STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

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SC Court of Appeals

S. Jackson Kimball, Special Circuit Judge

Case No. 2010-CP-46-02851

Pamela Dill as the Attorney-in-Fact
and Natural Mother of Britten Teno, ... Appellant,

v.

Colony Insurance Company, Gill-Young
Insurance (now known as "Gill Insurance
LLC") or ("The Gill Agency") and Hull
& Company, Inc., ... Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the trial court err in granting summary judgment for all Defendants on Plaintiff's claims for negligence and negligent misrepresentation because:

A. The doctrine of "reasonable expectations" is part of the law of South Carolina?

B. There are genuine issues of material fact whether Morton specifically requested insurance coverage for assault and battery claims and Defendants owed him a duty to advise him regarding coverage?

C. Morton's failure to read the policy is not fatal to the claims for negligence or negligent misrepresentation under the law of South Carolina?

D. The Claims are Not Barred by the Statute of Limitations?

STATEMENT OF THE CASE

On March 6, 2005, Britten Teno suffered severe, permanent injuries as a result of being attacked while a patron at "The Barn Club" in York County, South Carolina. Mr. Teno brought an action through his mother, Pamela Dill, against The Barn Club and others to recover for his damages. (R.p.7).

On August 1, 2007, the Barn Club's liability insurer, Colony Insurance Company, brought a declaratory judgment action against all of the parties in the earlier suit. Colony asserted it had provided a general liability insurance policy for The Barn Club but that because of various endorsements the policy did not provide coverage for Mr. Teno's injuries. Colony moved for summary judgment in that matter.

The Barn Club confessed judgment as to liability and assigned all claims it may have against Colony for denying coverage for Mr. Teno's injuries. The circuit court subsequently entered an order for judgment for Mr. Teno for $8,000,000.00 against The Barn Club. (R.p.7).

On July 8, 2010, Ms. Dill filed an action for Mr. Teno against Colony Insurance Company (the Insurer), Gill-Young Insurance (now known as "Gill Insurance, LLC" or "The Gill Agency") (the Agent) and Hull & Company, Inc. (the Producer). The complaint alleged Gill and Hull acted at all times as the agent, servant and/or employee of Colony and within the scope and course of the agency and/or employment at all relevant times.

The complaint also asserted that Jim Morton was president of The Barn Club and was responsible for procuring insurance for the night club. In March 2004 Morton approached Gill and Young Insurance Agency to purchase coverage for The Barn Club.

Morton made specific requests for coverage for general liability, including common occurrences such as fighting, intoxication of patrons, and security issues. Colony, Gill and Hull all worked together to produce and sell to Morton general liability insurance for The Barn Club. Morton believed he had purchased coverage for full protection with limits of $1,000,000.00. Morton and The Barn Club assigned all claims they had against the Defendants to Mr. Teno.

The Complaint pointed out that in March 2006, Mr. Teno was catastrophically injured while a patron at The Barn Club. Teno sued The Barn Club, Morton and others in June 2007. Colony filed an answer to the complaint on behalf of Morton and The Barn Club but also filed the declaratory judgment action asserting coverage did not exist under the policy. Colony never advised Morton or the Barn Club of its diverse positions in the two matters.

Teno also asserted that the Defendants had a pattern and practice of obtaining policies and then denying coverage once claims were made. The Defendants sold policies they knew provided "illusory coverage" and charged the Insureds $2,252.50 in annual premiums.

Teno stated claims for reformation, detrimental reliance, civil conspiracy, negligence, negligent misrepresentation, and breach of fiduciary duty. (R.p.84).

Gill (the Agent) filed an answer to the complaint generally denying the allegations. Gill also raised a number of affirmative defenses. (R.p.92). Gill also filed a motion to dismiss the all causes of action except for the negligence claim. (R.p.132)

Hull (the Producer) filed an answer to the complaint in which it also generally denied the allegations and raised numerous affirmative defenses. (R.p.104). Hull also moved to dismiss each of Plaintiff's causes of action.

Colony (the Insurer) also filed an answer generally denying the allegations and raising a number of affirmative defenses. (R.p.121).

