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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Case No. 15-CP-10-6684 (Appeal No.: 2018-000692)

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SC Court of Appeals

Zurich American Insurance Company of Illinois,Respondent,

v.

Palmetto Contract Services, Inc.,Appellant.

APPELLANT'S FINAL REPLY BRIEF

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July 25, 2019

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REPLY

Appellant, Palmetto Contract Services, Inc. (hereinafter "Palmetto"), hereby submits this Reply to the Brief of Respondent, Zurich American Insurance Company of Illinois (hereinafter "Zurich"). A brief chronology of the pleadings, motions and orders is provided. This Reply also rebuts Zurich's arguments on the standard for review, that Palmetto waived its right to a jury trial, and the word "demand" has to be included to make a proper demand for a jury trial.

I. CHRONOLOGY.

To avoid any confusion of the facts, and to demonstrate that Palmetto did not delay in its attempt to amend the complaint, the following simple chronology of events is provided.

January 14, 2016:	Zurich served Palmetto with the original Complaint.
February 12, 2016:	Palmetto filed Answer with affirmative defenses.
July 12, 2016:	Palmetto files Motion to Amend.
January 5, 2017:	Hearing before Judge Jeffrey Young on Motion to Amend. No Order was ever issued.
September 19, 2017:	Hearing on Motion to Amend before Judge Nicholson.
September 20, 2017:	Order granting Motion to Amend was signed by Judge Nicholson.
	No motion for reconsideration, or motion to alter or amend was filed by either party.
September 27, 2017:	Palmetto files Amended Complaint.
October 5, 2017:	Clerk of Court transfers the case to the jury roster.
October 26, 2017:	Zurich files Reply to the Counterclaim and a Motion to Strike the case from the jury roster.

March 6, 2018: Hearing before Judge Harrington on Zurich's Motion to Strike.

March 13, 2018: Order by Judge Harrington granting Motion to Strike.

II. THE CORRECT STANDARD OF REVIEW.

This is not an appeal of any order under Rule 39, which specifically states "the court in its discretion upon motion may order a trial by jury of any or all issues." Rule 39(b), SCRPC. Nothing in the trial court's Order, or in King v. Shorter cited in the Order, refer to Rule 39.

The issue in this appeal is whether Palmetto is entitled to a jury trial on the issues raised in its counterclaim. The law is clear that the correct standard of review for determining whether a party is entitled to a jury trial is a question of law. Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010).

The original answer did not assert any counterclaim, but only asserted affirmative defenses that were equitable in nature. The affirmative defenses did not demand any money or assert any claim against Zurich. "A cause of action for fraud may be at law or in equity, depending on the remedy sought. [citations omitted]." Mortgage Electronic Systems, Inc. v. White, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009). Thereafter, Palmetto asserted a compulsory counterclaim which entitled it to a jury trial. Johnson v. South Carolina Nat. Bank, 292 S.C. 51, 54, 354 S.E.2d 895, 896 (1987).

Further, the time for closing the pleadings, and thus the start of the ten (10) day time period to demand a jury trial, was when Zurich filed its reply to the counterclaim. Curry v. Pyramid Life Ins. Co., 271 F.2d 1 (1959), *cert. denied*, 361 U.S. 933, 80 S. Ct. 373, 4 L.Ed.2d 355 (1960). ("Application of Rule 7(a) makes it clear that until plaintiff

filed her reply to the counterclaim, the pleadings were open. That her reply, wherein she denied the fraud allegations; was the last pleading directed to such issue, is scarcely debatable; hence, it must follow that her application for a jury trial was seasonably made.”)

The court in Curry went on to state:

The instant situation makes appropriate our reference to the time-honored principle recently reiterated by the Supreme Court in Beacon Theatres, Inc. v. Westover, 356 U.S. 956, 78 S. Ct. 996, 2 L.Ed.2d 1064, granting certiorari, and 79 S. Ct. 948, 952, on the merits, in this language: “Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.” Id.

Under the facts of this case, the correct standard of review for determining whether a party is entitled to a jury trial is a question of law.

III. PALMETTO NEVER WAIVED ITS RIGHT TO A JURY TRIAL.

Palmetto made the demand for a jury trial by endorsing the demand on the Answer and Counterclaim, which was “not later than 10 days after the service of the last pleading directed to such issue” as required by Rule 38(b), SCRPC. Since the Answer and Counterclaim was the “last pleading directed to such issue,” the demand was proper and timely under Rule 38. Id. There was no delay in demanding a jury trial. The demand was made on the very first amended pleading. The Motion to Amend was filed less than six (6) months after the Complaint was filed; therefore, there was no undue delay.

