	3040U	\$ 20,000	23.02	\$ 4,604.00
	BOATBUILDING OR REPAIR & DRIVERS; COVERAGE UNDER U.S. ACT	6824F	\$ 50,000	27.42	\$ 13,710.00
	BOATBUILDING OR REPAIR & DRIVERS; COVERAGE UNDER STATE ACT ONLY	6834	\$ 460,000	8.35	\$ 38,410.00
	SALESPERSONS OR COLLECTORS - OUTSIDE	8742	\$ 50,000	1.04	\$ 520.00
	CLERICAL OFFICE EMPLOYEES NOC	8810	\$ 100,000	.59	\$ 590.00
	TOTAL CLASS PREMIUM				\$ 71,454.00
	INCREASE LIMITS 2.8%	9812			\$ 2,001.00
	TOTAL SUBJECT PREMIUM				\$ 73,455.00
	EXPERIENCE PREMIUM 1.25	9898			\$ 18,364.00
	TOTAL MODIFIED PREMIUM				\$ 91,819.00
	STANDARD TOTAL				\$ 91,819.00
	PREMIUM DISCOUNT 8.1%	0063			\$ -7,437.00
	EXPENSE CONSTANT	0900			\$ 160.00
	TERRORISM .02	9740			\$ 156.00
	CATASTROPHE (OTHER THAN CERTIFIED ACTS OF TERRORISM) .02	9741			\$ 156.00
	TOTAL ESTIMATED PREMIUM				\$ 84,854.00
	FINAL TOTAL				\$ 84,854.00
	POLICY TOTAL ESTIMATED COST				\$ 84,854.00

EXHIBIT "2"



Palmetto Contract Services, Inc.

Mailing:
231 Molasses Lane
Mount Pleasant, S.C. 29464

Ship To:
277 Shipyard Lane
Goose Creek, S.C. 29445

Phone 843-881-5551

Fax 843-553-0795

Email: Edelvans@comcast.net

June 17, 2013

All Risks, Ltd.
10150 York Road, 5th Floor
Hunt Valley, Maryland 21030
Phone: 410-828-5810 ext.3069

Re: Payroll Audit Dispute
Policy # WC-9595139-02
Policy period: 2/20/2012 to 2/20/2013

Dear Bonnie Livingston,

We have reviewed the audit and audit worksheets with our consultant. We formally request corrections to the audit on the following points:

1. The attending Auditor, Mrs. Evelyn Wyatt performed an audit on Thursday, 04 April 2013 and then submitted a copy of the audit results via e-mail to Palmetto of the audit on Thursday, 04 April 2013 that was in line with several of our previous years audits.
2. Any and All of Mrs. Wyatt's questions were answered immediately on site when asked.
3. Two (02) days later, on Saturday, 06 April 2013, Mrs. Evelyn Wyatt provide Palmetto with a revised audit via e-mail that in no way shape or form compares with the previous audits that Mrs. Wyatt had performed herself for the years 2010-2011, 2011 - 2012 or the original audit she performed for this period.
4. Under Class Code 8742, there are (03) three each personnel that perform outside sales and the payroll amounts are not in line with the actual payroll. Mrs. Wyatt has the exposure reduced by 27%.
5. Under Class Code 3040 (F) the original estimated amount was reduce to \$20,000 on the original audit to \$0 on the resubmitted audit.
6. Under Class Code 3040() the original audit was reduced from an actual of \$626,538.00 to \$0 on the resubmission two (02) days later.
7. Under Class Code 6824(F) the original audit was increased from an actual audit of \$132,479 to \$754,904 on the resubmission two (02) days later.
8. Under Class Code 6834 () the original audit was reduced from \$ an estimate of \$460,000 to \$0 and removed entirely from the updated audit.
9. In short, Class Codes were changed from the original audit to the resubmitted audit as follows:

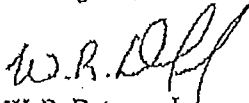
Class Code	Estimate	Original Audit:	% Change	Revised Audit
3040()	\$100,000	\$626,538	-100%	\$0
3040(F)	\$20,000	\$0	-100%	REMOVED-
6824(F)	\$50,000	\$132,479	+141.0%	\$754,904
6834()	\$460,000	\$0	-100%	\$0
8742()	\$50,000	\$36,356	-27%	\$36,356
8810()	\$100,000	\$199,320	+103%	\$203,433

10.) Palmetto Contract Services, Inc. Maintains and operates a machine shop and metal working shop that performs routine work for other customers on premise and on the customer site.

