

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2019-001488

MB Hutson/MB Hudson, ...Appellant,

v.

Penn America Insurance Company,
Global Indemnity Group, Inc.,
Timothy J. Newton, Esq., J.R. Murphy, Esq.,
John Doe #1, John Doe #2, ...Respondents.

**RESPONDENTS PENN AMERICA INSURANCE COMPANY
AND GLOBAL INDEMNITY GROUP, INC.'S
MOTION FOR AND MEMORANDUM IN SUPPORT OF IMPOSITION OF
SANCTIONS AGAINST APPELLANT**

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

Pursuant to Rule 269, SCACR, Respondents Penn America Insurance Company and Global Indemnity Group, Inc. ("Respondents PAIC") move for an Order awarding sanctions against Appellant, and in support thereof states as follows:

RELEVANT PROCEDURAL HISTORY

Since December 2011, Appellant Hutson has been involved in litigation related to or arising from a lease purchase agreement and membership interest purchase agreement he entered into with TLC Holdings, LLC ("TLC") in late 2010 for Big Water Resort campground.

Respondents PAIC issued a Commercial General Liability Policy to their named insured, BWR, Inc. d/b/a Big Water Resort, for which Appellant was a corporate officer. Respondents PAIC provided Hutson with a defense, subject to a reservation of rights, in two lawsuits—a federal class action and a state defamation action. Both lawsuits were resolved within policy limits and without any personal liability to Hutson.

Nonetheless, Appellant Hutson sued Respondents PAIC and their coverage counsel, Respondents Newton and Murphy, in state court, asserting a variety of claims in contract and tort. These claims centered around the alleged failure of the insurer to pursue counterclaims on Huston’s behalf, or otherwise undertake an independent action to set aside a 2012 Consent Order based upon a theory of “extrinsic fraud.” Following a dispositive motions hearing, the trial court granted summary judgment. (See **Exhibit A**, Newton/Murphy Order, July 18, 2019; **Exhibit B**, PAIC Order, July 18, 2019).

Hutson filed his notices of appeal on September 4 and 25, 2019. The appeal was held in abeyance from October 25, 2019 to January 30, 2020, while Respondents PAIC’s first Motion to Dismiss the appeal was pending.¹ Since then, all parties have filed their initial briefs.

At the time of this filing, the following motions are pending before this Court: (1) Appellant’s Motion to Exceed Page Limit; (2) Respondents PAIC’s Motion to Strike Appellant’s Reply Brief; (3) Respondent Newton’s Motion to Strike Appellant’s Briefs; (4) Appellant’s Emergency Motion to Have Open Hearing (“Emergency Motion”); (5) Respondents’ Motion to Dismiss based upon Appellant’s failure to serve the Record on Appeal; and (6) Appellant’s Motion for Additional Time to File Record on Appeal.

¹ Respondents PAIC first Motion to Dismiss was based upon untimeliness of the Notice of Appeal.

This Motion for Sanctions is based upon the frivolous nature of this appeal, the frivolous nature of Appellant's recent Emergency Motion, and Hutson's escalating allegations against both the attorneys involved in this case and the Court.

RELEVANT FACTS

Ejection Action and Eviction

Appellant Hutson's litigation history is voluminous. In December 2011, TLC filed an ejectment action against Hutson alleging he defaulted on the terms of the Lease Purchase Agreement.² Hutson filed counterclaims against TLC in the Ejectment Action. The parties agreed to settle the Ejectment Action, and the Settlement Agreement was adopted into a Consent Order filed April 13, 2012. Hutson was represented by attorney Paul Weissenstein, and briefly by attorney Stephen "Chip" Burn, in the Ejectment Action.

Following Hutson's default under the terms of 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. Hutson was represented by attorney H. Freeman Belser in the eviction proceedings.

Class Action, Defamation Action, and Coverage Action

In the midst of TLC's efforts to evict Hutson from the Big Water Resort property, Hutson allegedly sent the campground members a postcard, 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

² TLC Holdings, LLC v. Hutson, Case No. 2011-CP-14-602 (Clarendon Cnty. Ct. Comm. Pleas) ("the Ejectment Action").

members filed a class action against TLC in federal court (“the Class Action”).³ TLC asserted third-party claims for equitable indemnification against Hutson. On December 7, 2015, TLC filed a separate action against Hutson in state court for defamation (“the Defamation Action”).⁴ TLC’s claims related to certain statements in the postcard and certain statements Hutson made to the attorney who represented the campground members in the Class Action.

In 2016, PAIC was notified of the actions and provided Hutson a defense in both the Class Action and the Defamation Action, subject to a reservation of rights. 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 also asserted *pro se* counterclaims against TLC in both actions.

PAIC retained Murphy & Grantland as its coverage counsel and Respondent Newton filed a declaratory judgment action seeking a judicial ruling as to PAIC’s coverage for TLC’s claims against Hutson in the Class Action and the Defamation Action.⁵ On September 16, 2016, Hutson executed a Settlement Agreement and Release in the Coverage Action, in exchange for monetary consideration, whereby he released Penn-America, its agents, and its affiliates, from liability for certain claims. (**Exhibit C**, Coverage Action Settlement Agreement and Release).

Meanwhile, on April 5, 2016, Magistrate Judge Mary Gordon Baker issued a Report and Recommendation in the Class Action, which included a recommendation that TLC’s motion for summary judgment be granted as to Hutson’s counterclaims. (**Exhibit D**, Class Action Report &

³ Big Water Resort, LLC, et al. v. TLC Holdings, LLC, C/A: 2:14-1583-DCN-MGB (D.S.C.) (“the Class Action”).

⁴ TLC Holdings, LLC, et al. v. Hutson, Case No. 2015-CP-14-0615 (Clarendon Cnty. Ct. Comm. Pleas) (“the Defamation Action”).

⁵ Penn-America Insurance Company v. BWR, Inc., et al., C/A: 2:16-cv-01943-DCN (D.S.C.) (“the Coverage Action”).

Recommendation, Apr. 5, 2016). On May 20, 2016, Federal District Judge David C. Norton adopted the Report and Recommendation, finding that Hutson's counterclaims against TLC in the Class Action litigation were barred by res judicata. (**Exhibit E**, Class Action Order Adopting R&R, May 20, 2016). On March 2, 2017, the state court similarly granted TLC's motion for summary judgment as to Hutson's counterclaims in the Defamation Action. (**Exhibit F**, Defamation Action Order Granting Summ. Jmt, Mar. 2, 2017).

Though the federal court previously denied TLC's motion for sanctions against Hutson, a subsequent motion for sanctions led to an award of \$14,908.50 against Huston. (**Exhibit G**, Class Action Order Granting Sanctions, Oct. 6, 2017). Significantly, Judge Norton's Order granting sanctions against Hutson included the following findings:

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.

...

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. He lacks any evidence to support his counterclaims and other allegations against third-party plaintiffs. Indeed, Hutson routinely fails to provide factual or legal support for anything he files with the court. Accordingly, the court finds that sanctions are appropriate under the court's inherent power.

(Id. at p. 5, 6).

In early 2018, Penn-America settled TLC's claims against Hutson in the Class Action, which were formally 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 \$3.5 million on January 26, 2018. An appeal followed, but the case ultimately resolved through mediation—with no personal liability

for Hutson—and the appeal was dismissed.⁶ Respondent Newton informed Hutson of the settlement on December 4, 2018.

Instant Action Against Insurer and Their Coverage Counsel

On December 5, 2018, the day after notification of the final settlement, Hutson filed the instant lawsuit against Respondents.⁷ Construed liberally, the Complaint asserted causes of action for breach of contract, bad faith, fraud, misrepresentation, negligence, tortious interference with attorney-client relationship, and legal malpractice. Hutson sought \$4.5 million in damages.

Following written submissions, a hearing, and consideration of proposed orders, the trial court disposed of all claims against Respondents in its Orders granting the dispositive motions of Respondents. The trial court found that all of the claims made in the Amended Complaint were barred under the Release that Hutson executed on September 16, 2016. Accordingly, PAIC's motion for summary judgment was granted. (**Exhibit B**, PAIC Order, p. 10-11). The trial court further found that, even if not barred by the Release, summary judgment was proper on the merits of each cause of action alleged. (*Id.* at p. 11-25). This appeal followed.

As noted *supra*, the following motions are currently pending before this Court: (1) Appellant's Motion to Exceed Page Limit; (2) Respondents PAIC's Motion to Strike Appellant's Reply Brief; (3) Respondent Newton's Motion to Strike Appellant's Briefs; (4) Appellant's Emergency Motion to Have Open Hearing ("Emergency Motion"); (5) Respondents' Motion to Dismiss based upon Appellant's failure to serve the Record on Appeal; and (6) Appellant's Motion for Additional Time to File Record on Appeal.

⁶ TLC Holdings, LLC, et al. v. M.B. Hutson, Appellate Case No. 2018-000936 (S.C. Ct. App.) ("Defamation Appeal").

⁷ Hutson v. Penn America Ins. Co., et al., Case No. 2018-CP-40-06344 (Richland Cnty. Comm. Pleas).

Included as exhibits to this Motion are ten e-mails received from Appellant from June 16 through July 19, 2020, with their attachments. (**Exhibits H to O**, E-mails from Hutson). On June 16, 2020, Appellant first notified Respondents of his intention to file for an emergency hearing before the appellate court, at which he would seek to examine the attorneys under oath. Appellant stated that he would “declare that you lawyers are misinforming the Court and Appeal Judges and should be removed from practicing law.” (**Exhibit H**, Hutson E-mail, June 16, 2020). Subsequently, on June 21 and 22, Appellant sent a draft of his Emergency Motion along with the following:

Good morning Christian, this saddens me having to seriously consider bringing a[n] immediately separate action against you for participating with Tim Newton and JR Murphy in extrinsic fraud upon the Appeals Court and the lower Court. You are sticking with Murphy & Grantland including filing documents that play their defense against me and against what’s right and truthful.

Do any attorneys exist who want [sic] hesitate to step over the line of what's right and legal? Penn America and Global were fully aware that making a business decision to not defend me in order to remove the extrinsic fraud could only cause one outcome. In addition, they had an obligation to come to me advising me of what they had decided to do and how I was going to be destroyed by their decision since I was the insured and through me and my business, the insurance companies got their monthly payments for coverage.

I plan to serve the insurance companies copies of the complaint as well as serving you. I find this to be a crying shame. I would hope that you would have done the right thing immediately. I simply need and want real Justice. You are cheating against me.

(**Exhibit I**, Hutson E-mail, June 21 – 22, 2020). Huston filed his “Emergency Motion” on or about July 2, 2020. Respondents each filed Returns to the Motion.

On July 6, 2020, Appellant sent Respondent’s counsel another iteration of his view of the facts, concluding with the following:

By hiding the facts of the existing and underlying extrinsic fraud upon the courts to protect your clients, Penn America, et.al., you will likely find yourself personally and professionally entwined. I am not writing this email to you to threaten or extort but simply to remind you that your inaction to disclose extrinsic fraud underlying these actions in the court are wrong and dishonest to the Appeals Court and Judges, as well to me. You are intentionally concealing pertinent facts that you have a legal and professional obligation to bring to the attention of the Court. You intentionally failed to bring attention to this in Judge Nettles' court about the known concealments, also.

I have filed my Emergency Motion, as you know, and mailed you a copy. If I don't hear from you within the next (5) business days, I will proceed with a complaint in State or Federal Court against you.

(Exhibit J, Hutson E-mail, July 6, 2020).

On July 8, 2020, Appellant's e-mail threatened to "use the Internet, among other methods" to "name every person, every law firm and lawyer as well as every person who has assisted in plotting to defraud me including persons who work for Penn America or Global Indemnity." **(Exhibit K, Hutson E-mail, July 8, 2020).** He further welcomed "any new lawsuit that allows me to further expose the injustice...." (Id.).

On July 16, 18 and 19, 2020, Appellant sent three versions of his Reply to Respondents PAIC's Return to the Emergency Motion. **(Exhibit L, Hutson E-mail, July 16, 2020); (Exhibit M, Hutson E-mail, July 18, 2020); (Exhibit N, Hutson E-mail, July 19, 2020).** Included in two of these drafts was the following:

Should this honorable Appeals Court take NO ACTION to stop the on-going extrinsic fraud by these Respondents (officers of the Court), Appellant would be forced to view this inaction as the Honorable Court co-conspiring with those officers of the court and against this Appellant. These lawyers (sworn officers of the court) must be stopped. This has already been going on for years. If the Appellate Court does not act to clear their court of fraud, Appellant must consider all means which may be open to him, even, possibly, contacting local and national news departments.

(**Exhibit M**, Hutson E-mail, July 18, 2020); (**Exhibit N**, Hutson E-mail, July 19, 2020).

On July 17, 2020, Appellant wrote:

Christian, I would hope that you would understand that all Respondent's are basically in Checkmate. This condition has mostly worsen no matter how hard Respondent's defend for evidence clearly points to guilt. Why don't we talk and stop this thing? Why put me and the Respondent's through such a legal mess that will most likely get much worse. I am willing to talk.

(**Exhibit O**, Hutson E-mail, July 17, 2020). Respondent's counsel has refrained from oral communications with Appellant due to his history of misrepresenting the content of his discussions with attorneys.

Weissenstein Malpractice Action

On September 4, 2018, Hutson filed a legal malpractice action against Paul Weissenstein, one of the attorneys who represented him in the 2012 Ejectment Action and resulting Settlement Agreement.⁸

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 the 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 Huston 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 counterclaim

⁸ Hutson v. Weissenstein, Case No. 2018-CP-43-1583 (Sumter Cnty. Ct. Comm. Pleas) ("the Weissenstein Malpractice Action").

against TLC and advising Appellant to enter into the Settlement Agreement. (**Exhibit P**, Weissenstein Malpractice Action Order Granting Summary Judgment, Feb. 25, 2019).

Hutson appealed from the trial court's order.⁹ Weissenstein filed a motion to dismiss based upon Hutson's failure to serve the Record on Appeal in that case. The Court recently entered an Order denying the motion and providing Hutson twenty days, until July 27, 2020, to serve the Record on Appeal.

Burn Malpractice Action

On November 8, 2018, Hutson filed a legal malpractice action against Stephen "Chip" Burn, Sarah Guthrie, and Burn Law Firm, LLC.¹⁰ Hutson alleged in that lawsuit that Burn reviewed the documentation and advised Hutson that he did not have sufficient evidence to prevail on the counterclaims he had asserted in the Ejectment Action.

On April 10, 2019, the Honorable Frank R. Addy, Jr. entered an Order of Dismissal, finding that Hutson failed to cure the lack of expert affidavit or establish that such an affidavit was not necessary. (**Exhibit Q**, Burn Malpractice Action Order of Dismissal, April 10, 2019). Hutson did not appeal from the Order of Dismissal.

Atlantic Coast Properties Action

On November 25, 2018, Hutson filed a lawsuit against Atlantic Coast Properties, alleging fraud in another, unrelated real estate transaction.¹¹

⁹ Hutson v. Weissenstein, Appellate Case No. 2019-873 (S.C. Ct. App.) ("the Weissenstein Appeal").

¹⁰ Hutson v. Burn, et al., Civ. Action No. 2018-CP-32-03879 (Lexington Cnty. Ct. Comm. Pleas) ("the Burn Malpractice Action").

¹¹ Hutson v. Atlantic Coast Props., et al., Case No. 2018-CP-40-06156 () ("the Atlantic Coast Properties Action").

On April 11, 2019, the Honorable Robert E. Hood entered an Order of Dismissal, finding that the suit was filed in breach of a release. (**Exhibit R**, Atlantic Coast Action Order of Dismissal, Apr. 11, 2019). Hutson did not appeal from the Order of Dismissal.

LAW/ANALYSIS

Respondents PAIC outlined the litany of litigation involving Appellant and his correspondence with counsel and the parties over the past month to demonstrate Appellant's history of frivolous filings and threats during the instant appeal. Rule 269 of the South Carolina Appellate Court Rules provides:

Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require. This Rule does not apply to any matters where counsel is required by law to pursue an appeal or petition for writ of certiorari even though the matter may be frivolous.

Rule 269, SCACR.

It is notable that Judge Norton previously imposed monetary sanctions of \$14,908.50 against Hutson in the Class Action. (**Exhibit G**, Class Action Order Granting Sanctions, Oct. 6, 2017). However, Respondent PAIC ultimately paid the amount of Hutson's behalf. Thus, Appellant has never reaped any real consequence for his frivolous filings and antics in any prior litigation.

Similar to the findings made by Judge Norton in the Class Action, Appellant has engaged in a pattern of frivolous filings and conduct designed to harass or burden Respondents and there is no indication that he intends to cease. Appellant has misrepresented the facts to this Court, made unsupported allegations of unethical and criminal conduct against Respondents and their counsel,

and is using the judicial process as a mechanism of harassment. Appellant's meritless filings have continued to waste untold hours of this Court's time and the time of these Respondents. Accordingly, this Court should find that the imposition of sanctions is warranted because Respondent's appeal and his recent Motion for Emergency Hearing are frivolous and not in compliance with the South Carolina Appellate Court Rules.

Rule 269 provides for imposition upon the offending party of "such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 269, SCACR. In the present matter, Respondents request the following sanctions be imposed against Appellant: (1) An Order dismissing the instant appeal; (2) Alternatively, if the appeal is not dismissed, an Order requiring Appellant seek leave of this Court prior to filing any additional *pro se* motions in the instant appeal; and (3) An Order for repayment of all or a portion of the costs and attorney's fees incurred by Respondents PAIC in the instant appeal.

Dismissal of the instant appeal is a proper sanction because, as explicated in the pending Motions to Strike, Appellant's initial briefs are not in compliance with the South Carolina Appellate Court Rules and ultimately fail to address the actual issue before this Court, which is whether the trial court properly granted the Respondents' dispositive motions. Further, as noted in the pending Motion to Dismiss, Appellant has failed to serve the Record on Appeal. Even if this Court extended the time period for filing the Record, if past behavior is any indicator of future behavior, Respondents anticipate that it will fail to comply with the South Carolina Appellate Court Rules.

Alternatively, if this appeal is not dismissed, Respondents PAIC request that this Court enter an Order prohibiting Appellant from filing any additional *pro se* motions in the instant appeal without first obtaining leave of the Court. See City of Columbia v. Assa'ad-Faltas, 420 S.C. 28,

35-36, 800 S.E.2d 782, 785 (2017) (discussing appellate court's entry of an order prohibiting Appellant from filing anything with this Court unless it is signed and filed by an attorney). This will limit Appellant's future filings to two categories: the Record on Appeal and his Final Brief(s). Respondents will benefit from not having to be burdened with responding to Appellant's draft and filed motions, like Appellant's frivolous Emergency Motion for Hearing filed on July 6, 2020.

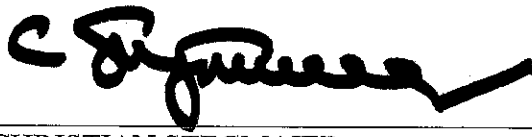
Additionally, Respondents request that this Court require Appellant to pay all or a portion of the attorney's fees and costs associated with the instant appeal, as reflected in the attached Affidavit. (See **Exhibit S**, Affidavit of Attorney's Fees and Costs). Respondents won summary judgment in the trial court. This appeal, to the extent Appellant could prosecute it within the applicable Rules, was supposed to be focused upon the propriety of the trial court's ruling. Instead, Respondents are having to respond to Appellant's briefing with motions to strike and file returns to Appellant's frivolous motions. Most egregiously, Appellant accuses the attorneys associated with this appeal of being criminals and fraudsters and calls for their disbarment. Appellant has most recently accused the appellate court—if it does not hold an evidentiary hearing that it has no authority to conduct—of being a co-conspirator against Appellant.

Appellant's behavior continues to escalate and must be stopped. It is obvious from the repeated dismissals of Appellant's filings that this alone does not dissuade his conduct. Thus, in addition to dismissal of this appeal or otherwise limiting Appellant's motions practice, Appellant should also be required to shoulder the financial burden that his conduct has created for Respondents.

CONCLUSION

Based upon the foregoing, Respondents PAIC respectfully request that this Honorable Court impose sanctions against Appellant.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENTS PENN
AMERICA INSURANCE COMPANY AND
GLOBAL INDEMNITY GROUP, INC.

**RESPONDENTS PAIC'S MOTION FOR AND
MEMORANDUM IN SUPPORT OF
IMPOSITION OF SANCTIONS AGAINST
APPELLANT**

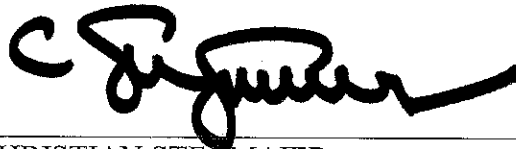
Columbia, South Carolina
July 23, 2020

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondents Penn America Insurance Company and Global Indemnity Group, Inc., do hereby certify that I have this date served the foregoing RESPONDENTS PAIC'S MOTION FOR AND MEMORANDUM IN SUPPORT OF SANCTIONS AGAINST APPELLANT by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to the following:

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Orangeburg, SC 29116
Pro Se Appellant

John R. Murphy, Esquire
Timothy J. Newton, Esquire
Post Office Box 6648
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Pro Se Respondents



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ATTORNEYS FOR RESPONDENTS PENN
AMERICA INSURANCE COMPANY AND
GLOBAL INDEMNITY GROUP, INC.

Dated: July 23, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2019-001488

MB Hutson/MB Hudson, ...Appellant,

v.

Penn America Insurance Company,
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EXHIBIT INDEX

**TO RESPONDENTS PENN AMERICA INSURANCE COMPANY AND GLOBAL
INDEMNITY GROUP, INC.'S MOTION FOR AND MEMORANDUM IN SUPPORT OF
IMPOSITION OF SANCTIONS AGAINST APPELLANT**

EXHIBIT No.	EXHIBIT NAME	PAGE NO.
A.	Order Granting Defendants Newton/Murphy Dispositive Motions, July 18, 2019	0001-0026
B.	Order Granting PAIC Motion for Summary Judgment, July 18, 2019	0027-0053
C.	Coverage Action Settlement Agreement and Release	0054-0059
D.	Class Action Report & Recommendation, April 5, 2016	0060-0077
E.	Class Action Order Adopting R&R, May 20, 2016	0078-0087
F.	Defamation Action Order Granting Summary Judgment, March 2, 2017	0088-0100
G.	Class Action Order Granting Sanctions, October 6, 2017	0101-0109
H.	Hutson E-mail, June 16, 2020	0110-0112
I.	Hutson E-mail, June 21 – 22, 2020	0113-0125
J.	Hutson E-mail, July 6, 2020	0126-0128
K.	Hutson E-mail, July 8, 2020	0129-0131
L.	Hutson E-mail, July 16, 2020	0132-0148
M.	Hutson E-mail, July 18, 2020	0149-0152
N.	Hutson E-mail, July 19, 2020	0153-0160
O.	Hutson E-mail, July 17, 2020	0161-0162
P.	Weissenstein Malpractice Action Order Granting Summary Judgment, February 25, 2019	0163-0178
Q.	Burn Malpractice Action Order of Dismissal, April 10, 2019	0179-0181
R.	Atlantic Coast Action Order of Dismissal, April 11, 2019	0182-0185
S.	Affidavit of Attorney's Fees and Costs	0186-0188

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2018-CP-40-06344

MB Hutson/MB Hudson,

Plaintiff,

vs.

Penn America Insurance Company, Global
Indemnity Group, Inc., Timothy J. Newton,
Esq., J.R. Murphy, Esq., John Doe #1, John
Doe #2,

Defendants.

**ORDER GRANTING
DEFENDANTS NEWTON AND MURPHY'S
DISPOSITIVE MOTIONS**

This matter is before me upon motions to dismiss by Defendants J.R. Murphy and Timothy J. Newton. Newton, joined by Murphy, also moved for summary judgment pursuant to Rule 12(b) and 56(b) of the South Carolina Rules of Civil Procedure. Defendants Penn-America Insurance Company and Global Indemnity Group, Inc. (hereinafter collectively "PAIC") also filed a motion for summary judgment. This matter was heard on June 26, 2019. The Plaintiff and Defendants Murphy and Newton appeared *pro se*. Christian Stegmaier represented PAIC.

This matter presents the question of whether a putative insured has a cause of action against coverage counsel representing a liability insurer. Under the circumstances of this case, I find that Plaintiff has failed to state a cognizable claim.

Plaintiff argues that questions of fact exist that prevent disposition of his claims at this stage of the case. However, the nature of Plaintiff's claim raises several threshold legal questions that must be addressed before proceeding to the merits. As noted above, a question of law exists as to whether Plaintiff has standing to assert this claim. A second question of law is whether Hutson has pled a recognized cause of action against Murphy and Newton. Yet another legal question is presented as to the effect of the release. Hutson's claim fails as a matter of law.

PLAINTIFF'S ALLEGATIONS

Plaintiff M.B. Hutson filed this action on December 5, 2018 and amended his complaint on December 28, 2018. Hutson also filed a supplemental memorandum, an affidavit, and exhibits. Construed broadly, Hutson alleges Newton knew that a fraud upon the court was committed in a prior action and failed to report the fraud or to otherwise take action to vindicate Hutson's rights. Hutson's allegations concern a campground known as Big Water Resort in Clarendon County.

Specifically, Hutson alleges that he entered into a Lease Purchase Agreement with certain non-parties to this action, TLC Holdings, LLC and its principals (hereinafter collectively "TLC"), to lease and ultimately purchase certain property located at 5215 Dingle Pond Road in Summerton (hereinafter "the Property"). Hutson alleges that when this transaction was negotiated, he notified TLC that he intended to purchase and develop lakefront condominiums on the Property.

Hutson alleges that TLC told him during these negotiations that TLC owned the Property and that a campground business located on the Property was owned by a separate entity, Big Water Resort, LLC. As alleged, TLC told Hutson that in order to purchase the Property, he would have to purchase Big Water Resort, LLC as well.

Hutson further alleges that TLC failed to disclose key facts to him during these negotiations. Specifically, TLC allegedly represented that water and sewer capacity were available for a development when in fact they were not, and misrepresented the financial condition of Big Water Resort, LLC. TLC also allegedly failed to disclose certain debts owed by Big Water Resort, LLC, including a debt owed to Black River Electric.

Hutson's key allegation is that TLC failed to disclose to Hutson that Big Water Resort, LLC had entered into Retail Membership Agreements (hereinafter "Campground Memberships") that granted the members of the campground the right to use the campground facilities for up to

two lifetimes. Hutson alleges that when he performed a title search, he did not find the Campground Memberships because they were not recorded.

Hutson alleges that these hidden defects rendered title to the Property unmarketable. As a result, the Property was undevelopable and the Property and Big Water Resort, LLC were worthless.

Exhibits establish that Hutson entered into the Lease Purchase Agreement with TLC in December of 2010. Hutson also entered into a Membership Interest Purchase Agreement at the same time. Through this agreement, Hutson became the sole principal in Big Water Resort, LLC.

Hutson alleges that the Defendants in this action knew that TLC's attorneys had committed "Extrinsic Fraud on the Courts" in a Settlement Agreement and Consent Order. This fraud was allegedly "carried over" into a defamation action filed by TLC against Hutson.

