



Judgment, on June 5, 2019. Newton subsequently filed a Memorandum in Support of his motion, with accompanying Exhibits A – AA, on May 30, 2019; a Reply Memorandum, with accompanying Exhibits BB – CC, on June 13, 2019; a Response to Plaintiff’s Supplemental Memorandum and an Affidavit from Newton on June 24, 2019; and an Amended Response to Plaintiff’s Supplemental Memorandum and Exhibits 1 – 3 to Newton’s Affidavit on June 25, 2019.

PAIC filed its timely Answer on February 14, 2019. PAIC filed its Motion for Summary Judgment on June 14, 2019, and filed its Memorandum in Support of its motion, with accompanying Exhibits A – B, on June 25, 2019.

In response to the dispositive motions, Hutson filed a Memorandum to Defendant’s Response on May 7, 2019,<sup>1</sup> and a Supplemental Memorandum and Affidavit of Huston, with attachments, on June 19, 2019.

A hearing was held on June 26, 2019, at which time the Court heard arguments on the motions from the parties. This Order addresses only the Motion for Summary Judgment brought by PAIC.

#### **STANDARD OF REVIEW**

Summary judgment is appropriate where “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.” Rule 56(c), SCRPC. In determining whether any triable issues of fact exist, the court must view both the evidence and all reasonable inferences able to be drawn from the evidence in the light most favorable to the non-moving party. Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000). Nonetheless, a court “cannot ignore facts unfavorable to [the

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<sup>1</sup> Plaintiff’s May 7, 2019 filing references accompanying Exhibits 14.0 – 30.0, but these exhibits were not included with the filing submitted to the Richland County Circuit Court.

non-moving] 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). Accordingly, the court must search the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory or shadowy one. Saluda Motor Lines v. Crouch, 300 S.C. 43, 46, 386 S.E. 2d 290, 292 (Ct. App. 1989).

The plain language of Rule 56(c), SCRCPP, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case and on which that party will bear the burden of proof at trial. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001). With respect to an issue on which the non-moving party has the burden of proof, the moving party may point out to the trial court that there is an absence of evidence to support the non-moving party’s case. Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). The non-moving party must then “do more than simply show that there is some metaphysical doubt as to the material facts[,]” but “must come forward with specific facts showing that there is a genuine issue for trial.” Id. A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. Shupe v. Settle, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (Ct. App. 1994). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Moore v. Barony House Restaurant, LLC, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009).

### **RELEVANT FACTS**

Stated succinctly, Hutson’s Amended Complaint raises claims in contract and tort against his former insurer and their coverage counsel related to the defense under right of reservation rendered to him in two prior lawsuits—a federal class action case in which Hutson was sued under

a third party claim for equitable indemnity and a related state defamation action—as well as a declaratory judgment action regarding PAIC’s coverage obligations in those two lawsuits. PAIC’s named insured was BWR, Inc. d/b/a Big Water Resort, and Hutson was an officer of the company. Construing his Complaint liberally, Hutson asserts, or attempts to assert, causes of action against PAIC for breach of contract, bad faith, fraud, misrepresentation, negligence, tortious interference with attorney-client relationship, and legal malpractice. Hutson seeks \$4.5 million in damages.

### *Original Land Deal and Hutson’s Ejectment*

To provide context to the instant litigation, a brief factual background is necessary.<sup>2</sup> Hutson entered into a land deal with TLC Holdings, LLC and its members (collectively “TLC”) in late 2010. Under the terms of the Lease Purchase Agreement, TLC agreed to sell the land upon which the Big Water Resort campground was located to Hutson. As part of that same transaction, Hutson entered into a Membership Interest Purchase Agreement, by which he became the sole member in Big Water Resort, LLC, which operated the campground. Big Water Resort, LLC had previously sold retail memberships in the Big Water Resort campground to the campground members. Hutson was represented by attorney Andrew Tucker in these transactions.

In December 2011, TLC filed an ejectment action against Hutson alleging he defaulted on the terms of the Lease Purchase Agreement. Hutson filed counterclaims against TLC in the Ejectment Action. The parties agreed to settle the Ejectment Action, and the Settlement

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<sup>2</sup> A more detailed recitation of the factual background has been set forth in several prior judicial orders. See Report and Recommendation of Mag. J., Big Water Resort, LLC, et al. v. TLC Holdings, LLC, et al., 2016 WL 7435620 at \*1-\*4 (D.S.C. Apr. 5, 2016), recommendation adopted, 2016 WL 2935891 at \*1-\*4 (D.S.C. May 20, 2016); Order Granting Pl’s. Mot. for Summ. J. as to Def’s. Countercls., TLC Holdings, LLC, et al. vs. M.B. Hutson a/k/a M.B. Hudson, Civ. Action No. 2015-CP-14-00615, pp. 1-5 (Clarendon Ct. Comm. Pl. filed Mar. 2, 2017).

