THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Appellate Case No.: 2011-192486

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

v.

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

BRIEF OF RESPONDENT HULL & COMPANY, INC.

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STATEMENT OF THE CASE

This matter arises out of a 2005 bar fight allegedly involving Britten Teno ("Teno"), a patron of The Barn Club, and employees of the business operating the bar. Teno contends he was seriously injured as a result of this fight and brought an action against The Barn Club and its former owner, Jim Morton ("Morton") in June of 2007 ("the Tort Action"). The Barn Club and Morton generally denied liability to Teno for his injuries.

In August of 2007, while the Tort Action was still pending, Colony Insurance Company ("Colony"), the general liability insurer for The Barn Club, brought an action against Teno and the Barn Club, seeking a declaration of no coverage for Teno's lawsuit and claims ("the Declaratory Judgment Action"). Colony's basis for its position of no coverage was that the claims were excluded by an assault and battery exclusion in the general liability insurance policy issued to the Barn Club. In October of 2009, the York County Court of Common Pleas granted summary judgment to Colony and issued a judicial declaration that Colony had no duty to defend or indemnify the Barn Club or Morton for the claims made against them in the Tort Action. No party appealed.

The Tort Action continued and resulted in a confession of judgment and subsequent uncontested $8 million judgment entered against The Barn Club. The Barn Club assigned its rights against Colony, Hull & Company, Inc. (hereinafter "Hull & Company"), the insurance broker, and the Gill-Young Insurance Agency (hereinafter "Gill"), The Barn Club's insurance agent, to Appellant.

Appellant filed the current action on July 7, 2010. She alleged six causes of action, including reformation, detrimental reliance, civil conspiracy, negligence,

negligent misrepresentation, and breach of fiduciary duty. Hull & Company filed an answer to the complaint on August 31, 2010, in which it denied liability. Hull & Company also filed a motion to dismiss each of the plaintiff's causes of action. A hearing was held on the motion to dismiss on November 18, 2010, and resulted in Judge Kimball granting Hull & Company's motion as to Appellant's reformation[1], detrimental reliance, civil conspiracy, negligent misrepresentation, and breach of fiduciary duty causes of action. Judge Kimball found that the dismissal of the negligence claim at the pleadings stage was premature and denied Hull & Company's motion to dismiss that cause of action at that time. No appeal was taken by any party.

After discovery, Hull & Company filed a motion for summary judgment as to the remaining negligence claim. On March 31, 2011, Judge Kimball granted Hull & Company's summary judgment motion as to the negligence claim. He also granted summary judgment to Gill as to the only claim remaining against it and to Colony for all claims. Appellant appealed following this order, and this appeal relates solely to the trial court's March 31, 2011 order.

[1] Appellant conceded at argument that she improperly pled a reformation cause of action against Hull & Company and Gill and agreed to voluntarily dismiss the reformation cause of action against these two defendants.

STATEMENT OF FACTS

This case arises out of personal injuries sustained by Britten Teno allegedly while a patron at a night club known as The Barn Club, d/b/a "The Money", on March 6, 2005. Appellant alleges that Mr. Teno was attempting to break up a fight on the dance floor when he was seriously injured as a result of being beaten by bouncers with flashlights and stomped and kicked in the head.

About a year prior to the alleged accident, Jim Morton, the former president of The Barn Club, sought to procure insurance coverage for it. In February 2004, Morton went to insurance agent, Gill, to purchase insurance for The Barn Club. He provided Gill with a letter from an attorney, Mickey Aberman, at the Aberman Family Partnership[2], making recommendations for desired insurance coverage. (R. p. 488; p.491, ll. 6-25; p. 506-508, ¶ 11). In the letter, Aberman recommended increasing the property coverage limits from $75,000 to $200,000, increasing the general liability coverage from $300,000 to $1 million, and requesting that there be no dram shop exclusion. (R. p. 488; p. 493, ll. 12-25). The letter made no request for assault and battery coverage. (R. p. 488; p. 494, ll. 8-11; p. 506-508, ¶ 12). Morton made no additional coverage requests, either orally or in writing. (R. p. 492, ll. 11-14).

Morton signed an application for insurance requesting several different types of insurance, including property coverage, general liability coverage, and liquor liability coverage. (R. p. 510-511). On March 10, 2004, Gill contacted Hull & Company, an insurance broker, and requested that it quote the different types of insurance referred to in the application for The Barn Club. (R. p. 513).

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[2] Aberman Family Partnership owned the building where The Barn Club was located and Mickey Aberman, who is a lawyer in Charlotte, is a member of that partnership.