In support of this allegation, Hutson quotes an e-mail from Defendant Newton. Hutson alleges that Newton gave him "legal advice" in the e-mail. Hutson does not allege that he acted upon the purported legal advice. Instead, Hutson alleges that the e-mail establishes Newton's knowledge of the fraud perpetrated on him by TLC. Hutson claims that Newton's failure to act on the knowledge of this alleged fraud damaged Hutson by causing Hutson to be unsuccessful in his litigation against TLC.

Broadly construed in favor of Hutson, the e-mail indicates that Newton was aware of evidence corroborating Hutson's claims that he was defrauded. These include evidence from prior cases that:

- TLC knew Hutson wanted to develop waterfront property;
- the Campground Memberships (as well as an alleged lease between TLC Holdings, LLC and Big Water Resort, LLC) were not recorded;

- the Lease Purchase Agreement, the Membership Interest Purchase Agreement, and the Campground Memberships do not specify which portions of the Property were part of the campground;
- one campground member testified she thought all of the Property was campground property;
- the campground members were not parties to the Settlement Agreement;
- the Settlement Agreement had provisions for an acreage release in conjunction with which Hutson agreed to submit a plat to TLC for its approval for a subdivision development on the Property; and
- exhibits to a separate bankruptcy action appeared to indicate that the subdivision TLC approved was on the campground site.

This e-mail is dated August 13, 2018. In the e-mail, Newton stated that “If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court’s attention.” Newton told Hutson that Newton did not represent Hutson, and that if Hutson wanted to pursue litigation against TLC, he should hire an attorney.

Hutson asserted several purported causes of action in his Amended Complaint. However, the gist of Hutson’s claim appears to be that Newton’s admitted knowledge of the above facts, coupled with certain statements about the law regarding these facts that Hutson calls “legal advice,” created a duty on the part of the Defendants to report fraud and/or to prosecute or pay for the prosecution of Hutson’s claims against TLC. Hutson made no allegations specific to Murphy.

Newton’s e-mail does not state that TLC committed fraud upon the court. However, in response to Newton’s briefing, Hutson submitted an affidavit averring that Newton told him verbally on several occasions that Newton knew that Hutson had been defrauded.

NEWTON’S CONTENTIONS

Newton denied Hutson’s allegations. In response, Newton pointed to a letter Hutson attached to his Amended Complaint. That letter recounts that the e-mail Hutson quoted in his Amended Complaint was part of ongoing settlement negotiations.

As set forth in the letter, Hutson had threatened to sue Defendant Penn-America Insurance Company for failure to procure a *supersedeas* bond while an appeal was pending from a judgment rendered against Hutson for \$3,500,000. During the course of those negotiations, Hutson offered to refrain from filing suit if Penn-America would join Hutson in a lawsuit against TLC. The e-mail Hutson quoted was in response to several e-mails from Hutson under the subject heading, "Setting Aside the Judgment," in which Hutson represented to Newton that Hutson was not aware at the time he purchased the property that all of the Property he purchased was subject to the lifetime Campground Memberships.

Newton submitted the entire series of e-mails in support of his motion. Hutson did not object to these documents or dispute their authenticity at the hearing. In response, Hutson submitted additional materials, but those materials did not contradict Newton's account in either the letter attached to Hutson's Amended Complaint or the series of e-mails Newton submitted.

Newton submitted court records demonstrating that Defendants Newton was not involved in any of the above-referenced cases. Newton's sole involvement in litigation with Hutson was that he represented Penn-America for purposes of a declaratory judgment action filed in federal court in June of 2016. Penn-America was notified of claims against Hutson in February of 2016 and it began defending Hutson in two lawsuits under a liability policy Penn-America issued to one of Hutson's companies, BWR, Inc.

PRIOR RELATED LITIGATION

Hutson's Amended Complaint alleges fraud that occurred in prior litigation. Newton submitted several judicial orders that bear upon Hutson's claims in this action. Because Hutson's allegations concern events that occurred in prior cases, a summary of the prior litigation and the judicial orders is necessary in order to evaluate Hutson's claims in this action.

The Ejectment Action

In late 2011, TLC filed an action for ejectment and breach of lease in the Court of Common Pleas for Clarendon County. TLC Holdings, LLC v. M.B. Hudson a/k/a M.B. Hutson, Civil Action No. 2011-CP-14-00602 (the Ejectment Action"). The Settlement Agreement and Consent Order that Hutson attached to his pleading and alleged are fraudulent were filed in the Ejectment Action. Court records reflect that Newton was not involved in the Ejectment Action. Hutson was represented by separate counsel throughout the course of the Ejectment Action.

In the Ejectment Action, TLC alleged that Hutson breached the Lease Purchase Agreement and failed to make lease payments. Hutson answered and asserted counterclaims against TLC. Among the issues Hutson raised in his counterclaim were the alleged undisclosed sewer moratorium and outstanding debt owed to Black River Electric Cooperative.

The Settlement Agreement, which was filed on April 13, 2012, imposes certain duties on Hutson, including the duty to make lease payments. Hutson was permitted to stay on the Property and the Lease Purchase Agreement remained in force. One of the terms of the Settlement Agreement was that Hutson agreed to submit a Qualified Plat for TLC's approval for a subdivision project on the Property. Court records from the Ejectment Action appear to confirm that the agreed-upon location of the proposed subdivision would be on the campground property. The Settlement Agreement specifically provided that if Hutson breached the terms of the Agreement, the Lease Purchase Agreement would be automatically terminated upon the filing of TLC's affidavit of default. In that event Hutson would be required to immediately vacate the property. Additionally, Hutson would be deemed to have released TLC from any conduct involving Big Water Resort through the date of Hutson's breach. The Settlement Agreement was incorporated into a Consent Order that was also filed on April 13, 2012.

None of the Defendants in this action were involved in negotiating the Settlement Agreement and Consent Order. Hutson was represented in that transaction by Paul Weissenstein.

TLC subsequently filed an Affidavit of Default in December of 2013. Hutson sought a temporary restraining order and moved to set aside the affidavit of default. On the date set for the hearing, Hutson filed bankruptcy. The bankruptcy court lifted the stay for a determination whether Hutson had an equitable interest in the Property.

In an Order filed March 21, 2014, Judge (now Justice) George C. James, Jr. ruled that Hutson breached the Settlement Agreement. He found that Hutson's breach was not caused by TLC's actions. Judge James ruled that by the terms of the Settlement Agreement, Hutson's breach terminated the Lease Purchase Agreement and required Hutson to immediately vacate the Property. Hutson was represented by counsel (E. Freeman Belser) at this hearing.

Hutson's postcard

Shortly after Hutson was notified of TLC's Affidavit of Default, Hutson sent a postcard (hereinafter "the Postcard") to all the campground members. In the Postcard, Hutson stated that both he and they were victims of a scam perpetrated by TLC. This led to two additional lawsuits.

The Class Action

The campground members filed a putative class action against TLC in federal court in April of 2014. Reed v. Big Water Resort, LLC, Civil Action No. 2:14-cv-1583-DCN-MGB (hereinafter "the Class Action"). The campground members settled their claims with TLC in February 2016. However, TLC asserted third-party claims against Hutson. Hutson also asserted counterclaims against TLC. TLC raised the automatic release provision in the 2012 Settlement Agreement as a defense to Hutson's counterclaims. Cross-motions for summary judgment were referred to Magistrate Judge Mary Gordon Baker for a hearing.

Magistrate Judge Baker's recitation of Hutson's counterclaims indicates that many of allegations Hutson raised in the Class Action are substantially the same allegations that Hutson raised in the Ejectment Action. In particular, Hutson alleged that TLC failed to disclose the financial location of Big Water Resort, LLC, the sewer moratorium, and the debt owed to Black River Electric when Hutson purchased the Property. Reed v. Big Water Resort, LLC, 2016 WL 7435620 at *4 (D.S.C. signed Apr. 5, 2016). Hutson also alleged that TLC failed to disclose the Campground Memberships with their lifetime use rights to Hutson when he purchased the property. Id.

Baker found that the release in the 2012 Settlement Agreement barred all of Hutson's counterclaims except for his defamation claim. Baker specifically found that the Settlement Agreement could not be set aside due to fraud. Id. at *12. After a thorough review of the evidence Hutson presented, Baker concluded that "All of Hutson's claims pertaining to fraud relate to the *original* transaction, *not the Release*." Id. at *14 (emphasis in original).

Baker specifically found that Hutson was aware of the Campground Memberships when he purchased the Property. Id. at *13 n.5. She cited correspondence dated November 2012 between Hutson, his realtor, TLC's realtor, and an attorney, regarding the effect of the lifetime memberships on the marketability of the title to the property. Id. This took place before Hutson signed the Lease Purchase Agreement and the Membership Interest Purchase Agreement.

At the time Magistrate Judge Baker heard the motions, Hutson was *pro se* as to his counterclaims. Hutson had an attorney prior to March 26, 2015, but that attorney (Matthew D.Hamrick) had been relieved as counsel. Hutson was *pro se* as to his counterclaims through the remainder of the Class Action. Counsel retained by Defendant Penn-America to defend Hutson (Laura Paton) had only appeared in the case a month earlier, and Paton only represented Hutson with respect to his defense. Id. at *8.

On May 20, 2016, District Judge David C. Norton granted TLC's motion for summary judgment as to Hutson's counterclaims. Judge Norton ruled that Hutson's counterclaims were barred by *res judicata*. Reed v. Big Water Resort, LLC, 2016 WL 2935891, *5-*8 (D.S.C. signed May 20, 2016). Judge Norton adopted Magistrate Judge Baker's factual findings as to Hutson's claims of alleged fraud. Id. at *7. He also found that all of Hutson's allegations of fraud related to the original transaction and not the procurement of the release. Id. at *7-*8.

The Defamation Action

In 2015, TLC filed suit against Hutson for defamation. TLC alleged that the defamatory statements he made in the Postcard he mailed to the campground members instigated the Class Action against TLC. TLC Holdings, LLC v. M.B. Hutson a/k/a M.B. Hudson, Civil Action No. 2015-CP-14-00615. Hutson also asserted counterclaims against TLC in the Defamation Action.

On March 17, 2017, Judge R. Ferrell Cothran, Jr. granted TLC's motion for summary judgment as to TLC's counterclaims. After reviewing the three above-referenced orders, Judge Cothran concluded that Hutson's counterclaims were barred by *res judicata*. Judge Cothran ruled that Hutson "never alleges that [TLC] perpetrated any sort of fraud or otherwise committed wrongful conduct, in relation to the parties' execution of the Settlement Agreement. . . . In other words, the fraud that Hutson here complains of is fraud related to the *original transaction*, not the *release*." Penn-America originally retained Laura Paton to defend Hutson in the Defamation. In February 2017, Frank J. Gordon was substituted as counsel for Hutson.

The Sanctions Order

In 2017, Hutson, acting *pro se*, filed a motion for reconsideration of the order granting summary judgment to TLC as to his counterclaims in the federal Class Action. Judge Norton denied Hutson's motion and also granted TLC's motion for sanctions. Judge Norton found that "Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass

or burden [TLC], and there is no indication that he intends to cease.” Judge Norton noted that Hutson “again makes reference to the alleged fraud by [TLC] in obtaining the settlement agreement and the order signed by Judge James in the prior state court litigation. Hutson has made these allegations throughout the course of this litigation. He has never, however, specified what the fraud is or submitted evidence of it.” Judge Norton concluded that:

Hutson has established a pattern of making misrepresentations to the court, of making unsupported allegations of unethical and criminal conduct by [TLC], and of using the judicial process as a mechanism of harassment. His meritless filings have wasted untold hours of the court’s time. He lacks any evidence to support his counterclaims and other allegations against [TLC]. Indeed, Hutson routinely fails to provide factual or legal support for anything he files with the court. Accordingly, the court finds that sanctions are appropriate

Reed v. Big Water Resort, LLC, 2017 WL 4480195 at *2-*3 (D.S.C. filed Oct. 6, 2017).

Court records reflect that Penn-America settled TLC’s claims against Hutson in early 2018. As part of that settlement, TLC released its claim for sanctions against Hutson.

The trial and appeal in the Defamation Action

In early 2018, TLC’s case against Hutson in the Defamation Action proceeded to trial. The jury returned a verdict against Hutson in the amount of \$3,500,000. Counsel defending Hutson (Frank Gordon) filed an appeal from that judgment.

The e-mail Hutson attached to his pleading was sent during the pendency of this appeal. The record reflects that the Defamation Action settled for \$1,875,000. The judgment was marked satisfied on December 20, 2018. After receiving notice of the settlement, Hutson filed this lawsuit.

The Coverage Action

One other prior lawsuit is pertinent to this case. Penn-America filed a declaratory judgment action in federal court on June 14, 2016. Penn-America Ins. Co. v. BWR, Inc., et al., Civil Action No. 2:16-01943-DCN (D.S.C.). Hutson was named as a defendant in the Declaratory Judgment Action. Defendants Murphy and Newton signed the Complaint. In the Declaratory Judgment

Action, Penn-America contested its coverage for Hutson as to TLC's claims against him in the Class Action and the Defamation Action. Among other things, Penn-America contended that Hutson was not an insured for purposes of his actions forming the basis for TLC's claims against him. Penn-America also contended that the claims were excluded because Hutson knowingly violated TLC's rights and/or knowingly published false information.

Hutson alleged that the Defamation Action was filed secretly. However, court records reflect that Hutson was personally served with the pleadings in the Defamation Action. Hutson was dismissed as a party from the Coverage Action after stipulating to be bound by the results.

The Release

In conjunction with Hutson's dismissal from the Coverage Action, Hutson entered into a settlement agreement with Penn-America. Another first-party claim on the policy by Hutson was also included in this settlement. As part of the settlement agreement, Hutson agreed to release Penn-America and its agents from any further claims related to the Coverage Action. Hutson alleged that Murphy and Newton acted as agents for Penn-America in his Amended Complaint.

STANDARD

Generally, a motion to dismiss pursuant to Rule 12(b)(6), SCRCP is based solely upon the allegations in the Complaint. Exhibits attached to a pleading are incorporated into the pleading as a part thereof for all purposes. Rule 10(c), SCRCP. This Court may dismiss a suit when the defendant demonstrates that the plaintiff has failed to state facts sufficient to constitute a cause of action. Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006). However, the Rules provide that a motion to dismiss may be converted into a motion for summary judgment when matters outside the pleadings are presented to the Court. Rule 12(c); SCRCP; Brown v. Leverette, 291 S.C. 364, 366-67, 353 S.E.2d 697, 698-99 (1987).

In this case, I find it appropriate to consider matters outside the pleadings. The Amended Complaint bases its claims in part on matters that occurred in prior proceedings. The documents filed in those proceedings are public record. Some excerpts from depositions and trial testimony have been provided. These documents were offered merely for the purpose of establishing Hutson's knowledge of certain events and determinations in prior litigation. The defendants have submitted a settlement agreement between Hutson and Penn-America that pertains to this litigation. Finally, Newton submitted correspondence between Hutson and Newton providing context to the e-mail Hutson quoted in his Amended Complaint. These were e-mails Hutson had in his possession when he filed this action. Hutson had the opportunity to produce documentation to refute Newton's account, and indeed he produced other e-mails in response. Accordingly, these documents will be considered and the appropriate standard is that found in Rule 56, SCRCp.

"Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 323-24, 566 S.E.2d 536, 540 (2002). "In determining whether a genuine question of fact exists, the court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party." Id.

A party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings. SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). Rule 56(e) requires a party opposing summary judgment "to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial." Doe v. Batson, 345 S.C. 316, 320-21, 548 S.E.2d 854, 856 (2001). Although only a scintilla of evidence is required, a party must present some evidence to avoid summary judgment. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 694 S.E.2d 1 (2010). Moreover, a party may not avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. Id. at 549, 694 S.E.2d at 6.

CONCLUSIONS OF LAW

Hutson's allegations, broadly construed in his favor, assert that Newton represented him. However, court records conclusively demonstrate that Newton did not appear as counsel for any party in the Ejectment Action, the Class Action, and the Defamation Action. Murphy and Newton appeared as coverage counsel for Penn-America in the Coverage Action only. I find it appropriate to take judicial notice of these facts because they are contained in the public record.

Therefore, despite Hutson's allegations to the contrary, Hutson's claim against Newton and Murphy relates to Newton's actions as counsel for Penn-America, an adverse party in the Coverage Action. The first question is whether Hutson has standing to sue counsel for an adverse party. The second issue is whether Newton's e-mail created a cause of action.

I. Standing

In South Carolina, attorneys are generally immune from liability to third parties arising from their actions as counsel for their clients. Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528, 339 S.E.2d 857, 889 (Ct. App. 1986). Attorneys are generally not liable to a party opponent for conduct in the course of litigation. Ronald E. Mallen & James A. Roberts, The Liability of a Litigation Attorney to a Party Opponent, 14 Willamette L. J. 387 (1978). Statements made in the course of litigation are absolutely privileged. Oesterle v. Wallace, 272 Mich. App. 260, 264, 725 N.W.3d 470, 474 (Mich. Ct. App. 2006). Every state that has considered the issue has held that the absolute judicial privilege from suit applies to statements made by attorneys during settlement negotiations. Id. at 266, 725 N.W.2d at 475-76.

The only exception to the rule that attorneys are immune from liability to third parties while representing party opponents is when misrepresentation or fraud is committed by the attorney. 7A C.J.S. Attorney & Client § 228 (June 2019 Update). There is no South Carolina case on point. 1 S.C. Jur. Attorney and Client § 22 (May 2019 Update). However, fraud generally requires proof

of nine distinct elements. Id. (citing M.B. Kahn Constr. Co. v. S.C. Nat'l Bank, 275 S.C. 381, 271 S.E.2d 414 (1980)).

Hutson does not allege that Newton or Murphy defrauded him. In fact, Hutson does not allege any conduct at all on the part of Murphy. Hutson's allegation is that Newton knew that TLC defrauded him and failed to take action. Moreover, as discussed below, it appears that Hutson cannot prove Newton or Murphy knew he was defrauded.

Hutson alleged that the purpose of Newton's e-mail was to provide leverage in settlement negotiations with TLC. A letter from Penn-America that Hutson attached to his pleading further explains that the e-mail served the dual purpose of providing leverage against TLC and also attempting to resolve Hutson's threatened lawsuit against Penn-America for failing to provide a *supersedeas* bond during the pendency of the appeal of the judgment in the Defamation Action.

I find that Newton's e-mail was part of ongoing settlement negotiations. The communication was made by Newton, acting as counsel for Hutson's opponent in the Coverage Action, Penn-America. Therefore, Hutson lacks standing to sue Newton or Murphy because they were acting as counsel for a party opponent in ongoing settlement negotiations.

II. Duty created by gratuitous undertaking

Hutson also alleges that Newton's e-mail constituted legal advice. Generally, an adverse party cannot demonstrate justifiable reliance in support of the creation of an implied duty of care. 1 S.C. Jur. Attorney and Client § 21 (May 2019 Update). Hutson, as an adverse party who was actively threatening litigation against Newton's client, cannot demonstrate he justifiably relied on any purported legal advice from Newton. Moreover, the e-mail upon which Hutson relies expressly states that the information therein was not provided based upon an attorney-client relationship, but rather upon a common interest.

As Hutson acknowledged at the hearing, Newton's e-mail states that Newton's comments to Hutson were based upon common interest. Hutson expressly alleges that had the alleged fraud been opposed, the \$3,500,000 judgment in the Defamation Action could have been set aside.

Liability insurers have an interest in the results of lawsuits they are defending because they are contractually obligated to indemnify the insured for covered damages. For this reason, the Supreme Court has recently held that liability insurers may sue attorneys they retain to defend their insureds for malpractice. Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 826 S.E.2d 270 (2019). (allowing claim by insurer based upon defense counsel's failure to timely respond to requests for admission). Hutson alleges he was Penn-America's insured. This allegation demonstrates that Hutson had a common interest with Murphy and Newton's client, Penn-America. The common interest, as reflected in Hutson's allegations and supporting exhibits, was in reducing the value of the judgment against Hutson by potentially setting aside the judgment or using the threat of such litigation as leverage against TLC.

E-mails Newton provided demonstrate that Hutson was threatening lawsuits against both TLC and Penn-America at the time Newton's e-mail was sent. Hutson requested that Penn-America join him in litigation to set aside TLC's judgment against Hutson.

Hutson alleges that by providing information to him about a potential claim for fraud, Newton provided legal advice. However, Hutson fails to consider the nature of his claim against Penn-America.

Hutson alleged that his counterclaims against TLC were intertwined with Penn-America's defense of TLC's claims against Hutson. In order to investigate Hutson's assertion that the \$3,500,000 judgment could be set aside due to fraud, Penn-America necessarily had to investigate the merits of Hutson's claim against TLC. This investigation could not be conducted by the attorneys Penn-America retained to defend Hutson for several reasons. First, Hutson was *pro se*

as to his counterclaims against TLC. Second, Hutson was threatening litigation against Penn-America. Third, Hutson's claim concerned Penn-America's duty to defend and indemnify Hutson, not strategy for Hutson's defense.

Once Penn-America completed its investigation and declined Hutson's request to join in an action against TLC, Penn-America had no further interest in the information. The party with an interest in the information was Hutson because it was material to Hutson's allegations against TLC. By providing this information to Hutson, Penn-America satisfied any special duty owed to Hutson, as putative insured, to protect his counterclaims. Penn-America also furthered its common interest with Hutson in possibly reducing the value of TLC's judgment against Hutson.

For the above reasons, Hutson fails to establish that Newton gratuitously undertook Hutson's representation. Newton's e-mail expressly states that Newton did not represent Hutson. Hutson does not allege that Newton or Murphy defrauded Hutson. Moreover, the contents of Newton's e-mail do not demonstrate an undertaking to represent Hutson, but rather actions to further Penn-America's common interest in reducing the value of TLC's judgment against Hutson.

III. Professional malpractice liability

In order to bring a claim for professional malpractice, Hutson must establish an attorney-client relationship. Fabian v. Lindsay, 410 S.C. 475, 483, 765 S.E.2d 132, 136 (2014). Contractual privity is necessary to establish standing. Id. at 482, 765 S.E.2d at 136. The remaining elements of a legal malpractice action are a breach of duty by the attorney and proximately caused damages. Fabian, 410 S.C. at 483, 765 S.E.2d at 136. Hutson's claim fails for several reasons.

A. Duty

Hutson does not allege the existence of a contract creating an attorney-client relationship between himself and Newton. In fact, in the e-mail Hutson relies upon, Newton expressly stated several times that he does not represent Hutson and that Newton represented Hutson's opponent,

Penn-America. Hutson cannot demonstrate the existence of an attorney-client relationship to support a claim for professional malpractice against Newton.

Additionally, even if an attorney-client relationship could be proven, Hutson has failed to support his claim with the affidavit of an expert. Section 15-36-100(B) of the South Carolina Code requires a party bringing a professional malpractice action to “file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.” This statute applies to claims against attorneys. S.C. Code Ann. § 15-36-100(G)(2). Hutson did not attach an expert affidavit to his Complaint in this action. Therefore, Hutson has failed to state a claim for professional malpractice.

B. Breach of duty

Even if Hutson’s allegations demonstrate the existence of a legal duty, Hutson fails to show a breach of that duty under the circumstances of this case.

Hutson does not allege that Newton or Murphy defrauded Hutson, but rather that they failed to take action to counteract known fraud perpetrated by TLC. Hutson does not appear to allege that Newton or Murphy ever represented TLC, and court records confirm that they only represented Penn-America in the Coverage action.

Hutson argues that the Rules of Professional Responsibility require an opposing attorney to report fraud. None of the rules Hutson cited stand for this proposition.

Rule 1.7 of the South Carolina Rules of Professional Responsibility governs attorney-client relationships. Specifically, it prohibits lawyers from representing clients when there is a conflict of interest. Because Murphy and Newton did not represent Hutson, this Rule does not apply.

Rule 1.2 prohibits a lawyer from engaging or assisting a client in committing a crime or a fraud. Hutson does not allege that Murphy or Newton represented TLC, who allegedly defrauded

Hutson. Therefore, this rule does not apply to them in this case. Importantly, this Rule does not impose any duties upon an attorney based upon mere knowledge of a fraud perpetrated upon an opposing litigant. The rule applies to fraud perpetrated by an attorney's client (*i.e.*, Penn-America). Hutson does not allege that Penn-America committed any fraud.

Rule 3.3 prohibits a lawyer from knowingly offering evidence the lawyer knows is false. Again, Hutson's allegation is not that Newton offered false evidence, but rather that TLC defrauded the court. Neither Murphy nor Newton ever represented TLC. Therefore, this Rule does not apply to them in this case.

Rule 4.1 prohibits a lawyer from knowingly making a false statement to others. It also requires lawyers to disclose material facts when disclosure is necessary to prevent a client from committing a fraud. Murphy and Newton did not represent TLC, who allegedly defrauded Hutson. They represented Penn-America, an adverse party to both TLC and Hutson. Nothing in this Rule imposes a duty on a lawyer who represents an adverse party to file an action to set aside the result of a prior action, regardless of whether there are allegations of fraud.

Rule 8.4(e) prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice. Newton did not represent either TLC or Hutson. This Rule does not require a lawyer representing a third party to intervene in a dispute merely because one of the adverse parties claims they are being defrauded.

Hutson provides no other basis for a breach of duty. Liability insurance policies do not require insurers to prosecute claims their insureds may have against third parties. Moreover, it appears that information material to Hutson's potential claims against TLC was disclosed to him.

C. Proximate cause

Even if a duty was breached, Hutson fails to allege any basis for proximate cause in this case. A review of Hutson's damages claims indicates that Hutson essentially claims that the results

of the Ejectment Action, the Class Action, and the Defamation Action would have been different had the Defendants in this suit acted on Hutson's behalf to counteract the fraud. Court records reflect that Newton and Murphy were not involved in those actions. By the time Newton's e-mail was sent, the Ejectment action was concluded, the Class Action had been settled, and a judgment had been entered against Hutson in the Defamation Action. Hutson provides no authority for the proposition that a lawyer representing an adverse party must attempt to re-open judgments in prior actions merely because of an awareness that those judgments may have been tainted by fraud.

Furthermore, the evidence does not support Hutson's allegation that Newton or Murphy knew Hutson was defrauded. Before any of the defendants in this action were involved in the Big Water Resort litigation, Judge James found that Hutson breached the Settlement Agreement and the Consent Order in the Ejectment Action. The subsequent rulings adverse to Hutson were all based upon *res judicata*. Therefore, Hutson could not prevail in any claim against TLC unless the ruling in the Ejectment Action could be set aside on some basis.

Before any of the Defendants in this action became involved, Hutson raised the issue of setting aside the Settlement Agreement and Consent Order based upon fraud. Hutson presented his arguments to Magistrate Judge Baker in the Class Action. Baker expressly found that Hutson failed to demonstrate fraud inducing him to enter into the Settlement Agreement. Reed v. Big Water Resort, LLC, 2016 WL 7435620 at *14. Judge Norton adopted this finding. Reed v. Big Water Resort, LLC, 2016 WL 2935891 at *7-*8. Judge Cothran's Order in the Defamation Action was in accord with Magistrate Judge Baker's findings. Moreover, Judge Norton sanctioned Hutson for continuing to assert the same argument after it had been ruled upon.