On November 18, 2010, the circuit court held a hearing on the motions to dismiss filed by Hull and by Gill. Plaintiff conceded the claims for reformation against Hull (the Producer) and Gill (the Agent) were not properly pled and the court dismissed the reformation claim with prejudice. (R.p.9). The court held the claim for "detrimental reliance" is not cognizable in South Carolina and dismissed that claim as well. (R. pp.9-10). The court found the claim for civil conspiracy was not properly pled and dismissed the claim with prejudice. (R.p.10). As to Hull's motion regarding the negligence claim, the court held dismissal was premature at the pleading stage and denied Hull's motion to dismiss. (R.p.10). Regarding the claim for negligent misrepresentation, the court held the complaint sufficiently stated a claim for such against Gill (the Agent) but not against Hull, and dismissed the claim with prejudice only as to Hull. (R.p.11). Finally, as to the breach of fiduciary duty claim, the court held South Carolina law does not recognize such a claim between an insurance agent and an insurance applicant, and accordingly dismissed that claim as to both Hull and Gill. (R.pp.11-12). Hence, only the negligence claim against Hull and the negligent misrepresentation claim against Gill survived the motion to dismiss; the negligence claim against Gill was not before the court.

On January 5, 2011, Colony moved for summary judgment. Colony asserted: (1) any claim for reformation should have been made in the 2009 declaratory judgment action; (2) the claim for detrimental reliance is not a legally cognizable claim pursuant to South Carolina law, and was not directed toward Colony in any event; (3) the claim for civil conspiracy was not sufficiently alleged as to Colony; (4) the claims for negligence and negligent misrepresentation fail as a matter of law; and (5) the claim for breach of fiduciary duty was not directed at Colony and would fail as a matter of law in any event. (R.p.137).

Gill and Hull thereafter separately moved for summary judgment as to the remaining claims against them. On March 31, 2011, the circuit court entered summary judgment as to all remaining claims as to all defendants. This appeal follows.

FACTS

On March 6, 2005, Britten Teno was at a club known as "The Money" which was operated by The Barn Club. (R.p.7). He was attacked by club employees while at the club and suffered severe injuries. He incurred medical expenses of nearly $393,000.00 and presented evidence of future economic losses in excess of $4.7 million. (R.p.8).

The Barn Club was owned by Jim Morton, who was also the club's president. (R.p.757). Colony issued a policy of insurance covering The Barn Club during the relevant period of time. (R.p.39). The policy provided a "General Aggregate Limit" as well as a "Personal and Advertising Injury Limit" of $1,000,000.00 each. R.p.39). The policy generally provided coverage for "bodily injury and property damage liability." (R.p.49). The commercial general liability coverage contained a number of exclusions. (R.pp.50-53). None of these exclusions addressed injuries caused by assault and battery.

The "Personal and Advertising Injury Liability" coverage also provided coverage for sums the insured "becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applied." (R.p.53). That coverage contained exclusions for "Knowing Violation of Rights of Another" and "Criminal Acts." (R.p.54). However, "Personal and Advertising Injury" was specifically defined and did not include assault and battery within the premises. (R.p.62, ¶ 14).

The policy contained a number of endorsements, however, including an "Assault and Battery Exclusion." (R.p.72). Dram shop coverage was also excluded by endorsement. (R.p.77).

Mr. Teno's mother, Pamela Dill, brought suit against The Barn Club (a/k/a The

Money) and several individuals, including Morton, on June 29, 2007. (R.p.757; R.p.30). Mr. Morton confessed judgment as to liability and the trial court entered judgment for Mr. Teno in the amount of $8,000,000.00. (R.p.8).

On August 1, 2007, Colony brought an action for a declaratory judgment, asserting the policy did not provide coverage for Mr. Teno's injuries. (R.p.23). The court ultimately granted Colony relief, finding the exclusions precluded coverage.

On October 10, 2009, Mr. Morton assigned all claims he had against any insurance company, insurance agent, insurance agency or insurance broker arising out of the denial of coverage in exchange for a covenant not to execute. (R.p.757). In the Assignment, Mr. Morton asserted that The Barn Club d/b/a The Money believed it had causes of action arising out of

(1) Colony's failure to accept the Teno claim and provide coverage;

(2) Colony's failure to pay the claim; and

(3) failure of the agent who sold The Barn Club "a policy to a bar/night club that would actually provide the types of coverage that The Barn Club, Inc., d/b/a The Money actually requested and believed it had and for failing to sell The Barn Club, Inc., d/b/a The Money the type of coverage that any reasonable bar/night club owner would need.