On March 12, 2004, Hull & Company provided quotes to Gill for commercial property insurance provided by Pacific Insurance Company and for commercial general liability coverage provided by Colony. (R. pp. 515-520). The quote provided by Colony included $1 million of commercial general liability coverage per occurrence and expressly excluded coverage for assault and battery.[3] In providing these quotes, Hull & Company relied exclusively on the information it received from Gill and dealt solely with Gill. It never received any requests or had any communication from Morton whatsoever. (R. p. 492, ll. 11-14).

On March 15, 2004, Gill requested that Hull & Company bind both policies as quoted, and it did so. (R. pp. 526-527; pp. 530-531). On March 24, 2004, Colony issued a commercial general liability policy to The Barn Club bearing number GL3145075 for the policy period March 17, 2004 through March 17, 2005. (R. pp. 533-577). The policy contained an exclusion highlighted by bold font that read "ASSAULT, BATTERY OR ASSAULT AND BATTERY EXCLUSION." (R. p. 566). Upon the issuance of this policy, it is clear that Hull & Company had located and Gill had provided coverage exactly as Morton requested in the letter provided by Aberman. (R. p. 192, ll. 11-14).

There is no doubt but that Mr. Morton knew of the existence of the assault and battery exclusion. Indeed, on March 10, 2004, in conjunction with his application for liquor liability coverage, the same date he approached Gill for general liability coverage, Morton was asked whether his general liability policy excluded coverage for assault and battery, and he answered affirmatively "yes." (R. pp. 581-582). In his deposition,

[3] The exclusion of assault and battery coverage is consistent with information obtained from Colony's requirements for general liability coverage which require that assault and battery coverage must be excluded. (Colony CGL Requirements).

Morton admitted that as of March 2004, assault and battery coverage was not included in his general liability policy. (R. p. 496, ll. 23-25; p. 497, ll. 1-3). He also admitted that there is no evidence to indicate that anyone ever asked Hull & Company to provide any quotes for insurance without such an exclusion. Further, it is uncontested that a copy of the policy containing the exclusion was provided to Mr. Morton almost a year before the date Mr. Teno was allegedly injured, but Mr. Morton never read his policy. (R. p. 194, ll. 4-8).

At no time during the insurance procurement process did anyone from Hull & Company have any relationship, communications or dealings with Mr. Morton or anyone associated with The Barn Club. (R. p. 501, ll. 23-25; p. 502; ll. 1-4, p. 504; ll. 16-19). He did not, either individually or on behalf of The Barn Club, rely on any actions by Hull & Company in making his insurance coverage decisions. (R. p. 503, ll. 24-25; p. 504, ll.1-3). Hull & Company made no representations to Mr. Morton or anyone else at The Barn Club, and there was no coverage requested by Mr. Morton that was not provided by Hull & Company. (R. P. 504, ll. 4-11). In fact, he professed to have no knowledge of Hull & Company's existence or involvement in this matter. (R. p. 501, ll. 23-25; p. 502, ll.1-8).

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court under Rule 56, SCRCP. Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct.App.2005). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any

triable issue of fact exists, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). Nonetheless a court "cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (citations omitted). Further, "[i]n order to resist a motion for summary judgment, the non-moving party must come forward with specific facts showing genuine issues necessitating trial." NationsBank v. Scott Farm, 320 S.C. 299, 303, 565 S.E.2d 98, 100 (Ct.App. 1995).

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE APPELLANT FAILED TO PRODUCE ANY EVIDENCE OF NEGLIGENCE BY HULL & COMPANY.

The sole cause of action against Hull & Company before the trial court was Appellant's claim that Hull & Company was negligent in failing to procure an insurance policy for The Barn Club that included assault and battery coverage. However, as the trial court noted, Appellant conceded at the summary judgment hearing that Hull & Company was not directly negligent. There was no evidence of any direct communications between Hull & Company and Morton - no request for advice, no promise of procurement of assault and battery coverage. In fact, Morton did not even know that Hull & Company was involved in the issuance of the policy. Rather, Appellant argued that if the insurance agent, Gill, was negligent, then Hull & Company, as the producer, was negligent by association. The trial court correctly granted summary judgment on this unrecognized theory of negligence.

In order to survive summary judgment, Appellant was required to produce some evidence of a duty owed by Hull & Company to The Barn Club; the breach of that duty by negligent acts or omissions; and damages resulting from the breach. See, Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716 (Ct.App. 1989). Appellant failed to produce evidence of a duty owed at the summary judgment stage and, even though Appellant has now introduced for the first time an alternative theory of the creation of a duty as to Gill, she has utterly failed in her appeal to point to any evidence of a duty owed by Hull & Company. Further, as Appellant conceded at the summary judgment hearing, she has no evidence of a breach of duty by Hull & Company.