The only theory upon which Hutson had any hope of prevailing was to demonstrate evidence that TLC fraudulently induced Hutson to enter into the Settlement Agreement. Correspondence filed with the briefing indicates that Hutson asked Penn-America to join him in

litigation to set aside the Order in the Ejectment Action based upon newly discovered evidence that TLC failed to disclose to Hutson that all of the Property was subject to the lifetime Campground Memberships. Because there was no record delineating which property could be developed and which could not, Hutson could potentially argue he was fraudulently induced to enter into the Settlement Agreement. Newton's e-mail discussed this possibility.

However, the evidence cited in Newton's e-mail falls well short of establishing a claim for fraud. The Supreme Court has summarized what is necessary for proving fraud as follows:

In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (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; (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery.

M.B. Kahn Constr. Co., Inc., 275 S.C. at 384, 271 S.E.2d at 415.

Fraud upon the court is an equitable doctrine. Chewning v. Ford Motor Co., 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003); Bryan v. Bryan, 220 S.C. 164, 167, 66 S.E.2d 609, 610 (1951) ("There is no doubt that a court of equity has inherent power to grant relief from a judgment on the ground of fraud."). Equitable relief is not available to a party who has unclean hands. Straight v. Goss, 383 S.C. 180, 206-07, 678 S.E.2d 443, 457-58 (Ct. App. 2009).

In order to prevail in an action to set aside a prior judgment based upon fraud, one of the elements Hutson would have to prove is that he was not aware at the time he entered into the Settlement Agreement that all of the Property was subject to the Campground Memberships. This element, which involves Hutson's subjective knowledge as to facts pertaining to prior transactions and legal actions, cannot be satisfied by any information in the possession of Newton or any of the Defendants in this case.

Although the issue was not specifically addressed in the judicial orders, court filings from the Class Action (a case in which Hutson was a party but in which Newton and Murphy were not involved) indicate that TLC argued in support of its motion for summary judgment against Hutson's counterclaims that all of the Property was not subject to the Campground Memberships. TLC's motion was granted. Therefore, Hutson appears to be collaterally estopped to argue that all of the Property was subject to the Campground Memberships. Moreover, a deposition transcript from the Class Action indicates that Hutson had the opportunity to personally cross-examine the realtor who represented TLC when Hutson purchased the Property, and she testified that some of the Property could have been developed.

Furthermore, Hutson has demonstrated a pattern of misrepresenting facts to the court regarding the alleged fraud. Hutson alleged in this action, as he did in the Ejectment Action, the Class Action, and the Defamation Action, that he was not aware of the Campground Memberships before he purchased the Property. Magistrate Judge Baker specifically found that Hutson was aware of the Campground Memberships before he purchased the Property. Reed v. Big Water Resort, LLC, 2016 WL 7435620 at *13 n.5. This finding was based upon communications between Hutson, the realtors, and an attorney in November 2010. Thus, Hutson's allegation in this action that he was not aware of the Campground Memberships before he purchased the Property is materially false. At a minimum, Hutson fails to show how any knowledge or actions on the part of Newton or any of the Defendants in this action could change the results of the prior litigation in light of this fact.

As discussed above, the genesis of this lawsuit—Hutson's representation to Newton that the entire Property (which included several parcels) was undevelopable and that TLC withheld this information from Hutson when he entered into the Settlement Agreement—appears to have been made without any good faith belief in its accuracy. Hutson made this same representation to this

Court in this action and to courts in other actions he has filed. (See Hutson Supp. Mem. filed June 19, 2019 at ¶ 9.C. on p. 11.) Newton argued at the hearing that his comments in the e-mail were conditional: “If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court’s attention.” Newton’s letter dated November 8, 2018, which was attached to Hutson’s pleadings, and the e-mails Newton submitted were consistent with this understanding. Hutson was on notice, prior to the time he made any of these representations, through the court rulings against him on his counterclaims and Stroman’s deposition testimony in the Class Action, that his assertion that none of the Property could be developed was baseless. Hutson was in a position to know which property could be developed, whereas Newton and Murphy were not. Yet Hutson herein seeks to invoke the authority of this Court against them based upon Newton’s reaction to this false information Hutson knowingly provided to Newton.

Hutson’s own court filings demonstrate that he had duties to the campground members in his capacity as principal in Big Water Resort, LLC, the entity that sold and held the Campground Memberships. Hutson thus had a duty to investigate which property could be developed and which could not at the time he entered into the Settlement Agreement because he was principal in Big Water Resort, LLC.

Hutson’s allegations in this action are inconsistent with an affidavit he filed in the Ejectment Action. In that affidavit, Hutson referred to his duty to the campground members in his capacity as principal in Big Water Resort, LLC as a “major obstacle.” Hutson testified that the Campground Memberships impaired his ability to develop and sell the property. Hutson testified he dealt with this by attempting to force the campground members to give up their lifetime memberships by (a) firing all the staff at Big Water Resort, and (b) raising costs to the campground members. These actions “outraged the members.” Thus, Hutson’s own testimony establishes that

he attempted to force the campground members out so he could build on the property, causing them to become outraged.

It is doubtful that Hutson could prevail on a claim of fraud upon the court because he appears to have unclean hands due to Hutson's breach of his duties to the campground members. Straight, 383 S.C. at 206-07, 678 S.E.2d at 457-58. At a minimum, this is sufficient to demonstrate that Newton and Murphy were not aware of provable fraud against Hutson.

This evidence, much of which is derived from court filings in prior related cases, and all of which was known to Hutson when he filed this action, demonstrates that Hutson cannot prove Newton knew he was defrauded by TLC. As a result, any breach of duty by Newton or Murphy could not have proximately caused the damages Hutson claims in this action. Moreover, this evidence reflects that Hutson's allegations in this action are consistent with his pattern of making materially false representations to courts, both in this case and throughout the course of his litigation involving Big Water Resort.

IV. Release

Finally, even if all of the above could be established, Hutson's claims are subject to dismissal because they are barred by a release. Hutson's settlement agreement with Penn-America releases his claims against not only Penn-America, but also Penn-America's agents.

A release is a contract by which a plaintiff relinquishes rights or claims against persons against whom those rights could have been enforced. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 492, 649 S.E.2d 494, 198 (Ct. App. 2007). "A release is a contract and contract principles of law should be used to determine what the parties intended." Id. at 497, 649 S.E.2d at 501. "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." Id. at 500, 649 S.E.2d at 503.

Hutson made no attempt either in briefing or at the hearing to contest the authenticity or enforceability of the release. Hutson failed to provide any reason why it should not apply to his claims in this case. The release bars any further claims against Penn-America relating to its coverage and claim handling with respect to the Class Action and the Defamation Action. This was the subject matter of the Coverage Action, the only case in which Murphy and Newton was involved. Because Hutson alleged Murphy and Newton acted as Penn-America's agents, Hutson's claims against them in this action are barred by the release.

CONCLUSION

For the reasons set forth above, I find that Newton's Amended Motion to Dismiss, or in the Alternative for Summary Judgment and Murphy's Motion to Dismiss should be granted pursuant to Rules 12(b)(6) and 56 of the South Carolina Rules of Civil Procedure.

It is hereby

ORDERED, ADJUDGED and DECREED that judgment be entered for Defendants Murphy and Newton, that Hutson's claims against them in this action should be dismissed, and that Murphy and Newton and should be dismissed as a parties from this action.

IT IS SO ORDERED.

Columbia, South Carolina
Date: _____

The Honorable Michael G. Nettles
Presiding Judge of the Fifth Circuit Court



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

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EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
MB Hutson/MB Hudson,	)	Civil Action No. 2018-CP-40-06344
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER GRANTING
	)	DEFENDANTS PENN AMERICA
	)	INSURANCE COMPANY AND
Penn America Insurance Company, Global	)	GLOBAL INDEMNITY GROUP, INC.'S
Indemnity Group, Inc., Timothy J. Newton,	)	MOTION FOR SUMMARY JUDGMENT
Esquire, J.R. Murphy, Esq., John Doe #1,	)	
and John Doe #2,	)	
	)	
Defendants.	)	

This matter came before the Court upon Defendants Penn America Insurance Company and Global Indemnity Group, Inc.'s Motion for Summary Judgment, as well as the dispositive motions filed by the other co-defendants. A hearing on the motions was held on June 26, 2019, before the Honorable Michael G. Nettles. MB Hutson, Timothy Newton, Esquire, and J.R. Murphy, Esquire all appeared *pro se*. Penn America Insurance Company and Global Indemnity Group, Inc. (collectively "PAIC") were represented by Christian Stegmaier. Having considered all of the parties' memoranda and exhibits, the filed affidavits, the arguments heard at the hearing on June 26, 2019, the applicable law, and the parties' proposed orders, this Court grants Defendants PAIC's Motion for Summary Judgment. The Court presents its findings and conclusions below.

PROCEDURAL BACKGROUND

Plaintiff Hutson filed the original Complaint in this action on December 5, 2018, and filed his Amended Complaint, with accompanying Exhibits 1.1 – 13.0, on December 28, 2018. Co-Defendants J.R. Murphy and Timothy Newton filed a joint Motion to Dismiss on February 12, 2019. Newton later filed an Amended Motion to Dismiss, or in the Alternative for Summary

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, 2019,¹ 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), SCRCP. 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

¹ 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 materials 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.² 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

² 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.³

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

³ 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.⁴ On March 2, 2017, the state court similarly granted TLC's motion for summary judgment as to Hutson's counterclaims in the Defamation Action.

⁴ 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.⁵ 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."

⁵ 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, Huston 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. Huston 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-Sumbelt 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.

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

Electronically signed on 2019-07-17 14:32:15 page 26 of 26

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION
CASE NUMBER: 2:16-cv-01943-DCN

Penn-America Insurance Company,

Plaintiff,

v.

BWR, Inc., on its own behalf and d/b/a Big
Water Resort, M.B. Hutson a/k/a M.B.
Hudson;

Big Water Resort, LLC, TLC Holdings, LLC,
Richard Clark, Jimmy S. Lovell a/k/a Jimmy
"Steve" Lovell, James Thigpen, Ocoee, LLC;

William Reed, Donna Reed, Bonnie Youmans,
Jane Yates, and Phillip Caulder, all
individually and for the benefit and on behalf
of all others similarly situated,

Defendants.

SETTLEMENT AGREEMENT
AND RELEASE
OF CERTAIN CLAIMS

This Settlement Agreement and Release of Certain Claims (hereinafter "Agreement") is entered into between Penn-America Insurance Company, (hereinafter "Penn-America") and M.B. Hutson a/k/a M.B. Hudson (hereinafter "Hutson").

WHEREAS, Penn-America issued policy number PAC7045167 to "BWR, Inc. d/b/a Big Water Resort" as the named insured (hereinafter "the Policy"). The policy contains both commercial general liability (CGL) and commercial property coverages, and it was in effect from October 16, 2013 through October 16, 2014; and

WHEREAS, Hutson was named as a defendant in two tort lawsuits styled as Reed v. Big Water Resort, LLC, et al., Civil Action number 2:14-1583-DCN-MGB; and TLC Holdings, LLC, et al. v. M.B. Hutson a/k/a M.B. Hudson, Civil Action No. 2015-CP-14-00615 (hereinafter "the Underlying Lawsuits"); and

WHEREAS, Penn-America filed the above-captioned declaratory judgment action seeking a ruling as to its coverage with respect to the Underlying Lawsuits (hereinafter "the Declaratory Judgment Action"); and

WHEREAS, after the Declaratory Judgment Action was filed, and while it remains pending, Hutson filed a claim for coverage under the Policy relating to certain property loss (hereinafter "the Property Loss claim"); and

WHEREAS, Hutson represents that he intends to file counterclaims in the Declaratory Judgment Action relating to claim investigation and/or handling by Penn-America; and

WHEREAS, Penn-America and Hutson (hereinafter "the Parties"), desirous of avoiding the expense, uncertainties, and risks of further litigation between and among themselves, have reached an agreement to fully, finally and forever compromise, release, and forever settle all past, present and future claims between and among them involving, in any way, all claims that were raised or could have been raised by Hutson in the Declaratory Judgment Action, as well as the Property Loss claim, whether known or unknown, whether patent, latent or hereafter discovered.

NOW, THEREFORE, in consideration of the following actions, forbearances and mutual promises of the Parties, the Parties agree as follows:

1. The recitals set forth above are true and correct and are, by this reference, made part of this Settlement Agreement and Release.

2. 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 claim practices, or any other cause of action which could be asserted, arising from the above-referenced matters (hereinafter "the 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.

3. It is the agreed by the Parties that Penn-America will not challenge its duty to defend, nor will it seek a ruling as to coverage in the pending Declaratory Judgment Action with respect to its duty to defend Hutson in the Underlying Cases. Penn-America will continue to defend Hutson in the Underlying Cases pursuant to the terms of the Policy. This Agreement will not be construed to expand Penn-America's duty to defend beyond that called for by the terms of the Policy except as set forth herein.

4. Hutson agrees to cooperate with Penn-America according to the terms and conditions of the Policy. In the event of any future conduct by Hutson that constitutes a material breach of the terms or conditions of the Policy or of this Agreement, Penn-America will not be bound by Paragraph 3. with respect to such future conduct by Hutson.

5. As part of the aforesaid agreement, Hutson agrees that he will enter into a Stipulation to abide by the judgment in the Declaratory Judgment action. It is further agreed that Hutson will not file any counterclaim or separate action against Penn-America with respect to the above-referenced matters, and that Hutson will not attempt to assign any rights he may have against Penn-America related to the above-referenced matters to any third party.

6. Hutson further agrees that he will not assert or attempt to assert any further coverage claims with Penn-America arising from the Released Claims.

7. The Parties expressly represent and warrant that they understand the effect of the things herein agreed to and that no statement or representations made by Penn-America or Hutson, or by any of their agents, representatives and attorneys have influenced the Parties to enter into this Agreement.

8. All parties agree that this Agreement is a product of negotiation and agreement among the parties.

9. The parties agree that entry into this Agreement is not an admission of liability or of any fact or circumstance out of which the claims and/or counterclaims in the Underlying Lawsuits or the Declaratory Judgment Action. The settlement made herein is solely for the purpose of avoiding further litigation between the Parties and is in full and final settlement of all claims released herein.

10. The execution of this Agreement is acknowledged to have taken place in the State of South Carolina. Further, that this Agreement shall be construed pursuant to South Carolina law.

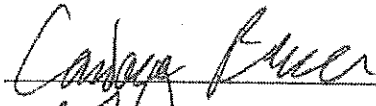
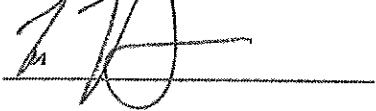
11. All agreements and understandings between the parties hereto are embodied and expressed herein and the terms of this Agreement are contractual and not a mere recital. The

Parties have read the foregoing Agreement and understand it to be a full, final and binding agreement.

12. This Agreement contains the entire agreement among the Parties with regard to the matters set forth in it. Except as set forth in this Agreement, no representation, warranties, or promises have been made or relied upon by the Parties to this Agreement. This Agreement shall prevail over prior communications between the Parties or their representatives regarding the matters contained herein.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 16 day of September, 2016.

WITNESSES:


M.B. HUTSON a/k/a M.B. HUDSON (SEAL)

PENN-AMERICA INSURANCE COMPANY

By: _____

Its: _____

EXHIBIT D

2016 WL 7435620

Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Charleston Division.

William REED, Donna Reed, Bonnie
Youmans, Jane Yates, Phillip Caulder, all
individually and for the benefit and on behalf
of all others similarly situated, Plaintiffs,

v.

BIG WATER RESORT, LLC; TLC Holdings,
LLC; Richard Clark; James Thigpen; Jimmy
"Steve" Lovell; and Ocoee, LLC, Defendants.

TLC Holdings, LLC; Richard Clark;
James Thigpen; Jimmy "Steve" Lovell;
and Ocoee, LLC, Third-Party Plaintiffs,

v.

M.B. Hutson a/k/a M.B.
Hudson, Third-Party Defendant.

C/A: 2:14-1583-DCN-MGB

Signed 04/05/2016

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**REPORT AND RECOMMENDATION
OF MAGISTRATE JUDGE**

MARY GORDON BAKER, UNITED STATES
MAGISTRATE JUDGE

*1 This matter is before the Court upon various motions:
(a) a Motion for Sanctions filed by Big Water Resort
LLC, Richard Clark, Jimmy Lovell, Ocoee LLC, TLC
Holdings LLC, James Thigpen (Dkt. No. 179); (b) a
Motion for Summary Judgment filed by Richard Clark,
Jimmy Lovell, Ocoee LLC, TLC Holdings LLC, James
Thigpen (Dkt. No. 183); and (c) a Motion for Summary
Judgment filed by M.B. Hutson a/k/a M.B. Hudson (Dkt.
No. 228). Pursuant to the provisions of Title 28, United
States Code, Section 636(b)(1) and Local Rule 73.02(B)
(2)(e), D.S.C., all pretrial matters in cases involving *pro*
se litigants are referred to a United States Magistrate for
consideration. A hearing was held before the undersigned
on March 16, 2016 at 10:00 a.m. (See Dkt. No. 257; Dkt.
No. 267.) For the reasons set forth herein, the undersigned
recommends denying Third-Party Plaintiffs' Motion for
Sanctions (Dkt. No. 179), granting Third-Party Plaintiffs'
Motion for Summary Judgment (Dkt. No. 183); and
denying Hutson's Motion for Summary Judgment (Dkt.
No. 228).

FACTUAL BACKGROUND

Plaintiffs are all purchasers of memberships in the club
known as "Big Water Resort." (See generally Am.
Compl.) The crux of the dispute between Plaintiffs and
Defendants centers upon whether Plaintiffs' memberships
in the Big Water Resort, LLC entitled Plaintiffs to the
use of a private, members-only resort, or whether that
resort could be opened to the public. Plaintiffs contend
that they purchased memberships in a private, members-
only resort. (See generally Am. Compl.) Defendants, on
the other hand, contend that the membership agreements
"do not promise exclusivity[.] and any evidence to the
contrary is inadmissible under the parol evidence rule
and under the terms of the merger clause contained in
the agreement." (Dkt. No. 88 at 13.) This portion of
the dispute has been settled, and on February 1, 2016,
Judge Norton entered an Order granting the Motion for
Preliminary Approval of the Settlement. (See Dkt. No.

248; see also Dkt. No. 242.) Ancillary disputes are before the Court today.

Defendants/Third-Party Plaintiffs¹ filed a Third-Party Complaint against Third-Party Defendant M.B. Hutson a/k/a M.B. Hudson (hereinafter "Hutson"). Third-Party Plaintiffs allege that their third-party complaint "arises from ... Hutson's failure to operate the Big Water Resort campground in a manner beneficial to the members." (Dkt. No. 72 ¶ 133.) Third-Party Plaintiffs allege that in December of 2010, they sold their membership interests in Big Water Resort, LLC to Hutson, "making Hutson the sole member of that LLC." (*Id.* ¶ 134.) According to Third-Party Plaintiffs, the sale price was \$500,000, "of which \$499,990 was payable under a promissory note executed by Hutson in favor of" Third-Party Plaintiffs Clark, Lovell, and Thigpen. (*Id.*) Third-Party Plaintiffs further allege that in December of 2010, they "entered into a lease-purchase agreement with ... Hutson," under which Third-Party Plaintiffs "agreed to sell certain property to Hutson," including the land on which the Big Water Resort campground was located. (*Id.* ¶ 135.) Third-Party Plaintiffs allege that Hutson "defaulted on both the promissory note and the lease-purchase agreement." (*Id.* ¶ 136.)

*2 Third-Party Plaintiffs allege that in December of 2011, they instituted an action against Hutson in state court "for breach of the lease-purchase agreement, seeking damages and ejectment." (*Id.* ¶ 137.) Third-Party Plaintiffs further allege as follows:

In March 2012, the parties to the lease—purchase agreement entered into a Settlement Agreement. The terms of the Settlement Agreement imposed many duties on Third-Party Defendant Hutson, including the duty to make certain improvements to the campground property and the duty to make certain payments to Third-Party Plaintiff TLC Holdings, LLC. The Settlement Agreement was approved by a consent order in April 2012.

(*Id.* ¶ 138.) Third-Party Plaintiffs allege that Hutson defaulted under the March 2012 Settlement Agreement and was notified of such default in February of 2013 but did not cure the defaults. (*Id.* ¶¶ 139-40.) Third-Party Plaintiffs assert that they filed an affidavit of default in December of 2013, and in response, Hutson filed a "motion to set aside the affidavit of default and a motion for a temporary restraining order." (*Id.* ¶ 141.) Third-Party Plaintiffs further allege, *inter alia*,

144. In an Order dated March 20, 2013, Judge James declined to set aside the affidavit of default or issue a preliminary injunction and ruled that the March 2012 Settlement Agreement and April 2012 Consent Order should be enforced. Specifically, he ordered that the lease—purchase agreement was terminated and that Third-Party Defendant Hutson was required to vacate the property.

145. Third-Party Defendant Hutson vacated the property in April 2014, at which time Third-Party Plaintiffs Clark, Lovell, and Thigpen were able to resume control and operation of the Big Water Resort campground.

(*Id.* ¶¶ 144-45.)

Third-Party Plaintiffs allege a cause of action for equitable indemnity against Hutson. (*Id.* ¶¶ 146-150.) Third-Party Plaintiffs allege that Hutson has "exposed Third-Party Plaintiffs to potential liability" by "his alleged wrongful acts" and that they "have incurred, and may continue to incur, expenses necessary to protect their interest in defending the claims brought by the members of the Big Water Resort campground." (*Id.* ¶¶ 147, 150.) Third-Party Plaintiffs allege that Hutson "is solely responsible for the acts that have allegedly harmed the members that compose the class in the underlying action" and that they "have no fault and did not join in Third-Party Defendant Hutson's allegedly wrongful acts." (*Id.* ¶ 149.) According to Third-Party Plaintiffs, the relationship between them and Hutson "is such that an obligation in equity exists on Third-Party Defendant Hutson to indemnify Third-Party Plaintiffs." (*Id.* ¶ 148.)

Hutson answered the third-party complaint and filed a counterclaim against Third-Party Plaintiffs. (See Dkt. No. 75.) Hutson alleges that in December of 2010, he "became aware of the Big Water Resort through a conversation

with a realtor ..., who stated that the resort was for sale as a campground and for other uses.” (Dkt. No. 75 ¶ 51.) Hutson alleges that after various discussions with the realtor and Third-Party Plaintiffs, he met with Clark and Lovell in Chattanooga. (*Id.* ¶¶ 52-54.) According to Hutson, Clark and Lovell told Hutson, *inter alia*, that if Hutson purchased three tracts of land, he “would also be required to purchase the rights to approximately 700 existing club memberships.” (*Id.* ¶ 54.) Hutson alleges that when he asked Clark and Lovell how much profit or loss the campground was experiencing, “[t]heir response was that it was not making a profit yet but had much potential.” (*Id.* ¶ 55.) Hutson further alleges,

*3 At or about the end of December, 2010 the Third-Party Defendant agreed to purchase the rights to the club memberships and the option to purchase all the tracts of real property and Third-Party Defendant moved onto the property. Prior to these transactions Third-Party Defendant told the Third-Party Plaintiffs that he intended to develop the property for sale to the public and the Third-Party Plaintiffs understood this and never indicated to Third-Party Defendant that he would be prohibited from doing so by virtue of any of the terms of the club membership agreements or otherwise.

(*Id.* ¶ 56.)

Hutson alleges that when he moved onto the property, he discovered there was only approximately \$5,000 in the club’s checking account, and that over the next few weeks, he determined “that there was not likely enough income to properly operate and maintain the campground.” (*Id.* ¶ 57.) Hutson asserts he “had no choice but to dismiss” most of the campground’s employees and cut back on various other expenses “because of lack of money and income from the campground resort operation.” (*Id.* ¶ 58.) Approximately two months after moving onto the property “and discovering the ...

situation,” Hutson “realized at that time that the resort was a seasonal business,” something Third-Party Plaintiffs “never disclosed” to Hutson. (*Id.* ¶ 61.) Hutson alleges he told Clark that “there was no business from the club members and that the resort was essentially dead.” (*Id.* ¶ 61.) Hutson states that Clark suggested raising club members’ fees, which Hutson did. (*Id.* ¶¶ 62-66.) Hutson further alleges that Clark told Hutson that Third-Party Plaintiffs “did not want to be responsible for the obligations to the class members, and that perhaps if [Hutson] raised the membership fees drastically then members would be encouraged to drop their memberships.” (*Id.* ¶ 64.) Hutson alleges that Clark also told him “that if the members dropped their memberships it would provide an opportunity for [Hutson] to seek business from the general public as opposed to only the club members and that it would lessen the potential of a class-action lawsuit against TLC Holdings, LLC and its owners.” (*Id.* ¶ 65.) According to Hutson, when he raised fees, “members began to drop their memberships and threatened to file a class-action lawsuit, stating that they thought they had been scammed and that their memberships had become worthless.” (*Id.* ¶ 66.)

Hutson alleges that prior to his involvement in the Big Water Resort, Third-Party Plaintiffs “were allowing members of the public to rent campsites, despite [the fact] that the club membership agreements arguably created a private club resort exclusive to the club’s members.” (*Id.* ¶ 70.) Hutson further alleges, *inter alia*,

71. Eventually, by the end of 2013, Third-Party Defendant realized that TLC Holdings, LLC and its owners intended to use him as a scapegoat. Once the Third-Party Plaintiffs collected millions of dollars from the lifetime club members the Third-Party Plaintiffs immediately began to quietly market the property for sale through realtor Susan Stroman. Susan Stroman has subsequently told Third-Party Defendant that she was instructed by the Third-Party Plaintiffs not to list the property for sale, but to instead ... quietly and privately help them find a buyer.

72. Unbeknownst to Third-Party Defendant, the Third-Party Plaintiffs placed him in an impossible situation which prevented him from successfully purchasing the land and developing a subdivision in the middle of the campsites, despite that Third-Party Plaintiffs were fully aware, prior to entering into the ... transactions with Third-Party Defendant, that this was Third-Party

Defendant's plan and reason for entering into the transactions with Third-Party Plaintiffs.

*4 73. Third-Party Plaintiffs intentionally misled and failed to disclose vital information to Third-Party Defendant, including but not limited to the facts that Third-Party Plaintiffs had previously promised the benefits of club membership including the exclusive right to enjoy the club land and property to club members for two lifetimes into the future, that Big Water Resort was losing approximately \$250,000 per year and had insufficient reserves or income for proper maintenance of the resort club, that the local authorities had imposed a sewer moratorium on the subject tracts of land, and that the Big Water Resort was subject to exorbitant charges by the Black River Electric utility company.

74. Third-Party Plaintiffs acknowledged to Third-Party Defendant, after they had entered into the transactions with Third-Party Defendant for the purchase of the rights to the club memberships and the lease-purchase agreement for the land, and after entering into the ... settlement agreement with Third-Party Defendant, that Third-Party Plaintiffs' real reason for entering into these transactions with Third-Party Defendant was [to] distance themselves from the club members and avoid a potential class-action lawsuit against Third-Party Plaintiffs.

(Dkt. No. 75 at ¶¶ 71-74.)