Agreement was adopted into a Consent Order filed April 13, 2012. Hutson was represented by attorney Paul Weissenstein in the Ejectment Action.<sup>3</sup>

Hutson subsequently defaulted upon his obligations under the 2012 Settlement Agreement and Consent Order. TLC sought to evict Hutson from the Big Water Resort property. Following a hearing, the Honorable George James entered an order on March 21, 2014, which enforced the terms of the Consent Order and Settlement Agreement, by operation of which the Lease Purchase Agreement was terminated and Hutson was required to vacate the property. Hutson was represented by attorney H. Freeman Belser in the eviction proceedings.

#### *Prior Lawsuits*

In the midst of TLC's efforts to evict Hutson from the Big Water Resort property, Hutson allegedly sent the campground members a postcard dated December 18, 2013, asserting that both he and they were victims of a scam perpetrated by TLC.

On April 22, 2014, a group of Big Water Resort campground members filed a class action against TLC in federal court ("the Class Action litigation"). TLC asserted third-party claims for equitable indemnification against Hutson, and Hutson filed counterclaims against TLC.

On December 7, 2015, TLC filed a separate action against Hutson in state court for defamation ("the Defamation Action"). TLC's claims related to certain statements in the postcard

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<sup>3</sup> On September 4, 2018, Hutson filed a legal malpractice action against Paul Weissenstein. On February 25, 2019, the Honorable Kristi Curtis granted summary judgment in favor of Weissenstein. In addition to being filed after the statute of limitations, Judge Curtis found that Hutson knew about the lifetime memberships and their potential impact on the title of the subject property during the purchase process. To extent an error was made in failing to identify the title defect, Weissenstein could not be held responsible because he did not represent Hutson at that time. Moreover, there was ample evidence that Hutson was aware of the lifetime memberships, such that his counterclaim against TLC for fraud would have necessarily failed. Accordingly, she found no cognizable malpractice claim against Weissenstein for failing to pursue a counter-claim against TLC and advising Hutson to enter into the Settlement Agreement. Hutson v. Weissenstein, Case No. 2018-CP-43-1583 (Sumter Cnty. Comm. Pleas).

and certain statements Hutson made to the attorney who represented the campground members in the Class Action litigation. Hutson again asserted counterclaims against TLC in the Defamation Action.

In 2016, the Class Action litigation and the Defamation Action were tendered to PAIC. PAIC retained Murphy & Grantland as its coverage counsel and Newton filed a declaratory judgment action seeking a judicial ruling as to PAIC's coverage for TLC's claims asserted against Hutson in the Class Action and the Defamation Action. On September 16, 2016, Hutson executed a Settlement Agreement and Release in the declaratory judgment action, in exchange for monetary consideration, whereby he released Penn-America, its agents, and its affiliates, from liability for certain claims.

Meanwhile, PAIC agreed to defend Hutson in both actions under reservation of rights, but PAIC declined to provide counsel to Hutson for purposes of prosecuting his counterclaims. PAIC originally retained Laura Paton and Mike Etheredge of Carlock Copeland to represent Hutson in both matters, but Frank Gordon of Millberg Gordon was later substituted as counsel for Hutson.

Hutson continued to pursue his counterclaims in both actions *pro se*. However, on May 20, 2016, the federal court granted TLC's motion for summary judgment as to Hutson's counterclaims in the Class Action litigation.<sup>4</sup> On March 2, 2017, the state court similarly granted TLC's motion for summary judgment as to Hutson's counterclaims in the Defamation Action.

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<sup>4</sup> On April 5, 2016, Magistrate Judge Mary Gordon Baker issued her Report and Recommendation in the Class Action litigation, part of which recommended granting TLC's motion for summary judgment on Hutson's counterclaims. Report & Recommendation, Apr. 5, 2016, 2:2014-cv-01583. In his May 20, 2016, Order adopting the findings of the Report and Recommendation, Federal District Judge David C. Norton found that all of the evidence of fraud Hutson submitted related to the original purchase transaction, and that Hutson submitted no evidence of fraud in the inducement as to the Settlement Agreement. Consequently, Judge Norton ruled that Hutson's counterclaims against TLC in the Class Action litigation were barred by *res judicata*. Order Adopting R&R, May 20, 2016, 2:2014-cv-01583.

In early 2018, Penn-America settled TLC's claims against Hutson in the Class Action. This settlement protected Hutson from personal liability for both TLC's third-party claims against Hutson in the lawsuit and from the sanctions previously awarded against him.<sup>5</sup> TLC's equitable indemnification claims against Hutson were dismissed on April 11, 2018.

While the settlement of TLC's claims against Hutson in the Class Action were being finalized, the Defamation Action was tried to a jury. The jury returned a verdict against Hutson in the amount of \$3,500,000.00. Following denial of the posttrial motions, the defense attorney retained by Penn-America filed a Notice of Appeal and filed the Initial Brief of Appellant. See TLC Holdings, LLC, et al. v. M.B. Hutson, Appellate Case No. 2018-000936. While the appeal was pending, Penn-America mediated the case with TLC and ultimately paid its policy limit to settle the Defamation Action in late 2018. TLC accepted the settlement in satisfaction of the judgment against Hutson in the Defamation Action. Newton informed Hutson that TLC's claims against him were settled on December 4, 2018. The next day, Hutson filed the instant lawsuit.