A. Hull & Company owed no duty to the insured to procure assault and battery coverage.

Insurers and their agents generally do not have a duty to advise an insured. Carolina Production Maintenance, Inc. v. U.S. Fidelity and Guar. Co., 310 S.C. 32, 38, 425 S.E.2d 39, 43 (Ct.App. 1992). During the application stage, an insurance agent is not required to go beyond the request of the insured, to inject matters not raised by the insured, or to conduct any independent inquiries. Pitts v. Jackson Nat'l Life Ins. Co., 352 S.C. 319, 336-37, 574 S.E.2d 502, 511 (Ct.App. 2002). Not even an insured's request for "full coverage" or for the "best policy" places an insurance agent "under a duty to determine the insured's full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase." Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 472, 377 S.E.2d 343, 347 (Ct.App. 1988).

According to his deposition testimony and sworn affidavit, Morton approached Gill with a letter listing the coverage he desired to procure for The Barn Club. This list

did not include assault and battery coverage and Morton admitted that he asked for no specific coverages other than those contained in the letter. (R. p. 492, ll. 3-14). This information was then presented to Hull & Company who solicited insurance in accordance with these requests. There is no evidence to suggest that Hull & Company deviated from the request for coverage it received, and Appellant has not argued otherwise. (R. p. 504, ll. 4-11).

Appellant, apparently conceding that no general duty to advise exists, seeks to create a duty by arguing on appeal that Morton made a specific request for assault and battery coverage. In her brief, Appellant quotes a portion of Morton's deposition testimony taken in the Declaratory Judgment Action in which Morton testified that, through the Aberman letter, he requested that Gill procure a policy that included assault and battery coverage. (Appellant's Br., p. 14-17). However, Morton did not have the letter available for inspection at the time of his testimony. Later, when Morton was presented with a copy of the Aberman letter, which does not mention assault and battery coverage, he admitted that his earlier testimony was erroneous and testified that no such specific request was ever made. (R. pp. 296-297).

Even if Appellant could maintain her negligence action based on erroneous testimony, which she cannot, she has failed in her appeal to make this argument, or, indeed, any argument, against Hull & Company. Specifically, Hull & Company is not mentioned by name in any of Appellant's arguments, nor does Appellant assert any argument of a specific duty created between Hull & Company and The Barn Club. In the complete absence of any evidence of a duty to procure assault and battery coverage owed

by Hull & Company to the insured, summary judgment was appropriate and should be affirmed.

B. Appellant's admission that Hull & Company breached no duty owed to the insured necessitated summary judgment.

In its order granting summary judgment to Hull & Company, the trial court wrote,

> Plaintiff conceded at the hearing that any relief against Hull is derivative of any liability to Gill and *no independent or separate acts of negligence exist to substantiate a claim against Hull.* Further, there is no evidence that any one at The Barn Club had any dealings with Hull or relied upon it in any respect whatsoever in connection with the procurement of coverage.

(R. p. 19) (emphasis added). Thus, even if Hull & Company had a duty to the insured in connection with the procurement of insurance, Appellant conceded that Hull & Company did not breach that duty.

This concession is not challenged in Appellant's appeal. Appellant does not point to a single act of negligence on the part of Hull & Company. The undisputed facts are that the insured not only never spoke to anyone at Hull & Company, he was not even aware of Hull & Company's existence. Morton presented Gill with a request for insurance, Gill forwarded this request to Hull & Company and Hull & Company solicited quotes to provide the requested coverage. Hull & Company provided Gill with a quote from Colony that explicitly stated that assault and battery coverage was excluded.

South Carolina has recognized that agents and brokers "are required to exercise due care in placing insurance and would be personally liable for the neglect of that duty." Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, 171 S.E.2d 486, 490 (1969). However, cases citing this principal address facts in which the agent or broker had a direct relationship with the insured and took on the duty of negotiating insurance policies

on behalf of the insured. See, Riddle-Duckworth at 421, 171 S.E.2d at 491 (holding questions of fact existed whether agent who had direct communications with insured exercised due care in procuring insurance); Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 377 S.E.2d 343 (Ct.App. 1988) (holding insurance agent does not have duty to advise insurance applicant).

In Riddle-Duckworth, an insured approached an insurance agent to procure liability insurance coverage and specifically requested that an elevator lift located on his premises be covered under the proposed policy. 253 S.C. at 417, 171 S.E.2d at 488. The agent delivered a policy to the insured with assurances that it afforded full coverage for the premises, including the elevator. Id. The following year, the insured moved to a new location and the elevator lift was re-located to the new premises. The agent transferred the policy to the new location and indicated to the insured that there was complete coverage for the new location which included the elevator. Id. at 417, 488-89. The insured renewed his policy in subsequent years, and upon each renewal the agent assured the insured that the premises were "fully covered and there was nothing to worry about." Id. at 418, 489.