Hutson alleges that "[b]ecause of the wrongful acts and omissions" of Third-Party Plaintiffs, he "became financially destitute and was forced to file for Chapter 11 bankruptcy." (*Id.* ¶ 76.) Hutson asserts he "became in a state of duress and suffered mental anguish because of this situation." (*Id.*) Hutson alleges that Third-Party Plaintiffs "have falsely told third-parties, verbally and in writing, that the failure of Third-Party Defendant's ability to successfully operate and maintain the Big Water Resort was Third-Party Defendant's fault, defaming him and damaging his reputation." (*Id.* ¶ 77.) Hutson contends that Third-Party Plaintiffs "were fully aware that Big Water Resort, LLC was totally insolvent and financially vulnerable prior to contracting" with him. (*Id.* ¶ 78.) Hutson lists the following causes of action against Third-Party Plaintiffs: breach of contract; breach of contract accompanied by fraud; fraud and fraud in the inducement; negligent misrepresentation; constructive fraud; breach of

the covenant of good faith and fair dealing; negligence, recklessness, wilfulness and wantonness; and defamation. (Dkt. No. 75 at 15-18 of 19.)

DISCUSSION

As noted above, three motions are pending before the Court: (a) Third-Party Plaintiffs' Motion for Sanctions (Dkt. No. 179); (b) Third-Party Plaintiffs' Motion for Summary Judgment (Dkt. No. 183); and (c) Third-Party Defendant's Motion for Summary Judgment (Dkt. No. 228). The undersigned addresses the motions in turn.

A. Motion for Sanctions (Dkt. No. 179)

In the Motion for Sanctions, Third-Party Plaintiffs seek sanctions against Hutson. (*See generally* Dkt. No. 179-1.) Third-Party Plaintiffs state, *inter alia*,

Throughout the course of this litigation, Third-Party Defendant Hutson has engaged in a pattern of behavior designed to harass and unduly burden Third-Party Plaintiffs and which has made a mockery of the judicial system. He has also attempted to extort a settlement from Third-Party Plaintiffs on numerous occasions by threatening them with criminal prosecution. This behavior has manifested itself primarily through Third-Party Defendant's filings with this Court and his communications with counsel for Third-Party Plaintiffs.

(Dkt. No. 179-1 at 2 of 15.) Third-Party Plaintiffs list a litany of actions taken by Hutson that they contend warrant sanctions. (*See* Dkt. No. 179-1 at 3-15 of 15; *see also* Dkt. No. 179-2; Dkt. No. 179-3; Dkt. No. 179-5; Dkt. No. 179-6; Dkt. No. 179-7; Dkt. No. 179-8; Dkt. No. 179-9; Dkt. No. 179-10; Dkt. No. 179-11; Dkt. No. 179-12; Dkt. No. 179-13; Dkt. No. 179-14; Dkt. No. 179-15; Dkt. No. 179-16; Dkt. No. 179-17; Dkt. No. 179-18; Dkt. No. 179-19; Dkt. No. 179-20; Dkt. No. 179-21; Dkt. No.

179-23; Dkt. No. 179-27; Dkt. No. 179-28; Dkt. No. 179-29; Dkt. No. 179-30.)

*5 Rule 11(b) of the Federal Rules of Civil Procedure provides as follows:

(b) **Representations to the Court.** By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

FED. R. CIV. P. 11(b).

Third-Party Plaintiffs present evidence of the following in support of their motion for sanctions:

- In an email dated March 25, 2015 to Attorneys Byrd and Wilkerson, Hutson stated that it was his "civic duty to report and provide evidence to the claims department" of Auto Owners Insurance, letting the insurance company know "that TLC's members are up to more no good." (Dkt. No. 179-2.) Hutson asserted TLC is "[t]rying to defraud more victims." (*Id.*) He "[r]espectfully" inquired, "How can someone file an insurance claim for something they plotted and planned and finally got caught?" (*Id.*)
- Hutson has frequently filed motions in this case with "no supporting exhibits" and no "supporting factual information or legal authority." (See Dkt. No. 179-1

at 2.) Third-Party Plaintiffs point to his May 5, 2015 motion asking the court to "set aside" his deposition in his bankruptcy case. (See Dkt. No. 112.)

- On June 29, 2015, Hutson filed a Motion "to be Allowed to Use Tape Recordings Found During Jury Trial." (Dkt. No. 138.)² Third-Party Plaintiffs assert this motion was "an attempt ... to circumvent this Court's Order compelling him to respond to Third-Party Plaintiffs' first set of requests for production by May 24, which he did not comply with." (Dkt. No. 179-1 at 4.) During his 2014 deposition, Hutson stated that he had not recorded anybody in the room (which included Clark); in this motion, however, he asserts he was able to find a 2011 recording he made of Clark. (See Dkt. No. 138; Dkt. No. 179-5 at 10, 13 of 14.)
- On July 5, 2015, Hutson sent an email to Mr. Wilkerson stating that if they were not able to settle, Hutson "plan[s] to quickly move in some new directions to get justice and restitution regarding [his] case that will soon go in another direction plus the civil with [sic] also remain." (Dkt. No. 179-6.) Third-Party Plaintiffs assert this is a "thinly-veiled threat at instituting criminal prosecution of Third-Party Plaintiffs." (Dkt. No. 179-1 at 5.)
- *6 • On July 11, 2015, Hutson emailed a copy of a draft complaint against Turner Padgett Graham & Laney to Attorneys Byrd, Wilkerson, and Cromer. (Dkt. No. 179-7; Dkt. No. 179-8.) The email itself was blank other than the subject line of "Revised Federal Complaint final draft." (Dkt. No. 179-7.) In the draft complaint, Hutson complained about his treatment when deposed by Attorney Byrd at Turner Padgett's office. (Dkt. No. 179-8.) Hutson also accused Turner Padgett of, *inter alia*, "unprofessional behavior" and violating the "SC Bar Association's Code of Conduct." (Dkt. No. 179-8 at 2 of 2.)
- One day later, on July 12, 2015, Hutson emailed Attorneys Byrd, Wilkerson, and Cromer with an updated draft of the complaint against Turner Padgett. (Dkt. No. 179-9; Dkt. No. 10.) In the email, Hutson told Wilkerson that the draft complaint "will be filed this coming Wed. and also an additional motion request[ing] that your law firm be barred from representing the Class Action/TLC Holdings/ Third Party Defendant MB Hutson based on multiple conflicts of interest." (Dkt. No. 179-9.) Hutson also told

Wilkerson that he "believe[s] that [Wilkerson's] clients will soon need criminal attorneys." (*Id.*) In the updated draft, Hutson continued to accuse Turner Padgett attorneys of "ethics and civil rights violations." (Dkt. No. 179-10 at 3 of 4.) The draft complaint had a "cc" line to the "State Bar Association of South Carolina," though it is unclear whether the draft complaint was in fact forwarded to the Bar. (*Id.* at 4 of 4.)

- One day later, on July 13, 2015, Hutson emailed Wilkerson and told Wilkerson that he was prepared to pay the filing fee and file the complaint against Turner Padgett. (Dkt. No. 179-11.) Hutson stated, *inter alia*, "I have prepared the necessary paper work for the South Carolina State Bar and will attach all necessary exhibits and other documents including depositions regarding your firm's involvement.... I honestly can't see how the State Bar Association will allow or support your firm being involved under these clear circumstances." (Dkt. No. 179-11.)
- On July 29, 2015, Hutson emailed Wilkerson, Byrd, and Cromer; the subject line was "Motion to consider criminal first." (Dkt. No. 179-14.) Hutson attached a draft motion entitled "Motion Asking the Honorable Court to Prioritize the Issue of Criminal Felony Theft Over the Civil Issues Involving Certification." (Dkt. No. 179-15.) It does not appear this motion was ever filed with the court.
- On or about July 29, 2015, Hutson filed a motion entitled "Third-Party Defendant's Motion Citing Reasons for the Piercing of Any Veil that Owners of TLC Holdings, LLC Do and Could Hide Behind, and a Formal Plea for the Immediate Investigation of Criminal Wrongsdoings by TLC Holdings, LLC., et al. to Be Made by This Honorable Court to the Appropriate Investigative Departments of the United States." (Dkt. No. 160.)³ This motion was withdrawn on or about December 3, 2015. (Dkt. No. 213.)
- On July 30, 2015, Hutson emailed Byrd, Wilkerson, Cromer, Padgett, Thomas, and Perry. (Dkt. No. 179-18.) The email was blank other than the subject line, which stated "Wayne Byrd Conspiracy." (*Id.*) A draft motion was attached; that draft motion was entitled, "Third-Party Defendant's Motion Regarding Third Parties Defense Attorney Wayne Byrd Showing a Conspiring Rol[e] to Protect Their Clients Felony Theft By Deception." (Dkt. No. 179-19.) Hutson filed this

motion on or about August 3, 2015, and withdrew it on or about December 3, 2015. (Dkt. No. 162; Dkt. No. 213.)

- *7 • On or about July 31, 2015, Hutson filed a document entitled "Third-Party Defendant Shows To Honorable Court How TLC Committed Felony Theft by Deception According to Federal Law." (Dkt. No. 161.) In that filing, Hutson "prays" that the Court "immediately turn this entire scheme into a First Class WHITE COLLAR FELONY CRIME case, having all three TLC owners arrested and charged with FELONY THEFT BY DECEPTION and prosecuted...." (Dkt. No. 161 at 2 of 2.)
- On July 31, 2015, Hutson emailed Byrd, Wilkerson, Cromer, Padgett, Thomas, and Perry. (Dkt. No. 179-20.) The email is blank other than the subject line, which states, "WAYNE Byrd." (*Id.*) The document he attached to that email was entitled "The Supreme Court of South Carolina Office of Disciplinary Counsel Has Opened Investigation into TLC Holdings, LLC's Defense Team & CEO, Wayne Byrd Regarding this Case, Thus Third Party Defendant Asks that the Turner Padgett Defense Team for TLC Holdings, LLC Be Barred Based on Various, Potentially Serious, Conflicts." (Dkt. No. 179-21.) Hutson filed that document on or about August 7, 2015. (Dkt. No. 168.) Hutson asserted therein that Byrd is "in such blatant disregard of ethical and professional behavior that he is now under investigation by the Supreme Court of South Carolina's Disciplinary Counsel pertaining to this case." (Dkt. No. 168.)
- In an email dated August 4, 2015 to Byrd, Wilkerson, Padgett, Thomas, Harper, and Perry, Hutson stated that he planned to file suit in the South Carolina Court of Common Pleas "regarding case number 11cp-14602," asking that the "case number and rulings be dropped, reversed or over-turned on the grounds of fraud, theft, deception, and entrapment." (Dkt. No. 179-23.)
- On September 1, 2015, Hutson emailed Byrd, Wilkerson, Cromer, Thomas, and Padgett; the email was blank except for the subject line of "Amended [sic] filing 9/1/15." (Dkt. No. 179-27.) Hutson attached a draft motion to his email; the draft motion was entitled "Motion Citing Felony Theft by Deception Committed by TLC Holdings, LLC Owners." (Dkt. No. 179-28.) Hutson therein asserted that the Third-Party Plaintiffs

violated South Carolina Code Section 16-13-260. (Dkt. No. 179-28.) Hutson filed this motion on or about September 9, 2015 and withdrew it on December 3, 2015. (Dkt. No. 186; Dkt. No. 213.)

* On September 2, 2015, Hutson emailed Byrd, Wilkerson, Cromer, Padget, and Thomas. (Dkt. No. 179-29.) The email was blank except for the subject line, which stated "ORIGINAL Federal Header TLC." (Dkt. No. 179-29.) Hutson attached a draft motion entitled "Third-Party Defendant's Motion Outlining Reasons for All Pending Motions to Be Heard in Court Before the Honorable Judge Baker." (Dkt. No. 179-30.) Although Hutson did not name this individual by name, presumably he was describing Byrd when Hutson said, "Third Party Plaintiff's Counsel (CEO) is shrewd, conniving, involved, [and] entwined with his clients in fraudulent and dishonest actions...." (Dkt. No. 179-30.) Hutson filed this document on September 9, 2015. (Dkt. No. 185.)

*8 The instant Motion for Sanctions was filed on September 3, 2015. (See Dkt. No. 179.) As noted above, Rule 11 "specifies that attorneys and *pro se* plaintiffs must sign pleadings, motions or other papers filed with the court" and that such a signature "constitutes a certification that (1) the paper is not being presented for any 'improper purpose,' (2) legal contentions therein are 'warranted,' (3) allegations have evidentiary support, and (4) denials of allegations are warranted on the evidence." *Johnson v. Lyddane*, 368 F. Supp. 2d 529, 532 (E.D. Va. 2005). "The purpose of Rule 11 is to deter conduct that frustrates the just, speedy, and inexpensive determination of civil actions." *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1078 (E.D. Va. 1997). Although *pro se* pleadings are held to less stringent standards than formal pleadings drafted by lawyers, see *Haines v. Kerner*, 404 U.S. 519 (1972), Rule 11 sanctions can still be appropriate against an individual despite his or her *pro se* status. See *Harmon v. O'Keefe*, 149 F.R.D. 114, 116 (E.D. Va. 1993).

In the case *sub judice*, Hutson has accused Turner Padget's attorneys of a variety of nefarious actions, though it does appear Hutson ultimately withdrew the motions accusing Turner Padget of criminal activities. (See Dkt. No. 209; Dkt. No. 213.) Despite being previously told that motions pertaining to trial (such as to exclude evidence) are premature, Hutson continued to file such motions. (See, e.g. Dkt. No. 145; Dkt. No. 260.) In addition, he re-

filed the motion pertaining to his deposition that Judge Marchant previously denied. (See Dkt. No. 255; see also Dkt. No. 121.)

Given Hutson's *pro se* status, the fact that he withdrew many objectionable filings prior to Third-Party Plaintiffs' filing the Motion for Sanctions, the fact that Hutson had not been previously warned that he was in violation of Rule 11, and the fact that Hutson will no longer be proceeding *pro se* if the District Judge adopts the undersigned's recommendation as to Third-Party Plaintiffs' Motion for Summary Judgment (Dkt. No. 183),⁴ the undersigned recommends denying Third-Party Plaintiffs' Motion for Sanctions (Dkt. No. 179). See *Pizzuto v. Smith*, Civ. A. No. 5:12-CV-149, 2014 WL 1648269, at *15 (N.D. W. Va. Apr. 23, 2014), adopted at 2014 WL 2155039 (N.D.W. Va. May 22, 2014) ("Courts that have imposed sanctions against *pro se* parties frequently attach importance to the fact that the party had already been placed on notice that she was close to violating Rule 11."); see also *Sharp v. Town of Kitty Hawk, N.C.*, Civ. A. No. 2:11-cv-13-BR, 2011 WL 5520432, at *2 (E.D.N.C. Nov. 14, 2011) ("While plaintiff's complaint in this action was largely factually and legally duplicative of the one she filed in her earlier action here, such repetition does not rise to a level violative of 'an objective standard of reasonableness' worthy of Rule 11 sanctions. Nor is it indicative of the bad faith and vexatious behavior necessary to invoke the court's inherent power to sanction.").

B. Motion for Summary Judgment (Dkt. No. 183)

Third-Party Plaintiffs seek summary judgment as to all of Hutson's counterclaims against them. Third-Party Plaintiffs contend they are entitled to summary judgment "on Hutson's Counterclaims because the Counterclaims are barred by the doctrine of *res judicata*." (Dkt. No. 183-1 at 7.) Specifically, Third-Party Plaintiffs assert Hutson's claims against them "are barred by *res judicata* due to the Settlement Agreement which was incorporated into Judge James' 2012 Consent Order." (Dkt. No. 183-1 at 9.) As explained below, many of the claims Hutson raises in the case *sub judice* are the identical claims he raised in the state court case of *TLC Holdings, LLC v. M.B. Hudson aka M.B. Hutson*, Civ. A. No. 2011-CP-14-602 (hereinafter the "State Court Case"); the parties to that action settled it and entered into a release. For the reasons set forth below, the undersigned recommends concluding

Hutson's claims for breach of contract; breach of contract accompanied by fraud; fraud and fraud in the inducement; negligent misrepresentation; constructive fraud; breach of the covenant of good faith and fair dealing; and negligence, recklessness, wilfulness and wantonness are barred by the release he executed in settling the state court action. The undersigned further recommends concluding that Hutson's claim for defamation fails as a matter of law. Accordingly, Third-Party Plaintiffs' Motion for Summary Judgment (Dkt. No. 183) should be granted.

*9 Before turning to the legal analysis, the undersigned will review the allegations, the settlement, and the Orders issued in the State Court Case.

1. The Allegations in the State Court Case (2011-CP-14-602)

The case *sub judice* is not the first civil action between the parties; TLC filed suit against Hutson in the State Court Case. The 2012 Consent Order to which Third-Party Plaintiffs refer was issued in the State Court Case. Most of the allegations Hutson makes against Third-Party Plaintiffs in the case *sub judice* are the same allegations he made against them in the State Court Case.

In the State Court Case, Hutson filed a counterclaim against TLC Holdings, LLC and a Third-Party Complaint against Clark, Lovell, and Thigpen. (See Dkt. No. 183-5.) Hutson raised the Third-Party Plaintiffs' knowledge (and failure to disclose)—and Hutson's lack of knowledge—that the South Carolina Public Health and Environmental Control “had imposed a moratorium on the property that prevented the property from tying into public water and sewer services.” (Dkt. No. 183-5 at ¶¶ 42-44; ¶ 58.) Hutson also raised therein Third-Party Plaintiffs' knowledge that Hutson intended to develop condominiums and other residential structures and failure to disclose that “there was no sewer capacity at that time.” (*Id.* ¶¶ 47-48.) He also alleged as follows:

49. Pursuant to the contract, Hutson caused a title examination to be made of the premises and found that [TLC Holdings, LLC] was involved in litigation affecting the premises. The Sellers in the contract disclosed the existence of that litigation, but set forth a Covenant, Consent and Agreement that included language that said “Seller covenants, consents and agrees that these actions shall be dismissed or otherwise addressed on or before closing of the entire premises, so

that said pending legal action shall in no way encumber the property or hinder such closing.” To date, those actions are still pending and Hutson has been unable to proceed to purchase the property.

(*Id.* ¶ 49.) He also alleged that Third-Party Plaintiffs interfered with his development of the property; specifically, Hutson alleges therein that Third-Party Plaintiffs notified Clarendon County Council of the pending litigation in order to “delay and hinder ... [Hutson] from further performance pursuant to the Lease Purchase Agreement.” (*Id.* ¶ 85.) He also alleged that Third-Party Plaintiffs “deliberately and maliciously [took] steps to try to cause [him] to fail at this project in order for them to recover same with the value of the project enhanced through [his] efforts.” (*Id.* ¶ 89.) Hutson further asserted therein that he should be given an equitable interest in the property for his improvements. (See *Id.* ¶¶ 55-56.)

2. The Orders in the State Court Case

The Settlement Agreement to which Third-Party Plaintiffs point was signed by Hutson on March 30, 2012. (See Dkt. No. 183-6 at 10 of 10.) The Settlement Agreement purports to be between Hutson and TLC Holdings, LLC. (See Dkt. No. 183-6 at 1 of 10.) However, it also provides as follows:

2. This Settlement Agreement shall be incorporated into a Consent Order (the “Consent Order”) entered in the above-referenced case (the “Litigation”). Although Richard U. Clark, Jimmy S. Lovell and James C. Thigpen are parties to this Settlement Agreement by virtue of being parties to the [Lease Purchase] Agreement, and are named as Third Party Defendants in the Litigation, they have not been served with the pleadings in the Litigation and shall not be deemed to have appeared in the Litigation by their execution of this Settlement Agreement. This Settlement Agreement shall be binding upon all of the undersigned parties even though Richard U.

Clark, Jimmy S. Lovell and James C. Thigpen have not appeared in the Litigation and are not parties to the Consent Order.

Section 23, the "Release," provides as follows:

*10 (Dkt. No. 183-6 at 1-2 of 10.) The Settlement Agreement further provides, *inter alia*,

4. Pursuant to the Consent Order, in the event that Mr. Hutson fails to comply with the terms of the Settlement Agreement, unless such failure is a direct and proximate result of TLC's failure to perform an action expressly required of it in this Settlement Agreement, time being of the essence, then the Plaintiff is entitled to the following immediate relief, without further notice of the court or notice to Defendant or his attorney: (a) termination of the [Lease Purchase] Agreement, (b) cancelation [sic] of the lis pendens filed by Hudson in this action, (c) immediate vacation of the Property by Mr. Hudson except for his personal residence, which shall be vacated within 15 days, enforceable by the Charendon County Sheriff; and (d) the provisions of Section 23 shall be effective. Prior to any such default by Hudson hereunder, the parties acknowledge that the Lease remains in full force and effect in accordance with its terms, as modified by this Settlement Agreement, and during the Primary Term (as may be extended as provided herein), Hutson shall have full possession of the Property in accordance with, and subject to, the terms of the Lease as modified by this Settlement Agreement.

23. As a material consideration of this Settlement Agreement, in the event of the termination of the [Lease Purchase] Agreement pursuant to Section 4 above as a result of Hudson[s] breach hereof, then automatically and without further action of the parties, as of the date of such termination (the "Termination Date"), Hudson shall be deemed to have released, forever discharged and promised never to sue TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, and their respective agents, attorneys, insurance companies, parent companies, subsidiaries, affiliates, predecessors, successors, or assigns (together, the "TLC Parties"), from any and all injuries, personal or property, known or unknown, causes of action, demands, warranty claims, damages, suits at law or in equity, of whatsoever kind and nature, or because of any matter or thing done, omitted or suffered to be done, by the TLC Parties, prior to and including the Termination Date, on account of all injuries and damages, including attorneys' fees and litigation expenses, arising from the Lease or the relationship between Hudson, on the one hand, and TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, on the other hand, and any causes of action, known or unknown, relating to the Lease, including any and all claims alleged, or which could have been alleged, in the Litigation.

(Dkt. No. 183-6 at 2 of 10.)

(Dkt. No. 183-6 at 6-7 of 10.)

On April 12, 2012, Judge James issued a Consent Order that approved the Settlement Agreement and incorporated the Settlement Agreement into the Consent Order by reference. (*See generally* Dkt. No. 183-7; *see also* Dkt. No. 183-7 at 2 of 7.) In an Order dated March 20, 2014, Judge James addressed various motions in the State Court Case, including Hutson's Motion to Set Aside Affidavit of Default and Motion for Temporary Restraining Order. (*See generally* Dkt. No. 183-8; *see also* Dkt. No. 183-8 at 3 of 12.) Judge James found that Hutson had breached several provisions of the Settlement Agreement, including, *inter alia*, failing to pay the arrearage prior to December 31, 2012. (Dkt. No. 183-8 at 6 of 12.) Judge James' Order further stated,

*11 10. Pursuant to the express terms of the Consent Order, effective upon the filing of the Affidavit of Default in this action on December 11, 2013, Plaintiff was entitled to have the following immediate relief, without further order of the Court or notice to Defendant or his counsel of record: (a) termination of the Lease Purchase Agreement, (b) cancellation of the Lis Pendens [filed by Defendant in this case], (c) immediate vacation of the Property by Defendant except for his personal residence thereon, which shall be vacated within fifteen (15) days; and (d) the provisions of Section 23 shall be effective." Consent Order at ¶ 2.

11. Therefore, the Lease Purchase Agreement was terminated, according to its terms as modified by the Settlement Agreement and Consent Order, as of December 11, 2013 (the "Termination Date"), and Hutson was required to vacate the Property immediately, except only for his personal residence thereon, which he was required to vacate within fifteen (15) days (i.e., December 26, 2013).

(Dkt. No. 183-8 at 11 of 12.) That order further provides,

[I]t is hereby:

...

FURTHER ORDERED, that the Settlement Agreement and Consent Order are to be enforced according to their terms.

FURTHER ORDERED, that, in conjunction with enforcing the Consent Order according to its terms, pursuant to Paragraph 2 of the Consent Order, upon the filing of the Affidavit of Default on December 11, 2013,

Plaintiff was and is entitled to, and is hereby awarded, the following immediate relief, without the need for further Order of this Court:

(a) The Lease Purchase Agreement was deemed automatically terminated and of no further force or effect; [and]

(b) The lis pendens filed by Defendant against the Property was deemed automatically cancelled, terminated of record, and of no further force or effect....

...

FURTHER ORDERED, that pursuant to the Consent Order, Defendant is deemed to have granted the TLC Release to the TLC parties, as set forth more fully in Section 23 of the Settlement Agreement.

(Dkt. No. 183-8 at 11-12 of 12.)

3. Release

Hutson's claims for breach of contract; breach of contract accompanied by fraud; fraud and fraud in the inducement; negligent misrepresentation; constructive fraud; breach of the covenant of good faith and fair dealing; and negligence, recklessness, wilfulness and wantonness are barred by the release he entered in settling the State Court Case. As in *Bowers v. Department of Transportation*, 360 S.C. 149, 600 S.E.2d 543 (Cl. App. 2004), the Settlement Agreement in the case *sub judice* is a contract. *Bowers*, 360 S.C. at 153, 600 S.E.2d at 545; *see also Hyman v. Ford Motor Co.*, 142 F. Supp. 2d 735 (D.S.C. 2001). In *Bowers*, the South Carolina Court of Appeals upheld dismissal of two suits against the Department of Transportation, concluding that the releases executed by two drivers in an accident released the Department of Transportation. The court noted that the release was a contract and that since the release "unambiguously sets forth the contracting parties' intent, [the court is] bound by that clearly expressed intent without resort to extrinsic evidence." *Bowers*, 360 S.C. at 153, 600 S.E.2d at 545. The court further stated,

The terms of the Release do not evince an intent to limit its scope to any specifically identified parties. Rather, the Release is general and all encompassing in its scope. It clearly states that the Appellants released the tortfeasor "and all other persons, firms or corporations liable, or who might be claimed to be liable." This

language is a clear, explicit, and unequivocal indication of the parties' intent that *all* claims arising from the accident—now and in the future—are barred under the terms of the Release. Had Appellants intended a contrary result and desired to limit the operation of the Release to named persons only, the terms of the Release could have been easily tailored to that end. We are constrained by the plain, unambiguous language of the Release to find that Appellants' claims against SCDOT fall within the terms of the Release.

*12 *Id.* at 154, 600 S.E.2d at 545-46.

Turning to the case *sub judice*, the Release—paragraph 23 of the Settlement Agreement—unequivocally provides that if the Lease Purchase Agreement is terminated as a result of Hutson's breach, Hutson "shall be deemed to have released, forever discharged and promised never to sue" Third-Party Plaintiffs for "any and all injuries, personal or property, known or unknown, causes of action, demands, warranty claims, damages, suits at law or in equity, of whatsoever kind and nature, or because of any matter or thing done, omitted or suffered to be done" by Third-Party Plaintiffs, "prior to and including" December 11, 2013. (Dkt. No. 183-6 at 6-7 of 10; *see also* Dkt. No. 183-8 at 11 of 12.) This Release is cut and dry—Hutson has clearly released Third-Party Plaintiffs from liability for actions they took (or actions they failed to take) prior to December 11, 2013.

A contract can be set aside for fraud, *see First Equity Inv. Corp. v. United Serv. Corp. of Anderson*, 299 S.C. 491, 497, 386 S.E.2d 245, 249 (1989) ("As a general rule, a defrauded party to a contract has a choice of remedies; he may rescind the contract and recover what he has paid, or he may affirm the contract and recover damages."), and Hutson asserts he has been defrauded. However, having reviewed all of Hutson's allegations and assertions, the undersigned concludes—for the reasons set forth below—that this Settlement Agreement and Release *cannot* be set aside due to fraud.

