

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2018-000692
Circuit Court Case No. 2015-CP-10-06684

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SC Court of Appeals

Zurich American Insurance Company of Illinois Respondent,

v.

Palmetto Contract Services, Inc. Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. **THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION WHEN IT GRANTED RESPONDENT'S MOTION TO STRIKE APPELLANT'S REQUEST FOR JURY TRIAL, BASED UPON THE CIRCUIT COURT'S FINDING THAT APPELLANT'S AMENDED ANSWER AND COUNTERCLAIM DOES NOT CREATE NEW ISSUES OF FACT**

- II. **APPELLANT WAIVED ITS RIGHT TO A JURY TRIAL BY ITS FAILURE TO PROPERLY "DEMAND" A JURY TRIAL AS REQUIRED BY RULE 38(b), SCRPC**

COUNTER-STATEMENT OF THE CASE

Respondent Zurich American Insurance Company of Illinois ("Respondent Zurich") filed its Summons and Verified Complaint alleging breach of contract against Appellant Palmetto Contract Services, Inc. ("Appellant Palmetto"), on December 12, 2015, based upon Appellant Palmetto's failure to pay its workers compensation insurance premiums as agreed. (R. pp. 9-10, ¶¶ 4-12) Respondent Zurich served Appellant Palmetto with its Summons and Verified Complaint on January 14, 2016. Appellant Palmetto served its original Answer to Zurich's Summons and Verified Complaint on February 12, 2016, denying all of the allegations in Zurich's Verified Complaint and alleging certain affirmative defenses, including fraud and misrepresentation. (R. p. 16, ¶ 9)

Neither party requested a jury trial.

Five months later, on July 12, 2016, Appellant Palmetto served its Motion to Amend its Answer and Assert a Counterclaim ("Motion to Amend") against Respondent Zurich for misrepresentation, fraud and breach of contract. (R. p. 57 and R. pp. 60-63 ¶¶ 12-36) Along with its Motion to Amend, Appellant Palmetto filed its proposed Amended Answer and Counterclaim. Appellant Palmetto failed to demand a jury trial at the time it served its Motion to Amend and proposed Amended Answer and Counterclaim. (R. p. 59)

The first hearing on Appellant Palmetto's Motion to Amend was held before The Honorable W. Jeffrey Young on January 5, 2017. (R. pp. 30-35) At the request of Judge Young the parties submitted proposed orders. (R. p. 3) Judge Young left the bench before ruling on Appellant Palmetto's Motion to Amend.

A second hearing on Appellant Palmetto's Motion to Amend was held before The Honorable J. C. Nicholson Jr., on September 19, 2017. (R. pp. 36-43) The Court granted Palmetto's Motion to Amend based upon several factors. One of the factors for the Court's granting Palmetto's Motion to Amend is that Palmetto's initial Answer to Zurich's Complaint already alleged the affirmative defenses of fraud and misrepresentation. (R. p. 7, ¶ 2) Respondent Zurich never notified Appellant Palmetto that it desired a jury trial as required by Judge Nicholson at the hearing on September 19, 2018. (R. p. 41, lines 24-25, and R. p. 42, lines 1-2) Nor did Appellant Palmetto ever notify Respondent Zurich that it intended to request a jury trial prior to serving its Amended Answer and Counterclaim. No motion was ever filed by Appellant Palmetto to transfer this action from the Circuit Court's Non-jury Trial Roster to the Circuit Court's Jury Trial Roster. Six months prior to Appellant Palmetto's placement of the words "(Jury Trial)" on its Amended Answer and Counterclaim, the lawsuit had reached the circuit court's backup Non-jury Trial Roster for the week of March 20, 2018 to March 24, 2017. (R. p. 88)

On September 27, 2017, approximately 18 months after the serving its initial Answer, Appellant Palmetto served its Amended Answer and Counterclaim. For the first time, Appellant Palmetto included the words and symbols, "(Jury Trial)," on its Amended Answer and Counterclaim. (R. p. 18) Appellant Palmetto never "demanded" a jury trial. Instead, Appellant Palmetto only wrote the words, "Jury Trial," in parentheses, at the top of its Amended Answer and Counterclaim.