Upon receiving a renewal policy, the insured read the documents and had some doubt as to whether the policy afforded coverage for the elevator. When the insured asked the agent about the policy, the agent indicated that the policy provided for full coverage. Id. Subsequently, an accident occurred in the elevator. After being notified of the accident, the agent indicated to the insured that "everything would be taken care of." When the insurer denied coverage on the grounds that the policy did not cover the

operation of the elevator, the agent informed the insured that he made a mistake and would "take care of it." Id. at 419, 489.

The insured brought suit against the agent and his partner to recover the amount of the judgment against it in the underlying tort case. The Court held that because the transaction relative to the procurement of insurance was solely between the insured and the agent, the trial court erred as a matter of law in refusing to grant the motion of the partner for directed verdict. Id. at 419-20, 490. The Court indicated that the duties in the procurement of insurance arise from the relationship of a principal and his agent and held that the agent was liable to the insured for negligently failing to follow the insured's instructions. Id.

Unlike the agent in Riddle-Duckworth, Hull & Company had no contact whatsoever with. Morton or any representative of The Barn Club when it solicited insurance quotes at Gill's request. In fact, Morton was not aware of Hull's existence until the complaint was filed in this case. (R. p. 502, ll. 1-4). While the agent in Riddle-Duckworth repeatedly assured the insured that the policy provided the desired coverage, Hull & Company made no representations to either Appellant or Gill that suggested that the policy covered assault and battery. In fact, the quote and binder Hull & Company provided to Gill both specifically mention that assault and battery is excluded under the policy. Because there was no direct relationship between Hull & Company and the insured giving rise to an independent duty of care, and there is no evidence of a negligent act on the part of Hull & Company in providing insurance to the insured, as conceded by Appellant, the trial court's grant of summary judgment to Hull & Company should be affirmed.

II. THE STATUTE OF LIMITATIONS BARS APPELLANT'S CLAIMS

The trial court correctly held that Appellant's claim against Hull & Company is barred by the applicable statute of limitations. Appellant asserted a negligence claim against Hull & Company that is subject to a three-year statute of limitations. S.C. Code Ann. § 15-3-550 (Supp. 2010). Appellant does not contest the applicable statute. The issue is when the statute began to run and the extent, if any, of forbearance afforded by the discovery rule.

The trial court held that the insured's claim against Hull & Company accrued no later than March of 2007 and as early as March of 2004. Because the sole claim against Hull & Company is a negligence claim in connection with the procurement of an insurance policy, the trial court correctly looked at the date of the procurement, March of 2004. At that time, when the policy was issued, the insured, had he read his policy, would have been on notice that it did not include assault and battery coverage. Indeed, Morton testified that had he read the policy, he would have known that assault and battery claims were expressly excluded (R. p. 194, ll. 9-12; pp. 506-508, ¶ 21).

South Carolina's discovery rule holds that the statute of limitations begins to run "from the date when a claimant knew or should have known that, through the exercise of reasonable diligence, a cause of action exists." Holmes v. National Service Industries, Inc., 395 S.C. 305, 309, 717 S.E.2d 751, 753 (2011). Because the insured could have easily determined in March of 2004 that no assault and battery coverage was procured by reading his policy, the statute of limitations accrued at that time and expired in March of 2007. Appellant did not file this action until July of 2010, over three years after the statute expired.

Additionally, the trial court found indisputable evidence that the insured knew that his policy did not contain assault and battery coverage in March of 2007. At that time, the insured prepared and signed an insurance application that asked whether the nightclub's general liability policy excluded assault and battery coverage. The insured answered, "yes." (R. p. 586-587). Therefore, the insured had actual knowledge that the policy excluded assault and batter coverage in March of 2007. Yet Appellant's lawsuit was not filed until July of 2010, missing the statute by at least three months.

Appellant argues that the statute did not begin to run until Colony filed its declaratory judgment action in August of 2007. (Appellant's Br., p. 23). However, this calculation mischaracterizes the nature of Appellant's claims against Hull & Company. Appellant claims that Hull & Company was negligent in failing to procure an insurance policy for The Barn Club that included coverage for assault and battery. As early as March of 2004, the insured was able to verify that assault and battery coverage was clearly and unambiguously excluded under the policy and as late as March of 2007 the insured acknowledged the exclusion. The accrual of a cause of action was never dependent upon Colony's filing of a declaratory judgment action or the outcome of that action. Therefore, the trial court correctly granted the motion for summary judgment based on Appellant's failure to file within the statute of limitations.

III. THE TRIAL COURT PROPERLY REFUSED TO CONSIDER THE DOCTRINE OF REASONABLE EXPECTATIONS

Despite South Carolina's prior rejections of the doctrine of reasonable expectations, Appellant argues that the trial court improperly rejected the doctrine's application in this matter. Appellant's argument is erroneous not only for advancing a rejected theory of insurance contract construction, but also for being irrelevant in light of

the prior judicial adjudication of no coverage in the Declaratory Judgment Action and the doctrine's irrelevance to the negligence cause of action against Hull & Company in this action. Finally, Appellant never advanced the doctrine of reasonable expectations to the trial court as a basis for rejecting Hull & Company's motion for summary judgment and, thus, failed to preserve it for appeal.