(R.p.759).

ARGUMENTS

I.
Summary Judgment Standard

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011). In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the motion. *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 687 S.E.2d 29 (2009).

An appellate court reviewing a grant of summary judgment applies the same standard used by the trial court. *Knight v. Austin*, 396 S.C. 518, 521, 722 S.E.2d 802, 804(2012). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show "there is no genuine issue as to any material fact and the moving party must prevail as a matter of law." *Knight v. Austin*; Rule 56(c), SCRCP. In determining whether a triable issue of material fact exists, the Court must construe all facts and inferences in the light most favorable to the non-movant. *Wogan v. Kunze*, 379 S.C. 581, 585, 666 S.E.2d 901, 903 (2008).

"In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to

submit a mere scintilla of evidence." *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). *See also Bass v. GOPAL, Inc.*, 395 S.C. 129, 716 S.E.2d 910 (2011) (in a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment). "A motion for summary judgment on the basis of the absence of a duty is a question of law for the court to determine." *Oblachinski v. Reynolds*, 391 S.C. 557, 560, 706 S.E.2d 844, 845 (2011). If a legal duty is established, whether the defendant breached that duty is a question of fact. *Singletary v. S.C. Dept. of Educ.*, 316 S.C. 153, 157, 447 S.E.2d 231, 233 (Ct. App.1994).

Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial. *Spence v. Wingate*; *Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004).

II.

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

The trial court granted summary judgment to all Defendants on the same basis. (R.pp.15-19 as to Gill; p.19 as to Hull; pp.19-20 as to Colony). Thus, the following discussion applies to the ruling as to all three of these Defendants.

(A) South Carolina Follows the Doctrine of "Reasonable Expectations"

The circuit court rejected Plaintiff's claim that Defendants had a "duty to sell to a bar owner coverage that a reasonable bar owner would not only need and desire" but that "common sense would dictate these common occurrences [would] include fighting (assault/battery)." (R.p.17). The court cited to *Ex parte United Services Auto. Ass'n*, 365 S.C. 50, 614 S.E.2d 652 (Ct. App. 2005) in holding South Carolina does not follow what is essentially the doctrine of "reasonable expectations." *Ex parte United Services*, however, should not control this case.

In *Ex parte United Services* this Court stated, "The doctrine of reasonable expectations, which is essentially that the objectively reasonable expectations of insureds as to coverage will be honored even though a careful review of the terms of the policy would have shown otherwise, has been rejected in South Carolina." *Id.*, at 54, 614 S.E.2d at 654. The Court cited *Allstate Ins. Co. v. Mangum*, 299 S.C. 226, 383 S.E.2d 464 (Ct. App. 1989) in making that pronouncement. However, all the *Mangum* Court held was this: (1) our Supreme Court has never accepted the doctrine, and (2) the issue was not

preserved for review in *Mangum*. Contrary to the statement in *Ex parte United*, the doctrine of reasonable expectations has not been "rejected in South Carolina."

In fact, our Supreme Court very recently applied the doctrine in *Crossmann Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). There, the Court adopted the "time on risk" framework for liability among CGL insurers and stated:

> In our view, the "time on risk" approach best conforms to the terms of a standard CGL policy <u>and to the parties' objectively reasonable expectations</u>. In particular, the "time on risk" approach requires a policyholder to bear a *pro rata* portion of the loss corresponding to any portion of the progressive damage period during which the policyholder was not insured or purchased insufficient insurance.

Id., at 50, 717 S.E.2d at 594 (emphasis added). The Supreme Court noted it followed the approach adopted in *Boston Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 910 N.E.2d 290 (2009). The Court stated further:

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

Id., at 62, 717 S.E.2d at 600-601 (emphasis added). The Court also outlined the formula for computing each insurer's liability and stated "[i]n this way, each triggered insurer is responsible for a share of the total loss that is proportionate to its time on the risk." The Court noted further:

> Because this formula allocates the total loss caused by a progressive injury in equal shares across all policy periods, there might arise a situation in which the portion of the loss attributed to a particular policy exceeds that policy's limit of coverage. The portion of the loss that exceeds the policy limit would either fall back onto the policyholder or be

> covered by an excess insurance policy. This result is equitable and in line with the policyholder's objectively reasonable expectations: the policyholder could only have expected each policy to indemnify up to its limit of coverage and, as we have explained above, should have expected that each policy would cover only the damage that occurred during its policy period.