(R. p. 18). Palmetto never wrote the words, “Jury Trial Demanded” or “Demand for Jury Trial” on its Amended Answer and Counterclaim. (R. p. 18)

On October 26, 2017, Respondent Zurich served its “Objection to the Transfer to Jury Trial Roster and Motion to Strike Jury Trial Demand (“Motion to Strike”). (R. p. 79) On March 5, 2018, Respondent Zurich served its “Memo in support of its Objection to Transfer to Jury Trial Roster and Motion to Strike Defendant Palmetto Contract Services Inc.’s Demand for Jury Trial. (R. p. 90) Appellant Palmetto failed to file a written response to Respondent Zurich’s Motion to Strike.

At the Hearing on the Motion to Strike on March 6, 2018, Appellant Palmetto argued among other things, “[y]our Honor, what’s interesting is if -- it’s your discretion. If you grant this motion, this matter is immediately appealable. If you deny their motion, it’s not appealable. And that’s only significant to trying to get this thing resolved. (R. p. 50, lines 18-21)

On March 13, 2018, the Charleston County Clerk of Court entered the Circuit Court’s Order granting, Respondent Zurich’s Motion to Strike. (R. p. 1) The Circuit Court based its decision on Rule 38(d), SCRPC, and the South Carolina Court of Appeals’ decision in *King v. Shorter*, 291 S.C. 501, 354 S.E. 2nd 402 (Ct. App. 1987). The Circuit Court holds that “[t]he Counterclaims raised in Defendant’s Amended Pleading do not create new issues of fact” (R. p. 3).

On April 12, 2018, Appellant Palmetto served its Notice of Appeal of the Order granting Plaintiff’s Motion for to Strike Defendant’s Jury Trial Demand. This appeal followed.

STATEMENT OF FACTS

Respondent Zurich is a workers compensation insurance carrier. (R. p. 37, lines 19-20) Appellant Palmetto operates a shipyard on the Cooper River. (R. p. 37, lines 17-18) In February 2013, Respondent Zurich and Appellant Palmetto entered into a contract for a workers compensation

insurance policy. (R. p. 9, p. ¶ 4) Based on the terms of the policy, the initial premiums are based on payroll estimates and employee job classifications provided to Respondent Zurich by Appellant Palmetto. The policy provides, that at the end of the policy term Respondent Zurich might conduct an audit of the actual payroll and job classifications to determine whether either additional premiums or a refund of premiums is due.

After the end of the policy term, Respondent Zurich conducted an audit (the "Audit") of Appellant Zurich's payroll. (R. p. 10, ¶¶ 6-8) The Audit revealed that Appellant Palmetto underestimated its payroll by more than 30% and failed to submit the proper job classifications for many of its employees, prior to the beginning of the policy term. Based on the Audit, Respondent Zurich requested additional premiums in the amount of \$158,744.00. (R. p. 10, ¶ 8) Appellant Palmetto refused to pay. (R. p. 10, ¶ 9) Respondent Zurich filed suit in December 2015 for breach of contract. (R. pp. 9-13) Respondent Zurich's lawsuit seeks a money judgment for the unpaid audit premiums in the amount of \$158,744.00, plus, statutory pre-judgment interest at the rate of 8.75% per annum, after June 18, 2013, to the date of entry of judgment. (R. p. 10, ¶¶ 8-12) When Appellant Palmetto served its initial Answer on Respondent Zurich's Summons and Complaint in February 16, 2016, it failed to demand a jury trial. (R. p. 15)

Appellant Palmetto's initial Answer alleges, among other affirmative defenses, fraud, fraud in the inducement and misrepresentations arising out of the policy and the Audit conducted by Respondent Zurich. (R. p. 16, ¶ 9)

Five months later, on July 12, 2016, Palmetto served its Motion to Amend. (R. p. 57) Along with its Motion to Amend, Appellant Palmetto filed its proposed Amended Answer and Counterclaim alleging misrepresentation, fraud and breach of contract against Respondent Zurich.