A. An overview of the doctrine of reasonable expectations.

In 1970, Professor (later Judge) Robert E. Keeton published a two-part article examining the rights of insurance policyholders and identifying three principals he viewed as emerging in the courts to deal with situations not capable of being addressed by traditional contract principals. Keeton, Insurance Law Rights at Variance With Policy Provisions: Part One, 83 HARV. L. REV. 961 (1970) and Keeton Insurance Law Rights At Variance With Policy Provisions: Part Two, 83 HARV. L. REV. 1281 (1970). The second of these three principals he dubbed the doctrine of reasonable expectations, and he summarized it thus:

> The objectively reasonable expectations of applicants and intended beneficiaries of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

Id. at 967. Keeton conceded that the doctrine overlapped to some extent the contractual doctrine of resolving ambiguities in a contract against the drafter. Id. However, under Keeton's expression of the doctrine, a clear and unambiguous exclusion in a policy of insurance would not be enforced if it contravened the "objectively reasonable expectations" of the insured. Id. at 968. Further, Keeton argued that an insured's knowledge and acquiescence of the terms of the policy, even though the terms were

objectively unreasonable, would not defeat coverage under the doctrine of reasonable expectations. Id. at 974.

Following Keeton's articles, a number of jurisdictions began adopting the doctrine of reasonable expectations. However, the degree of faithfulness to Keeton's doctrine varied widely, as did the application.

> Many courts had difficulty embracing a concept that they regarded as turning too quickly away from the traditional contract law principals positing that contract language should be enforced as written if it is sufficiently clear. These courts were willing to consider policyholder expectations only if policy language was ambiguous. Other courts were willing to utilize the Keeton form of reasonable expectations analysis to overcome clear text, but only where language favorable to insurers was complex, hidden, arguably unfairly surprising, or where the insured was a consumer or small business.

Stemple, Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role, 5 CONN. INS. L.J. 181, 189-190 (1998). Indeed, it appears that only seven states, Alaska, Arizona, Colorado, Minnesota, Nevada, New Mexico and Pennsylvania have adopted Keeton's version of the doctrine of reasonable expectations, in which the insured's expectations prevail over unambiguous policy language and the insured's failure to read the policy is irrelevant.[4]

By far, the majority of jurisdictions that have adopted the doctrine of reasonable expectations have adopted a narrower version.[5] This narrow version is sometimes

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[4] Whittier Properties, Inc. v. Alaska Nat'l Ins. Co., 185 P.3d 84 (Alaska 2008); Castle v. Barrett-Jackson Auction Co., LLC, 276 P.3d 540 (Ariz. 2012); Bailey v. Lincoln Gen. Ins. Co., 255 P.3d 1039 (Colo. 2011); Carlson v. Allstate Ins. Co., 749 N.W.2d 41 (Minn. 2008); Sullivan v. Dairyland Ins. Co., 98 Nev. 364, 649 P.2d 1357 (1982); Pribble v. Aetna Life Ins. Co., 84 N.M. 211, 501 P.2d 255 (1972); Collister v. Nationwide Life Ins. Co., 479 Pa. 579, 388 A.2d 1346 (1978).

[5] See, e.g., Federated Mut. Ins. Co. v. Abston Petroleum, Inc., 967 So.2d 705, 714 (2007) (Alabama); AIU Ins. Co. v. Superior Court, 51 Cal.3d 807, 274 Cal.Rptr. 820, 799 P.2d 1253 (1990) (California); Agosto v. Aetna Cas. & Sur. Co., 239 Conn. 549, 687 A.2d 1267 (1996) (Connecticut); Smagala v. Woen, 307 Ill.App.3d 213, 240 Ill.Dec. 398, 717 N.E.2d 491 (Ill.App. 1st Dist. 1999) (Illinois); Rodman v. State Farm Mut. Ins. Co., 208 N.W.2d 903 (Iowa 1973) (Iowa); True v. Raines, 99 S.W.3d 439 (Ky. 2003) (Kentucky); Kertz v. State Farm Mut. Ins. Co., 236 S.W.3d 39 (Mo. 2007) (Missouri); Babcock v. Farmers Ins.

viewed simply as a tool to use where the insurance policy contains an ambiguous provision. Smagala v. Woen, 307 Ill.App.3d 213, 240 Ill.Dec. 398, 717 N.E.2d 491 (Ill.App. 1st Dist. 1999). The Supreme Court of Alabama explained the reasons for limiting the doctrine:

> Other courts have limited the use of the doctrine of reasonable expectations to situations in which an insurance policy is ambiguous. Furthermore, expectations that contradict a clear exclusion are not "objectively reasonable." Such a limit on the doctrine of reasonable expectations is necessary. Otherwise, this Court would be faced with the strong temptation to substitute its notion of equity for the unambiguous terms of a contract and the doctrine could be used to invalidate every policy exclusion.