Id., at 65 n. 15, 717 S.E.2d at 602 n. 15. (emphasis added). Therefore, in 1989 at the time of the *Mangum* decision it may well be that our Supreme Court had not accepted the doctrine, but that is a far cry from saying the Court outright rejected the doctrine. And the language of *Crossman* demonstrates our Supreme Court has now fully embraced the doctrine of "reasonable expectations" in regards to insurance coverage in this State.

The trial court's decision to grant summary judgment to these Defendants on the ground that South Carolina has expressly rejected the doctrine of "reasonable expectations" is thus controlled by an error of law. Accordingly, this Court should reverse the decision and remand the matter for further development regarding whether coverage for assault and battery injuries in a bar was within Morton's reasonable expectations.

(B) There is Evidence of a Duty to Advise

The circuit court stated that under South Carolina law, "an insurer and its agents owe no duty to advise an [insured]." The court cited to *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 377 S.E.2d 343 (Ct. App. 1988) to support this statement. (R.p.17) The circuit court added that at the application stage, the agent is not "required to go beyond the request of the insured for information, to inject matters not raised by the insured, or to make independent inquiries into such extraneous matters, especially when

these matters were well within the knowledge of the insured himself." (R.p.17). The circuit court cited to *Pitts v. Jackson Nat'l Life Ins.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App.2002) in support of this statement. These are, however, incomplete statements of the law in South Carolina.

Our Supreme Court has held:

> [A]s a general rule, an insurance agent has no duty to advise an insured at the point of application, absent an express or implied undertaking to do so. *See Sullivan Co. v. New Swirl, Inc.*, 313 S.C. 34, 437 S.E.2d 30 (1993); *Pitts v. Jackson Nat'l Life Ins.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App.2002); *Trotter v. State Farm*, 297 S.C. 465, 377 S.E.2d 343 (Ct. App.1988). A duty may be imposed, however, "if the agent, nevertheless, undertakes to advise the insured." *Carolina Prod. Maint., Inc. v. United States Fid. & Guar. Co.*, 310 S.C. 32, 425 S.E.2d 39, 43 (1992) (citing *Trotter*, 377 S.E.2d at 347). Absent an express undertaking to assume such a duty, a duty can be impliedly created. *Id.* In determining whether an implied duty has been created, courts consider several factors, including whether: (1) the agent received consideration beyond a mere payment of the premium, (2) the insured made a clear request for advice, or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on. *Id.* (citing *Trotter*, 377 S.E.2d at 347).

Houck v. State Farm Fire and Cas. Ins. Co., 366 S.C. 7, 13, 620 S.E.2d 326, 330 (2005) (emphasis added). *See also Sullivan Co., Inc. v. New Swirl, Inc.*, 313 S.C. 34, 437 S.E.2d 30 (1993) (an insurance agent or broker must exercise good faith, reasonable skill, care, and diligence; if, because of his fault or neglect, the agent fails to procure insurance, or does not follow instructions, or the policy issued is void, or materially deficient, or does not provide the coverage he undertook to supply, the agent is liable to his principal).

In his deposition in the declaratory judgment action, the following exchanges took place:

Q. As far as your responsibility for getting insurance, what - - what steps did you take to get that?

A. Well, I could go to the Gilliam Young Insurance, give them a list of what kind of insurance was needed, coverages, and then she would say "Sign here" and "this is how much the check will be."

Q. What type of coverages did you generally tell them that you needed for The Money?

A. Generally, it was just monetary amounts, but specifially, I took a list from the Abram and Family Partnership.

Q. From the who?

A. The Abram and Family Partnership.

Q. Who was - - what is that?

A. That's the people who own the building.

Q. The building that The Money is in?

A. Yes, sir.

Q. Do you happen to have a copy of that list, still?

A. No, sir.

Q. Do you recall what - - what type of things were on that list?\

A. You know, the amounts of coverage that we needed for the building, the amounts of coverage we needed for liquor liability, certain things they didn't want exclusions for.