(R. pp. 59-64, ¶¶ 12-36). Again, Appellant Palmetto failed to demand a jury trial at the time it served its Motion to Amend and its proposed Amended Answer and Counterclaim. (R. p. 59)

A Hearing on Palmetto's Motion to Amend was held before The Honorable W. Jeffrey Young on January 5, 2017. (R. pp. 30-35) At the hearing, Appellant Palmetto argued among other issues, that Respondent Zurich would not be prejudiced by the court granting it leave to amend and assert counterclaims against Respondent Zurich (R. p. 32, lines 2-23). According to Appellant Palmetto's argument, there would be no prejudice to Respondent Zurich since Appellant Palmetto put Respondent Zurich on notice of the issues of fraud and misrepresentation in its initial Answer. (R. p. 32, lines 2-23) Judge Young took the matter under advisement and requested that both parties submit proposed orders. (R. p. 34, lines 12-14) On August 24, 2017, Appellant Palmetto submitted a letter along with its proposed Order granting its Motion to Amend to Judge Young. (R. pp. 82-87) Appellant Palmetto's proposed order contains a finding that, "Zurich has failed to show how it might be prejudiced by the amendment. In fact, Zurich has been on notice since the Defendant filed the original answer that there were issues of fraud and misrepresentation." (R. p. 86, ¶ 2).

Appellant Palmetto failed to inform the Circuit Court at the hearing before Judge Young that it intended to seek a jury trial. (R. pp. 30-35), Judge Young never ruled on Appellant Palmetto's Motion to Amend. While the matter was under advisement, Judge Young left the bench.

On September 19, 2017, a second hearing on Appellant Palmetto's Motion to Amend was held before The Honorable J. C. Nicholson, Jr., since Judge Young had not issued an order before leaving the bench. At the second hearing, Judge Nicholson granted Appellant Palmetto's Motion to Amend based upon several factors. Based on the proposed Order submitted to Judge Nicholson by Appellant Palmetto, Judge Nicholson found "[t]here is no prejudice to Zurich. Palmetto put

Zurich on notice of allegations of fraud in the original answer. . .” (R. p. 7, ¶ 2, and R. p. 8, ¶ 2).

Judge Nicholson did not rule on whether Appellant Palmetto was entitled to a jury trial. (R. pp. 36-43) Appellant Palmetto’s entitlement to a jury trial was not an issue before Judge Nicholson. The proposed Amended Answer and Counterclaim filed by Appellant Palmetto with its Motion to Amend did not even include the words “Jury Trial” in the case caption. (R. p. 59) Appellant Palmetto never alleged at the hearing before Judge Nicholson that it was entitled to a jury trial (R. pp. 36-43) Rather, Appellant Palmetto offered to consent to a jury trial if Respondent Zurich desired a jury trial. (R. p. 41, lines 21-23) The purpose of Palmetto’s consent to a jury trial was to remove the issue of possible prejudice as to Respondent Zurich. At the hearing, Judge Nicholson directed Appellant Palmetto, “[a]ll right I’ll grant [the motion to amend]. Put it in the order that you consent to a jury trial if the plaintiff desires a jury trial, all right? (R. p. 41, lines 24-25, R. p. 42, lines 1-2).

Appellant Palmetto failed to comply with Judge Nicholson’s directive to Appellant Palmetto to “. . . put in the order that you consent to a jury trial if the plaintiff desires a jury trial.” Respondent Zurich did not request a rehearing on the Order Granting Motion to Amend. It was not known to Respondent Zurich when Judge Nicholson’s order was entered that Appellant Palmetto intended to seek a jury trial. It was not until October 5, 2017, more than 10 days after Respondent Zurich received notice of the Order Granting the Motion to Amend Answer, that it learned that Appellant Palmetto was attempting to obtain a trial by jury without the consent of Respondent Zurich. (R. p. 89) On October 5, 2017, Respondent Zurich received the Charleston County Clerk of Court’s Electronic Notice to Parties that the case is on the Jury Trial Roster for the period from October 9, 2017 to October 13, 2017. (R. p. 89) By the time Respondent Zurich confirmed that Appellant Palmetto was seeking a jury trial it was too late to request that the Circuit Court reconsider

its order granting Appellant Palmetto's Motion to Amend. As a result, Respondent Zurich filed its Motion to Strike. (R. p. 79-80)