In arguing that the Settlement Agreement and Release should be set aside due to fraud, Hutson refers to the January 2009 meeting minutes as well as the "2015 depositions." (Dkt. No. 192; *see also* Dkt. No. 200-1 at 9-11 of 28.) Hutson asserts the minutes of the January 2009 meeting reveal the "severe options" TLC was "consider[ing] to rid themselves of the BWR campground and its members." (Dkt. No. 200 at 3 of 7.) Although

Hutson refers to "2015 depositions," the only deposition transcript he attached to his filings opposing the Motion for Summary Judgment were transcripts from Lovell's deposition taken on February 16, 2011. (*See* Dkt. No. 200-1 at 15-16, 21 of 28.)

In his Supplemental Response in Opposition, Hutson contends that TLC knew—as of April 2003—that sewer service was needed to support further development at the Big Water Resort and that such service was not available until the water treatment plant in Manning was enlarged. (Dkt. No. 200 at 1 of 7.) Hutson states, "TLC Holdings, LLC and its owners were fully aware of this serious long term problem as it prevented ANY developer from getting any of the necessary local governmental approvals to develop at that location." (*Id.* at 2 of 7.) According to Hutson, TLC's owners "knew that water and sewer as an essential component for the Buyer signing," and they also knew that "water and sewer WAS NOT AVAILABLE." (Dkt. No. 200 at 4 of 7.)

To support his claim for "FELONY THEFT BY DECEPTION," Hutson asserts that although TLC "was not EVER with clear title to close, they continued to collect hundreds of thousands of dollars from [Hutson] for a 'right to purchase.'" (Dkt. No. 200 at 5 of 7.) He states, "Is it not theft by deception to then add mandatory cash requirements totaling hundreds of thousands of dollars for the 'Right to Purchase'—even if they could be credited toward closing—since the Seller had NO INTENTION to close?" (Dkt. No. 200 at 2 of 7.) Hutson points to TLC's admission that "they had financially subsidized" the Big Water Resort "just to keep the gates open." (Dkt. No. 200 at 2 of 7.)

*13 Hutson asserts that TLC knew—as outlined in its January 2009 minutes—that the membership agreements "creat[ed] un-marketable title for home loans." (Dkt. No. 202 at 1 of 2; *see also* Dkt. No. 202-1.)⁵ According to Hutson, TLC found several buyers "who wanted to buy and develop the property into a condo subdivision," but these developers "found that TLC Holdings, LLC could not get marketable title." (Dkt. No. 200 at 2-3 of 7.) Hutson notes that Community Resource Bank had a "very large lien on all of the property for approximately two years," and each time Hutson asked Clark "if the title was now clear in order for Third Party Defendant to start making plans to acquire purchase contracts from potential Buyers to move toward closing," "[n]ever once did the

Seller or any of its agents inform the Buyer[] that clear title had been resolved.” (Dkt. No. 200 at 4 of 7.) Hutson contends he was required to close within 24 months, but he was “trapped and unable to close” because of the liens on the property. (*Id.*)

*14 Hutson asserts Third-Party Plaintiffs “intentionally held back and misrepresented critical information (ex.: sewer ...) and the sixty year obligation to family members for an exclusive right to use all property covered by the contract and improvements thereon.” (Dkt. No. 200 at 5 of 7.) Hutson contends he had seven months under the contract to “repave all private roads, parking lots and recreational vehicle (RV) parking spaces on the Premises,” but it was impossible to do so within seven months because “the municipalities would not approve any permanent asphalt roads” unless he was able to address the sewer issues. (Dkt. No. 200 at 5 of 7.)

According to Hutson, Third-Party Plaintiffs never had any plan to “actually sell” the property but that instead their “plan was to stage it so they could re-call the property.” (Dkt. No. 200 at 6 of 7.) He asserts that Third-Party Plaintiffs knew—“as far back as January 16, 2009”—that they could not sell real estate that was leased for an extended period of time. (Dkt. No. 200 at 6 of 7.) Hutson claims “theft” in that he “was not offered nor given” an “equitable interest” for accomplishments during [his] tenure on-site, which was appraised at over one million dollars ... WITHOUT the impact of the restaurant.” (Dkt. No. 200 at 6 of 7.)

As to contractual interference, Hutson asserts that attorney Thomas Harper, who was representing TLC, “contractually interfered, on behalf of TLC Holdings, LLC ... by contacting government approval agencies to slow down [Hutson’s] progress in acquiring approvals for the development project,” negatively impacting his “ability to close within the contract’s 24 months.” (Dkt. No. 200 at 6 of 7.)

Hutson asks this Court to “set aside paragraph 23 [of the Settlement Agreement] for it was designed to be a fraudulent buffer providing protection to TLC Holdings, LLC and it’s [sic] owners to carry out the criminal acts.” (Dkt. No. 192 at 3 of 4.)

Hutson’s claims for breach of contract; breach of contract accompanied by fraud; fraud and fraud in the inducement;

negligent misrepresentation; constructive fraud; breach of the covenant of good faith and fair dealing; and negligence, recklessness, wilfulness and wantonness all arise out of the Lease Purchase Agreement and Hutson’s dealings with TLC, Thigpen, Lovell, and Clark in purchasing the Big Water Resort. The Release plainly releases all claims against Third-Party Plaintiffs for claims that arose on December 11, 2013 or before. (See Dkt. No. 183-8 at 11 of 12.)

Hutson has not alleged fraud that took place after December 11, 2013, and there is accordingly no basis to set aside the Release.⁶ Most of the circumstances to which he now points (with the exception of his claim for defamation, discussed below) were raised in his counterclaim and third-party claim in the state court action, so he clearly had notice of these circumstances at the time he entered into the Settlement Agreement and Release. All of Hutson’s claims pertaining to fraud relate to the *original* transaction, *not the Release*. In other words, Hutson cannot set aside the Release because he has not made any showing that fraud induced him to enter into the Release. See *House v. Alken Cnty. Nat’l Bank*, 956 F. Supp. 1284, 1291-92 (D.S.C. 1996) (granting motion to dismiss—treated as motion for summary judgment—without prejudice where “[t]he only issue before this Court is whether the release signed as a result of that previous settlement is invalid because of fraud, misrepresentation or like circumstances. Plaintiffs have failed to provide any evidence, other than their own conclusory allegations, that they were induced to enter into this release because of fraud or misrepresentation.”); see also *Hopkins v. Fidelity Ins. Co.*, 240 S.C. 230, 125 S.E.2d 468 (1962).

*15 Moreover, to establish fraud, Hutson would have to prove the following elements:

- (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or 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.

Armstrong v. Collins, 366 S.C. 204, 218-19, 621 S.E.2d 368, 375 (Ct. App. 2005) (quoting *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444-45 (Ct. App. 2003)). Although Hutson frequently contends he was defrauded, he has not clearly alleged the elements of fraud. For example, it is not clear upon what representation or representations he asserts he relied, nor is it clear such representation was false or that he had the right to rely on such representation(s).⁷

Although Hutson repeatedly asserts fraud, none of his assertions of fraud pertain to the Release. He is therefore not entitled to set aside the Release. See *House*, 956 F. Supp. at 1291-92; see also *Hopkins*, 240 S.C. 230, 125 S.E.2d 468. Third-Party Plaintiffs are entitled to summary judgment on the following claims Hutson makes against them: breach of contract; breach of contract accompanied by fraud; fraud and fraud in the inducement; negligent misrepresentation; constructive fraud; breach of the covenant of good faith and fair dealing; and negligence, recklessness, wilfulness and wantonness.

4. Defamation

Hutson's claim for defamation requires a slightly different analysis, as the events giving rise to this claim occurred after execution of the Settlement Agreement and Release. At the hearing, Mr. Hutson clarified that the only basis for his defamation claim is the April 3, 2014 letter from TLC to "Members of the Big Water Resort Campground." (See Dkt. No. 77-17.) That letter provides, in relevant part,

Over the course of the past three (3) years, Mr. Hutson breached his obligations under the [Lease Purchase] Agreement in numerous respects. Those breaches began just months after he took over the property. For example, he failed to pay rents he owed to TLC Holdings, LLC, and taxes owing to Clarendon County that were his responsibility under the Agreement. He failed to pave or repave the roads as required by the Agreement, which would have been a benefit to everyone at the campground. At times, he failed to carry insurance that was necessary to protect the property and the club [that] operated on it. TLC Holdings, LLC has been forced to make tax payments and

insurance payments to protect the property that were Mr. Hutson's responsibility under the Agreement.

Beginning in 2011, TLC Holdings has endeavored to enforce the obligations of Mr. Hutson with regard to the campground. As a result of Mr. Hutson's breaches, TLC Holdings, LLC sued him in state court back in 2011. Mr. Hutson has vigorously resisted TLC Holdings' efforts to enforce his obligations. After protracted litigation in the state court, when TLC Holdings was finally on the verge of success in evicting Mr. Hutson from the property, Mr. Hutson then filed for bankruptcy on January 8th of this year, delaying for a few more months TLC Holdings' recovery of the property. For all these months that Mr. Hutson has resisted TLC Holdings' efforts to recover the property, he has continued the breaches of the Agreement that have hurt TLC Holdings, LLC, and the club members who have used the property.

*16 ...

As a result of TLC Holdings' successes in the state court and bankruptcy court, TLC Holdings, LLC is now finally in control of the campground property for the first time since December, 2010. Much has changed over those three years, and it appears that much work is needed....

Unfortunately, because the records recovered by TLC Holdings, LLC from Mr. Hutson are incomplete in some respects, we ask that you provide to us your understanding of your current status with regard to your membership agreement with Big Water Resort....

...
We understand that this protracted litigation may have confused or frustrated you. It certainly has us ...

(Dkt. No. 77-17.)

The undersigned recommends granting summary judgment as to Hutson's claim for defamation. "The tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant's communication to others of a false message about the plaintiff." *Holtzschelter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998); see also *Parrish v. Allison*, 376 S.C. 308, 321, 656 S.E.2d 382, 389 (Ct. App. 2007) ("A communication is defamatory if it tends

to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him.” (citing *Holtzschetter*, 332 S.C. at 530, 506 S.E.2d at 513 (Toal, J., concurring))). As stated in *Parrish*,

To recover for defamation, the plaintiff must establish by a preponderance of the evidence, that there was (1) a false and defamatory statement by the defendant concerning the plaintiff; (2) an unprivileged communication; (3) fault on the defendant's part in publishing the statement; and (4) either actionability of the statement irrespective of special harm or the existence of special harm to the plaintiff caused by the publication.

Parrish, 376 S.C. at 320, 656 S.E.2d at 388 (citations omitted).

Hutson complained at the hearing that TLC stated he filed for bankruptcy but did not explain why he filed for bankruptcy. Because Hutson *did* file for bankruptcy, however, TLC's statement is true, and Hutson cannot prevail on a claim of defamation for such a statement. See *Fountain v. First Reliance Bank*, 398 S.C. 434, 442-44, 730 S.E.2d 305, 309-10 (2012). The same can be said of the other statements contained in the April 3, 2014 letter. The letter indicated that Mr. Hutson “failed to pay rents he owed to TLC Holdings, LLC and taxes owing to Clarendon County.” (Dkt. No. 77-17.) The Settlement Agreement in the State Court Action—which Mr. Hutson signed—indicated that Hutson was in arrears to TLC in the amount of \$199,969.19. (See Dkt. No. 183-6 at 2 of 10.) Mr. Hutson stated in his deposition that he “didn't have enough money to pay the taxes on the property like [he] was supposed to.” (Hutson Dep. at 199; Dkt. No. 135.) As to the statement that Hutson failed to carry insurance, there is undisputed evidence in the record that Hutson did not always carry insurance. (See Clark Dep. at 21-22; Dkt. No. 134.) Similarly, as to the statement in the letter that Hutson failed to pave the roads, Hutson admitted that he did not pave the roads. (Hutson Dep. at 80, 82; Dkt. No. 135.) In the letter of April 3, 2014,

TLC states that Hutson “has continued the breaches of the [Lease Purchase] Agreement. (Dkt. No. 77-17.) Of course, that is exactly what Judge James found in the State Court Action in his Order dated March 20, 2014. (See Dkt. No. 183-8; Dkt. No. 183-8 at 6 of 12.) Because the undisputed evidence reveals that the statements of which Hutson complains were, in fact, true, Third-Party Plaintiffs are entitled to summary judgment as to Hutson's claim against them for defamation.

C. Motion for Summary Judgment (Dkt. No. 228)

*17 Hutson seeks summary judgment as to Third-Party Plaintiffs' claim against him for equitable indemnity. (See Dkt. No. 228.)⁸ As stated in *Vernier Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999),

For a party to recover under a theory of equitable indemnification, three things must be proven: (1) the indemnitor was liable for causing the Plaintiff's damages; (2) the indemnitee was exonerated from any liability for those damages; and (3) the indemnitee suffered damages as a result of the Plaintiff's claims against it which were eventually proven to be the fault of the indemnitor.

Vernier, 336 S.C. at 63, 518 S.E.2d at 307. Stated another way, in order for Third-Party Plaintiffs to recover pursuant to a theory of equitable indemnification, Third-Party Plaintiffs must prove that (1) Hutson “was liable for causing the Plaintiff's damages”; (2) Third-Party Plaintiffs were “exonerated from any liability for those damages”; and (3) Third-Party Plaintiffs suffered damages as a result of the Plaintiff's claims against [them] which were eventually proven to be the fault of” Hutson. See *Vernier*, 336 S.C. at 63, 518 S.E.2d at 307.

In his written filings, Hutson asserts he is entitled to summary judgment on the claim for equitable indemnity because “Third Party Plaintiffs were sued by the Class due to broken promises and fraudulent behaviors by the Third Party Plaintiffs in the years prior to Third

Party Defendant's arrival." (Dkt. No. 251 at 16 of 20.) Hutson points to Judge Norton's Order of February 1, 2016 to support his position that Third Party Plaintiffs "convert[ed] the 'club' to a public club and allowed the public onto the property several years prior to 2011." (Dkt. No. 251 at 16 of 20.)

At the hearing, Hutson argued that he is entitled to summary judgment as to Third-Party Plaintiffs' claim for equitable indemnity because the Court can find as a matter of law that TLC is at fault for the circumstances "that we find ourselves here in today." Hutson asserted that TLC violated several South Carolina statutes by not recording the membership agreements or the "purported lease" between Big Water Resort and TLC—which he contends is negligence per se. Hutson argued that negligence per se is fault and that, as a matter of law, TLC is at fault and cannot prevail on its claim for equitable indemnity.

The undersigned recommends denying Hutson's Motion for Summary Judgment (Dkt. No. 228.) Hutson's arguments about Third-Party Plaintiffs' failure to record—while interesting—are red herrings. Even if TLC violated the South Carolina Code in failing to record the membership agreements and the lease between Big Water and TLC, this failure did not cause the Plaintiffs' damages. See *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Constr., LLC*, 413 S.C. 615, 619, 625-26, 776 S.E.2d 426, 428, 432 (Ct. App. 2015) (noting that the party seeking equitable indemnification (the general contractor Marick) "cannot recover for equitable indemnity" from Clear View (the subcontractor) "if [Marick] had any fault in causing Stoneledge's damages," where Stoneledge "brought this lawsuit seeking damages resulting from construction defects that allowed water into the townhomes" and "[t]wo of the construction defects alleged by Stoneledge related to the stonework performed by Clear View"). The crux of Plaintiffs' claim is that they were injured when the resort changed from a private resort to a public resort. Simply put, whether lease and the membership agreements were recorded had nothing to do with changing the resort from a private resort to a public resort. Whatever damages Hutson contends he suffered due to the failure to record, it is clear that the Plaintiffs suffered no damages.

*18 To the extent Hutson argues that Judge Norton's order of February 1, 2016 supports his position that it was Third-Party Plaintiffs who converted the club from

a private club to a public club, the undersigned finds no such support therein.⁹ The portion of the Order to which Hutson points provides,

The Defendants asserted numerous defenses arguing among other things that the conversion of the club to a public club was not a breach of contract and that the public was allowed onto the property several years prior to 2011 which would render all claims time barred by the statute of limitations.

(Dkt. No. 248 at 3 of 10.) The fact that Defendants pled the statute of limitations as a defense does not mean that they cannot also argue that Plaintiffs' damages were caused by a third party, as inconsistent defenses may be pleaded. See FED. R. CIV. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."); see also *Little v. Texaco, Inc.*, 436 F.2d 219, 220 (10th Cir. 1972) ("[A] defendant is at liberty to deny and at the same time advance an affirmative defense.").

Third-Party Plaintiffs contend that Hutson is the one who opened Big Water Resort up to the public, thereby causing Plaintiffs' damages, and Hutson contends Third-Party Plaintiffs opened Big Water Resort to the public, thereby causing Plaintiffs' damages. Who in fact opened the resort to the public—Third-Party Plaintiffs or Hutson—is a classic factual dispute;¹⁰ accordingly, Hutson's Motion for Summary Judgment as to the claim for equitable indemnity should be denied. See *Stoneledge*, 413 S.C. at 626, 776 S.E.2d at 432 ("Marick cannot recover for equitable indemnity if it had any fault in causing Stoneledge's damages. We have carefully examined the record in this case, and we cannot say as a matter of law Marick is at fault. Rather, we find the evidence is conflicting, and viewing the evidence in the light most favorable to Marick, the record contains evidence a factfinder could reasonably find supports the conclusion Marick was not at fault. Because of this conflicting evidence, the equitable indemnity cause of action must be remanded for a trial."). While Third-Party Plaintiffs "cannot recover for equitable indemnity if they had any fault in causing Plaintiffs' damages," because the evidence

of who is at fault is conflicting, Hutson's motion should be denied. *See id.* at 626, 776 S.E.2d at 432.

for Summary Judgment (Dkt. No. 183) be GRANTED, and that Third-Party Defendant's Motion for Summary Judgment (Dkt. No. 228) be DENIED.

IT IS SO RECOMMENDED.

CONCLUSION

*19 It is therefore RECOMMENDED, for the foregoing reasons, that Third-Party Plaintiffs' Motion for Sanctions (Dkt. No. 179) be DENIED. It is further RECOMMENDED that Third-Party Plaintiffs' Motion

All Citations

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Footnotes

1 Third-Party Plaintiffs are TLC Holdings, LLC; Richard Clark; James Thigpen; Jimmy "Steve" Lovell; and Ocoee, LLC (hereinafter "Third-Party Plaintiffs").

2 This motion was denied via text order on July 2, 2015. (Dkt. No. 145.)

3 To the extent Hutson attempts to have criminal charges brought against Thigpen, Lovell, and/or Clark, he cannot do so in the instant civil action. *See Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir. 1988) (rejecting argument that the plaintiff "had an enforceable right as a member of the public at large and as a victim to have the defendants criminally prosecuted," stating, "There is ... no such constitutional right....").

4 Hutson has counsel as to the claim against him for equitable indemnity. (See Dkt. No. 263.) Counsel does not represent Hutson as to Hutson's counterclaims against Third-Party Plaintiffs. (*Id.*)

5 Hutson knew about the membership agreements at the time he purchased the Big Water Resort. (See Dkt. No. 266-1 at 7 of 35; see also Dkt. No. 266-1 at 31-34 of 35.) Renee Roark was Hutson's realtor in connection with the purchase of Big Water Resort. (See Dkt. No. 266-1 at 4-7 of 15.) On November 11, 2010, Ms. Roark emailed Mr. Coffey of Coffey Chandler & Kent; that email stated, *inter alia*,

Attached is Susan's lifetime membership info. regarding Big Water camp ground. My buyer is concerned about the "life time" memberships and the impact they can have on the future development of the property. In other words, in your opinion, what is the easiest, legal way to terminate the lifetime memberships of Big Water? Will these memberships have an impact on obtaining clear title for the property?

(Dkt. No. 266-3 (emphasis added).) At the hearing, Mr. Hutson stated, "I knew that there were memberships, but I did not know, and was not ever told that the memberships created defective title." On the one hand, Hutson stated at the hearing that he knew there were memberships but "was told that they were annual," and on the other hand, he stated that he "asked Renee Roark if the ... lifetime memberships would affect the title." Hutson complained at the hearing that he never received an answer as to whether the lifetime memberships would have an impact on obtaining clear title. He also stated at the hearing that he bought Big Water Resort without looking at the books or business records. Furthermore, the Lease Purchase Agreement contained the following provision:

Purchaser shall, within ninety (90) days after the Effective Date, investigate Seller's title to the Premises and identify any exceptions to title which are not acceptable to Purchaser (any such exception being referred to herein as a "Title Exception"). Purchaser shall within ninety (90) days after the Effective Date provide Seller notice of any such Title Exception. If Purchaser does not notify Seller in writing of Title Exceptions within ninety (90) days after the Effective Date, then Purchaser shall be deemed to have accepted title to the Premises with all exceptions and conditions....

(Dkt. No. 266-6 at 5 of 34.) The "Effective Date" was in December of 2010. (See Dkt. No. 266-3 at 1, 25-27 of 34.) Hutson admitted at the hearing that he had access to the membership agreements within this ninety day period.

Hutson was also represented by an attorney—Andrew Tucker—in conjunction with his purchase of Big Water Resort. (See Dkt. No. 266-1 at 9-13 of 35.) At his deposition, Hutson stated that approximately four or five days after Christmas of 2010, he and Tucker "actually started reading some of the membership agreements." (Dkt. No. 266-1 at 15 of 35.) Hutson continued,

And lo and behold, I can't tell you why, [Tucker] never picked up on the fact that I was obligated, according to you, for 60 years, for each one of these people. Because if so, it would be—why—why bother to get a—a sales contract and charge me \$10–\$10,000 a month, when they know good and well that I can't develop, because I've got to keep this place as a whole for 60 years?

(Dkt. No. 266-1 at 15-16 of 35.) Hutson indicated that he and Tucker "sat at the table together and went over" the membership agreements before closing. (Dkt. No. 266-1 at 16 of 35.)

6 At the hearing, Hutson argued he was "misled" via "six direct fraudulent paths" and submitted a document laying out his arguments. (See Hutson Ex. 3.) The alleged misrepresentations which, according to Hutson, constitute fraud, are as follows:

(a) Big Water Resort has no known debt, when the campground was operating with an annual shortfall;

(b) The financial reports listed memberships as a "present net value" of over \$1.7 million, when they "were in fact a liability";

(c) "[T]here [w]ere no actions, suits, or proceedings, either at law or equity ... or to the knowledge of Sellers, threatened," where Third-Party Plaintiffs were aware of the threat of suit by the individuals who purchased membership agreements;

(d) "[T]he Seller represents, warrants and covenants to Purchaser" that seller is "[i]n compliance with all laws, regulation and orders applicable to its business," where Third-Party Plaintiffs failed to record the membership agreements pursuant to South Carolina Code § 27-33-30;

(e) Third-Party Plaintiffs had "[g]ood and marketable title" to all "properties and assets," where Big Water Resort "did not own any real estate"; and

(f) Third-Party Plaintiffs had "[g]ood and marketable title" where (1) the sellers "agreed to owner finance the purchase," as it "appeared from their willingness to owner finance that they were confident in the value of the property and the marketability of their title" and where (2) the sellers "agreed to be paid from the proceeds of the sale of condominiums and lots," as the sellers' "willingness to accept a percentage gave confidence that they had good and marketable title to the property."

(Hutson's Ex. 3.) All of these alleged "fraudulent paths" arise out of Hutson's purchase of the Big Water Resort; they do not pertain to the Release.

7 For example, Hutson indicates he asked Lovell and Clark—"right before [he] bought" Big Water—how much money the campground was making, and Hutson admits they said none. (See Dkt. No. 135 at 28, 83-84 of 328.) He complains, however, that TLC "didn't bother to tell [him] it was losing \$300,000 a year." (*Id.*)

8 From a reading of Hutson's motion, it is not entirely clear to the undersigned whether Hutson also seeks summary judgment as to his counterclaims against Third-Party Plaintiffs. (See Dkt. No. 228.) To the extent Hutson seeks summary judgment as to his counterclaims against Third-Party Plaintiffs, such a request should be denied because, as set forth above, Hutson's counterclaims against Third-Party Plaintiffs fail.

9 Hutson also asserts that Third-Party Plaintiffs "have agreed to pay damages/restitution to the Class Members because they are guilty of contract violations for the exclusivity of use to the Class Members." (Dkt. No. 251 at 17 of 20.) However, the Settlement Agreement contains no admission of liability. (See Dkt. No. 218-1.)

10 The record contains evidence that Big Water Resort was opened to the public before Hutson ever arrived. One of the named Plaintiffs in this case—Bonnie Youmans—testified at her deposition that in 2008 or 2009, she noticed that nonmembers were coming in off I-95 and staying for just one night; she indicated these people were not at the resort for a tour. (Youmans Dep. 14-15, 20; Dkt. No. 91-9.) Ms. Youmans testified that she, along with Linda Hudson and Frances McDonald, consulted an attorney in 2008 or 2009 about a possible class action. (Youmans Dep. 34-35; Dkt. No. 91-9.) Of course, the record also contains evidence that Hutson was the one who opened the resort to the public. On or about August 19, 2011, Hutson sent a letter to the "Members"; that letter stated, *inter alia* (verbatim),

Regarding the issue of taking in the public, please let us clear this up. The same as each member use to be (public prior to becoming a member) other outsiders who express an interest are being considered. The only difference is we allow perspective new members to visit our park under trial membership which allows us the opportunity to observe that potential member for longer yearly memberships. All new members will and do pay more money for each visit for campsites and cabin sites. Existing members will always pay far less. The new system will help with the financial growth of Big Water and provide opportunity for Big Water to offer more than ever, with your help and support...

(Dkt. No. 77-23 at 1-2 of 2.) Hutson testified during his deposition that Big Water began to "take every person that we could coming in from the public" about six months after his August 2011 letter (in other words, in early 2012). (Hutson Dep. at 320-21; Dkt. No. 126-1.) He also testified, however, that members complained to him about public access to the resort as early as five or six days after he arrived there. (Hutson Dep. 58-65, 88, 91; Dkt. No. 135.)

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EXHIBIT E

2016 WL 2935891

Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina, Charleston Division.

William Reed, Donna Reed, Bonnie
Youmans, Jane Yates, Phillip Caulder, all
individually and for the benefit and on behalf
of all others similarly situated, Plaintiffs,

v.

Big Water Resort, LLC; TLC Holdings, LLC;
Richard Clark; James Thigpen; Jimmy
"Steve" Lovell; and Ocoee, LLC, Defendants.
Big Water Resort, LLC; TLC Holdings, LLC;
Richard Clark; James Thigpen; Jimmy "Steve"
Lovell; Ocoee, LLC, Third-Party Plaintiffs,

v.

M.B. Hutson, a/k/a M.B.
Hudson, Third-Party Defendant.