Q. Do you remember what things they did not want exclusions for?

A. The only one I specifically remember is the assault and battery exclusion.

Q. They said they did not want that exclusion?

A. Yes, sir.

(R.pp.745-746). Morton testified further:

Q. Do you have any reason to dispute that this exclusion is part of the policy that was issued to The Money during that time?

A. Yes.

Q. And what is the basis for that?

A. I would dispute it on the grounds that we specifically asked for an insurance policy that did not have an assault and battery exclusion.

* * *

Q. When you - - when you got this policy and this exclusion was in it, did you go back to the insurance company and tell them, "We don't want this exclusion. Please recalculate for us and draft a new policy"?

A. I didn't realize that it was in there.

Q. Okay.

A. You know, it comes a good bit after, so basically we would have - - this incidence would have happened sometime during around our renewal time ... and it was - - if it was at a time when we were ending up a policy or beginning a policy - - usually, when you are given a policy, you know, you don't get the book until months later, and truthfully, you know, it's - - it's a very hard read. It's a very - - no offense - - it's kind of like gobblety-gook.

Q. Totally understandable. No offense taken, and I guess I should rephrase my question. You would not dispute that this exclusion was, in fact, in effect; you would dispute that it should have been included in the first place?

A. The exclusion should have been included in the first place, and I had no knowledge of the fact until after, you know, we had to go back, you know, because of this liability lawsuit that this was - - that this exclusion was in place.

(R.pp.750-752). Mr. Teno's counsel was not at that deposition. (R.p.737).

At a later point Morton was deposed in this case. He stated he did not specifically recall applying for the commercial general liability policy. (R.p.178, ll. 1-3). He also stated that when he received the policy he did not read it but instead "put it in a file." (R.p.194, ll. 4-8). He was unaware what any of the exclusions exactly were and did not know they were included until he read through the policy after Mr. Teno's injury. (R.p.300, ll. 1-7; p.340, ll. 16-20).

In this case, there is a genuine issue of material fact as to whether Morton made a clear request for advice as to assault and battery coverage for The Barn Club. Such a request would give rise to a duty by the Defendants to advise Morton regarding coverage and to procure the coverage Morton requested. Although Morton testified in the second deposition that he did not specifically request coverage for assault and battery injuries, at the summary judgment stage there is a scintilla of evidence that he sought the coverage but the Defendants did not provide it. The fact that Morton signed the Assignment of claims against the Defendants is further evidence that Morton in fact believed the Defendants should have provided him with coverage for Plaintiff's injuries.

The trial court's ruling is based upon an incomplete and erroneous understanding of this Court's decisions in *Trotter* and *Pitts* as set forth in the Supreme Court's ruling in *Houck*. Summary judgment on this basis was not appropriate. Therefore, this Court should reverse the entry of summary judgment for the Defendants on Plaintiff's claims for negligence and negligent misrepresentations, and remand the matter for the jury to determine whether the evidence establishes that Defendants breached an express or

implied undertaking to provide assault and batter coverage for The Barn Club.

(C) Morton's Failure to Read the Policy is Not Fatal to the Claims

The trial court held Morton's failure to read the insurance policy barred any recovery as a matter of law. (R.p.18). In support of its ruling the circuit court relied upon four (4) cases: (a) *Carolina Production Maintenance, Inc. v. U.S. Fidelity and Guar. Co.*, 310 S.C. 32, 425 S.E.2d 39 (Ct. App. 1992), (b) *Doub v. Weathersby-Breland Ins. Agency*, 268 S.C. 319, 233 S.E.2d 111 (1977), (c) *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 328 S.E.2d 916 (Ct. App.1985) and (d) *Towles v. United HealthCare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). The court misapplied each of these cases, and this Court should reverse this ruling.