Appellant Palmetto never complied with Rule 38(b), SCRC. Appellant Palmetto never used the word "demand," in conjunction with the phrase "jury trial." (R. p. 18) Prior to the transfer of the case to the Jury Trial Roster, the action was on the Circuit Court's Non-jury Trial Roster. By March 8, 2017, the case had reached the Circuit Court's backup Non-jury Trial Roster for the week of March 20, 2017 to March 24, 2017. (R. p. 88)

The allegations in Appellant Palmetto's Amended Answer and Counterclaim are based upon the same fact issues raised in Respondent Zurich's Complaint and Appellant Palmetto's initial Answer. (R. pp. 9-11 and R. pp. 15-16 ¶ 9) Appellant Palmetto's allegations against Respondent Zurich for breach of contract arise from the additional audit premiums that Respondent Zurich assessed after the Audit and the terms of the policy.

In response to Appellant Palmetto's request for a jury trial, Respondent Zurich served its Motion to Strike and Memo in Support of its Motion to Strike. (R. pp. 79-80 and R. pp. 90-93) Appellant Palmetto failed to file a written response to Zurich's Motion to Strike. Instead, at the hearing on Respondent Zurich's Motion to Strike, Appellant Palmetto argued that, *King v. Shorter*, 291 S.C. 501, 354 S.E.2d 402 (Ct. App. 1987), supports its entitlement to a jury trial. (R. p. 50, lines 13-25, and R. p. 51, lines 1-12) Appellant Palmetto argued that its Amended Answer and Counterclaim creates new issues of fact entitling it to a jury trial. Palmetto further argued that, ". . . [the Circuit Court's] decision here is really discretionary . . . If you grant this motion, this matter is immediately appealable. If you deny their motion [to Strike Jury Demand], its not appealable. And that's only significant to trying to get this thing resolved." (R. p. 50, lines 13-25)

On March 13, 2018, the Charleston County Clerk of Court entered the Circuit Court's Order granting, Appellee Zurich's Motion to Strike. (R. p. 1) The Circuit Court based its decision on Rule 38(d), SCRPC, and the South Carolina Court of Appeals' decision in *King v. Shorter*, 291 S.C. 501, 354 S.E. 2nd 402 (Ct. App. 1987), in which this Court states that, "... the new claims failed to create new issues of fact." The Circuit Court found that, "[t]he counterclaims raised in [Palmetto's] Amended Pleadings do not create new issues of fact." (R. p. 1)

ARGUMENT

I. The Correct Standard of Review is Abuse of Discretion

The proper standard of review for appeals from an order granting a motion to strike a request for a jury trial, based upon a waiver under Rule 38(d), is abuse of discretion. *King* at 503, 402. Appellant Palmetto admits in its Initial Brief that this Court in *King* found that abuse of discretion is the proper standard of review. Then, Appellant Palmetto confuses the standard of review in cases involving the waiver of demand for a jury trial, with cases involving the denial of the right to a jury trial. (Appellant's Initial Brief P. 5-6)

Appellant Palmetto contends that courts after *King*, hold that whether a party is entitled to a jury trial is a question of law. Thus, making the standard of review on appeal a de novo review. (Appellant's Initial Brief P. 5-6) The only South Carolina decision cited by Appellant Palmetto in support of its contention of a de novo review is *Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771 (2010). The issue in *Verenes* is whether the Appellant Alvanos is entitled to a jury trial in probate court on equitable causes of action. In *Verenes* at 13, 772, the South Carolina Supreme Court found that whether appellant Alvanos is entitled to a jury trial is a question of law. "An appellate court

may decide questions of law with no particular deference to the trial court.” *Verenes* at 13, 772-773. *Verenes* is distinguishable from the case on appeal.