No. 2:14-cv-01583-DCN

Signed 05/20/2016

ORDER

DAVID C. NORTON, UNITED STATES DISTRICT
JUDGE

*1 This matter is before the court on the following three motions: (1) a motion for sanctions filed by third-party plaintiffs Big Water Resort LLC, Richard Clark, Jimmy Lovell, James Thigpen, Ocoee LLC, and TLC Holdings LLC ("third-party plaintiffs") (ECF No. 179); (2) a motion for summary judgment filed by third-party plaintiffs (ECF No. 183); and (3) a motion for summary judgment filed by third-party defendant M.B. Hutson a/k/a M.B. Hudson ("Hutson") (ECF No. 228). Pursuant to the provisions of Title 28 U.S.C. § 636(b) (1) and Local Rule 73.02(B)(2)(e), the court referred all pretrial matters in this case, involving a *pro se* litigant, to United States Magistrate Judge Mary Gordon Baker. The magistrate judge conducted a hearing on the aforementioned motions on March 16, 2016 and submitted a report and recommendation ("R&R") to this court recommending that the court deny third-party plaintiffs' motion for sanctions, grant third-party

plaintiffs' motion for summary judgment, and deny Hutson's motion for summary judgment. For the reasons set forth below, the court adopts the R&R, denies third-party plaintiffs' motion for sanctions, grants third-party plaintiffs' motion for summary judgment, and denies Hutson's motion for summary judgment.

I. BACKGROUND

The plaintiffs are members of a putative class of over 1,000 individuals who purchased memberships in defendant Big Water Resort, LLC. Am. Compl. ¶¶ 40, 41. The Big Water Resort, LLC membership agreements ("membership agreements") grant plaintiffs "a right to use all...campground facilities and services" at Big Water Resort ("BWR"), a recreational campground and an accommodation located in Clarendon County, South Carolina and owned by TLC Holdings LLC. *Id.* ¶¶ 14, 79. Third-party plaintiffs Big Water Resort, LLC, TLC Holdings, LLC, Richard Clark ("Clark"), James Thigpen ("Thigpen"), and Jimmy "Steve" Lovell ("Lovell") allegedly had an interest in BWR in various capacities, fully set forth in the court's order on plaintiffs' motion to certify class. *Id.* ¶¶ 17, 19; see also ECF No. 193. Big Water Resort, LLC sold memberships from BWR's opening in 2003 until the it was transferred to third-party defendant Hutson in December 2010 through a lease-purchase agreement. Am. Compl. ¶¶ 70-72; Hutson Answer and Countercl. ¶ 5.

Plaintiffs make various allegations regarding this transfer. They allege that: (1) Big Water Resort, LLC was insolvent at the time of the transfer; (2) Hutson did not have the financial ability to continue its operations; and (3) there was no long term contract between defendant TLC Holdings, LLC—the owner of the property on which BWR is located—and Big Water Resort, LLC to ensure that members would have continued access to BWR. Am. Compl. ¶¶ 36, 38, 82. Following this transaction, the BWR became a public facility and Big Water Resort, LLC ceased operations. *Id.* ¶¶ 28, 82.

Plaintiffs, taking issue with this conversion, filed suit in this court on April 22, 2014. The disputes between plaintiffs and third-party defendants have been settled. The court entered an order granting preliminary approval of the class settlement. ECF No. 248. The final fairness hearing, during which the court considered whether to

finally approve the class action settlement, was held on May 16, 2016. The issues now before the court involve ancillary disputes between third-party plaintiffs and Hutson.

*2 In December 2011, TLC Holdings, LLC instituted an action against Hutson in the Court of Common Pleas for Clarendon County for "breach of the lease-purchase agreement, seeking damages and ejectment." Third-Party Pls.' Mot. Ex. 4. Hutson filed a third-party complaint against Clark, Lovell, and Thigpen. *Id.* at Ex. 5. The parties entered into a settlement agreement resolving the dispute on March 30, 2012. In this action, third-party plaintiffs allege that:

In March 2012, the parties to the lease-purchase agreement entered into a Settlement Agreement. The terms of the Settlement Agreement imposed many duties on [Hutson], including the duty to make certain improvements to the campground property and the duty to make certain payments to [TLC Holdings, LLC]. The Settlement Agreement was approved by consent order in April 2012.

Third-Party Defs.' Answer ¶ 138; *see also* Ex. 6. Judge James approved the Settlement Agreement and incorporated it into a Consent Order in April 2012. Third-Party Pls.' Mot. Ex. 7. Hutson defaulted on the March 2012 Settlement Agreement, and despite third-party plaintiffs notifying him of such default on numerous occasions, he did not cure the default. Third-Party Defs.' Answer ¶¶ 139-40; *see also* Ex. 9. Third-party plaintiffs filed an affidavit of default in December 2013, and Hutson filed a "motion to set aside the affidavit of default and a motion for a temporary restraining order" in response. *Id.* ¶ 141; *see also* Third-Party Pls.' Mot. Exs. 11-13. On March 23, 2013, Judge James declined to set aside the affidavit of default or issue a preliminary injunction and ruled that the March 2012 Settlement Agreement and April 2012 Consent Order should be enforced. *Id.* ¶ 144; *see also* Ex. 8. Judge James deemed the lease-purchase agreement terminated and ordered Hutson to vacate the property pursuant to the terms of the

settlement agreement. *Id.* In April 2014, Hutson vacated the property, at which time Clark, Lovell, and Thigpen resumed operation of BWR. *Id.* ¶ 145.

After plaintiffs filed suit in this court, third-party plaintiffs filed a third-party complaint against Hutson alleging that Hutson failed to operate BWR in a manner beneficial to the members. Defs.' Answer, ECF No. 72, ¶ 133. Third-party plaintiffs allege that in December 2010, they sold their membership interests in Big Water Resort, LLC to Hutson pursuant to a lease-purchase agreement, making Hutson the sole member of the LLC. *Id.* ¶ 134. According to third-party plaintiffs' complaint, the sale price was \$500,000.00, \$499,990.00 of which was payable under a promissory note executed by Hutson in favor of Clark, Lovell, and Thigpen. *Id.*; *see also* Defs.' Mot. Summ. J., Ex. 2. They further allege that they "entered into a lease-purchase agreement with... Hutson," under which third-party plaintiffs agreed to sell certain property to Hutson, including the land on which BWR was located. *Id.* ¶ 135; *see also* Ex. 3. Third-party plaintiffs contend that Hutson defaulted on both the promissory note and the lease-purchase agreement. *Id.* ¶ 136. Third-party plaintiffs bring a cause of action for equitable indemnity, alleging that Hutson's actions during his control of the BWR exposed them to potential liability. *Id.* ¶¶ 146-50. Third-party plaintiffs further allege that they "have incurred, and may continue to incur, expenses necessary to protect their interest in defending the claims brought by the members of the [BWR] campground." *Id.* ¶¶ 147, 150. According to the allegations in the complaint, "an obligation in equity exists on...Hutson to indemnify [third-party plaintiffs]." *Id.* ¶ 148.

*3 Hutson answered the third-party complaint and filed counterclaims against third-party plaintiffs. ECF No. 75. In his pleadings, Hutson explains how BWR came to be open to the public. He alleges that in early 2011, he contacted Clark "asking permission to convert the beautiful recreational building, known as the Clubhouse, into a public restaurant." Hutson Answer ¶ 8. As a result of this conversion, members "would no longer have open, free access to that former recreational building as presented in their membership agreement. The restaurant was to be open to the public and all incoming business was required to pay for their meals." *Id.*

Hutson alleges that after learning about the property from a real estate agent, he met with Clark and Lovell, who

told Hutson that if he purchased three tracts of land, he "would also be required to purchase the rights to approximately 700 existing club memberships." *Id.* ¶¶ 51–54. Hutson alleges that when he asked Clark and Lovell how much the campground lost and profited, "[t]heir response was that it was not making a profit yet but had much potential." *Id.* ¶ 55. Hutson further alleges that prior to purchasing the rights to club memberships and the option to purchase the real property, he told third-party plaintiffs that he intended to develop the property for sale to the public. *Id.* ¶ 56. Hutson alleges that third-party plaintiffs understood his desire to develop the property and never indicated that he would be prohibited from doing so by the terms of the membership agreements or otherwise. *Id.* Hutson alleges that after he moved onto the property, he discovered that there was only approximately \$5,000.00 in the club's existing checking account. *Id.* ¶ 57. According to Hutson, he soon realized that there was not enough income to properly operate and maintain the campground. *Id.* Hutson alleges that he had no choice but to let go approximately 90% of the employees, cut back on the telephone lines, change insurance companies, and use part-time employees. *Id.* ¶ 58. Clark suggested that Hutson raise the membership fees drastically, which would encourage members to drop their memberships and allow Hutson to seek business from the general public. *Id.* ¶¶ 60–65. Thereafter, Hutson raised member fees, and members began to drop their memberships and threatened to file a class-action lawsuit. *Id.* ¶ 66.

Hutson alleges that prior to his involvement with BWR, third-party plaintiffs allowed the public to access the campground. *Id.* ¶ 70. Hutson alleges that he eventually realized that third-party plaintiffs intended to use him as a scapegoat after collecting millions of dollars from lifetime club members. *Id.* ¶ 71. Hutson claims that third-party plaintiffs intentionally misled him and failed to disclose pertinent information, putting him in an impossible situation that prevented him from developing the property. *Id.* ¶ 72. Hutson alleges that third-party plaintiffs failed to disclose the exclusive nature of the memberships, BWR's yearly losses of \$250,000.00, the lack of sufficient reserves or income for proper maintenance of the resort club, the fact that local authorities imposed a sewer moratorium on the property, and the fact that BWR was subject to large charges by the utility company. *Id.* ¶ 73. Hutson claims that third-party plaintiffs' actions caused him to become financially destitute and forced him to file for bankruptcy. *Id.* ¶ 76.

Hutson also alleges that third-party plaintiffs defamed him and caused him duress and mental anguish. *Id.* ¶ 76–77. Hutson brings the following counterclaims: (1) breach of contract; (2) breach of contract accompanied by fraud; (3) fraud and fraud in the inducement; (4) negligent misrepresentation; (5) constructive fraud; (6) breach of the covenant of good faith and fair dealing; (7) negligence, recklessness, willfulness, and wantonness; and (8) defamation.

*4 On September 3, 2015, third-party plaintiffs filed a motion for sanctions against Hutson. On September 9, 2015, third-party plaintiffs filed a motion for summary judgment. Hutson filed a response in opposition to the motion for sanctions on September 11, 2015, and an amended response that same day. On September 14, 2015, Hutson filed another response in opposition to the motion for sanctions and a response in opposition to the motion for summary judgment. Hutson filed an additional response to both motions on September 29, 2015. Third-party plaintiffs replied on October 8, 2015, and Hutson filed a sur-reply on October 13, 2015. Hutson filed a motion for summary judgment on third-party plaintiffs' equitable indemnity claim on January 6, 2016. Third-party plaintiffs filed a response in opposition on January 25, 2016, and Hutson replied on February 5, 2016. Hutson filed a second reply on February 10, 2016. The magistrate judge held a hearing on all pending motions on March 16, 2015. On April 5, 2016, the magistrate judge issued an R&R, recommending that the court deny third-party plaintiffs' motion for sanctions, grant third-party plaintiffs' motion for summary judgment, and deny Hutson's motion for summary judgment. Hutson and his counsel—representing him on the equitable indemnity claim only—filed objections to the R&R. Third-party plaintiffs did not file objections to the R&R, but they filed a reply to Hutson's objections on May 9, 2016. The motions have been fully briefed and are ripe for the court's review.¹

II. STANDARD

This court is charged with conducting a *de novo* review of any portion of the magistrate judge's report to which specific, written objections are made, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). The magistrate judge's recommendation does

not carry presumptive weight, and it is the responsibility of this court to make a final determination. Mathews v. Weber, 423 U.S. 261, 270–71 (1976). A party's failure to object may be treated as agreement with the conclusions of the magistrate judge. See Thomas v. Arn, 474 U.S. 140, 150 (1985).

Summary judgment shall be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. When the party moving for summary judgment does not bear the ultimate burden of persuasion at trial, it may discharge its burden by demonstrating to the court that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The non-movant must then "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322. The court should view the evidence in the light most favorable to the non-moving party and draw all inferences in its favor. Anderson, 477 U.S. at 255.

III. DISCUSSION

A. Third-Party Plaintiffs' Motion for Summary Judgment

Third-party plaintiffs argue that the court should grant their motion for summary judgment because Hutson's counterclaims are barred by the doctrine of res judicata

in light of the Settlement Agreement incorporated into Judge James's 2012 Consent Order in the state court action. Third-Party Pls.' Mot. 7. The R&R recommends that the court grant third-party plaintiffs' motion and hold that Hutson's claims for breach of contract, breach of contract accompanied by fraud, fraud and fraud in the inducement, negligent misrepresentation, constructive fraud, breach of the covenant of good faith and fair dealing, and negligence, recklessness, willfulness, and wantonness are barred by the release Hutson executed in settling the state court action. R&R 14–15. Hutson objects to the magistrate judge's recommendation, arguing that an exception to the doctrine of res judicata applies because the release was procured by fraud. Third-Party Def.'s Obj. 17–20.

*5 " + "The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action.' + " S.C. Dep't of Soc. Servs. v. Basnight, 551 S.E.2d 274, 278 (S.C. Ct. App. 2001) (quoting First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co., 35 S.E.2d 47, 56 (S.C. 1945)). Res judicata, or claim preclusion, bars litigation of claims that were litigated or could have been litigated in an earlier suit. Nevada v. United States, 463 U.S. 110, 130 (1983); Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 362 S.E.2d 176, 177 (S.C. 1987). To determine the preclusive effect of a state court judgment, federal courts look to state law. Allen v. McCurry, 449 U.S. 90, 95–96 (1980); Laurel Sand & Gravel, Inc. v. Wilson, 519 F.3d 156, 161–62 (4th Cir. 2008). In South Carolina, res judicata requires proof of three elements: (1) "a final, valid judgment was entered on the merits of the first suit"; (2) "the parties to both suits are the same"; and (3) "the subsequent action involves matters properly included in the first action." Judy v. Judy, 677 S.E.2d 213, 217 (S.C. Ct. App. 2009).

As stated above, in December 2011, third-party plaintiffs instituted an action against Hutson in the Court of Common Pleas for Clarendon County for "breach of the lease-purchase agreement, seeking damages and ejectment." Third-Party Pls.' Mot. Ex. 4; TLC Holdings, LLC v. M.B. Hudson, a/k/a M.B. Hutson, Civ. A. 2011-co-14-602 (hereafter "state court case"). Hutson filed counterclaims against TLC Holdings, LLC and a third-party complaint against Clark, Lovell, and Thigpen. Third-Party Pls.' Mot. Ex. 5, Hutson Answer. Hutson

alleged that third-party plaintiffs "knew" that defects existed in regard to the premises," including that a moratorium was imposed on the property for sewer installation and of the large utility bills. Id. Ex. 5 at 7, 14. Hutson further alleged that third-party plaintiffs "made misrepresentations to [Hutson] or otherwise concealed relevant and material statements of facts regarding the condition, usefulness, and ability to develop the property." Id. at 12. According to Hutson's third-party complaint, third-party plaintiffs interfered with his development of the property by notifying Clarendon County of the pending litigation in an attempt to hinder and delay Hutson's performance under the lease-purchase agreement. Id. ¶ 85. Hutson further alleged that he should be given an equitable interest in the property because of the improvements made thereon. Id.

On March 30, 2012, Hutson and TLC Holdings, LLC signed a settlement agreement ("Settlement Agreement") resolving the dispute. Third-Party Pls.' Mot. Ex. 6. Although the other third-party plaintiffs did not sign the Settlement Agreement, its provisions provide:

This Settlement Agreement shall be incorporated into a Consent Order (the "Consent Order") entered in the above-referenced case (the "Litigation"). Although Richard U. Clark, Jimmy S. Lovell and James C. Thigpen are parties to this Settlement Agreement by virtue of being parties to the [Lease Purchase] Agreement, and are named as Third Party Defendants in the Litigation, they have not been served with the pleadings in the Litigation and shall not be deemed to have appeared in the Litigation by their execution of this Settlement Agreement. This Settlement Agreement shall be binding upon all of the undersigned parties even though Richard U. Clark, Jimmy S. Lovell and James C. Thigpen have not appeared in the Litigation and are not parties to the Consent Order.

Id. The Settlement Agreement further provides:

Pursuant to the Consent Order, in the event that Mr. Hudson fails to comply with the terms of the Settlement Agreement, unless such failure is a direct and proximate result of TLC's failure to perform an action expressly required of it in this Settlement Agreement, time being of the essence, then the Plaintiff is entitled to the following immediate relief, without further notice of the court or notice to Defendant or his attorney: (a) termination of the [Lease Purchase] Agreement, (b) cancelation [sic] of the lis pendens filed by Hudson in this action, (c) immediate vacation of the Property by Mr. Hudson except for his personal residence, which shall be vacated within 15 days, enforceable by the Clarendon County Sheriff; and (d) the provisions of Section 23 shall be effective. Prior to any such default by Hudson hereunder, the parties acknowledge that the Lease remains in full force and effect in accordance with its terms, as modified by this Settlement Agreement, and during the Primary Term (as may be extended as provided herein), Hutson shall have full possession of the Property in accordance with, and subject to, the terms of the Lease as modified by this Settlement Agreement.

*6 Id. at 2 (emphasis added).

Section 23 of the Settlement Agreement, titled "Release," provides as follows:

As a material consideration of this Settlement Agreement, in the event

of the termination of the [Lease Purchase] Agreement pursuant to Section 4 above as a result of Hudson[s] breach hereof, then automatically and without further action of the parties, as of the date of such termination (the "Termination Date"), Hudson shall be deemed to have released, forever discharged and promised never to sue TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, and their respective agents, attorneys, insurance companies, parent companies, subsidiaries, affiliates, predecessors, successors, or assigns (together, the "TLC Parties"), from any and all injuries, personal or property, known or unknown, causes of action, demands, warranty claims, damages, suits at law or in equity, of whatsoever kind and nature, or because of any matter or thing done, omitted or suffered to be done, by the TLC Parties, prior to and including the Termination Date, on account of all injuries and damages, including attorneys' fees and litigation expenses, arising from the Lease or the relationship between Hudson, on the one hand, and TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, on the other hand, and any causes of action, known or unknown, relating to the Lease, including any and all claims alleged, or which could have been alleged, in the Litigation.

Id. at 6-7 (emphasis added).

Judge James entered a Consent Order on April 12, 2012 approving the Settlement Agreement and incorporating it into the Consent Order by reference. Third-Party Pls.' Mot. Ex. 7. By December 31, 2012, Hutson was in default of the provisions of the Settlement Agreement. *Id.* at Ex. 8, 4. After sending numerous default letters to Hutson,

TLC Holdings, LLC filed an affidavit of default, signed by Clark. *Id.* at Ex. 11. In response, Hutson filed a motion to set aside the affidavit of default and a motion for a restraining order against TLC Holdings, LLC. *Id.* at Exs. 12, 13. Judge James held a hearing on these motions on January 8, 2014.

On March 20, 2014, Judge James entered an order in which he found that Hutson had breached several provisions of the Settlement Agreement. *Id.* at Ex. 8, at 6. Judge James's order further stated that pursuant to the express terms of the Consent Order, Hutson defaulted as of the filing date of the affidavit of default on December 11, 2013, resulting in a termination of the lease-purchase agreement and his immediate vacation of the property, except his personal residence thereon, which he was required to vacate within fifteen days. *Id.* at 9. In light of Hutson's default and the terms of the Settlement Agreement, Judge James's order deemed Hutson to have granted "the TLC Release to the TLC Parties, as set forth more fully in Section 23 of the Settlement Agreement." *Id.* at 11-12.

Judge James's order is plainly a final judgment on the merits of the state court case. Further, it is clear that Hutson's counterclaims for breach of contract, breach of contract accompanied by fraud, fraud and fraud in the inducement, negligent misrepresentation, constructive fraud, breach of the covenant of good faith and fair dealing, and negligence, recklessness, willfulness, and wantonness fall within the broad, express language of the Settlement Agreement and its Release provision. The state court action involved the same parties currently before the court, although not named in the caption, and the Settlement Agreement was binding on all of the parties. Lastly, the state court action involves matters that are now before the court that were, or could have been, brought by Hutson.

*7 Hutson's objections, construed broadly, do not appear to object to the magistrate judge's finding that the Settlement Agreement and the Release, incorporated into the state court order, encompass his present counterclaims against third-party plaintiffs. Nor does Hutson object to the magistrate judge's finding that the principles of res judicata apply. Rather, Hutson argues that the Release is unenforceable. Specifically, Hutson argues that he could not have pursued a claim for fraud in the state court action because he did not have knowledge upon which to raise

the claim until after he signed the Settlement Agreement. Third-Party Def.'s Obj. 20–21. Hutson specifically points to Lovell's deposition and meeting minutes from a January 2009 meeting to support his claims that he did not have knowledge of the alleged fraudulent conduct. *Id.* Hutson additionally argues that the Release and Settlement Agreement should be set aside for public policy reasons. *Id.* at 21–30.

Although Hutson contends that the alleged fraud was ongoing, he does not point to any alleged fraudulent conduct that took place after December 11, 2013.² There is no dispute that Hutson knew about the "life time" membership agreements when he purchased BWR. *See* Third-Party Def.'s Obj. 20; *see also* Third-Party Pls.' Reply, Ex. 3 (email from Hutson's real estate agent expressing his concerns about the effect of the life time membership agreements).³ The Release clearly releases all claims against third-party plaintiffs that arose on or prior to December 11, 2013, the date on which third-party plaintiffs filed the Affidavit of Default.

Further, all of Hutson's claims of fraud relate to the original transaction and not the procurement of the Release. Hutson was represented by an attorney in the underlying state court action and was therefore presumably advised of the application and effect of the Release. *See House v. Aiken Cty. Nat. Bank*, 956 F. Supp. 1284, 1291 (D.S.C.) ("[T]hey have failed to produce an affidavit or statement from the attorney who represented them in the former litigation, any documents to show they were not fully informed or advised as to the content of the settlement of that previous litigation, or any other evidence sufficient to raise a genuine factual dispute as to this issue. Plaintiff's conclusory allegations, without more, are insufficient to provide evidence of fraud or to defeat a properly supported motion for summary judgment."). Hutson has failed to provide any evidence whatsoever of fraud in the procurement of the Release. Therefore, there is no basis to set aside the Release. *See House*, 956 F. Supp. at 1292 ("Plaintiffs have failed to provide any evidence, other than their own conclusory allegations, that they were induced to enter into this release because of fraud or misrepresentation.").

*8 Hutson also makes various public policy arguments for his assertion that the Release should be set aside, including that public policy disfavors releases procured by fraudulent conduct, there was a disparity in bargaining

power, and there was no meeting of the minds between the parties. Third-Party Def.'s Obj. 21–28. Again, all of Hutson's allegations of fraud relate to the original transaction and not the procurement of the Release. Further, as stated above, Hutson was represented by counsel in the state court action. The Settlement Agreement and Release were reviewed by an impartial judge and incorporated into his order. There is absolutely no indication that Hutson held an unfair bargaining position. Further, although Hutson continues to argue that he did not have sufficient knowledge to form a binding contract, all of the evidence on the record points to the contrary. Hutson made the same allegations of third-party plaintiffs' fraudulent misrepresentations in the state court action that were thereafter released by the Settlement Agreement. *See* Third-Party Pls.' Mot. Ex. 8 at 2. Therefore, Hutson's public policy arguments also fail.

Thus, the court grants third-party plaintiffs' motion for summary judgment as to Hutson's claims for breach of contract, breach of contract accompanied by fraud, fraud and fraud in the inducement, negligent misrepresentation, constructive fraud, breach of the covenant of good faith and fair dealing, and negligence, recklessness, willfulness, and wantonness.⁴

B. Third-Party Defendant's Motion for Summary Judgment

Hutson seeks summary judgment as to third-party plaintiffs' equitable indemnity claim. ECF No. 228. The magistrate judge recommends that the court deny Hutson's motion for summary judgment because the third-party plaintiffs' alleged failure to record the membership agreements did not cause the damage of which plaintiffs complain. R&R 30–35. Hutson objects to the magistrate judge's recommendation, arguing that the magistrate judge defines plaintiffs' damages too narrowly.⁵ Third-Party Def.'s Obj. 7.

"The law of equitable indemnification allows recovery of expenses when the act of the wrongdoer involves the innocent defendant in litigation or places him in such relation with others as makes it necessary to incur expenses to protect his interest." *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 518 S.E.2d 301, 305 (S.C. Ct. App. 1999). Third-party plaintiffs must prove the following three things to recover against Hutson for equitable indemnification: (1) Hutson was liable for

causing plaintiffs' damages; (2) third-party plaintiffs were exonerated from any liability for those damages; and (3) third-party plaintiffs suffered damages as a result of the plaintiffs' claims against it which were eventually proven to be Hutson's fault. *Id.* at 307.

Hutson argues that third-party plaintiffs' "failure to record the membership agreements and the alleged lease between TLC and BWR is negligence *per se* which is fault and, as a matter of law, TLC cannot prevail on its claim for equitable indemnity." Third-Party Def.'s Obj. 6. Hutson argues that the plaintiffs' damages all arise out of third-party plaintiffs' failure to record the membership agreements. However, not all of plaintiffs' alleged damages relate to third-party plaintiffs' failure to record the membership agreements. Most notably, plaintiffs allege that the public was allowed to access BWR in violation of the membership agreements. There is evidence on the record the BWR was opened to the public prior to Hutson's involvement. *See* Youmans Dep. 14:11-15:11, ECF No. 91, Ex. 9. On the other hand, there is also evidence that Hutson opened the resort to the public. *See* Mot. to Certify Class, Ex. 23 Hutson letter to members; *see also* Hutson Dep. 320:18-32:25, ECF No. 126 ("QUESTION: And about six months later, sometime in 2012, because of the financial condition that - that you inherited this - this club in, you opened it up to the general public as an at-large; isn't that right? ANSWER: We always took the members. But we would take every person that we could coming in from the public. We didn't have no [sic] choice.").

*9 Third-party plaintiffs cannot recover for equitable indemnity if they had any fault in causing plaintiffs' damages. *See Walterboro Cmty. Hosp. v. Meacher*, 709 S.E.2d 71, 74 (S.C. Ct. App. 2011) ("The most important requirement for...equitable indemnity is that the party seeking to be indemnified is adjudged without fault and the indemnifying party is the one at fault." (citation

omitted)); *Vermeer*, 518 S.E.2d at 307 ("[T]here can be no [equitable] indemnity among mere joint tortfeasors."). The court cannot say as a matter of law who is at fault, and there is evidence in the record—when viewed in the light most favorable to the third-party plaintiffs as the nonmoving parties—from which a jury could determine that Hutson caused the plaintiffs' damages. There is a genuine issue of material fact as to who opened BWR to the public, thereby causing plaintiffs' alleged damages. The court agrees with the magistrate judge that this dispute cannot be resolved at the summary judgment stage. Because there is conflicting evidence of who is at fault in causing plaintiffs' damage, Hutson's motion for summary judgment is denied. *See Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC*, 776 S.E.2d 426, 432 (S.C. Ct. App. 2015) ("[W]e find the evidence is conflicting, and viewing the evidence in the light most favorable to [the nonmoving party], the record contains evidence a factfinder could reasonably find supports the conclusion [the nonmoving party] was not at fault. Because of this conflicting evidence, the equitable indemnity cause of action must be remanded for a trial.").

IV. CONCLUSION

For the foregoing reasons, the court **ADOPTS** the R&R, **DENIES** third-party plaintiffs' motion for sanctions, **GRANTS** third-party plaintiffs' motion for summary judgment, and **DENIES** third-party defendant's motion for summary judgment.