First, the circuit court cited *Carolina Production Maintenance* for the purported rule that "even if the agent was negligent [in failing to procure specific coverage], the plaintiff was contributorily negligent in failing to read the policy...despite the fact that it had been in effect for over a year." (R.p.18). The circuit court stated the Court of Appeals "found that the failure to read the policy barred any recovery." (R.p.18). *Carolina Production Maintenance*, however, arose on facts that occurred in 1989. See *Carolina Production Maintenance*, 310 S.C. at 35, 425 S.E.2d at 41 (noting "On June 26, 1989, a CPM employee improperly re-installed a set of blades in the grinding machine."). In 1991, South Carolina abolished the doctrine of contributory negligence and adopted comparative negligence as its tort standard in *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991). Prior to that time, under contributory negligence, if a

plaintiff was negligent to any extent in contributing to his own injury, the plaintiff was completely barred from recovering damages from a negligent defendant. *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011). Hence, the rule of *Carolina Production Maintenance* that an insured's failure to read the policy completely bars recovery under the doctrine of contributory negligence is no longer good law.

Furthermore, the rule set forth in *Doub* is not as absolute as the circuit court held in this case. As this Court explained in two cases, *Doub* is no bar to recovery if an insured makes a specific inquiry as to the terms and provisions of the policy, even where reading the policy would reveal the lack of coverage. *See Kelly v. South Carolina Farm Bureau Mut. Ins. Co.*, 316 S.C. 319, 450 S.E.2d 59 (Ct. App. 1994) (noting Kelly made specific inquires of her agent as to the specific terms and provisions of her policy, and reasonably relied upon her agent whom she trusted to provide her with the same coverage she enjoyed under a prior policy); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994) (noting *Doub* did not compel a finding of contributory negligence which would have barred recovery under pre-*Nelson* law, and that OSCO relied upon the agent whom it trusted to provide it with the same coverage it enjoyed for the previous five years under the policy). *Doub*, *Carolina Production Maintenance*, *Kelly* and *Orangeburg Sausage* all involved a tort system under which *any* level of contributory negligence amounted to a bar of recovery. Furthermore, even under *Doub* and its progeny the rule was not as unwavering as portrayed by the circuit court. *See Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 423-24, 171 S.E.2d 486, 492 (1969) ("[w]hile an insured cannot abandon all care, the rules which require one to

inform himself of the terms of his contract and to take precautions for his own protection are less exacting when dealing with one's own insurance agent or broker in the procurement of an insurance contract.").

The circuit court also cited to *Giles v. Lanford & Gibson, Inc.* for the rule that "one cannot complain of misrepresentation concerning the content of a written document when the truth could have been ascertained by reading that document." (R.p.18). Once again the circuit court relied upon only a potion of the opinion out of context and misapplied the rule so that its holding is controlled by an error of law.

To begin with, *Giles* also pre-dated *Nelson* and was a contributory negligence case. Furthermore, what Judge Randall Bell actually stated in *Giles* was:

> Concerning the right to rely, Lanford & Gibson argue that Giles could have ascertained the nature of his coverage by reading the policy. Since he failed to read the policy, they insist he had no right to rely on Mullinax's representation as to the coverage the policy provided. It is true that
>
> > one cannot complain of fraud in the misrepresentation of the content of a written instrument when the truth could have been ascertained by reading the instrument, and one entering into a written contract should read it and avail himself of every reasonable opportunity to understand its contents and meaning.
>
> *Guy v. National Old Line Ins. Co.*, 252 S.C. 47, 49, 164 S.E.2d 905, 906 (1968) (citation omitted). However, with respect to insurance policies our courts have also held:
>
> > Whether or not reliance upon a representation in a particular case is justifiable or excusable, what constitutes reasonable prudence and diligence with respect to such reliance, and what conduct constitutes a reckless or conscious failure to exercise such prudence, will depend upon the various circumstances involved, such as the form

> and materialty [sic] of the representations, the respective intelligence, experience, age, and mental and physical condition of the parties, and the relation and respective knowledge and means of knowledge of the parties.
>
> *Thomas v. American Workmen*, 197 S.C. 178, 182, 14 S.E.2d 886, 888, 136 A.L.R. 1, 4 (1941).
>
> Given the circumstances involved in this case, we hold that Giles had a right to rely on the representation that the policy gave him coverage on the fire damaged house. Lanford & Gibson concede that when he came to their office to request insurance, Giles did not know what type of coverage he needed. Thus, they were in the position to know Giles was relying on their expertise as insurance agents to provide him proper coverage. They were possessed of superior experience, knowledge, and means of knowledge in relation to Giles. In the circumstances, it was reasonable for Giles to assume the truth of any representations they made concerning the coverage provided by the policy they were writing for him.