The issue on appeal is not whether Appellant Palmetto is entitled to a jury trial under the South Carolina Constitution or State Statutes. The issue is whether the Circuit Court abused its discretion in finding that Appellant Palmetto waived its right to a jury trial under Rule 38(d), SCRCPC and *King*. *Verenes* does not address a litigant’s waiver of its right to a jury trial. Instead, *Verenes*, addresses whether a litigant has a right to a jury trial on equitable issues. The other decisions relied upon by Appellant Palmetto in support of a de novo review involve federal court decisions that are irrelevant to this appeal. In *Atchison, T. & S.F. Ry. v. Hercules, Inc.*, 146 F.3d 1071, 1073 (9th Cir. 1998), the Ninth Circuit holds that the standard of review for a district court’s interpretation of the Federal Rules of Civil Procedure is a de novo review.

The Circuit Court’s interpretation of either the Federal Rules of Civil Procedure or the South Carolina Rules of Civil Procedure is not an issue on appeal. In another federal circuit court decision cited by Appellant Palmetto, *Kulas v. Flores*, 255 F.3d 780, 783 (9th Cir. 2001), the Ninth Circuit holds that “[t]he right to a jury trial is a question of law reviewed de novo. . . however, the district court has discretion to grant or deny an untimely jury demand,” citing *Kletzelman v. Capistrano Unified Sch. Dist.*, 91 F.3d 68, 71 (9th Cir. 1996). In *Cal. Scents v. Surco Prods.*, 406 F.3d 1102, 1105 (9th Cir. 2005), another Ninth Circuit decision relied upon by Appellant Palmetto, the Ninth Circuit again found that the standard for review is de novo on the issue of whether a party is entitled to a jury trial and a district court’s interpretation of the Federal Rules of Civil Procedure.

The issue on appeal is not whether Appellant Palmetto is entitled to a jury trial or the Circuit Court’s interpretation of the Federal Rules of Civil Procedure or South Carolina Rules of Civil

Procedure. The issue is whether based on the facts the Circuit Court abused its discretion in finding that Appellant Palmetto waived its right to a jury trial by failing to make a timely demand.

II. Appellant Waived its Right to a Jury Trial by Failing to Make a Timely Demand

“The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868.” *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005). While the South Carolina Constitution provides the right to trial by jury, Rule 38, SCRCP, places certain requirements on those parties that seek a jury trial. Rule 38(d), SCRCP reads:

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a) a party waives its right to a jury trial unless a demand is made within 10 days.

When Rule 38(b), SCRCP, is read in conjunction with Rule 38(d), SCRCP, its obvious that unless a party serves a demand for a jury trial within 10 days from the date of the last issue for which a jury trial is demanded, the right to a jury trial is waived. Appellant Palmetto alleges in its Initial Brief that it is entitled to a jury trial because its counterclaims “raise new issues of fact.” However, Appellant Palmetto admits in its Initial Brief:

There is no dispute that Palmetto’s counterclaim arises out of the same contract as Zurich’s claim for breach of contract, however, the two claims and counterclaims are distinctly different. Palmetto’s breach of contract claims are based on Zurich’s breaches as opposed to the alleged breached [sic] by Palmetto. Likewise, there is no dispute that Palmetto’s counterclaim for fraud and negligent misrepresentation are related to the contract, and are based on similar facts to Palmetto’s affirmative defense of fraud in the inducement [Appellant’s Initial Brief, P. 8]

When arguing that it did not waive its right to a jury trial, Appellant Palmetto contends that its counterclaims raise new issues of fact. But when arguing and submitting proposed orders to the Circuit Court on its Motion to Amend, Appellant Palmetto contends that Respondent Zurich will not be prejudiced by the counterclaims because Respondent Zurich has been on notice of the claims since it raised the affirmative defenses of fraud and misrepresentation in its initial Answer. (R. pp. 85-86, fn. 1; R. p. 8, ¶ 2; R. p. 32, lines 2-23) Respondent Zurich's Complaint for breach of contract, Appellant Palmetto's original Answer with the affirmative defenses of fraud and misrepresentation and Palmetto's Amended Answer and Counterclaim for negligent representation, fraud and breach of contract, all hinge on the same matrix of facts involving the workers compensation insurance policy and the Audit conducted by Respondent Zurich.