11.) Over the past years, we have had discussions with our insurance broker regarding classifications, We have attempted to have personnel classed under 6834() Boat Building State to no avail. We are a Boat Repair Company that also provides painting services and steel fabrication. This can be witnessed and has been witnessed at our facility by personnel from your company in the past.

At this time, Palmetto Contract Services, Inc. formally requests our audit be amended, based on the above points. Thank you for your time and consideration and I look forward to your response.

Best regards,



W. R. Detyens, Jr.
President

COPY

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
ZURICH AMERICAN INSURANCE)
COMPANY OF ILLINOIS,)
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Plaintiff,)
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)
PALMETTO CONTRACT SERVICES,)
INC.,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NUMBER 2015-CP-10-6684

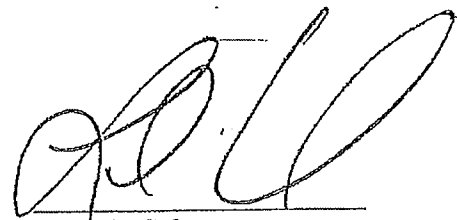
CERTIFICATE OF SERVICE

The undersigned does hereby certify that he has this date served true and correct copies of Plaintiff's Response in Opposition to the Defendant's Motion to Amend Complaint and File Counterclaim and this Certificate of Service upon the following attorney of record by depositing the same in the United States Mail, First Class Mail, with sufficient postage duly attached thereto, to the following address:

William A. Scott, Esquire
775 St. Andrews Blvd.
Charleston, SC 29407

Attorney for Defendant

Charleston, South Carolina
November 3, 2016



Larry D. Cohen
Larry D. Cohen, LLC
Attorneys at Law
PO Box 30547
Charleston, SC 29417
Tel. (843) 225-4445
Fax (843) 225-2009

ATTORNEY FOR PLAINTIFF

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
ZURICH AMERICAN INSURANCE)
COMPANY OF ILLINOIS,)
)
Plaintiff,)
)
PALMETTO CONTRACT SERVICES,)
INC.,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NUMBER 2015-CP-10-6684

PLAINTIFF ZURICH'S OBJECTION
TO TRANSFER TO JURY TRIAL
ROSTER AND MOTION TO STRIKE
DEMAND FOR JURY TRIAL

20150926 PM 4:37
JAMES ARMSTRONG
CLERK OF COURT

FILED
JP

To: William A. Scott, Esquire, 775 St. Andrews Blvd, Charleston, South Carolina 29407,
Attorney for Defendant Palmetto Contract Services, Inc.

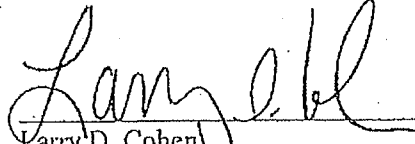
PLEASE TAKE NOTICE, that Plaintiff Zurich American Insurance Company of Illinois, pursuant to Rules 38 and 40, South Carolina Rules of Civil Procedure, files this its objection to the transfer of this action to the Jury Trial Roster and will move at a time and place to be arranged by the Court and counsel involved, for an Order Striking Defendant Palmetto Contract Services, Inc.'s jury trial demand and for the transfer of this action to the Court's Non-jury Roster.

Wherefore Premises Considered, Plaintiff prays that this Court strike Defendant's demand for jury trial and transfer this action to the Court's non-jury roster and for any other relief that Plaintiff may show itself entitled.