AND IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2016 WL 2935891

Footnotes

- 1 Hutson did not object to the magistrate judge's recommendation that the court grant third-party plaintiffs' motion as it pertains to the defamation claim. Further, third-party plaintiffs did not file objections. After reviewing the record *de novo*, the court adopts the R&R as it pertains to third-party plaintiffs' motion for sanctions and motion for summary judgment as to Hutson's defamation claim. Accordingly, the court denies the motion for sanctions and dismisses Hutson's defamation claim.
- 2 Section 23 of the Settlement Agreement provides that in the event of Hutson's default, as of the date of the termination of the lease-purchase agreement, "Hutson shall be deemed to have released, forever discharged, and promised never to sue" third-party plaintiffs. Third-Party Pls.' Mot. Ex. 6, at 7. Judge James's order provided that, effective upon the

filing of the Affidavit of Default on December 11, 2013, third-party plaintiffs remained entitled to the relief set forth in the Settlement Agreement. See Judge James's Order, Third-Party Pls.' Mot. Ex. 8, at 9; see also Consent Order, Ex. 7, at 2-3. The order also states that Hutson is deemed to have granted the Release as set forth in the Settlement Agreement. Id. at 10. Therefore, the court uses the date of the filing of the Affidavit of Default as the date of termination to trigger the Release provision.

- 3 The R&R extensively outlines Hutson's allegations as set forth in his many filings with this court. See R&R 22-25. The R&R also provides the lengthy basis of Hutson's knowledge of the underlying allegations of fraud prior to signing the Release, as set forth in his own filings and representations made to the court during various hearings. Id. The court has reviewed the magistrate judge's representations of the allegations and Hutson's respective knowledge thereof and finds no error. Because the R&R provides a comprehensive outline of Hutson's allegations and his knowledge of the alleged fraud, the court does not find it necessary to regurgitate that information in this order and will refer the parties to the R&R for further discussion thereof.
- 4 The magistrate judge did not find that the Settlement Agreement and Release applied to Hutson's defamation claim because his allegations of defamation occurred after December 11, 2013. R&R 27. However, the R&R recommends that the court grant third-party plaintiffs' motion for summary judgment as to Hutson's defamation claim because "the undisputed evidence reveals that the statements of which Hutson complains were, in fact, true...." R&R 30. In his objections, Hutson states that he "would not object to a dismissal without prejudice on the defamation claim as he will pursue it in state court." Third-Party Def.'s Obj. 30. After reviewing the R&R de novo, the court agrees with the magistrate judge that third-party plaintiffs are entitled to summary judgment as to Hutson's defamation claim because the alleged defamatory statements are true. Therefore, the court also grants third-party plaintiffs' motion for summary judgment as to Hutson's defamation claim.
- 5 Hutson has an attorney who represents him only on the equitable indemnification claim. His attorney submitted objections on his behalf that relate only to the magistrate judge's recommendation as to the equitable indemnity claim. However, Hutson's objections to the magistrate judge's other recommendations were filed pro se.

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EXHIBIT F

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS
Civil Action No. 2015-CP-14-0615

TLC Holdings, LLC, Richard Clark, and
Jimmy S. Lovell,

Plaintiffs,

vs.

M. B. Hutson a/k/a M. B. Hudson,

Defendant.

**ORDER GRANTING
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AS TO
DEFENDANT'S COUNTERCLAIMS**

BEULAH
CLERK OF COURT
CLARENDON COUNTY, SC
2019 MAR 2 2 59

This matter is before the Court upon the motion of Plaintiffs TLC Holdings, LLC, Richard Clark, and Jimmy S. Lovell for summary judgment as to Defendant M. B. Hutson a/k/a M. B. Hudson's counterclaims. For the reasons set forth below, the Court grants Plaintiffs' motion.

BACKGROUND

This case arises from events related to the Big Water Resort campground ("Big Water"), which is located on the shores of Lake Marion in Clarendon County, South Carolina. Big Water provides campsites, cabins, pools, clubhouse, beach access, boat launch/storage, etc. Big Water began operation in 2003 and memberships were sold from 2003 until sales activities ended in 2010.

Prior to December 31, 2010, the three members of Big Water Resort, LLC,¹ were Richard Clark, Steve Lovell, and James Thigpen. Thigpen served as managing member until June 2008, at which time Steve Lovell became the managing member. In December 2010, Plaintiffs Clark and Lovell, along with Thigpen, sold their membership interests in Big Water Resort, LLC to

¹ Big Water Resort, LLC was the entity that operated the campground.

Defendant M. B. Hutson a/k/a M. B. Hudson, making Hutson the sole member of that LLC. The sales price was \$500,000, of which \$499,990 was payable under a promissory note ("Note") executed by Hutson in favor of Clark, Lovell, and Thigpen. (Ex. A to Plaintiffs' Memorandum in Support of their Motion for Summary Judgment.) At the same time, TLC Holdings, LLC, Clark, Lovell, and Thigpen entered into a lease-purchase agreement ("Lease-Purchase Agreement") with Hutson, under which TLC Holdings, Clark, Lovell, and Thigpen agreed to sell certain property to Hutson. (Ex. B to Plaintiffs' Memorandum.) This property included the land on which the Big Water Resort campground was located. Hutson also executed a pledge agreement in favor of Clark, Lovell, and Thigpen as security for the transaction. (Ex. C to Plaintiffs' Memorandum, Pledge Agreement.) Hutson ultimately defaulted on both the Note and the Lease-Purchase Agreement.

In December 2011, TLC Holdings, LLC instituted an action in Clarendon County Court of Common Pleas against Hutson for breach of contract, seeking damages and ejectment. (Ex. D to Plaintiffs' Memorandum, State Court Summons and Complaint.) Hutson answered and asserted several counterclaims against TLC Holdings and also filed a third-party complaint against Clark, Lovell, and Thigpen. (Ex. E to Plaintiffs' Memorandum, Hutson Answer and Third-Party Complaint.) On March 30, 2012, the parties to the Lease-Purchase Agreement (TLC Holdings, LLC, Clark, Lovell, Thigpen, and Hutson) entered into a Settlement Agreement. (Ex. F to Plaintiffs' Memorandum, Settlement Agreement.) The terms of the Settlement Agreement imposed many duties on Hutson, including the duty to make certain improvements to the campground property and the duty to make certain payments to Plaintiff TLC Holdings, LLC. The Settlement Agreement provided, in part, that a breach by Hutson would terminate the Lease-Purchase Agreement, would require Hutson to vacate the property, and would operate as a

release by Hutson of any and all claims he had against Plaintiffs, whether or not alleged in that lawsuit. *Id.* Hutson was represented by counsel in connection with the negotiation of the settlement agreement. The Settlement Agreement was approved by, and incorporated into, a consent order signed by the Honorable George C. James, Jr. in April 2012 (Ex. G to Plaintiffs' Memorandum, Consent Order).²

By December 31, 2012, Hutson had breached the Settlement Agreement in numerous respects. (Ex. H to Plaintiffs' Memorandum, Judge James' Order, p. 4.) Counsel for Clark, Lovell, and TLC Holdings notified Hutson in February 2013 that he was in default of the Lease-Purchase Agreement and Settlement Agreement. (Ex. I to Plaintiffs' Memorandum, Feb. 2013 Default Letter.) Hutson did not cure the defaults. (Ex. H to Plaintiffs' Memorandum, p. 5.)

TLC Holdings, LLC sent Hutson another default letter in December 2013, notifying him that he had failed to cure the defaults outlined in the February 2013 default letter and that they would proceed with filing an affidavit of default. (Ex. J to Plaintiffs' Memorandum, Dec. 2013 Default Letter.) TLC Holdings subsequently filed the affidavit of default, which was signed by Clark. (Ex. K to Plaintiffs' Memorandum, Affidavit of Default.) In response, Hutson filed a motion in Clarendon County Court of Common Pleas to set aside the affidavit of default and a motion for a temporary restraining order against TLC Holdings, LLC. (Ex. L to Plaintiffs' Memorandum, Motion to Set Aside Affidavit; Ex. M to Plaintiffs' Memorandum, Motion for TRO.) The court granted the temporary restraining order, which prevented TLC Holdings from pursuing further proceedings arising from its issuance of an affidavit of default.

² Because Clark, Lovell, and Thigpen were not made parties to that action due to Hutson's failure to serve them in that action, the Consent Order was between only TLC Holdings, LLC and Hutson. (Ex. G to Plaintiffs' Memorandum, p. 2.) Clark, Lovell, and Thigpen were parties to the Settlement Agreement, however.

A hearing on these motions was held on January 8, 2014 before Judge James. During or immediately prior to this hearing, which Hutson did not attend, Hutson filed a Chapter 11 bankruptcy petition, which automatically stayed the state court proceedings. (Ex. H to Plaintiffs' Memorandum, p. 6.) In February 2014, the Bankruptcy Court granted relief to TLC Holdings, LLC from the automatic stay so that Judge James could determine whether Hutson had any interest in the property that is the subject of the Lease-Purchase Agreement, as of the date of filing the bankruptcy petition. (Ex. H to Plaintiffs' Memorandum, p. 6.)

After a hearing on March 6, 2014, regarding these issues, Judge James issued an order on March 20, 2014, in which he declined to set aside the affidavit of default or issue a preliminary injunction and ruled that the March 2012 Settlement Agreement and April 2012 Consent Order should be enforced. (Ex. H to Plaintiffs' Memorandum, pp. 8-9.) Specifically, he ordered that the Lease-Purchase Agreement was terminated and that Hutson was required to vacate the property. (Ex. H to Plaintiffs' Memorandum, pp. 9-10.) Hutson vacated the property in late March 2014.

In the midst of TLC Holdings' efforts to evict Hutson from the property, he made numerous statements about Plaintiffs, which statements Plaintiffs allege are defamatory, including mailing a postcard to hundreds of current and former campground members asserting that they, along with him, were victims of a scam perpetrated by Plaintiffs. These allegedly defamatory statements led to the initiation of the instant case.

Following Hutson's allegedly defamatory statements, a group of campground members filed a putative class action in federal court against TLC Holdings, Richard Clark, Jimmy Lovell, and other parties,³ alleging a variety of claims.⁴ Those defendants then filed a third-party

³ William Reed, et al. v. Big Water Resort, LLC, et al. (D.S.C. 2:14-cv-01583).

complaint against Hutson, alleging a claim for equitable indemnity. In response, Hutson asserted a variety of counterclaims, including breach of contract, fraud, misrepresentation, negligence, and defamation. See Ex. 1, Hutson Answer & Counterclaims, *Reed Case*. TLC, Clark, Lovell, and the other third-party plaintiffs moved for summary judgment as to Hutson's counterclaims on the basis that they were barred by the doctrine of *res judicata*. Magistrate Judge Mary Gordon Baker agreed, finding that Hutson had released his claims against the third-party plaintiffs and that Hutson's claims were precluded by Judge James' Order. (Ex. N to Plaintiffs' Memorandum, Judge Baker's Report and Recommendation.) District Judge David C. Norton then issued an Order adopting Judge Baker's R&R and granting third-party plaintiffs' motion. (Ex. O to Plaintiffs' Memorandum, Judge Norton's Order.)

Returning focus to the instant case, Hutson, acting pro se, asserted counterclaims against Plaintiffs. These counterclaims consist of the following:

- Fraud / Negligent Misrepresentation
- Defamation / Libel Per Se
- Breach of Contract / Breach of Contract Accompanied by a Fraudulent Act
- Violation of the South Carolina Unfair Trade Practices Act
- Amalgamation / Alter Ego / Piercing the Corporate Veil

Plaintiffs then filed the motion at hand, asking this Court to grant their motion for summary judgment on these claims.

LEGAL STANDARD

A trial court may properly grant summary judgment when "the pleadings, depositions,

⁴ TLC Holdings, Clark, Lovell, and the other defendants in that matter ultimately defeated the plaintiffs' attempts to certify a class and also succeeded in getting certain causes of action dismissed. The parties then reached a settlement agreement, which was approved by the district court.

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), SCRCP. In determining whether any triable issues of fact exist, the Court must view the evidence and all reasonable inferences that may 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).

Once the party moving for summary judgment meets its initial burden of showing a lack of genuine issue of material fact, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Bravis v. Dunbar*, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994). Rather, the nonmoving party must set forth or point to specific facts showing that there is a genuine issue for trial. *Id.*

DISCUSSION

The doctrine of *res judicata* "bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *S.C. Pub. Interest Found. v. Greenville County*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2012) (citation and internal quotation marks omitted). "Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by a court of competent jurisdiction." *Catawba Indian Nation v. South Carolina*, 407 S.C. 526, 538, 756 S.E.2d 900, 907 (2014). "Under the doctrine of *res judicata*, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (citation and internal quotation marks omitted).

As stated above, in December 2011, Plaintiff TLC Holdings, LLC instituted an action against Hutson in this Court for breach of the Lease-Purchase Agreement and ejectment. Hutson counterclaimed and filed a third-party complaint against Plaintiffs Clark and Lovell. Hutson alleged that Plaintiffs "knew that defects existed in regard to the premises," including that a moratorium was imposed on the property for sewer installation and that there were large utility bills outstanding. Ex. E to Plaintiffs' Memorandum, Hutson Answer and Third-Party Complaint, pp. 7, 13, 14.) Defendant Hutson further alleged that Plaintiffs "made misrepresentations . . . or otherwise concealed relevant and material statements of facts regarding the condition, usefulness, and ability to develop the property." *Id.* at 12. The parties in that case ultimately entered into the Settlement Agreement, discussed *supra*, which includes the following provisions:

This Settlement Agreement shall be incorporated into a Consent Order (the "Consent Order") entered in the above-referenced case (the "Litigation"). Although Richard U. Clark, Jimmy S. Lovell and James C. Thigpen are parties to this Settlement Agreement by virtue of being parties to the [Lease-Purchase] Agreement, and are named as Third Party Defendants in the Litigation, they have not been served with pleadings in the Litigation and shall not be deemed to have appeared in the Litigation by their execution of this Settlement Agreement. This Settlement Agreement shall be binding upon all of the undersigned parties even though Richard U. Clark, Jimmy S. Lovell and James C. Thigpen have not appeared in the Litigation and are not parties to the Consent Order.

....

Pursuant to the Consent Order, in the event that Hudson fails to comply with the terms of this Settlement Agreement, unless such failure is a direct and proximate result of TLC's failure to perform an action expressly required of it in this Settlement Agreement, time being of the essence, then the Plaintiff is entitled to the following immediate relief, without further order of the court or notice to Defendant or his attorney: "(a) termination of the [Lease-Purchase] Agreement, (b) cancelation of the *lis pendens* filed by Hudson in this action, (c) immediate vacation of the Property by Hudson except for his personal residence, which shall be vacated within 15 days, enforceable by the Clarendon County sheriff; and (d) the provisions of Section 23 shall be effective.

....

[Section 23.] As a material consideration of this Settlement Agreement, in the event of the termination of the [Lease-Purchase Agreement] pursuant to Section 4 above as a result of Hudson breach hereof, then automatically and without further action of the parties, as of the date of such termination (the "Termination Date"), Hudson shall be deemed to have released, forever discharged and promised never to sue TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, and their respective agents, attorneys, insurance companies, parent companies, subsidiaries, affiliates, predecessors, successors, or assigns (together, the "TLC Parties"), from any and all injuries, personal or property, known or unknown, causes of action, demands, warranty claims, damages, suits at law or in equity, of whatsoever kind and nature, or because of any matter or thing done, omitted or suffered to be done, by the TLC Parties, prior to and including the Termination Date, on account of all injuries and damages, including attorneys' fees and litigation expenses, arising from the [Lease-Purchase Agreement] or the relationship between Hudson, on the one hand, and TLC, Richard U. Clark, Jimmy S. Lovell, and James C. Thigpen, on the other hand, and any causes of action, known or unknown, relating to the [Lease-Purchase Agreement], including any and all claims alleged, or which could have been alleged, in the Litigation.

(Ex. F to Plaintiffs' Memorandum, Settlement Agreement) (emphasis added). Judge James issued his consent order in April 2012 approving the Settlement Agreement and incorporating it by reference. (Ex. G to Plaintiffs' Memorandum, Consent Order.) Subsequently, in early 2014, Judge James found that Hudson was in breach of the Settlement Agreement. Judge James issued his second order in March 2014, which found as follows:

Pursuant to the express terms of the Consent Order, effective upon the filing of the Affidavit of Default in this action on December 11, 2013, Plaintiff was entitled to have the following immediate relief, without further order of the Court or notice to Defendant or his counsel of record: (a) termination of the [Lease-Purchase Agreement], (b) cancellation of the Lis Pendens [filed by Defendant in this case], (c) immediate vacation of the Property by Defendant except for his personal residence thereon, which shall be vacated with fifteen (15) days; and (d) the provisions of Section 23 shall be effective. Consent Order at ¶2.

Therefore, the Lease Purchase Agreement was terminated, according to its terms as modified by the Settlement Agreement and Consent Order, as of December 11, 2013 (the "Termination Date"), and Hudson was required to vacate the property immediately, except only for his personal residence thereon, which he was required to vacate within fifteen (15) days (i.e., December 26, 2013).

....

[I]t is hereby:

....

FURTHER ORDERED, that the Settlement Agreement and Consent Order are to be enforced according to their terms.

....

FURTHER ORDERED, that pursuant to the Consent Order, Defendant is deemed to have granted the TLC Release to the TLC parties, as set forth more fully in Section 23 of the Settlement Agreement.

(Ex. H to Plaintiffs' Memorandum, Judge James' March 2014 Order.)

The terms of the Settlement Agreement are clear and unambiguous: Hutson has released Plaintiffs from liability for any actions, whether known or unknown, that they took (or failed to take) prior to December 11, 2013. This fact was confirmed in the two orders of Judge James.

Furthermore, in the federal class action case, Hutson filed counterclaims against Plaintiffs, in which he alleged the same wrongs as in the state court case. See Ex. 1. Upon the motion of Plaintiffs, Magistrate Judge Baker issued a Report and Recommendation in which she recommended that summary judgment be granted as to Hutson's counterclaims, as he had previously released all of his claims against Plaintiffs by way of the Settlement Agreement. (Ex. N to Plaintiffs' Memorandum, Judge Baker's Report and Recommendation.) District Judge Norton then issued an Order adopting Judge Baker's R&R and finding that the Settlement Agreement was binding on all parties, that Hutson had previously released his claims against Plaintiffs, and that Judge James' order was a final judgment on the merits. (Ex. O to Plaintiffs' Memorandum, Judge Norton's Order.)

Judge James' order is plainly a final judgment on the merits of the prior state court case. In the case at bar, Hutson's counterclaims against Plaintiffs, and all of the allegations in his

pleading, relate to conduct by Plaintiffs that allegedly occurred in or around December 2010 and were all part of the same transaction or occurrence that was litigated in the prior state court case.⁵ His claims here, in other words, either were or could have been brought by Hutson in the prior state court case, and they fall within the broad, express language in the Settlement Agreement. The prior state court case involved the same parties currently before the Court and the Settlement Agreement was expressly binding on all parties. As Judge James, Judge Baker, and Judge Norton have found, Hutson has released Plaintiffs from any claims he had against them during this time period. The principles of *res judicata*—identity parties, identity of claims, and a final adjudication—are all present here.

Indeed, Hutson does not dispute that the Settlement Agreement, incorporated into Judge James' order, encompasses his claims in the instant case. Nor does Hutson dispute that the elements of *res judicata* are satisfied here. Rather, he asserts that the Settlement Agreement is unenforceable because of fraud. Hutson, however, has failed to demonstrate or even allege any fraud that would bar the application of the Settlement Agreement. A review of the allegations in Hutson's pleading shows that he never alleges that Plaintiffs perpetrated any sort of fraud, or otherwise committed wrongful conduct, in relation to the parties' execution of the Settlement

⁵ The sole exception is his counterclaim for defamation. In this claim, Hutson complains of a letter that TLC Holdings sent to the campground members on April 3, 2014, shortly after evicting Hutson from the campground. The letter discussed the facts that Hutson filed for bankruptcy and had failed to pay rents and taxes that he owed. Hutson, however, alleged this same claim in the federal court action. In recommending that summary judgment be granted on this claim in favor of Plaintiffs, Magistrate Judge Baker found in her R&R this claim fails because none of the statements in the letter were false. *See* Ex. N to Plaintiffs' Memorandum, pp. 27-30. Similarly, Judge Norton found that summary judgment was proper for this claim because the undisputed evidence shows that all the statements in the letter were true. *See* Ex. O to Plaintiffs' Memorandum, p. 17, footnote 4. Thus, in addition to summary judgment being proper on this claim because the statements were not defamatory, summary judgment is proper because Judge Norton's Order is a final order on this claim that precludes it from being raised in this action. Hutson neither moved for a reconsideration of Judge Norton's Order nor appealed it.

Agreement. Rather, the only fraud he pleads is fraud in connection with the parties' transactions related to the sale of the campground in December 2010. In other words, the fraud that Hutson here complains of is fraud related to the *original transaction*, not the *release*.

Any claim of fraud that Hutson had in connection with the December 2010 transactions is unquestionably barred. Defendant had the opportunity to litigate those claims in the prior state court litigation, and that case culminated in the March 2012 Settlement Agreement in which Hutson agreed to release all such claims. Hutson also agreed for the release to be incorporated into Judge James' consent order. He cannot now re-litigate those issues.

With regard to his counterclaims in the case at hand, Hutson contends that he needs time to perform additional discovery in this case, including the opportunity to depose Plaintiffs on matters related to his counterclaims. However, in light of the clear, express, and broad terms of the Settlement Agreement and the orders of Judge James, Hutson's counterclaims here are barred. No additional discovery, including depositions of Plaintiffs, would change that fact. Hutson was represented by counsel in the prior state court case and had a full opportunity to conduct discovery in that matter; that same counsel represented him in connection with the execution of the Settlement Agreement; and he further had the opportunity to conduct full discovery, and in fact took the depositions of Plaintiffs with regard to these very same issues, in the federal court case.⁶ Throughout that entire process, he has identified no allegedly fraudulent conduct by Plaintiffs except that which he has alleged in connection with the December 2010 transactions, which claims he voluntarily released in the Settlement Agreement. Hutson has identified no instance of fraud in connection with the execution of the Settlement Agreement,

⁶ In that case, Hutson took the deposition of TLC Holdings, LLC on May 20, 2015; the deposition of Richard Clark on September 26, 2014; and the deposition of Jimmy S. Lovell on September 25, 2014. See Ex. 2. He also participated in written discovery in that case and received service of all documents Plaintiffs produced in that matter.

either in his pleading or in his arguments in this Court; indeed, he has not even alleged such fraud.⁷ At the hearing on Plaintiffs' summary judgment motion in this Court on January 5, 2017, when asked by the Court what fraud he was complaining of, Hutson complained only about fraud in connection with his purchase of the campground. Additional discovery by Hutson on his counterclaims would be fruitless, and he has failed to show why the binding, preclusive effect of *res judicata* principles does not bar his claims here.

In sum, the elements of *res judicata* are satisfied, and they operate to bar Defendant Hutson's counterclaims. Hutson's counterclaims either were or could have been raised in the prior state court litigation, and he released all such claims by virtue of the Settlement Agreement. The Court finds that summary judgment is proper.

CONCLUSION

For the reasons discussed above, this Court GRANTS Plaintiffs' motion for summary judgment as to Defendant Hutson's counterclaims.

AND IT IS SO ORDERED.

By:


The Honorable R. Ferrell Cothran, Jr.
Presiding Judge, Third Judicial Circuit

March 2, 2017

Monrovia, SC.

⁷ Even if Hutson had alleged such fraud, summary judgment would still be proper, as he has produced no evidence of such. See *House v. Aiken Cnty. Nat'l Bank*, 956 F. Supp. 1284, 1291-92 (D.S.C. 1996) (granting motion to dismiss (treated as motion for summary judgment) where "[t]he only issue before [the] Court is whether the release signed as a result of that previous settlement is invalid because of fraud, misrepresentation or like circumstances. Plaintiffs have failed to provide any evidence, other than their own conclusory allegations, that they were induced to enter into this release because of fraud or misrepresentation."); see also *Hopkins v. Fidelity Ins. Co.*, 240 S.C. 230, 125 S.E.2d 468 (1962).

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

William Reed, Donna Reed, Bonnie)
Youmans, Jane Yates, Phillip Caulder, all)
individually and for the benefit and on)
behalf of all others similarly situated,)

Plaintiffs,)

vs.)

Big Water Resort, LLC, TLC Holdings,)
LLC, Richard Clark, James Thigpen, Jimmy)
"Steve" Lovell, and Ocoee, LLC,)

Defendants.)

ORDER

TLC Holdings, LLC, Richard Clark, James)
Thigpen, Jimmy "Steve" Lovell, and Ocoee,)
LLC,)

Third-Party Plaintiffs,)

vs.)

M. B. Hutson a/k/a M. B. Hudson,)

Third-Party Defendant.)

This matter is before the court on the motion for sanctions filed by third-party plaintiffs TLC Holdings, LLC, Richard Clark, James Thigpen, Jimmy "Steve" Lovell, and Ocoee, LLC ("third-party plaintiffs"), ECF No. 302. For the reasons set forth below, the court grants the motion for sanctions.

BACKGROUND

Third-party plaintiffs previously moved for sanctions against third-party defendant Hutson, ECF No. 179, and also moved for summary judgment on Hutson's

counterclaims, ECF No. 183. In the previous sanctions motion, third-party plaintiffs pointed to a course of conduct by Hutson which they argued was tantamount to harassment and abuse of the judicial system. The conduct cited by third-party plaintiffs included Hutson's repeated filing of motions lacking factual and legal support, his accusations of criminal conduct and threats to contact law enforcement, and his accusations of unethical conduct by third-party plaintiffs' counsel. See ECF No. 179-1.

Magistrate Judge Mary Gordon Baker issued a report and recommendation acknowledging several improper actions by Hutson, including his continued filing of trial-related motions despite being told that such motions were premature and his refiling of a motion previously denied by Magistrate Judge Bristow Marchant. Magistrate Judge Baker recommended that third-party plaintiffs' previous motion be denied in light of the facts that Hutson was pro se, that he had not been previously warned that his conduct may merit sanctions, that he withdrew some of his offending filings, and that he would no longer be proceeding pro se if this court were to adopt her recommendations to dismiss his pro se counterclaims. ECF No. 270 at 13-14. In an order dated May 20, 2016, this court adopted Magistrate Judge Baker's report and recommendation, declining to impose sanctions on Hutson and granting summary judgment in favor of the third-party plaintiffs on Hutson's counterclaims. ECF No. 280 at 8, n.1.

On April 21, 2017, Hutson filed a motion to reconsider this court's order dismissing his counterclaims. ECF No. 298. Third-party plaintiffs filed a response to the motion, asserting that it failed to identify any new evidence, despite Hutson's claims to the contrary; failed to demonstrate any of the requirements for amending a judgment under FRCP 59(e), and was untimely under that rule; failed to satisfy the requirements of

FRCP 60; and improperly asked the court to review a state court judgment in a separate proceeding. See ECF No. 300. This court denied Hutson's motion. ECF No. 306.