In *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 620 (9th Cir. 1979), a decision relied upon by Appellant Palmetto in its Initial Brief, "The Las Vegas Sun Newspaper" contends among other issues on appeal that the district court's denial of its motion for a jury trial pursuant to Rule 39(b) was an abuse of discretion. The *Las Vegas Sun* Court, 610 F.2d at 620, quotes, *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1050 (9th Cir. 1974), a decision also relied upon by this Court in *King*, and explains that:

... we held, that the presentation of a new Theory does not constitute the presentation of a new Issue on which a jury trial should be granted (as of right) under F. R. Civ. P., Rule 38(b)." (Emphasis in original.) We thus find that the Sun was not entitled as of right to a jury on the claims presented in the amended complaint. Nor do we think that the district court's denial of the Sun's motion for a jury trial was an abuse of discretion. *Rule 39(b)* provides:

Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues. *Las Vegas Sun* at 620.

Appellant Palmetto's initial Answer's "Fifth Defense (Fraud and Fraud in the Inducement)" reads, "[t]he Plaintiff's claims are barred as a result of the Plaintiff's fraud and misrepresentations concerning the policy and audit." (R. p. 16, ¶ 9). Appellant Palmetto's Amended Answer and Counterclaim's "Eighth Defense and By Way of Counterclaim (Negligent Representation and Fraud) and Ninth Defense by Way of Counterclaim (Breach of Contract)," all arise out of the same matrix of facts concerning the insurance policy between Respondent Zurich and Appellant Palmetto, and the Audit. (R. pp. 19-22, ¶¶ 12-34) Appellant Palmetto's Eighth and Ninth Defenses raise issues of fact concerning the policy and the Audit conducted by Respondent Zurich. In its Eighth and Ninth Defenses, Appellant Palmetto alleges that Respondent Zurich breached the terms of the policy by making false representations in the policy and by failing to apply proper job classification codes in its Audit. (R. pp. 19-22, ¶¶ 12-34) These claims are all based on the matrix of facts previously alleged in Appellant Palmetto's initial Answer and Respondent Zurich's Complaint (R. p. 16, ¶ 9 and R. pp. 9-11)

In *King*, at 503, 403, this Court finds that, "... whether a litigant is entitled to jury trial on the issues presented in an amended pleading, when no prior demand for a jury trial has been made turns on whether the amended pleadings create new issues of fact." *King*, a decision relied upon by both parties, and cited by the Circuit Court in its Order striking the jury trial, also relies upon *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045 (9th Cir. 1974), the same decision quoted by the *Las Vegas Sun* Court, 610 F.2 at 620.

Trixler decided the same waiver issue under Rules 38(b) and (d), Fed. R. Civ. Proc., as the *King* Court decided under Rules 38(b) and (d), SCRCF. *King* at 503, 402, cites the holding in *Trixler*, "... that where the plaintiff failed to move for a jury trial on his first five claims, but did

make a timely jury demand on an amended complaint which added sixth and seventh claims, a motion for jury trial was determined to be properly denied because the new claims failed to create new issues of fact.” *Trixler* determined that appellant having waived its right to a jury trial on its fifth claim is unentitled to a jury trial on a more detailed statement of the same charge in its sixth and seventh claims. *Trixler* at 1050. In the case on appeal, Appellant Palmetto’s Amended Answer and Counterclaim (R. pp. 19-22, ¶¶ 12-34) is based on the same issues of fact as its initial Answer’s Fifth Defense (R. p. 16, ¶ 9). Accordingly, there are not any new issues of fact raised by its Amended Answer and Counterclaim. Appellant Palmetto has failed to meet its burden of establishing that the Circuit Court abused its discretion in granting Respondent Zurich’s Motion to Strike Jury Demand.