Even if Palmetto did not file a demand for a jury trial within ten (10) days, the trial court abused its discretion in granting the Plaintiff’s Motion to Strike. Palmetto’s right to a trial by jury is highly favored, and “waivers of the right are always strictly construed and not lightly inferred or extended by implication.” South Carolina Community Bank v. Salon Proz, LLC, 420 S.C. 89, 93-94, 800 S.E.2d 488, 490.(Ct. App. 2017), citing Keels v. Pierce,

315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993). As the federal courts have held, “The court’s discretion should be exercised in favor of granting a jury trial ‘in the absence of strong and compelling reasons to the contrary.’ *Local 783 v. General Elec. Co.*, 471 F.2d 751, 755 (6th Cir.) (quoting *Swofford v. B & W, Inc.*, 336 F.2d 406, 409 (5th Cir.1964), *cert. denied*, 379 U.S. 962, 85 S. Ct. 653, 13 L.Ed.2d 557 (1965)), *cert. denied*, 414 U.S. 822, 94 S. Ct. 120, 38 L.Ed.2d 55 (1973).” *Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987).

In this case, in opposing Palmetto’s Motion to Amend, Zurich argued it would be prejudiced if it was not allowed an opportunity to demand a jury trial on the amended complaint and counterclaim. By so arguing, Zurich acknowledges that it would be equally prejudicial to Palmetto to be denied the right to a jury trial. To avoid any prejudice to either party, Palmetto consented to any request by Zurich for a jury trial.

Despite Zurich’s argument that it would be prejudiced if it was not allowed to demand a jury trial, the court granted Zurich’s motion to strike. Granting the Motion to Strike was an abuse of discretion considering Zurich’s own acknowledgement and argument that it would be prejudiced if it were denied the right to a jury trial. Just as Zurich would be prejudiced, the trial court’s order is prejudicial against Palmetto. There is no legitimate bases for denying Palmetto’s demand for a jury trial in light of Zurich’s acknowledgement of the prejudice it will cause.

IV. PALMETTO DEMANDED A JURY TRIAL BY USING THE TERM “JURY TRIAL” ON THE CAPTION.

Zurich’s argument that Palmetto failed to make proper demand for a jury trial because it only put the words “Jury Trial” on the caption, and did not use the word “Demand” is baseless. By including “Jury Trial” on the caption, everyone understood

Palmetto made a demand for a jury trial. The clerk of court's office understood it to be a demand for a jury trial. The case was transferred to the jury roster. R. p. 89.

Zurich and its counsel clearly understood the term "Jury Trial" on the caption to be a demand for a jury trial. In Zurich's Memo In Support of Its Objection to Transfer to Jury Trial Roster and Motion to Strike Demand for Jury Trial, Zurich moved "for an Order Striking Defendant Palmetto Contract Services, Inc.'s **jury trial demand**" (emphasis added). Zurich further stated in the motion that "Plaintiff prays that this Court strike Defendant's **demand for jury trial**" (emphasis added). R. pp. 79-81; *see also*, R. pp. 90-98, Plaintiff Zurich's 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.

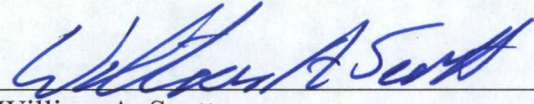
Finally, Zurich did not use the word "demand" on the caption to the original Complaint. R. pp. 9-14. Based on Zurich's argument, by failing to include the word "demand" on its original complaint, it never made a proper demand for a non-jury trial. Since no proper demand for a non-jury trial was made, and its claims are legal in nature, the case should be a jury trial.

Based on the clear and undisputed facts, Palmetto made a proper demand for a jury trial. Even Zurich understood Palmetto made a demand for a jury trial. For Zurich to argue otherwise is disingenuous.

[SIGNATURE ON NEXT PAGE]

Respectfully submitted.

PEDERSEN & SCOTT, P.C.

A handwritten signature in blue ink, appearing to read "William A. Scott", is written over a horizontal line.

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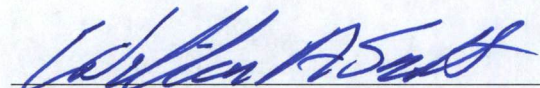
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Reply Brief complies with Rule 211(b), SCACR.

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