Federated Mut. Ins. Co. v. Abston Petroleum, Inc., 967 So.2d 705, 714 (2007) (internal citations omitted).

Many jurisdictions adopting the narrow version of the doctrine of reasonable expectations still enforce the insured's duty to read the policy of insurance. For example, the Kentucky Court of Appeals held that "an insured is obligated to read the policy of insurance in its entirety and is bound by its conspicuous and unambiguous terms." Bidwell v. Shelter Mut. Ins. Co., No.2009-CA-001298-MR, 2010 WL 3187986, at *6 (Ky.App. Aug. 13, 2010). In Minnesota, the Court of Appeals observed that the doctrine of reasonable expectations "protects the objectively reasonable expectations of the insured" but "does not destroy the insured's obligation to read the policy." Frey v. United Servs. Auto. Ass'n, 743 N.W.2d 337, 342-43 (Minn.Ct.App. 2008). Rather, the doctrine "holds an insured to a reasonable understanding of the policy." Id.

Exchange, 299 Mont. 407, 999 P.2d 347 (2000) (Montana); Nile Valley Coop. Grain & Milling Co. v. Farmers Elevator Mut. Ins. Co., 187 Neb. 720, 193 N.W.2d 752 (1972) (Nebraska); Shea v. United Services Auto. Ass'n, 120 N.H. 106, 411 A.2d 1118 (1980) (New Hampshire); Villa v. Short, 195 N.J. 15, 947 A.2d 1217 (2008) (New Jersey); Max True Plastering Co. v. U.S. Fidelity & Guar. Co., 912 P.2d 861 (Okla. 1966) (Oklahoma); Parker v. State Farm Mut. Auto. Ins. Co., 224 W.Va. 317, 685 S.E.2d 895 (2009) (West Virginia); Ahrenholtz v. Time Ins. Co., 968 P.2d 946 (Wyo. 1998) (Wyoming).

Many jurisdictions have rejected the doctrine of reasonable expectations.[6] Most courts rejecting the doctrine (and many courts declining to adopt it) have expressed support for traditional contract interpretation principals and skepticism that the doctrine would assist the courts in deciding contract questions. The Supreme Court of Florida expressed its rejection of the doctrine of reasonable expectations in terms of its limited usefulness:

> We decline to adopt the doctrine of reasonable expectations. There is no need for it if the policy provisions are ambiguous because in Florida ambiguities are construed against the insurer. To apply the doctrine to an unambiguous provision would be to rewrite the contract and the basis upon which the premiums are charged. . . . Construing insurance policies upon a determination as to whether the insured's subjective expectations are reasonable can only lead to uncertainty and unnecessary litigation.

Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So.2d 1135, 1140 (Fla. 1998). In explaining its rejection of the doctrine, the Ohio Supreme Court focused on the need to uphold traditional contractual principals:

> [T]he reasonable expectation doctrine requires a court to rewrite an insurance contract which does not meet popular expectations. Such rewriting is done regardless of the bargain entered into by the parties to the contract.

Sterling Merchandise Co. v. Hartford Ins. Co., 30 OhioApp.3d 131, 506 N.E.2d 1192, 1197 (1986). Finally, several states have been invited to adopt the doctrine of reasonable expectations, but, for various reasons, have declined to do so. See, Mayer v. Medical Malpractice Joint Underwriting Ass'n, 40 Mass.App.Ct. 266, 663 N.E.2d 274, fn. 6 (1996) (Massachusetts); Nationwide Mut. Ins. Co. v. Lagodinski, 683 N.W.2d 903 (N.D.

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[6] Deni Associates of Florida, Inc. v. State Farm Fire & Cas. Ins. Co., 711 So.2d 1135 (Fla. 1998) (Florida); J.A. Casey v. Highlands Ins. Co., 600 P.2d 1387 (Idaho 1979) (Idaho); Wilkie v. Auto-Owners Ins. Co., 469 Mich. 41, 664 N.W.2d 776 (Mich. 2003) (Michigan); Sterling Merchandise Co. v. Hartford Ins. Co., 30 OhioApp.3d 131, 506 N.E.2d 1192 (1986) (Ohio); Sosa v. Paulos, 924 P.2d 357 (Utah 1996) (Utah); Keenan v. Industrial Indem. Ins. Co., 108 Wash.2d 314, 738 P.2d 270 (1987) (Washington).

2004) (North Dakota); American Family Mut. Ins. Group v. Kostaneski, 688 N.W.2d 410 (S.D. 2004) (South Dakota).