III. Additional Sustaining Ground; Appellant Never *Demanded* a Jury Trial

Appellant Palmetto asserts without qualification in its Initial Brief’s Statement of the Case (P. 1) that, “. . . Palmetto filed its Amended Answer and Counterclaim and *demanded* a jury trial.” (Italics added). Appellant Palmetto never made a “demand” for a jury trial. Instead, Appellant Palmetto only inserted the words and symbols, “(Jury Trial),” on the top right-hand side of its Amended Answer and Counterclaim (R. p. 18). No other reference to a jury trial is contained in Palmetto’s Amended Answer and Counterclaim. Rule 38(b), SCRCF reads as follows:

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

The editor’s comment to Rule 38 reads:

This Rule 38 is substantially the Federal Rule. The last sentence is added to Paragraph 38(a) to preserve the language of Code § 15-23-60. Paragraph 38(e) of the

Federal Rule, referring to admiralty and maritime claims, is inapplicable to State practice. [See also, *King v. Shorter*, 291 S.C. 501, 503, 354 S.E.2d 402, 403 (1987)]

No South Carolina Appellate Court decisions have determined the language required to “demand” a jury trial under Rule 38(b), SCRCP. However, the federal courts have reviewed the issue and determined that the preferred method for demanding a jury trial is a clear endorsement in bold letters demanding a jury trial. *Walker v. Edison Chouest Offshore, L.L.C.*, 2006 U.S. Dist. Lexis 53786, 206 AMC 2382 (U.S. Dist. Ct. S. Dist. N.Y. (2006), citing, *Rosen v. Dick*, 639 F.2d 82, 89 (2d Cir. 1980); “see also 22 Fed. Proc. L. Ed. § 77:116 (2006) (‘Since Fed. R. Civ. P 38(b) does not describe how to endorse a pleading, it is sufficient if a party places the phrase ‘jury trial demanded’ under the docket number’). In his complaint, Walker never used the word ‘demand,’ or any equivalently affirmative verb in conjunction with the phrase ‘jury trial.’ Instead his complaint states, ‘Nothing in these jurisdictional allegations is to be construed as a waiver of the plaintiff’s right to a jury trial . . . nor the right to have all the claims asserted herein tried to a jury, at plaintiff’s option . . .’ (Compl. P. 6) Walker argues that the intent behind paragraph six of his complaint was to not waive a trial by jury.” *Walker* at P. 2

The *Walker* Court found that, “[t]he plain meaning of the word demand, . . . is an insistent and peremptory request made of right. See Webster’s Third New International Dictionary 598 (1986); see also Black’s Law Dictionary (8th Ed. 2004) (defining demand as the assertion of a legal or procedural right.’). Thus, a demand as used generally and in Rule 38(b) is a definitive statement . . .” *Walker*, at P. 2. In its Initial Brief, Appellant Palmetto alleges that, it filed its Amended Answer and Counterclaim and ‘demanded’ a jury trial.” (emphasis added) (Appellant’s Initial Brief P. 1, ¶ 1) Nowhere in Appellant Palmetto’s Initial Brief does it explain how the words, “jury trial,”

alone, amount to either an insistent and peremptory request, as the word “demand” is defined by *Webster’s Dictionary* or as an assertion of a legal or procedural right, as the word, “demand” is defined by *Black’s Law Dictionary*.