[signature on following page]

Charleston, South Carolina
October 26, 2017

Respectfully submitted,



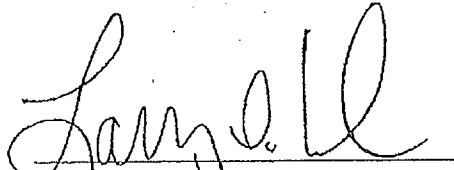
Larry D. Cohen
Larry D. Cohen, LLC
Attorneys at Law
P.O. Box 30547
Charleston, SC 29417
Tel. (843) 225-4445
Fax (843) 225-2008
ldcohen@ldcohenlaw.com

Carolyn H. Blue
Attorney at Law
P.O. Box 30845
Charleston, S.C. 29417
Tel. (843) 860-8076
carolyn.blue@ymail.com

ATTORNEYS FOR MOVANT

CERTIFICATE OF CONFERENCE

Pursuant to the requirements of Rule 11 SCRPC, the undersigned affirms that he communicated with opposing counsel via email in a good faith attempt to resolve the subject of this Motion, but was unable to do so.


Larry D. Cohen
Attorney for Plaintiff

Charleston, South Carolina
October 26, 2017

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
ZURICH AMERICAN INSURANCE)
COMPANY OF ILLINOIS,)
)
Plaintiff,)
)
)
PALMETTO CONTRACT SERVICES,)
INC.,)
)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
CASE NUMBER 2015-CP-10-6684

CERTIFICATE OF SERVICE

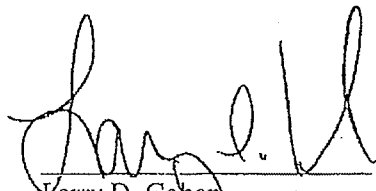
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2017 OCT 26 PM 4:07
JULIE J. ARMS, ROG
CLERK OF COURT

The undersigned does hereby certify that he has this date served true and correct copies of Plaintiff's Reply to Defendant's Amended Answer and Counterclaim, Motion Information Form and Coversheet, Plaintiff's Objection to Transfer to Jury Trial Roster and Motion to Strike Demand for Jury Trial and this Certificate of Service upon the following attorney of record by depositing the same in the United States Mail, First Class Mail, Priority, with sufficient postage duly attached thereto, to the following address:

William A. Scott, Esquire
775 St. Andrews Blvd.
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Attorney for Defendant
Palmetto Contract Services, Inc.

Charleston, South Carolina
October 26, 2017



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August 24, 2017

Via Email: ryoungj@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**
y. Palmetto Contract Services, Inc.
Civil Action No. 15-CP-10-6684

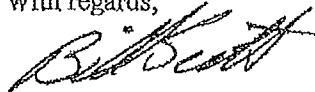
Dear Judge Young:

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-

¹ Zurich 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 complaint 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

2/10/2019

Case 2016CP1006884- Zurich American Insurance Company Of ... - Larry D. Cohen

Case 2015CP1006684- Zurich American Insurance Company Of
Illinois VS Palmetto Contract Services Inc added to Court Roster for
period 2017-03-20 through 2017-03-24.

cpas@charlestoncounty.org

Wed 3/8/2017 9:45 AM

To: Larry D. Cohen <ldcohen@ldcohenlaw.com>;

THIS CASE IS ON THE BACK UP NON-JURY TRIAL ROSTER FOR THE WEEK OF MARCH 20, 2017.
ATTENDANCE AT THE ROSTER MEETING AT 9:30 AM ON FRIDAY, MARCH 17, 2017 IS MANDATORY. YOU CAN ATTEND THE
ROSTER MEETING ON LINE AT THE CLERK OF
COURT CHAT ROOM.

NON JURY CASES ARE CALLED AFTER THE JURY ROSTER HAS BEEN COMPLETED FOR THE WEEK.

If you have questions, please contact Caroline Leonard at ccleonard@charlestoncounty.org

Tracy Braceland

From: cpas@charlestoncounty.org
Sent: Thursday, October 05, 2017 9:08 AM
To: Bill Scott
Subject: Case 2015CP1006684- Zurich American Insurance Company Of Illinois VS Palmetto Contract Services Inc added to Court Roster for period 2017-10-09 through 2017-10-13.