### *The Instant Lawsuit*

Generally speaking, Hutson continues to assert that TLC and its attorneys committed "extrinsic fraud" upon the courts in the 2012 settlement, which he alleges carried over into and tainted all of the subsequent litigation. Hutson makes various claims related to what he avers was PAIC's obligation to expose and address the "extrinsic fraud."

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<sup>5</sup> Though the federal court declined to impose the requested sanctions in its order granting summary of judgment in favor of TLC on the counterclaims brought by Huston, a subsequent motion for sanctions led an award of \$14,908.50 against Huston. Judge Norton found: "Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass or burden third-party plaintiffs, and there is no indication that he intends to cease." Judge Norton further found that "Hutson has established a pattern of making misrepresentations to the court, of making unsupported allegations of unethical and criminal conduct by the third-party plaintiffs, and of using the judicial process as a mechanism of harassment. His meritless filings have wasted untold hours of the court's time." Order Granting Sanctions, Oct. 6, 2017, 2:14-cv-01583.

At the June 24, 2019 hearing, Hutson made no objection to the Court hearing PAIC's timely filed motion for summary judgment. PAIC craved reference to the detailed memorandum that it filed with this Court but orally articulated the eight separate bases for granting its motion. Attached to its memorandum, PAIC provided a copy of the commercial general liability policy pursuant to which PAIC defended Hutson and an affidavit of Thomas L. Harper, Jr. with accompanying exhibits, including excerpts of Hutson's prior Rule 2004 Examination. PAIC requests an order granting summary judgment in its favor because: (a) Plaintiff executed a valid Release in favor of Penn-America and its affiliates, which precludes the instant claims; and (b) there exists no genuine issues of material fact and PAIC is entitled to judgment as a matter of law as to all causes of action articulated in Plaintiff's Amended Complaint.

Hutson also craved reference to the voluminous filings he has made with the Court. Hutson began his presentation by stating that he is a victim and citing the "scintilla of evidence" standard. Hutson admitted that the terms of the agreements related to Big Water Resort and the Lease Purchase Agreement sent up "red flags" and seemed "suspicious" to him, but contended that his attorney(s) at the time reviewed the title and advised him that things looked "okay." Hutson contended that attorneys from Turner Padgett prepared documents that they knew were based upon "extrinsic fraud." Hutson contends that this "extrinsic fraud" supersedes the settlement agreement he entered in 2012. When asked to narrow his focus to the allegations in the instant action, Hutson claimed that J.R. Murphy "breached his duty to represent me." While Hutson agreed that Laura Paton in Charleston was the attorney actually retained to represent him, he stated that Tim Newton was his "contact person" at PAIC. Hutson then repeated the allegations contained his pleadings regarding Newton's correspondence with Hutson, which Hutson perceived to validate his theory of "extrinsic fraud" and to later be inconsistent. Hutson then said: "Newton knew he didn't

represent me.” He averred that the “common interest” between Hutson and PAIC in Newton’s letter referred to the upcoming mediation to reduce the \$3.5 million judgment. Hutson contends that “by settling with knowledge of extrinsic fraud, they (presumably referring to the defendants) are co-conspirators in the fraud.” Hutson did not articulate any fraud or other basis to set aside the Release that he executed on September 16, 2016.

The court is cognizant that, ordinarily, a court will not consider statements of fact presented only in an attorney’s argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment. West v. Gladney, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct. App. 2000). However, Hutson filed an affidavit with the Court on June 19, 2019. Though directly contradicted by the written correspondence from Newton, Hutson states that Newton verbally acknowledged to him in August 2018 that he was aware of the extrinsic fraud by TLC Holdings and their attorneys. Hutson contends that Newton initially refused to aid him in his efforts to expose the “extrinsic fraud” but later decided to assist Hutson, reviewing his drafted pleadings and providing him with a 16-point letter of legal advice. He avers that Newton had a duty to bring the “extrinsic fraud” to the attention of the state court, which would have prevented the \$3.5 million judgment. Notably, Hutson’s affidavit admits that Frank Gordon and Laura Paton were the attorneys who actually represented Hutson in the Class Action litigation and the Defamation Action. He further admits that Paton’s filing with the court “listed approximately ten direct concealments and lack of disclosures” that had been committed, apparently referring to the Answer to Amended Complaint and Pro Se Counter-Claims Back filed in the Defamation Action on December 16, 2016.