Appellant Palmetto’s Initial Brief fails to explain how the phrase “jury trial,” alone, can amount to a “demand” under Rule 38(b), SCRCF. Instead, by its failure to address the issue, Appellant Palmetto assumes that it has complied with the “demand” requirement of Rule 38(b), SCRCF. The words “Jury Trial,” alone, do not constitute a “demand” under Rule 38(b), SCRCF. At the Hearing on Respondent Zurich’s Motion to Strike and in its Memo in Support of its Motion to Strike, Respondent Zurich objected to Appellant Palmetto’s claim that it made a demand for a jury trial under Rule 38, SCRCF. In Respondent Zurich’s Memo in Support of its Motion to Strike, Respondent Zurich states, “. . . that Defendant Palmetto failed to comply with Rule 38, SCRCF, in that no actual *demand* for a jury trial was made by Defendant Palmetto.” (emphasis in original) (R. p. 90, fn. 1; R. p. 48, lines 9-14)

As further evidence that Appellant Palmetto failed to make either an ‘insistent and peremptory request as a matter of right’ or “an assertion of its legal or procedural right” to a jury trial, at the end of each of Palmetto’s counterclaims, it requests that the amount of the damages it seeks be determined by a generic “trier of fact,” and not a jury. (R. p. 22, ¶¶ 34 and 36) In its prayer for relief, Palmetto “. . . requests that the *Court* issue an Order dismissing [Zurich’s] Complaint with prejudice, and for judgment against [Zurich] in excess of \$100,000.00 . . . for punitive damages to be determined by the trier of fact . . . and for such further relief as this Court deems just and proper.” [emphasis added] Again, Appellant Palmetto’s prayer for relief seeks a determination from the court and a generic trier of fact, not a jury, of the amount of its alleged damages (R. p. 22, ¶ 38) Nowhere

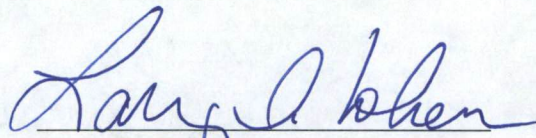
in Appellant Palmetto's Amended Answer and Counterclaim does it request that a jury reach a determination of its alleged damages. The failure of Appellant to *demand* a jury trial is fatal to its claim that it did not waive its right to a jury trial.

Accordingly, Appellant's failure to demand a jury trial is an additional basis for this Court finding that the Circuit Court did not abuse its discretion in granting Respondent Zurich's Motion to Strike Jury Trial Demand.

CONCLUSION

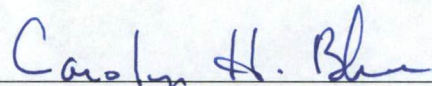
For the reasons stated, based on the cited pleadings, motions, memos, law and precedents, Respondent Zurich American Insurance Company of Illinois requests that this Honorable Court affirm the Circuit Court's Order and dismiss this appeal.

Respectfully submitted,



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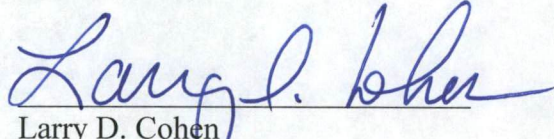
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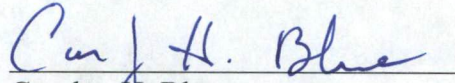
CERTIFICATE OF COUNSEL

I certify that Respondent's Final Brief complies with Rule 211(b), SCAR.

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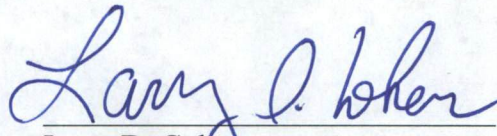
in Appellant Palmetto's Amended Answer and Counterclaim does it request that a jury reach a determination of its alleged damages. The failure of Appellant to *demand* a jury trial is fatal to its claim that it did not waive its right to a jury trial.

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CONCLUSION

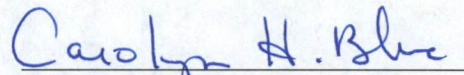
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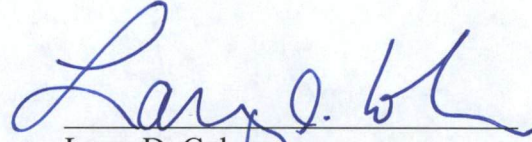
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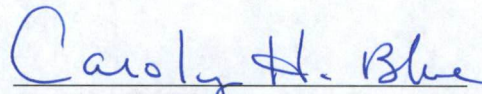


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