

92602

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2018-001180

RECEIVED

APR 16 2020

SC Court of Appeals

Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson, Plaintiffs,

v.

Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium Association, Inc., Respondents,

And

Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium Association, Inc., Respondents,

v.

Great American Insurance Company Appellant.

**MOTION TO DISMISS APPEAL
AND AGREEMENT TO VACATE ORDER ON APPEAL**

Pursuant to Rules 240, 260(b), and 261(d) of the *South Carolina Appellate Court Rules*, Appellant Great American Insurance Company, with the consent of Respondents, hereby moves for an Order dismissing the appeal and vacating the order of the circuit court. The basis for this

motion is that Great American and Respondents have entered into a final settlement agreement, pursuant to which they desire to vacate the June 15, 2018 order of the circuit court upon which Great American's appeal is based.

BACKGROUND

This appeal arose from an order of the Horry County Court of Common Pleas granting Respondents' Motion for Judgment on the Pleadings. (R. pp. 9-24). The circuit court held Appellant Great American Insurance Company ("Great American") has a duty to defend Respondents under a policy of directors and officers liability insurance ("D&O") issued to Respondent Tilghman Beach and Racquet Club Condominium Association, Inc. ("Association"). (R. p. 23).

On July 7, 2016, Plaintiffs, a group of homeowners, filed a Complaint against Respondents, Association and its board members, seeking recovery for property damage allegedly due to Respondents' failure to properly maintain the common elements of Tilghman Beach and Racquet Club Condominium Regime ("Tilghman Beach"), a horizontal property regime located in Myrtle Beach. (R. pp. 25-61). Plaintiffs filed amended complaints on August 24, 2017, October 28, 2016, and March 8, 2017 (collectively, the "Complaints"). (R. pp. 295-328). In each of these Complaints, Plaintiffs sought monetary and non-monetary relief and set forth various iterations of similar factual allegations against Respondents. (*Id.*; R. p. 60).

On March 28, 2017, Respondents filed a consent motion for leave to file a Third-Party Complaint against Great American pursuant to Rule 14(a), SCRCF. (R. p. 3061). That motion was granted on May 2, 2017. (R. pp. 1-3). Respondents filed the Third-Party Complaint on May 2, 2017, and it was served on Great American on May 9, 2017. (R. p. 2634). Great American answered the Third-Party Complaint on July 10, 2017 and filed an amended answer on August 30,

2017. (R. p. 2849; R. p. 2860). In these pleadings, Great American asserted affirmative defenses based in part upon certain exclusions contained within the policy it had issued to Association. (R. pp. 2854-55; R. pp. 2865-67). It also asserted a counterclaim for a declaratory judgment that coverage for Respondents' claims are excluded by one or more exclusions in the Policy. (R. pp. 2857-59; R. pp. 2867-70). In the Amended Answer, Great American added counterclaims seeking rescission of the Policy on the ground that Association had made material misrepresentations of fact in the applications for both the 2015-16 and 2016-17 policy periods. (R. pp. 2870-74).

On January 15, 2018, Respondents filed a Motion for Judgment on the Pleadings requesting the circuit court find as a matter of law that Great American owes a duty to defend Respondents with respect to Plaintiffs' Claim. (R. p. 3279). Great American filed a Motion to Amend its Amended Answer and Counterclaim on February 23, 2018. (R. p. 3600). That motion was argued along with Respondents' Motion for Judgment on the Pleadings on March 27, 2018. (R. pp. 2999-3046).

On April 23, 2018, the circuit court granted leave for Great American to file a Second Amended Answer and Counterclaim, which it did on the same day. (R. pp. 5-8). Although Great American had sought to amend its Amended Answer and Counterclaim in numerous ways, the circuit court limited the relief so that only changes based upon a new policy defense, which had not existed as of the date the prior pleading had been filed, could be made. (R. p. 7). Great American therefore asserted an additional affirmative defense and counterclaim based on Respondents' commercial general liability insurer, Lexington Insurance Company, having agreed to provide a defense to Respondents. (R. pp. 2867-70). It also dropped one of the two rescission claims it had previously asserted. (*See generally*, R. p. 2860-2874).

On June 15, 2018, the lower court entered an Order Granting Respondents' Motion for

Judgment on the Pleadings, holding Great American has a duty to defend Respondents as a matter of law, and that this duty has existed since the inception of Plaintiffs' Claim. (R. pp. 15-24); (Order on Defendants'/Third-Party Plaintiffs' Motion for Judgment on the Pleadings ("Order on Appeal"))).

On June 22, 2018, Great American timely filed and served its Notice of Appeal. This Court granted Great American's Emergency Motion for a Protective Order protecting it from being subject to further discovery while the appeal is pending by Order filed July 13, 2018. The litigation has since been stayed by order of the circuit court dated July 13, 2018. On February 21, 2020, Respondents and Great American conducted a mediation session, which resulted in a settlement of Plaintiffs' claims against Respondents, Respondents' counterclaims against Plaintiffs, Respondents' third-party claims against Great American, and Great American's counterclaims against Respondents. The settlement agreement reached between Respondents and Great American contains a provision that calls for the parties to dismiss this appeal and to seek vacatur of the Order on Appeal.