Follow Up Flag: Follow up
Flag Status: Completed

THE REFERENCED CASE IS ON THE JURY TRIAL ROSTER FOR THE WEEK OF OCTOBER 9, 2017. UNLESS YOU HAVE ALREADY BEEN EXCUSED BY THE COURT, YOU MUST ATTEND TOMORROW'S DOCKET MEETING EITHER ONLINE VIA THE CLERK OF COURT CHAT ROOM OR IN PERSON IN COURTROOM 3E AT 9:30AM. THE COMPLETE LIST OF CASES MAY BE FOUND ON THE UPDATE TEXT LINK ONLINE AT: <http://jrosterjinfo.charlestoncounty.org>.

QUESTIONS SHOULD BE DIRECTED TO DON MICHEL AT:
DMICHEL@CHARLESTONCOUNTY.ORG OR (843) 958-5013.

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
))
ZURICH AMERICAN INSURANCE)
COMPANY OF ILLINOIS,)
))
Plaintiff,)
))
PALMETTO CONTRACT SERVICES,)
INC.,)
))
Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NUMBER 2015-CP-10-6684

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

NOW comes Plaintiff Zurich American Insurance Company of Illinois ("Zurich"), and files this its Memoranda in Support of its Objection to Transfer to the Jury Trial Roster and Motion to Strike Demand for Jury Trial made by Defendant Palmetto Contract Services, Inc. ("Palmetto")¹ and shows the Court as follows:

BACKGROUND

1. Zurich filed its Summons and Complaint alleging breach of contract against Palmetto on December 12, 2015, based upon Palmetto's failure to pay it's workers compensation insurance premiums as agreed.
2. Zurich served Palmetto with Zurich's Summons and Complaint on January 14, 2016.
3. Palmetto served its initial Answer to Zurich's Summons and Complaint on February 12, 2016, denying all of Zurich's allegations in the Complaint and alleging affirmative defenses, including fraud and misrepresentation. [Judge Nicholson's Order, P.1, Para. 1.] A true and correct copy of Judge Nicholson's Order Granting Defendant's Motion to Amend is attached hereto as Exhibit "A." Defendant Palmetto failed to demand a jury trial in its initial Answer to Plaintiff

¹ Plaintiff Zurich contends that Defendant Palmetto failed to comply with Rule 38 SCRCF in that no actual *demand* for a jury trial was made by Defendant Palmetto.

Zurich's Complaint or within 10 days of serving it.

4. Five months later, on July 12, 2016, Palmetto moved to amend its initial Answer and assert counterclaims against Zurich for misrepresentation, fraud and breach of contract. Along with its Motion to Amend, Palmetto filed its proposed Amended Answer and Counterclaim. Defendant Palmetto failed to demand a jury trial at the time it filed its proposed Amended Answer and Counterclaim.

5. On or about September 22, 2017, The Honorable J. C. Nicholson Jr., granted Defendant Palmetto's Motion to Amend based upon several factors. One of the basis for the Court granting Defendant Palmetto's Motion to Amend is that Palmetto's initial Answer to Zurich's Complaint already alleged the affirmative defenses of fraud and misrepresentation. [Judge Nicholson's Order, P. 3, Para. 2]

6. After the Court granted leave to amend, Defendant Palmetto served its Amended Answer and Counterclaim and included the words, "(Jury Trial)," for the first time. Defendant Palmetto never complied with Rule 38 SCRCP. It never actually stated in writing that it "demanded a jury trial" or "jury trial demand" as required by Rule 38 SCRCP. No motion was ever filed by Defendant Palmetto seeking a transfer of this action from the Court's non-jury trial roster to this Court's jury trial roster.

7. The allegations in Defendant Palmetto's Amended Answer and Counterclaim are based upon the same issues and facts raised in Plaintiff Zurich's Complaint and Defendant Palmetto's initial Answer to the Complaint. [Judge Nicholson's Order, P. 3, Para. 2]

ISSUE PRESENTED

8. Has Defendant Palmetto waived its right to trial by jury?

ANSWER

9. Yes. Palmetto has waived its right to a trial by jury by its failure to timely demand a jury trial as required by Rule 38 (b) SCRPC. An Amended Answer and Counterclaim do not revive a right to demand a jury trial unless based upon new facts.