## LAW/ANALYSIS

**I. Summary judgment is proper because Plaintiff's claims are barred pursuant to the Settlement and Release Agreement he executed on September 16, 2016, releasing any present or future claims against Penn-America.**

On September 16, 2016, Hutson executed a Settlement Agreement and Release in the declaratory judgment action, whereby he released Penn-America, its agents, and its affiliates, from liability for exactly the kinds of claims he raises in the instant action. The Release explicitly provides:

Hutson, for and in consideration of the sum of Nine Thousand Five Hundred and 00/100 (\$9,500.00) Dollars, receipt of which is hereby acknowledged, does hereby release and forever discharge Penn-America, its agents, servants, employees, affiliates, successors and assigns, and any and all other persons, firms or corporations from any and all actions, causes of action, demands and/or claims of any nature whatsoever which the undersigned may have against Penn-America relating to:

- a. Penn-America's coverage for the Underlying Lawsuits; and
- b. Penn-America's coverage for the Property Loss claim;

together with any claims relating to Penn-America's investigation and/or claim handling, including any causes of action for breach of contract, bad faith, improper claims practices, or any other cause of action which could be asserted, arising from the above-reference matters (hereinafter "Released Claims"). The consideration expressed herein constitutes payment in full to Hutson for all policy proceeds, damages, losses and/or injuries to persons or property or both, whether known or unknown, developed or undeveloped, which have resulted or may result from the incident aforesaid, whether the claims could have been asserted against Penn-America by way of counterclaim in the Declaratory Judgment Action or by separate lawsuit.

"Litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law." Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App.2007). General contract principles apply to the construction of a settlement agreement because a settlement agreement is a contract. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct.App. 2009). When an agreement is plain and

unambiguous, the court does not have the authority to modify its terms. Patricia Grand Hotel, LLC v. MacGuire Enters., 372 S.C. 634, 643 S.E.2d 692 (Ct.App.2007). The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993).

Huston has not articulated any policy or law prohibiting the September 16, 2016, agreement, or denied that he received the consideration specified therein. The plain language of the Release specified that the Released included "any claims relating to Penn-America's investigation and/or claim handling, including any causes of action for breach of contract, bad faith, improper claims practices, or any other cause of action which could be asserted, arising from the above-reference matters." Those matters included both of the underlying lawsuits, i.e. the Class Action litigation and the Defamation Action. Global Indemnity Group, Inc. is the parent company of Penn-America Insurance Company, and is thus encompassed within the Release's specification that it applies to Penn-America's "affiliates" and "any and all other persons, firms or corporations." Thus, all of the claims made in Hutson's Amended Complaint are barred under the Release. Accordingly, PAIC's motion for summary judgment as to all claims against them must be granted.

**II. Summary judgment is proper because Plaintiff's claim for breach of contract must fail because there is no evidence that PAIC failed to comply with its contractual duty to defend Plaintiff in both underlying actions.**

Even if it were not barred by the Release referenced *supra*, Hutson's claim for breach of contract fails as a matter of law. To establish a claim for breach of contract, a plaintiff must establish (1) the existence of a contract, (2) its breach, and (3) the damages caused by such breach. Branche Builders, Inc. v. Coggins, 686 S.E.2d 200, 202 (S.C. Ct. App. 2009). Section 1.a

of the applicable commercial general liability policy between Penn-America and BWR, Inc. provides:

We [the insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

Hutson cannot point to any evidence that this provision was either breached or that he has suffered any damages from an alleged breach.

PAIC did defend him, under a reservation of rights, with respect to the claims against him both in the Class Action litigation and the Defamation Action. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365, 372-73 (4th Cir. 2005) (finding insured "adhered to settled principles under South Carolina law regarding their right and duty to defend by providing counsel ... to represent the defendants for all claims filed against them, despite the reservation of rights"); Allstate Ins. Co. v. Wilson, 259 S.C. 586, 193 S.E.2d 527, 530 (1972) (holding that insurance company, operating under a reservation of rights, "had the right and the duty to control the defense until such time as it was determined that it had no liability insurance coverage"). Both the federal third party claim and defamation case were ultimately settled without any personal liability to Hutson.

Hutson's contention that PAIC owed a duty to prosecute his affirmative counter-claims, which he pursued *pro se* and lost, is without merit. While the South Carolina courts have not specifically ruled on whether an insurer's duty to defend includes an obligation to prosecute an insured's affirmative counter-claims, other jurisdictions have found no such obligation arises under the ordinary insurance contract. See, e.g., Mount Vernon Fire Ins. Co. v. Visionaid, Inc., 76 N.E.3d 204, 209-10 (Mass. 2017) (holding insurer has no duty to prosecute an affirmative claim

against the plaintiff in the underlying suit unless explicitly provided for in the policy); Morgan, Lewis & Bockius LLP v. Hanover Ins. Co., 929 F.Supp. 764, 771 (D.N.J. 1996) (same); Shoshone First Bank v. Pacific Employers Ins. Co., 2 P.3d 510, 516 (Wyo. 2000) (same); Aldous v. Darwin Nat'l Assur. Co., 851 F.3d 473, 483 (5th Cir. 2017) (same). Even those jurisdictions which more broadly interpret the insured's duty do so only under narrow circumstances. See, e.g., Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co., 766 F.Supp. 324, 333-334 (E.D. Pa. 1991) (duty to defend requires insurer to bring any counterclaim that is factually "inextricably intertwined" with underlying claim).