DISCUSSION

The South Carolina Appellate Court Rules provide that the parties to an appeal may, by agreement, request that an appeal be dismissed and that the appellate court vacate a prior order, opinion, or judgment in the matter. Rule 260(b), SCACR; *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Havird*, 343 S.C. 485, 486, 541 S.E.2d 241, 242 (2001) (granting the parties' motion to dismiss and vacating the opinion of the Court of Appeals under former version of Rule 260, SCACR). "The agreement may contain a provision altering the costs to be assessed under Rule 222 and/or other settlement terms subject to the provisions of Rule 261." Rule 260(b), SCRCR. "An agreement that the proceeding be dismissed need not be in the form of a motion

unless the parties request that the appellate court alter the costs assessed; approve a settlement agreement; modify the requirements of an Appellate Court Rule; or vacate a prior order, opinion, or judgment.” *Id.* Rule 261(d), SCRCF, reads:

(d) Vacation of Prior Opinions, Orders or Judgments. In the agreement, the parties may request vacation of opinions, orders, decisions and judgments previously issued in the matter. The agreement must set forth the facts that warrant this extraordinary relief. If the matter is pending before the Supreme Court and the agreement requests the vacation of an order or opinion of the Court of Appeals, the Supreme Court, in its discretion, may seek a recommendation from the Court of Appeals regarding the request for vacation. If an agreement containing a request for vacation is rejected, the parties may resubmit the agreement without the request for vacation.

Great American and Respondents agree that this extraordinary relief is warranted. The Order on Appeal makes findings of fact and conclusions of law as to the D&O policy and Great American’s duty to defend that could have implications for future cases. (R. pp. 15-24). Although Great American and Respondents have settled the issues pending between them to avoid the expense and inconvenience of further litigation, Great American expressly disputes the substantive findings in the Order on Appeal. Accordingly, Great American and Respondents seek to vacate the Order on Appeal so that Great American may avoid collateral estoppel issues arising in other litigation. *See Beall v. Doe*, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984) (recognizing that the doctrine of nonmutual collateral estoppel may be used offensively in South Carolina). This is particularly important because the Order on Appeal could remain a “final judgment,” despite the fact it was never fully adjudicated on appeal or rendered final by way of an appellate affirmation due to the settlement between the parties.

Furthermore, vacating the Order on Appeal will not result in any prejudice to the parties. The parties have settled the entire case, including Plaintiffs’ claims against Respondents, so Great American’s coverage and indemnification of Respondents are no longer in issue. The declaratory

relief granted by the circuit court is no longer needed going forward because the case is finished, and Plaintiffs' most recent Amended Complaint will be dismissed with prejudice. Respondents have been fully compensated for any damages caused by Great American's alleged breach of the duty to defend, so the settlement resolves any and all disputes between Respondents and Great American covered by the Third Party Complaint and the Order on Appeal.

CONCLUSION

For the reasons stated above, Appellant, with Respondents' consent, seeks an Order from this honorable Court dismissing the appeal and vacating the Order on Appeal in accordance with Rules 260(b) and 261(d), SCACR.

Respectfully submitted,

s/Kirby D. Shealy III
Kirby D. Shealy III
ADAMS AND REESE LLP
1501 Main Street, 5th Floor
Columbia, South Carolina 29201
(803) 254-4190
kirby.shealy@arlaw.com

Attorneys for Appellant

s/Charles B. Jordan, Jr.
Charles B. Jordan, Jr.
The Pearce Law Group, PC
1314 Professional Drive
Myrtle Beach, SC 29577
(843) 839-3210
cjordan@pearcelawgroup.com

Attorneys for Respondents

s/H. Sam Mabry III
Joshua D. Spencer
Bonnie Allen Lynch
H. Sam Mabry III
Haynsworth Sinkler Boyd
P.O. Box 2048
Greenville, SC 29602
(864) 240-3200
jspencer@hsblawfirm.com
blynch@hsblawfirm.com
smabry@hsblawfirm.com

Attorneys for Respondents

April 15, 2020.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APR 16 2020

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2016-CP-26-4464

Jill Keck Humphries, Dennis L. Johnson, Jr., Delona Penny Rice, Whitmel L. Brown, Jr., Gary Steven Robinson, Elizabeth Erin Humphries, and Nancy H. Johnson,Plaintiffs,

v.

Tilghman Beach and Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach and Racquet Club Condominium Association, Inc., Respondents,

v.

Great American Insurance Company.....Appellant.