RATIONALE

10. Rule 38 of the South Carolina Rules of Civil Procedure governs requests for a jury trial and provides that a party must serve a demand upon the other party in writing not later than ten days after the last pleading addressed to the issue or else a jury trial is waived:

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and *not later than 10 days after the service of the last pleading directed to such issue*. Such demand may be endorsed upon a pleading of the party. [italics added]

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. . .

11. Defendant Palmetto's served its initial answer to Plaintiff Zurich's Complaint on February 12, 2016. Under Rule 38, the deadline for Defendant Palmetto to demand a jury trial was Monday, February 22, 2016. Defendant Palmetto did not serve a jury trial request until September 27, 2017, more than 18 months after the deadline passed.

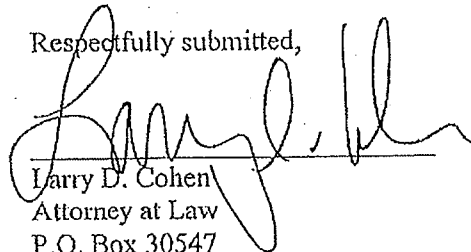
12. In *King v. Shorter*, 291 S.C. 501, 354 S.E.2d 402 (S.C. Ct. App. 1987), the court held that the trial court did not abuse its discretion in granting a motion to amend an answer to assert a counterclaim for unfair trade practices while denying a motion to transfer the case to the jury roster. In *King*, appellant had filed three previous sets of pleadings without a request for a jury trial being made. *Id.* at 502, 354 S.E.2d at 403. The Court in *King* stated, "... a litigant's entitlement to a jury

trial on the issues presented by an amended pleading, when no prior demand for a jury trial has been made, turns on whether the amended pleadings create new issues of fact." *Id.* at 503, 354 S.E.2d at 403." In Judge Nicholson's Order, this Court found that Plaintiff Zurich was not prejudiced by allowing Palmetto to amend its initial Answer because Palmetto's Amended Answer and Counterclaim asserted the same issues raised in Palmetto's initial answer. [Judge Nicholson's Order, P. 3, Para. 2]

13. Defendant Palmetto is not entitled to a jury trial, based on its filing of its Amended Answer and Counterclaim as it was based on essentially the same issues and factual allegations as its initial Answer. Defendant Palmetto failed to timely demand a jury trial and its Amended Answer and Counterclaim does not resurrect Defendant Palmetto's right to a jury trial.

Charleston, South Carolina
March 5, 2018

Respectfully submitted,



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carolyn.blue@ymail.com

ATTORNEYS FOR PLAINTIFF

EXHIBIT "A"

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

gm
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.

gan 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." Araut 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.

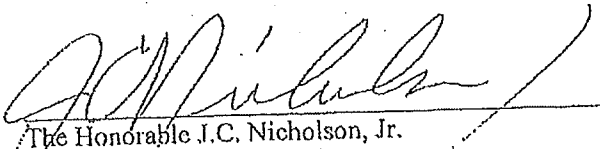
For all the foregoing reasons, Palmetto's motion to amend the answer to add counterclaims is granted. The amended answer and counterclaims shall be filed within ten (10) days of receipt of this court's order. Plaintiff shall have thirty (30) days to answer upon receipt of the amended answer and counterclaims.

AND IT IS SO ORDERED.

Dated: _____, 2017

9/20

2017


The Honorable J.C. Nicholson, Jr.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 15-CP-10-6684 (Appeal No.: 2018-000692)

Zurich American Insurance Company of Illinois, Respondent,

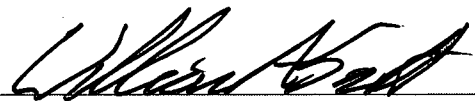
v.

Palmetto Contract Services, Inc., Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by all parties and not any other matter.

PEDERSEN & SCOTT, P.C.



William A. Scott
775 St. Andrews Blvd.
Charleston, SC 29407
Tel: (843) 556-5656
Fax: (843) 556-5635
E-Mail: bscott@pslawpc.com

Attorney for Appellant

Dated: July 25, 2019
Charleston, South Carolina

RECEIVED

JUL 30 2019

SC Court of Appeals