Our Supreme Court has held that "[a]n insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law." Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 484, 487 (2008). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Beaufort Cty. Sch. Dist. v. United Nat'l Ins. Co., 392 S.C. 506, 709 S.E.2d 85, 90 (S.C.Ct.App.2011) (citing Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 579 S.E.2d 132, 134 (2003)). "If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect." Id. (citing Schulmeyer, 579 S.E.2d at 134). "However, an insurance contract which is 'in any respect ambiguous or capable of two meanings must be construed in favor of the insured.'" Id. (quoting Reynolds v. Wabash Life Ins. Co., 251 S.C. 165, 161 S.E.2d 168, 169 (1968)).

The plain meaning of "defend" is "to work to defeat a claim that could create liability against the individual being defended." Mount Vernon, 76 N.E.3d at 208-09. To impose a broader duty where none was explicitly included "is far beyond interpreting the language of the contract."

Id. at 210. Here, there is no provision in the policy requiring PAIC to pursue counter-claims, much less ancillary or collateral litigation, on behalf of its insured. Hutson has not provided any authority for his contention that PAIC or his retained counsel had a duty to re-open the 2011 case and attempt to set aside the 2012 Consent Order and Settlement Agreement entered therein. PAIC adhered to its duty to defend, which did not include prosecuting Hutson's counter-claims and which did not include pursuing a separate course of litigation to set aside a 2012 Settlement Agreement and Consent Order. Moreover, Hutson cannot show that he was damaged by any alleged breach where the Class Action litigation and Defamation litigation were both settled without any personal liability as to Hutson. Accordingly, PAIC's motion for summary judgment as to the breach of contract claim against them must be granted.

**III. Summary judgment is proper because Plaintiff's claim for bad faith must fail because there is no evidence that PAIC failed to act reasonably.**

Even if it were not barred by the Release referenced *supra*, Hutson's claim for bad faith fails as a matter of law. The South Carolina courts recognize an insured's ability to sue its insurer both in contract and for bad faith in tort. Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 502-03, 473 S.E.2d 52, 54 (1996). There is an implied "duty of good faith and fair dealing in the performance of *all* obligations undertaken by the insurer for the insured." Id. at 501, 473 S.E.2d at 53-54 (emphasis in original). Our Supreme Court specifically recognizes the existence of a cause of action for breach of the implied covenant of good faith and fair dealing by an insured against his or her insurer for consequential damages allegedly suffered because of the insurer's bad faith handling of third party claims. Id. at 504, 473 S.E.2d at 55. Breach of an express contractual provision is not a prerequisite to bringing a bad faith action. Id.

"[T]he covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed." Mixson, Inc. v. American

Loyalty Ins. Co., 562 S.E.2d at 662. Under South Carolina law, an insurer acts in bad faith when there is no reasonable basis to support the insurer's decision. Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996). "If there is a reasonable ground for contesting a claim, there is no bad faith." Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992).

"South Carolina courts have found that where a policy provides an insurer with the right and duty to defend, the insurer has 'the right and the duty to control the defense until such time as it is determined that it has no liability insurance coverage.'" Founders Ins. Co. v. Richard Ruth's Bar & Grill LLC, 2016 WL 3219538, at \*9 (D.S.C. June 8, 2016) (quoting Allstate Ins. Co. v. Wilson, 193 S.E.2d 527, 530 (S.C. 1972)). "If courts allowed insureds to create a genuine issue of material fact on a bad faith processing claim by engaging in a 'nit-picky' analysis of each action the insurance adjustor took or did not take in handling claims, every bad faith action would survive a motion for summary judgment." Id. There must still be an evaluation of the reasonableness of the insurer's conduct...." Id.

Here, PAIC did not refuse to defend Hutson; rather, PAIC provided a defense under a reservation of rights and ultimately settled both of the suits without any personal liability to Hutson. Hutson complains PAIC acted unreasonably in failing to "expose extrinsic fraud on the courts" and in failing to represent him in his counter-claims against TLC and its members. Hutson raised this alleged fraud to several courts, including as part of his *pro se* counterclaims in both the federal Class Action litigation and the Defamation Action. Each court has found that Hutson's claims of fraud relate to the underlying land transaction and were validly waived in the 2012 Settlement Agreement and Consent Order between Huston and TLC and its members. See Judge James' Order, Mar. 21, 2014, Civ. Action No. 2011-CP-14-00602; Judge Norton's Order, May 20,

2016, Civ. Action No. 2:2014-cv-01583; Judge Baker's Report & Recommendation, April 5, 2016, Civ. Action No. 2:2014-cv-01583; Judge Cothran's Order, Mar. 2, 2017, Civ. Action No. 2015-CP-14-00615. Thus, Hutson's bald and speculative averment that the outcome of his counter-claims would have been different had PAIC provided legal representation to prosecute them is insufficient to survive this motion for summary judgment.