285 S.C. at 288-289, 328 S.E.2d at 918-919. Like the plaintiff in *Giles*, Morton had a right to rely upon the expertise of the Defendants to provide him the proper coverage. Contrary to the circuit court's ruling, Morton's failure to read the policy to discover the truth of its contents is not fatal to a claim of negligence or negligent misrepresentation in the procurement and provision of coverage that excludes assault and battery.

Next, the circuit court cited to *Towles v. United HealthCare Corp.* for the rule that "the law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents simply from reading the document." (R.p.18). Once again this is an over-reading of the case and a misapplication of its rule.

Towles involved an appeal of a denial of a motion to compel arbitration in an employment contract dispute. The Court of Appeals noted that Towles signed an

acknowledgment form that clearly informed him that any dispute over the contract was subject to binding arbitration. This Court stated:

> After receiving and signing the Acknowledgment, Towles cannot legitimately claim United failed to provide actual notice of the arbitration provisions because the law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document.

338 S.C. at 39, 524 S.E.2d at 845. This was, however, the Court speaking in the context of an arbitration clause in a contract for employment. As Judge Bell noted in *Giles*, the rule with respect to insurance policies is different. *Towles* does not control the result in this case.

In sum, Morton's failure to read the policy is no longer a complete bar to recovery under the modified comparative negligence rule of *Nelson*. Furthermore, South Carolina law relaxes the rule set forth in *Towles* and *Doub* in the context of insurance coverage. The circuit court's rulings are thus based upon misapplication of the law. This Court should reverse and remand for trial on Plaintiff's claims for negligence and negligent misrepresentation.

(D) The Statute of Limitations Does Not Bar the Claims

The trial court ruled that Plaintiff's claims were barred by the three-year statute of limitations as a matter of law. The court held Morton knew or should have known the policy did not cover assault and battery as early as March 2004, so that the action commenced in July 2010 was not timely. (R.p.19).

Under the discovery rule, the statute of limitations begins to run from the date the

claimant knew or should have known that, by the exercise of reasonable diligence, a cause of action exists. *Holmes v. National Service Industries, Inc.*, 395 S.C. 305, 717 S.E.2d 751 (2011). If there is conflicting evidence as to whether a claimant knew or should have known he or she had a cause of action, the question is one for the jury. *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E.2d 693 (1989); *Logan v. Cherokee Landscaping and Grading Co.*, 389 S.C. 611, 698 S.E.2d 879 (Ct. App. 2010).

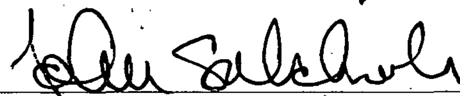
The discovery rule does not bar recovery under the statute of limitations in this case. The attack on Mr. Teno at The Barn Club occurred on March 6, 2005. (R.p.7). Colony filed its declaratory judgment action on August 1, 2007, putting Morton on notice that Colony contested coverage under the policy for assault and battery injuries. Teno's lawsuit against the defendants was commenced July 8, 2010, within three years of that date. Until Colony indicated it was denying coverage under the exclusion Morton should not have known that he had claims against the Defendants for failing to procure appropriate coverage. It is at least a question of fact for the jury to resolve.

Accordingly, this Court should reverse the grant of summary judgment on this ground and remand the matter for further proceedings.

CONCLUSION

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

Respectfully Submitted,



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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2010-CP-46-02851

RECEIVED
FEB 04 2013
SC Court of Appeals

Pamela Dill as the Attorney-in-Fact and Natural Mother of Britten Teno, ... Appellant,

v.

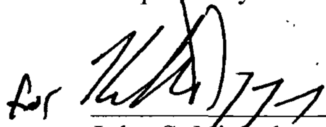
Colony Insurance Company, Gill-Young Insurance (now known as "Gill Insurance LLC") or ("The Gill Agency") and Hull & Company, Inc., ... Respondents.

CERTIFICATE OF COMPLIANCE

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

/Signature page attached

Respectfully Submitted,



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PROOF OF SERVICE

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

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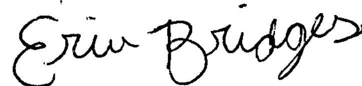

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