B. South Carolina has not adopted the doctrine of reasonable expectations.

In South Carolina, our Supreme Court has not expressly ruled on the doctrine of reasonable expectations. However, the Court of Appeals has expressly rejected it several times as not consistent with South Carolina's traditional rules for contract construction. Ex parte United Services Auto. Ass'n, 365 S.C. 50, 54, 614 S.E.2d 652, 654 (Ct.App. 2005); Allstate Ins. Co. v. Mangum, 299 S.C. 226, 231-32, 383 S.E.2d 464, 466-67 (Ct.App. 1989); see also, Bell v. Progressive Ins., 2011-UP-242 (Ct.App. May 24, 2011) (opinion withdraw, substituted and refilled June 23, 2011). Further, the United States District Court for the District of South Carolina has similarly declined to apply the doctrine on many occasions. See, Doe v. Northwestern Mut. Life Ins. Co., 2012 WL 2405510 (D.S.C. June 26, 2012); Mize v. Travelers Cas. Co., 2011 WL 891322 (D.S.C. 2011); Nationwide Mut. Fire Ins. Co. v. Neetu, Inc., 2010 WL 3927568 (D.S.C. 2010); Southern Land and Golf Co. v. Harleysville Mut. Ins. Co., 2006 WL 2443340 (D.S.C. 2006).

Despite the opinions from this court, Appellant argues that the South Carolina Supreme Court "applied" (not "adopted") the doctrine in Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co., 395 S.C. 40, 717 S.E.2d 589 (2011). (Appellant's Br., p. 12). In Crossmann, the South Carolina Supreme Court fashioned a method of allocation amongst insurers whose policies were triggered by continuous or progressive property damage claims in the context of a construction defect suit. Overlooked by Appellant is the fact that the insurance policies at issue did not

specify a method for allocation, forcing the court to craft a method. Nevertheless, the court, using traditional contract construction tools, sought to give effect to the policies' provisions regarding damage that occurs during the policy period. In doing so, the court referenced a Massachusetts case that decided the same issue, Boston Gas Co. v. Century Indemnity Co., 454 Mass. 337, 910 N.E.2d 290 (2009):

> 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), it is consistent with the objectively reasonable expectations of the contracting parties.

Crossmann at 62, 717 S.E.2d at 600-601. The Crossmann Court went on to quote portions of the Boston Gas opinion addressing the reasonable expectations of an insured in connection with a time-on-risk allocation method.

Appellant fails to acknowledge that the South Carolina Supreme Court did not adopt the doctrine of reasonable expectations in Crossmann. At most, the court referenced the objectively reasonable expectations of insureds, in *dicta*, in connection with fashioning an allocation method that was simply not addressed in the policies. True to its traditional views of contract construction, the Crossmann Court sought to adopt an allocation methodology that gave effect to the policies' limitation of damages to those incurred in the policy period. More importantly, the court did not utilize the doctrine of reasonable expectations in Crossmann as Appellant seeks to do in the present case, to avoid the enforcement of an unambiguous exclusion in the insured's policy and to avoid the insured's obligation to read the policy.

South Carolina has successfully construed insurance policies using the traditional rules of contract construction in the forty-two years since Professor Keeton's introduction of the doctrine of reasonable expectations. Our Supreme Court's reference to the

"reasonable expectations" of insureds in Crossmann in no way indicates an adoption of the doctrine or, indeed, a preference for which version of the doctrine the court would adopt. Accordingly, Appellant's argument that South Carolina recognizes the doctrine of reasonable expectations is erroneous.

C. The doctrine of reasonable expectations, as a contract theory, is inapplicable to the negligence cause of action at issue in this appeal.

As detailed in the overview above, the doctrine of reasonable expectations is a tool for the construction of contracts. Indeed, it is codified in the Restatement (Second) of Contracts at section 211:

> Section 211. Standardized Agreements
>
> (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.
>
> (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
>
> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

While the doctrine, if adopted, might have application to a declaratory judgment action or breach of contract action on an insurance policy, neither of these causes of action were before the trial court or before this court in connection with this appeal. The Declaratory Judgment Action, which was resolved over three years ago, was the appropriate litigation for Appellant to raise the applicability of the doctrine of reasonable expectations. The present litigation, at least as it relates to Hull & Company, is focused

on a single cause of action for negligence. Appellant has not argued that, and has certainly presented the court with no case law support for the proposition that, the doctrine of reasonable expectations somehow applies to tort claims. Indeed, there is no support for such a proposition and, thus, the trial court's grant of summary judgment was appropriate.