Hutson points to no legal authority for the proposition that PAIC would have any duty to go even further to pursue collateral litigation to set aside the 2012 Settlement Agreement. Further, any such action would have likely been fruitless. See Robinson v. Estate of Harris, 388 S.C. 630, 641, 698 S.E.2d 222, 228 (2010) ("If a judgment procured by extrinsic fraud could have been avoided if the challenging party exercised due diligence, a court generally will not grant relief from the judgment."); id. ("The doctrine of laches is applicable in determining whether an action is time-barred even if extrinsic fraud is established.").

To the extent Hutson complains about the settlement reached, there was no contractual requirement for the insured's consent to settle. Rather, the policy provides: "We [the insurer] may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." PAIC had a duty to settle the claims if settlement was "the reasonable thing to do." Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001). Hutson has not pointed to any evidence that PAIC did not act reasonably. Additionally, where – as here – an insurance contract provides that the insurer may, as it deems appropriate, settle any claim or action brought against its insured, a cause of action alleging breach of the insurer's good faith will not lie where the insurer has settled such a claim within the monetary limits of the policy. See, e.g., Marginian v. Allstate Ins. Co., 481 N.E.2d 600 (Ohio 1985); Casualty Ins. Co. v. Town & Country Pre-School Nursery, Inc., 498 N.E.2d 1177 (Ill. App. Ct. 1986); Feliberty v.

Damon, 129 A.D.2d 207 ((N.Y. App. Div. 1987); Shuster v. South Broward District Physicians' Professional Liability Insurance Trust, 570 So.2d 1362, 1366 (Fla. 4th DCA 1990).

To the extent that Hutson alleges that the declaratory judgment action regarding coverage was brought in bad faith, Hutson has failed to articulate how or why that filing was unreasonable. PAIC, through its counsel, requested declarations that Hutson was not an insured with respect to the personal misconduct alleged against him in the federal class action or in the state defamation action, that the coverage provided for in the insurance policy did not extend to the types of claims asserted in those actions, and that PAIC had no duty to defend or indemnify Hutson in either action. The arguments in the declaratory judgment action were based upon the plain language of the policy. Moreover, PAIC ultimately resolved the underlying cases by settlement and dismissed the declaratory judgment action and satisfied the judgments.

In sum, there is no evidence that PAIC, either directly or vicariously, acted in bad faith. Accordingly, PAIC's motion for summary judgment as to the bad faith claim against them must be granted.

**IV. Summary judgment is proper because Plaintiff's claim for fraud must fail because there is no evidence (a) that PAIC or its agents made any material or false representation to Hutson, (b) that Hutson relied on such representation, or (c) that Hutson was consequently and proximately injured.**

Even if it were not barred by the Release referenced *supra*, Hutson's claim for fraud fails as a matter of law. In order to prevail on a claim of fraud, the plaintiff must prove: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d

267, 269 (Ct.App.1993). “A complaint is fatally defective if it fails to allege all nine elements of fraud.” Id.

Hutson’s claims of fraud center on Newton’s e-mail to him regarding the possible argument of the existence of extrinsic fraud on the court. Hutson contends that Newton wanted Hutson to file an action to set aside the 2012 Settlement Agreement and Consent Order, as it would have benefited and provided leverage in PAIC’s defense of the other cases. Hutson never claims that anything written in the letter to him by Newton was false; rather, he later argues that the contents of the e-mail were all true in paragraphs 37-49 of his Amended Complaint. Further, in paragraph 35 of his Amended Complaint, Hutson admits that he never filed any such action to set aside the Agreement and Order. Thus, regardless of its truth or falsity, Hutson failed to allege any reliance upon the representation. Lastly, and perhaps most importantly, Hutson has not been injured. The claims against Hutson, and the federal sanctions awarded against him, were settled without any personal liability to Hutson. Accordingly, PAIC’s motion for summary judgment as to the fraud claim against them must be granted.

- V. **Summary judgment is proper because Plaintiff’s claim for misrepresentation must fail because there is no evidence (a) that PAIC or its agents made any false representation to Hutson, (b) that PAIC or its agents failed to exercise due care; (c) that Hutson relied on such representation, or (d) that Hutson proximately suffered a pecuniary loss.**

Even if it were not barred by the Release referenced *supra*, Hutson’s claim for misrepresentation fails as a matter of law. In order to prevail on a claim for negligent misrepresentation, the plaintiff must prove (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his

reliance on the representation. Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680–81 (Ct. App. 2001). Thus, a key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement. Id.

Like his claims of fraud, Hutson's claims of misrepresentation center on Newton's e-mail to him regarding the possible argument of the existence of extrinsic fraud on the court. Hutson contends that Newton wanted Hutson to file an action to set aside the 2012 Settlement Agreement and Consent Order, as it would have benefited and provided leverage in PAIC's defense of the other cases. Hutson never claims that anything written in the letter to him by Newton was false; rather, he later argues that the contents of the e-mail were all true in paragraphs 37-49 of his Amended Complaint. Further, in paragraph 35 of his Amended Complaint, Hutson admits that he never filed any such action to set aside the Agreement and Order. Thus, regardless of its truth or falsity, Hutson failed to allege any reliance upon the representation. Lastly, and perhaps most importantly, Hutson has not suffered any pecuniary loss. The claims against Hutson, and the federal sanctions awarded against him, were settled without any personal liability to Hutson. Accordingly, PAIC's motion for summary judgment as to the misrepresentation claim against them must be granted.