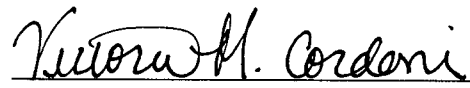
CERTIFICATE OF SERVICE

I certify I have served **Appellant's Motion to Dismiss Appeal and Vacate Order on Appeal** on counsel by depositing a copy of said documents in the United States Mail, postage prepaid, on **April 15, 2020** addressed to Respondents' attorneys of record as follows:

Howell V. Bellamy, III, Esquire
Bellamy Law Firm
Post Office Box 357
Myrtle Beach, SC 29578
Attorney for Plaintiffs

Joshua D. Spencer, Esquire
Bonnie Allen Lynch, Esquire
H. Sam Mabry, Esquire
Haynesworth Sinkler Boyd
P.O. Box 2048
Greenville, SC 29602
Attorneys for Respondents

Charles B. Jordan, Jr., Esquire
The Pearce Law Group, PC
1314 Professional Drive
Myrtle Beach, SC 29577
Attorneys for Respondents

A handwritten signature in black ink that reads "Victoria M. Cordoni". The signature is written in a cursive style with a horizontal line underneath it.

Victoria Cordoni – Paralegal

April 15, 2020.

April 15, 2020

VIA FEDERAL EXPRESS:

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Kirby D. Shealy III
Direct: 803.212.4966
Fax: 803.779.4749
Kirby.shealy@arlaw.com

Re: *Jill Keck Humphries, et.al. vs. Tilghman Beach & Racquet Club Condominium Association, Inc., James H. Austin, III, Daniel G. Coe, C. Doug Madison, George P. White, and Steele Brice Windle, III, individually and as Members of the Board of Directors of the Tilghman Beach & Racquet Club Condominium Association, Inc. v. Great American Insurance Company*
Appellate Case No. 2018-001180
AR File No.: 006347-000037

RECEIVED

APR 16 2020

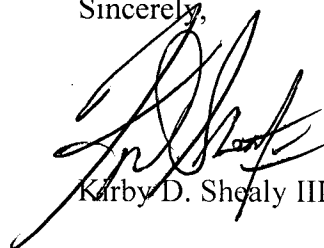
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed are the original and six copies of Appellant's Motion to Dismiss Appeal and Agreement to Vacate Order on Appeal as well as a Certificate of Service in the above-referenced matter. Please file the originals and return the clocked copy in the envelope provided. Also enclosed is our firm's check in the amount of \$50.00 to cover the filing fee.

If you have any questions regarding this matter, please do not hesitate to contact me. Thank you for your assistance with this matter.

Sincerely,



Kirby D. Shealy III

KDSIII/vmc

Enclosures

cc: Howell V. Bellamy, III, Esquire
Joshua D. Spencer, Esquire
H. Sam Mabry, Esquire
Sarah P. Spruill, Esq.
Charles B. Jordan, Jr., Esq.

ORIGIN ID:USCA (803) 212-4403
VICTORIA MOODY

1501 MAIN STREET, 5TH FLOOR

COLUMBIA, SC 29201
UNITED STATES US

SHIP DATE: 15APR20
ACTWGT: 1.00 LB
CAD: 105241771/NET4220

BILL SENDER

TO THE HONORABLE JENNY ABBOTT KITCHING
SOUTH CAROLINA COURT OF APPEALS
1220 SENATE STREET
1ST FLOOR
COLUMBIA SC 29201

56BU47B3AF-E4A

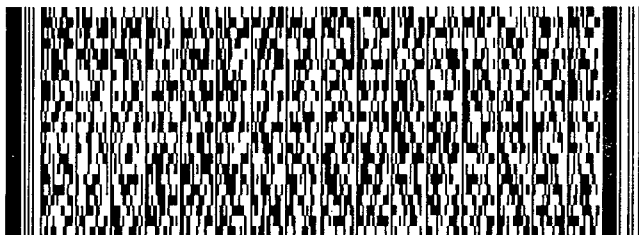
(803) 734-1890

REF: 006347-000037

INV:
PO:

DEPT:

FedEx Ship Manager - Print Your Label(s)



FedEx
Express



201020011301uv

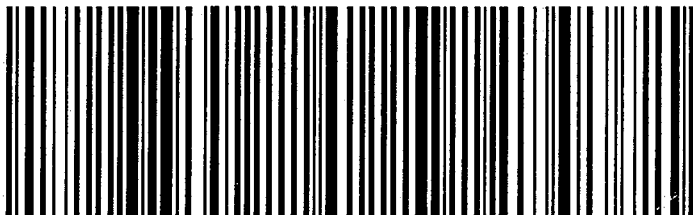
THU - 16 APR 10:30A
PRIORITY OVERNIGHT

TRK#
0201

7702 4241 8375

28 USCA

29201
SC-US CAE



4/15/2020

After printing this label:

1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com. FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is \$1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our Service Guide. Written claims must be filed within strict time limits, see current FedEx Service Guide.