D. Appellant failed to preserve for appeal her argument on the doctrine of reasonable expectations.

The issue of the applicability of the doctrine of reasonable expectations should be dismissed because there is no evidence that the appellant raised this issue to the trial court. The doctrine of reasonable expectations was never pled in the appellant's complaint and was never argued in connection with the summary judgment hearing giving rise to this appeal. Rather, the appellant now seeks to transform her negligent misrepresentation claim against her agent into what is essentially a defense to enforcement of the Colony policy's assault and battery exclusion. However, by failing to appeal the determination of no coverage in the Declaratory Judgment Action, Appellant cannot now, in her appeal in this matter, relitigate the assault and battery exclusion.

In her brief, Appellant argues that she alleged that the 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)." (Appellant's Br. at p. 11). However, this argument was not made to the trial court in support of the application of the doctrine of reasonable expectations, which is never mentioned by Appellant in her complaint or arguments to the trial court. Rather, it was made to support Appellant's negligent misrepresentation claim against Morton's insurance agent, Gill.

As the South Carolina Supreme Court recently reiterated, "[a]t a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 640 (2011) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). In Herron, the appellant raised the issue of federal preemption for the first time on appeal. In addressing the issue preservation argument, the court held:

> [B]ecause Appellant can point to no instance where preemption was properly raised or ruled upon, to disregard our issue preservation rules under these circumstances would render them meaningless. As this Court observed, issue preservation rules "prevent[ ] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Here, intentionally or by chance, Appellant kept the ace card of preemption up its sleeve until after this Court filed its opinion. Under even the most liberal approach to issue preservation principles, we could not treat Appellant's preemption argument as preserved in our courts as a matter of state law.

Herron at 470, 719 S.E.2d at 644-45 (internal citations omitted). Thus, under South Carolina law, Appellant's doctrine of reasonable expectations issue, raised for the first time in her brief on appeal, is not properly preserved for appellate review.

IV. THE TRIAL COURT CORRECTLY HELD THAT APPELLANT'S CLAIMS ARE BARRED AS A MATTER OF LAW BY THE INSURED'S FAILURE TO READ HIS POLICY.

A. The insured's failure to read his policy is the sole evidence of negligence in this matter.

The trial court correctly granted Hull & Company's motion for summary judgment in part based on Morton's failure to read his policy of insurance. (R. p. 18). Specifically, the trial court's order finds:

> Morton admitted that he never read the policy when he received it in March, 2004. I find and conclude that Morton had a duty to read the policy. In fact, he concedes as much. Since Morton failed to read the

> policy, which had been in effect for nearly a year before the alleged assault and battery occurred, Plaintiff's claims must fail as a matter of law.

Appellant objects that the trial court based its decision on pre-comparative negligence case law and argues that under our current comparative negligence theory, the insured's failure to read his policy is not a complete bar to recovery. (Appellant's Br., p. 19). However, Appellant mistakes the trial court's ruling as a complete bar to recovery. Rather, the trial court held that Morton's failure to read the policy barred recovery as a matter of law.

Assuming, for the sake of argument, that Appellant is correct that failure to read a policy is a factor to be considered in assessing comparative negligence, Morton's complete failure to read the policy in his possession for nearly a year is evidence of overwhelming negligence. Indeed, the insured conceded that had he read the policy he would have easily understood that no assault and battery coverage was afforded. (R. p. 194, ll. 4-8; pp. 506-508, ¶21). Under South Carolina's comparative negligence theory, a party is entitled to recovery only if his or her negligence is not greater than the defendant's negligence. Nelson v. Concrete Supply Co., 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991). The South Carolina Supreme Court has held, however, that when "evidence of the plaintiff's greater negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough" to deny summary judgment. Bloom v. Ravoria, 339 S.C. 417, 424, 529 S.E.2d 710, 714 (2000). In this case, the trial court found, and Appellant conceded, that Hull & Company was not negligent in any way. The trial court further found that the insured's failure to read the policy was overwhelming evidence of greater, indeed, complete negligence, there being

none on the part of the defendants. As such, the trial court correctly granted summary judgment for the Hull & Company as to the negligence claim.

B. Appellant failed to raise this issue before the trial court, and it is not preserved for appellate review.

Appellant cannot point to evidence that she raised the issue of the insured's failure to read his policy and whether it constitutes a complete bar on recovery to the trial court. Because this argument was not raised and addressed by the trial court, it cannot now be considered on appeal. See, Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 640 (2011) (at minimum, issue must be raised and ruled upon by trial judge to be preserved).

CONCLUSION

For the reasons set forth above, this court should affirm the trial court's order granting summary judgment to Hull & Company.

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January 28, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Appellate Case No. 2011-192486

Pamela Dill as 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. ..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondent Hull & Company, Inc. complies with Rule 211(b), SCACR.

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

PROOF OF SERVICE

The undersigned hereby certifies that on the 28th day of January, 2013, copies of Respondent Hull & Company, Inc.'s Final Brief and Certificate of Counsel were placed in envelopes, and deposited in the United States Mail with sufficient postage annexed thereto, addressed as follows:

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