**VI. Summary judgment is proper because Plaintiff's claim for negligence must fail because there is no evidence that PAIC breached any duty to its insured or caused any harm to its insured.**

Even if it were not barred by the Release referenced *supra*, Hutson's claim for negligence fails as a matter of law. To establish a cause of action for negligence a plaintiff must show the concurrence of three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by negligent act or omission; and (3) damage proximately resulting from the breach of duty. Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 474, 377 S.E.2d 343,

348 (Ct. App. 1988). The absence of any one of these elements renders the cause of action insufficient. Id. An insurer can be found negligent in its handling of a claim or suit even in absence of fraud or bad faith. See Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346, 348 (1933).

As discussed more fully *supra*, Hutson believes that PAIC should have gone above and beyond its contractual duty to defend by either providing representation for his counter-claims against TLC or by instituting a separate action to set aside the 2012 Consent Order and Settlement Agreement. PAIC's failure to exceed its duty to Hutson is not evidence of its failure to meet its duty to Hutson. Hutson cannot establish that there was any duty for PAIC to act in the manner he suggests was required, much less that there was a breach of the actual duty owed to him. Moreover, Hutson's claims of damages are baseless and speculative. Accordingly, PAIC's motion for summary judgment as to the negligence claim against them must be granted.

**VII. Summary judgment is proper because Plaintiff's claim for tortious interference with the attorney-client relationship must fail because there is no evidence that PAIC acted wrongfully, that there was any breach of the attorney-client relationship, or that PAIC was unjustified in its control and settlement of the underlying litigation.**

Even if it were not barred by the Release referenced *supra*, Hutson's claim for tortious interference fails as a matter of law. South Carolina recognizes a cause of action for wrongful interference with an attorney-client relationship. DeBerry v. McCain, 275 S.C. 569, 574, 274 S.E.2d 293, 296 (1981) (citing Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945)). [I]nterference by a third party with contractual relationships, without justification, is a violation of a primary legal right. Keels, 207 S.C. at 100, 34 S.E.2d at 484. It is "an actionable injury to cause another to violate his contract with a third person, without a legal justification, or, as otherwise stated, where the breach is induced or caused maliciously, 'malice' having the meaning in this connection

of the intentional doing of a wrongful act without justification or excuse.” Id. at 101, 34 S.E.2d at 484. “[T]he interference must have been willful and unjustified.” Id. The Keels Court cited 7 C.J.S., Attorney and Client, § 53, p. 836, which provides: “Third persons unlawfully interfering with the relationship of an attorney and his client... are liable to the attorney for the damages caused thereby.” Id. The DeBerry Court clarified the elements of interference with contractual relations, which include: “(1) the contract; (2) the wrongdoer’s knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom.” 275 S.C. at 574, 274 S.E.2d at 296.

South Carolina has not specifically recognized the applicability of a tortious interference cause action in the context of an insurer’s purported interference with an insured’s relationship with the retained defense counsel. However, South Carolina recognizes that “[w]hen an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured—his client.” Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 426 S.C. 154, 157, 826 S.E.2d 270, 271 (2019). “Pursuant to that relationship, the attorney owes the client—not the insurer—a fiduciary duty.” Id. “However, an insurance company that hires an attorney to represent its insured is in a unique position in relation to the resulting attorney-client relationship.” Id. at 157, 826 S.E.2d at 272.

An insurer’s contractual “right to control the litigation carries with it certain duties, including the duty not to prejudice the insured’s rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages.” Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 341; 803 S.E.2d 288, 299 (2017) (internal quotations omitted); Id. (“[B]y virtue of its duty to defend, an insurer gains the advantage of exclusive control over the litigation...”). Moreover, “a liability insurer owes its insured a duty to settle a personal injury

claim covered by the policy, if settlement is the reasonable thing to do.” Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001). The duty of good faith requires the insurer to act reasonably in protecting the insured from liability in excess of the policy limits. Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346, 348 (1933). Thus, PAIC’s control over the litigation was justified by the terms of the insurance policy providing its duty to defend.

PAIC’s actions in determining the scope of the representation, i.e. that it would defend the cases against Hutson under reservation but would not prosecute his counterclaims, and decision to settle the claims, do not constitute tortious interference with Hutson’s attorney-client relationship with retained counsel Frank Gordon. As discussed *supra*, Huston pursued his counterclaims and lost. Further, the settlement agreements were not entered until after the disposition of the counterclaims in the federal case and until after the disposition of the counterclaims and loss at trial in the state defamation case. There is no evidence that PAIC acted without justification or with malice. To rule otherwise, and allow an insurer to pursue such a claim against its insured anytime that it gives instructions to retained counsel in contravention to the instructions of the insured, would strip the insurer of its right to exclusively control the litigation. Moreover, Hutson cannot prove any damages from any alleged interference, as the claims against Huston were resolved without any personal liability to him. Hutson’s allegations otherwise are baseless and speculative. Accordingly, PAIC’s motion for summary judgment as to the negligence claim against them must be granted.

**VIII. Summary judgment is proper because Plaintiff's claim for legal malpractice must fail because (a) Plaintiff failed to accompany his pleadings with the statutorily required affidavit regarding malpractice; (b) PAIC is not vicariously liable for any malpractice of counsel it retains to defend its insured or of coverage counsel; and (c) even if vicarious liability applied to coverage counsel, Plaintiff lacked the necessary attorney-client relationship with coverage counsel to sustain a claim of legal malpractice.**

Even if it were not barred by the Release referenced *supra*, Hutson's claim for legal malpractice fails as a matter of law. In order to prevail in a cause of action for legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "In South Carolina, attorneys are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000).

PAIC is not vicariously liable for any malpractice of counsel it retains to defend its insured. Mike Etheredge, Laura Paton or Frank Gordon. Vicarious liability does not fall on the carrier by virtue of their having retained them as attorneys to defend their insured. See Feliberty v. Damon, 129 A.D.2d 207, 210-11 (N.Y. App. Div. 1987) (holding "[i]f the acts are performed solely by the attorney (in his capacity as an attorney) and are directly related to the representation of the insured in litigation, the attorney's negligence will not be imputed to the insurance carrier."). Even if vicarious liability did apply, Hutson has not pointed to any evidence that any of the attorneys who actually represented him breached any duty to him or any damage to Hutson therefrom. Hutson's bald allegations that these attorneys should have prosecuted his counterclaims, and that had they done so, he would have prevailed, is without merit.

To the extent that Hutson asserts a legal malpractice action against Tim Newton or other attorneys at Murphy & Grantland, PAIC is not vicariously liable for the actions of its coverage

counsel. Generally, an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.” Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Sols., 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010). Further, an attorney owes no duty to a non-client unless he “breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client.” Id. (quoting Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). In his professional capacity the attorney is not liable, except to his client and those in privity with his client, for injury allegedly arising out of the performance of his professional activities. Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 529, 339 S.E.2d 887, 889 (Ct. App. 1986).

Despite Hutson’s efforts to muddy the waters, neither Tim Newton nor any other attorney at Murphy & Grantland ever provided direct representation to Hutson. Hutson admitted as much at the hearing on this motion and in his filed affidavit. Tim Newton and the attorneys at Murphy & Grantland represented PAIC. Newton reminded Hutson of that fact in his August 13, 2018 e-mail to Hutson, writing: “I need to remind you that I don’t represent you and I can’t represent you because I represent Penn-America.” Newton again stated at the end of the same e-mail: “I highly recommend that you get a lawyer involved, even if it’s a pro bono lawyer.” Thus, no attorney-client relationship existed to support a legal malpractice claim against Newton or Murphy. With no attorney-client relationship between Hutson and any Murphy & Grantland attorney, Hutson cannot sustain a legal malpractice action against them, much less against their client, PAIC. See Fabian v. Lindsay, 410 S.C. 475, 483, 765 S.E.2d 132, 136 (2014) (“Privity for legal malpractice has traditionally been established by the existence of an attorney-client relationship.”); Williams

v. Burns, 463 F. Supp. 1278, 1285 (D. Colo. 1979) (“Clients are not insurers of actions taken by attorneys, despite the fact that such actions are taken on the clients behalf.”).

Accordingly, PAIC’s motion for summary judgment as to the legal malpractice claim(s) against them must be granted.

**CONCLUSION**

Plaintiff’s claims against PAIC are barred by the Release that Plaintiff executed on September 16, 2016. Notwithstanding the bar to Plaintiff’s claims, Plaintiff’s claims that PAIC, either directly or vicariously, breached its contract, acted in bad faith or negligently, engaged in fraud or misrepresentation, tortuously interfered with his attorney-client relationship, or committed legal malpractice, each must fail as a matter of law. Accordingly, the Court concludes that PAIC is entitled to a grant of summary judgment, which thereby dismisses Plaintiff’s claims against them.

**IT IS ORDERED** Defendants Penn America Insurance Company and Global Indemnity Group, Inc.’s Motion for Summary Judgment is hereby granted.

**AND IT IS SO ORDERED.**

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THE HONORABLE MICHAEL G. NETTLES  
Presiding Judge of the Fifth Judicial Circuit

\_\_\_\_\_, South Carolina  
July \_\_\_\_\_, 2019



Richland Common Pleas

**Case Caption:** MB Hutson , plaintiff, et al vs Penn America Insurance Company ,  
defendant, et al  
**Case Number:** 2018CP4006344  
**Type:** Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140