After Hutson filed his motion to reconsider, third-party plaintiffs then filed the instant motion for sanctions. They argue that Hutson's bad faith intent is evidenced by his motion to reconsider, which lacks legal support, falsely purports to offer new evidence, and repeats the same allegations he has made in numerous filings throughout the course of this litigation. Third-party plaintiffs further assert that no inference can be drawn from Hutson's conduct except that he desires to harass them and increase their legal expense. They incorporate by reference their prior motion for sanctions and supporting memorandum, which sets forth the history of Hutson's conduct. Third-party plaintiffs request both monetary and non-monetary sanctions, the latter in the form of an order barring Hutson from submitting further pro se filings to the court.

STANDARD

The court has the inherent power to impose sanctions on litigants when merited by their conduct:

Rule 11 has not robbed the district courts of their inherent power to impose sanctions for abuse of the judicial system. In Chambers v. NASCO, Inc., 501 U.S. 32, 49 111 S.Ct. 2123, 115 L.Ed 2d 27 (1991), the Court was quite clear that "the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." The Court stated that there was "no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanction for . . . bad-faith conduct"

Drake v. Ham, 2007 U.S. Dist. LEXIS 58060, at *4 (D.S.C. 2007) (quoting Methode Elecs. v. Adam Techs., 371 F.3d 923, 927 (7th Cir. 2004)). "Due to the very nature of the court as an institution, it must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates. This power is organic,

without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers.” United States v. Shaffer Equip. Co., 11 F.3d 450, 461 (4th Cir. 1993). “Sanctions authorized under the court’s inherent powers include the striking of frivolous pleadings or defenses, disciplining lawyers, punishing for contempt, assessment of attorney’s fees, and outright dismissal of a lawsuit,” Drake, 2007 U.S. Dist. LEXIS 58060 at *4-5. Sanctions imposed under the court’s inherent power serve the purpose of penalizing and deterring violations of the judicial process. In re Howe, 800 F.2d 1251, 1252 (4th Cir. 1986). The court’s inherent power to sanction includes penalties up to and including outright dismissal of the offending party’s claims. Chambers v. Nasco, 501 U.S. 32, 44–45 (1991). “[A]n assessment of attorney’s fees is undoubtedly within a court’s inherent power.” Id. at 45. “A court may assess attorney’s fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” Id. at 45–46. Unlike the statutory and rule-based sanctioning schemes, which reach only certain conduct, “the inherent power extends to a full range of litigation abuses.” Id. at 46.

Further, pro se parties are not exempt from the Rules of Civil Procedure or from the requirements of respect and decorum before the court. District courts must “not allow liberal pleading rules and pro se practice to be a vehicle for abusive conduct.” Spears v. Warden FCI Williamsburg, 2016 WL 2935894 (D.S.C. Apr. 20, 2016), at *1.

DISCUSSION

Hutson’s status as a pro se party in this matter ended when this court granted summary judgment on his counterclaims in favor of third-party plaintiffs. Since that time, his capacity as a party to this case has been limited to his status as a third-party

defendant defending the equity indemnity claim. Hutson, however, has continued to make pro se filings in this court.

In his motion to reconsider, Hutson claimed to present new evidence but instead repeated the same arguments he made in his prior filings and failed to identify any new documents or evidence, despite representing to the court that he had the latter.¹ He also asked the court for relief that it lacks jurisdiction to grant.² He failed to provide evidentiary support for the factual allegations in his motion. No inference can be drawn that the motion was filed in good faith. 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.

Hutson's response, ECF No. 310, to the pending sanctions motion again makes reference to the alleged fraud by third-party plaintiffs in obtaining the settlement agreement and the order signed by Judge James in the prior state court litigation. Hutson has made these allegations throughout the course of this litigation. He has never, however, specified what the fraud is or submitted evidence of it.

Third-party plaintiffs Clark, Lovell, and TLC have a pending action for defamation against Hutson in the Clarendon County Court of Common Pleas, which they filed in December 2015. While his counterclaims were still pending in this court, Hutson

¹ Specifically, Hutson cites the Big Water Resort, LLC meeting minutes of January 16, 2009 as the Rule 60(b) evidence which entitles him to relief from the Order. He asserts that he did not see or obtain this document until 2015. However, he was privy to this document at Steve Lovell's deposition in September 2014, at the latest. He has filed it with the court on at least ten separate occasions. (*See, e.g.*, ECF Nos. 191, 192, 200, 202-1, 216, 228, 233, 237, 251, and 252.) Hutson also relied on this document in opposing third-party plaintiffs' motion for summary judgment.

² Hutson asked this court to review a final order in a state court proceeding.

filed counterclaims in the defamation case that were identical to those he filed in this matter. ECF No. 302-1, at 5–6. After this court ruled that Hutson’s counterclaims were barred by res judicata, ECF No. 280, Hutson still refused to dismiss them in the Clarendon County action. Third-party plaintiffs in the state court matter then moved for summary judgment, which was granted in March of this year, in light of the fact that Hutson had previously released those claims in a settlement agreement and that two previous judges had ruled that the claims were barred. ECF No. 302-1, at 5–6.

The reasons that Magistrate Judge Baker gave for recommending the denial of the previous sanctions motion—the facts that Hutson now has counsel and has been warned of his conduct—have failed to alter his behavior.³ Hutson’s recent filing with the court makes repeated reference to his *pro se* status. Hutson has established a pattern of making misrepresentations to the court, of making unsupported allegations of unethical and criminal conduct by 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. He lacks any evidence to support his counterclaims and other allegations against third-party plaintiffs. Indeed, Hutson routinely fails to provide factual or legal support for anything he files with the court. Accordingly, the court finds that sanctions are appropriate under the court’s inherent power.

Third-party plaintiffs request monetary sanctions in the amount of \$14,908.50. Third-party plaintiffs’ counsel submitted an affidavit of their qualifications and

³ Recently, in the state court defamation matter, Hutson sent the liability insurance carrier an email after learning of the carrier’s offer of settlement to TLC Holdings, Clark, and Lovell. Hutson directed the carrier to withdraw the offer and threatened suit should the carrier settle the suit. ECF No. 312-1.

experience, along with a fee detail breakdown showing that this was the amount of legal fees they incurred in responding to Hutson's motion for reconsideration and in preparing their sanctions motion. ECF No. 302-2. They also submitted an affidavit from attorney L. Morgan Martin asserting that third-party plaintiffs' counsel are qualified, well-regarded attorneys and that their rates and fees were reasonable and customary for the nature of the work done. ECF No. 302-3. The court finds that monetary sanctions against Hutson in the amount of \$14,908.50 are appropriate. The court finds that the hourly rates of third-party plaintiffs' counsel and support staff are reasonable for the nature of the work done and the community in which it was done. The court further finds that the total hours expended by counsel are reasonable and expected in light of the circumstances and complexity of this case.

Third-Party Plaintiffs also ask the court to impose certain nonmonetary sanctions on Hutson. Specifically, they ask that Hutson be barred from submitting any more pro se filings with the court. The court declines to grant this non-monetary sanction.

CONCLUSION

For the reasons set forth above, the court **GRANTS** third-party plaintiffs' motion for sanctions. **IT IS FURTHER ORDERED** that third-party defendant Hutson make payment to third-party plaintiffs' counsel in the amount of Fourteen Thousand Nine Hundred Eight and 50/100 (\$14,908.50) within thirty days of the entry of this Order.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'D. Norton', is written over a horizontal line.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

October 4, 2017
Charleston, South Carolina

EXHIBIT H

From: H Hutson <hutson4444@gmail.com>

Sent: Tuesday, June 16, 2020 7:30 AM

To: Tim J. Newton <tnewton@murphygrantland.com>; J. R. Murphy <jrmurphy@murphygrantland.com>; Christian Stegmaier <cstegmaier@collinsandlacy.com>

Cc: Hmr226621@gmail.com

Subject: Notice

Good morning Respondent Tim Newton and J.R. Murph;

Putting you on notice that I plan to file for a emergency hearing Motion before the Appeals Court asking that I be allowed to cross examine all lawyers who are committing extrinsic fraud upon the Appeals Court and the Judges. In addition, I will ask that the Honorable Judge swear all lawyers in prior to the questioning.

How can I win this appeal while you lawyers conceal from the Courts for it prevents me from having my case fully heard. I am going to ask for a stay until we are allowed the emergency hearing. Had enough of lies and concealment. I will declare that you lawyers are misinforming the Court and Appeal Judges and should be removed from practicing law. I will remind the Appeals Court that Tim Newton had full opportunity and a legal responsibility to reveal the extrinsic fraud before the Judge residing over the jury trial while in Private meetings of which I was present but told not to speak and a few other things.

Respectfully,

MB Hutson

--

803-308-2714

EXHIBIT I

From: H Hutson <hutson4444@gmail.com>

Sent: Sunday, June 21, 2020 8:26 PM

To: Tim J. Newton <tnewton@murphygrantland.com>; J. R. Murphy <jrmurphy@murphygrantland.com>; Christian Stegmaier <cstegmaier@collinsandlacy.com>

Subject: Emergency Filing

Exhibits Attached to filing will be:

1. 402 Rule
2. Newton's Letter dated 8/23/2018
- 3.

From: H Hutson <hutson4444@gmail.com>
Sent: Sunday, June 21, 2020 8:31 PM
To: Tim J. Newton <tnewton@murphygrantland.com>; J. R. Murphy <jrmurphy@murphygrantland.com>; Christian Stegmaier <cstegmaier@collinsandlacy.com>
Subject: Fwd: Emergency Filing

CONTINUATION:

3. Hutson letter to Bill Lyles (10-23-18)
4. Paton's Complaint (Aug 8, 2016)
5. Mark Hardee Affidavit (8-8-2018)

----- Forwarded message -----

From: H Hutson <hutson4444@gmail.com>
Date: Sun, Jun 21, 2020 at 8:25 PM
Subject: Emergency Filing
To: Tim J. Newton <tnewton@murphygrantland.com>, J. R. Murphy <jrmurphy@murphygrantland.com>, Christian Penn Amer <cstegmaier@collinsandlacy.com>
[APP-PA et al. Emergency Motion.pdf \(188K\)](#)

Exhibits Attached to filing will be:

1. 402 Rule
2. Newton's Letter dated 8/23/2018
- 3.

From: H Hutson <hutson4444@gmail.com>

Sent: Monday, June 22, 2020 8:14 AM

To: Christian Stegmaier <cstegmaier@collinsandlacy.com>; Insurance Glenn Paul <gpaul@global-indemnity.com>

Cc: Hutson4444@gmail.com

Subject: Participating in extrinsic fraud

June 22, 2020

Good morning Christian, this saddens me having to seriously consider bringing a immediately separate action against you for participating with Tim Newton and JR Murphy in extrinsic fraud upon the Appeals Court and the lower Court. You are sticking with Murphy & Grantland including filing documents that play their defense against me and against what's right and truthful.

Do any attorneys exist who want hesitate to step over the line of what's right and legal? Penn America and Global were fully aware that making a business decision to not defend me in order to remove the extrinsic fraud could only cause one outcome. In addition, they had an obligation to come to me advising me of what they had decided to do and how I was going to be destroyed by their decision since I was the insured and through me and my business, the insurance companies got their monthly payments for coverage.

I plan to serve the insurance companies copies of the complaint as well as serving you. I find this to be a crying shame. I would hope that you would have done the right thing immediately. I simply need and want real Justice. You are cheating against me.

Respectfully,

MB Hutson

--
803-308-2714

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant.

v.

Penn America Insurance Company,
Global Indemnity Group, Inc.,
Timothy J. Newton, Esq. and
J. R. Murphy, Esq., John Doe #1 and
John Doe #2 APP-PA et al. Emergency Motion.doc

Respondents.

**APPELLATE'S EMERGENCY MOTION TO HAVE OPEN HEARING DUE TO
RESPONDENTS COMMITTING EXTRINSIC FRAUD ON THE SOUTH
CAROLINA COURT OF APPEALS AND ITS JUDGES**

The United States Court of Appeals for the Sixth Circuit has delineated five (5) elements of conduct that constitute extrinsic fraud upon the court:

1. "On the part of an officer of the court;"
2. "That is directed to the 'judicial machinery' itself;"
3. "That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth;"

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4. "That is a positive averment or is concealment when one is under a duty to disclose;" and
5. "That deceives the court."

--Demjanjuk v. Petrovsky, 10 F.3d 338, 348 (6th Cir. 1993)

Appellant makes this EMERGENCY MOTION due the fact that Respondents Tim Newton, J R Murphy and Christian Stegmaier, Esq. as attorney for the respondent insurance companies, are actively perpetrating extrinsic fraud against the Honorable Appeals Court and the Honorable Judges. Such extrinsic fraud and concealment disgraces and damages the Honorable Court system and is a direct attack to prevent justice for this Appellant. In addition, extrinsic fraud creates irreparable harm to both the Court and Honorable Judges including irreparable harm to the Appellant. This motion is time sensitive due to the fact that this fraud is active and prevents Appellant the opportunity from his case being heard and believed. These Respondents are licensed in the State of South Carolina and each took an oath (required by the South Carolina Appellate Court Rule 402 K). Appellant lists evidence below that shows Respondent's (including Christian Stegmaier, Esq.) are actively carrying out extrinsic fraud upon the Honorable Appellate Court, as they did formerly on the lower court with Judge Nettles, by actively plotting against this Appellant's cry to be heard in order to protect themselves from professional and financial repercussions for their breaking the professional oath and the SC Rules for Professional Conduct:

1. Respondents Tim Newton, Esq., J R Murphy, Esq. and Christian Stegmaier, Esq. for Penn America Insurance Company / Global Indemnity Group, Inc. *all* had copies of attorney Laura Paton's filing prepared on August

8, 2016, who was hired by Penn America and Global Indemnity Group to represent Appellant, in a Counter Complaint against TLC Holdings, LLC, in favor of Appellant which clearly outlined the depth of the underlying fraud and extrinsic fraud upon the courts. Respondents engaged and paid attorney Paton to zealously investigate, develop a defense for and represent this Appellant in SC State Court. Paton stated that she prepared the attached document based on her investigation and her review of all contracts, paperwork and legal records. Her attached document clearly shows in detail that TLC Holdings, LLC's attorneys committed the initial and underlying extrinsic fraud. Respondents Newton and Murphy filed a complaint to terminate Appellant's insurance in the middle of the Federal Court suit that reflects their blatant efforts to distance themselves from the underlying fraud and possible subsequent litigations. Laura Paton, Esq. (SC) and Frank Gordon, Esq. (NC) were both then hired by the insurance companies to represent this Appellant against TLC Holdings, LLC in SC state court. The insurance companies and all the attorneys then knew of the underlying Extrinsic Fraud. Yet, they allowed the extrinsic fraud to go undisclosed to the court systems. At that point, Respondents had an "insured" (this Appellant) being sued by attorneys who orchestrated and perpetrated the original Extrinsic Fraud upon the Court. Since this Appellant's attorneys and insurance companies (Respondents in this Appellate case) did not choose the professional and ethical action of disclosing the crime of Extrinsic Fraud by fellow attorneys, they consequently lost all the cases which were against this Appellant. This left Appellant with a \$3.5M judgment and

millions in losses. At that time, Appellant was unaware of the fraud that had been discovered by these Respondents. Through the original Extrinsic Fraud, TLC Holdings' attorneys had purposefully and without disclosure, trapped Appellant into becoming responsible for \$22M and other damages.

Respondent Tim Newton, Esq. openly admitted to Appellant that he, and the insurance companies which he represented (Respondents), had become fully aware of that underlying fraud through their investigations and studying the documents. Respondents, however, refused to expose the fraud and the extrinsic fraud carried out by TLC Holdings' attorneys in the courts which was not only illegal, but prevented the various judges from ruling properly and with justice because they were unaware of and never heard the undisclosed parties' voice, the original extrinsic fraud carried out by TLC Holdings, LLC and their attorneys. Laura Paton (hired by Penn America and Global Indemnity prepared and typed this attached response based on her professional and personal investigation. She then emailed it to Appellant to electronically execute the same for filing, which she filed.

2. All Respondents were aware that Tim Newton, Esq. (who represented Penn America and Global Indemnity at that time) wrote the attached sixteen (16) paragraph letter (herein attached) written by Newton on August 13, 2018, to Appellant. Respondent Newton fully understood what he was writing, which was to advise and equip Appellant to file a lawsuit against those entities which he (Newton) was about to negotiate a settlement with on behalf of the Insurance Companies. In that email, Respondent Newton even

sites case law that he had researched (see item16) regarding Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E, 2s 605 (2003), adding at the bottom of the 16 paragraph letter, *"If you need the documents supporting the above, let me know"*. The letter speaks for itself clearly outlining that Newton, who was counsel for Penn America and Global Indemnity, knew or should have known, of the extrinsic fraud of which such fraud is required to be disclosed and reported to the tribunal legal department by all attorneys.

"It hard to see why TLC and its lawyers should not have, in good faith, simply told you (and the court) that the Big Water Resort property was undevelopable because it was already obligated to double lifetime memberships as a private club. It appears that could easily have averted the entire fiasco. Since attorneys were involved, and it resulted in your inability to present your case in court, and possibly led to the sanctions order and judgment against you, there might possibly be extrinsic fraud on the court to support setting aside the Consent Order. See Chewning v. Ford Motor Co. 354 S.C. 72, 579 S. E. 2d 605 (2003). However, that is something you would have to follow up with on your own. I can't undertake that. Possibly Frank could file a motion if Penn-America approves it, but he and I both have agreed to put everything on hold until the mediation".

3. When Appellant informed Newton (who was then still representing the insurance companies) that he was going to expose the 16 point letter to Penn America (now also a Respondent), Newton threatened to sue Appellant. Newton also stated that if Appellant did show his 16 point letter to the Insurance Company or any other party, "Appellant would not be or could not be a Christian". In a later conversation, Newton stated that if Appellant did expose the letter *"It would be like throwing me under the bus."* Shortly after the letter was exposed to the Insurance Companies, Penn America and Global fired Respondents Newton and Murphy (Murphy & Grantland). Thus, Christian Stegmaier, Esq. of Collins and Lacy P.C. became counsel for Penn America / Global Indemnity. After now

having received information, documents and other real evidence, Stegmaier has admittedly had many discussions with Newton and Murphy, who willfully are violating and continuing to violate SCRCR Rules. Never has anyone ever written a letter to Appellant advising him that even though Appellant is the insured, Penn America and Global made the decision not to defend Appellant in order to remove the extrinsic fraud and consequently, Appellant would be irreparably harmed and destroyed due to a business decision to overlook the extrinsic fraud.

SCRCR Rule 4.1 Truthfulness In Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person;*
or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.*

Respondents were aware of Appellant's suffering and the impending doom and irreparable harm to Appellant should they choose not to expose the underlying Extrinsic Fraud when they discovered it, yet they chose NOT to defend insured, Appellant, as the attached case law clearly sets a precedent for them so to do. Respondents Newton, Murphy, Penn America and Global Indemnity simply elected not to defend *while fully understanding* that if Respondents did not defend Appellant, by exposing the Extrinsic Fraud enacted against him, it would doom Appellant. Respondents chose to protect the perpetrators, "fellow attorneys" and merely engage in "a fake show of representing this Appellant," i.e. they pretended to represent Appellant while ignoring their professional and moral responsibility to expose the underlying Extrinsic Fraud they discovered . By

choosing to conceal the crime, rather than expose it, these Respondents became equally guilty of the Extrinsic Fraud. Their engagement therein remains active to this day and upon this Honorable Appellate Court. Respondents had a moral and legal obligation to inform Appellant that Penn America, et. al., Appellant's insurance company(s), had simply *made a business decision not to defend* (to get this case off their books) Appellant although they were required to --by law--, nor did any of the Respondents advise Appellant that due to their joint decision not to defend Appellant, he would be ruined despite Appellant having had paid all premiums for full protection. See: Discovered and cited by Respondent Newton in his 16 point letter of August 13, 2018, received by Appellant via email (and attached). *Not one* of the Respondents had the courage to advise the Appellant that his doom was going to be directly and consequentially caused by the Insurance company(s) choosing not to defend/disclose the underlying Extrinsic Fraud. All Respondents understood that they could be hauled into court as a result of their supporting TLC's attorneys' Extrinsic Fraud. Nevertheless, they chose to take the risk and become part and parcel to the Extrinsic Fraud: *they were each, and thereby all, concealing critical, criminal information from the Courts* while fully understanding the fatal consequences to the insured, this Appellant. Respondents pretended that they were defending the Appellant. However, they knew full well they would never win. Their farce continues to this day and in this honorable Appellate court. The Respondents still refuse to disclose to the Appeals Court that they orchestrated a mission to hush all knowledge about the fraud initiated by their fellow attorneys and that they "professionally" concealed that truth as they appeared before

many Circuit, State, and now Appellate Judges. Respondents concealed the attorney plotted and executed plan against Appellant in the courts.

3. On October 23, 2018, Appellant writes the attached letter to the mediator (Bill Lyles) located in Charleston, South Carolina, putting him on notice regarding the extrinsic fraud and copied Tim Newton. Appellant is told at that time to stay away from any settlement. At this point, all Respondents had full knowledge of the extrinsic fraud yet simply looked the other way and took steps to prohibit the Appellant/insured from interfering. Appellant, who should have won all of his cases, instead, found himself at the hands of the Respondents as he remained the victim of the on-going Extrinsic Fraud. These Respondents, by their avoidance of duty, became part and parcel of the fraud's proliferation. It continues now, even in this Appellate Court! Respondents have concealed these facts to protect fellow attorneys, prevent legal punishment on the attorney group(s) and thereby cementing Appellant's losses in court and making Appellant their sacrifice on the bloody alter of self pride and the perpetuation of fraud to protect fellow attorneys. Appellant has filed an official complaint with the South Carolina Bar. The Bar wrote back and said they would wait to see what the Court was going to do or act upon prior to them taking any actions. Now it is up to the Appellate Court:

Appellant asks that the Honorable Appeals Court:

1. set down a live hearing requiring the Appellant, Tim Newton, JR Murphy and Christian Steigmaier be sworn in and allow Appellant and Judges to examine each individual. Hopefully, this action may

encourage the lawyers to tell the truth and no longer conceal pertinent information, bringing this case to an end, as all courts carry the responsibility to require lawyers to be truthful and faithful to their oath;

2. order a stay all other Appellate actions or pending actions regarding this case until this EMERGENCY MOTION can be heard and ruled on;
3. Take a bold stand to not only prevent this extrinsic fraud from continuing, but also send a message through the legal system, and in fact, throughout the country that the ethics outlined in the SCRCP (for South Carolinians) and other professional national and state standards are for ALL attorneys to adhere to. Courts cannot administer justice when officers of the Court are committing extrinsic fraud inside the Courts and placing pleadings in the United States mail to the Honorable Appeals Court. Fraud is illegal and being pushed by the attorneys intentionally via the USPS is not at all acceptable in these United States. How can we expect law and order when those who oversee it do not?
4. Take immediate action to set examples for other lawyers. These lawyers should not carry a badge designating them as "Officer of the Court."

Appellant has provided sufficient evidence to fully establish these allegations.

July 1, 2020

M B Hutson, Pro Se
Post Office Box 2755
Orangeburg, South Carolina 29116-2755
(803) 308-2714

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EXHIBIT J

From: H Hutson <hutson4444@gmail.com>

Sent: Monday, July 6, 2020 9:32 AM

To: Christian Stegmaier <cstegmaier@collinsandlacy.com>; Tim J. Newton <tnewton@murphygrantland.com>; J. R. Murphy <jrmurphy@murphygrantland.com>; Insurance Glenn Paul <gpaul@global-indemnity.com>

Cc: Hutson4444@gmail.com

Subject: You can't win this case

July 6, 2020

Christian, this case boils down to a few simple facts:

1. All Respondents were aware of the TLC/lawyers extrinsic fraud.
2. All Respondentss made a decision **not** to remove the extrinsic fraud even though they fully understood that if they did not, I would be ruined and damaged.
3. All Respondents had a duty, moral obligation and a professional legal obligation to write a letter advising me (since I was the insured) that they had made the decision **not** to remove the fraud and as a result, I could never win any related case and would be destroyed. Furthermore, all Respondants fully understood that not writing/informing me that their decision was going to cost me enormous and continual damages including losing all cases due to the unexposed extrinsic fraud, leaving a \$3.5M judgement on my record that further crippled my ability to move forward professionally and sealed my becoming indigent, which continues, making it impossible for me to hire an attorney.
4. Tim Newton's personally written letter is more than enough evidence that Respondant's actions more than exceeded reasonable doubt. The letter even suggested that "Possibly Frank could file a motion if Penn-America approves it, but he and I both have agreed to put everything on hold until the mediation." Newton was talking about filing a motion to get the extrinsic fraud out of the way so I could prevail like I was entitled to do, not conceal winning evidence due to a business decision on the part of all Respoindents to get my case off their books.

All Respondents were in possession of and took the opportunity to review, study, and investigate all the contracts and court actions which clearly identified TLC/lawyers' extrinsic fraud including your firm. Should you, as counsel to Penn America, continue to conceal pertinent facts that prevents my case/s from being heard, **you** will become equally guilty of undisclosed extrinsic fraud upon the courts. We both know that could possibly result you to be ultimately held professionally responsible and/or lose your license to practice law. Do not cheat me out of my case being heard. I would like to remind you of the following:

The United States Court of Appeals for the Sixth Circuit has delineated five (5) elements of conduct that constitute extrinsic fraud upon the court:

- A. "On the part of an officer of the court:"
- B. "That is directed to the judicial machinery' itself;"
- C. "That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth;"
- D. "That is a positive averment or is concealment when one is under a duty to disclose;" and
- E. "That deceives the court."

By hiding the facts of the existing and underlying extrinsic fraud upon the courts to protect your clients, Penn America, et.al., you will likely find yourself personally and professionally entwined. I am not writing this email to you to threaten or extort but simply to remind you that your inaction to disclose extrinsic fraud underlying these actions in the court are wrong and dishonest to the Appeals Court and Judges, as well to me. You are intentionally concealing pertinent facts that you have a legal and professional obligation to bring to the attention of the Court. You intentionally failed to bring attention to this in Judge Nettles' court about the known concealments, also.

I have filed my Emergency Motion, as you know, and mailed you a copy. If I don't hear from you within the next (5) business days, I will proceed with a complaint in State or Federal Court against you. This entire situation should come to an end.

Respectfully,

MB Hutson

--

803-308-2714

EXHIBIT K

From: H Hutson <hutson4444@gmail.com>

Sent: Wednesday, July 8, 2020 9:15 AM

To: Tim J. Newton <tnewton@murphygrantland.com>; J. R. Murphy <jrmurphy@murphygrantland.com>; Christian Stegmaier <cstegmaier@collinsandlacy.com>; Fournier, Doreen <dfournier@global-indemnity.com>; Insurance Glenn Paul <gpaul@global-indemnity.com>; Laur Paton <lpaton@carlockcopeland.com>; Mediator Charleston Bill Lyles <bill@billyleslaw.com>; Frank Gordon <fgordon@mgsattorneys.com>; Att Chip Emge Insurance Attorney <nemge@carlockcopeland.com>

Subject:

Dear Christian,

Simply wish to give you a heads up.

Since all actions and fraudulent conduct by Penn America and Global Indemnity, including some of their employees, as well as attorneys representing or associated with Penn America and Global by way of representation, I plan to bring to the entire publics attention how easy it is for an insurance company and their attorneys to defraud / plot against the insured either to save money, protect other lawyers or drop the duty to protect and defend the insured via extrinsic fraud.

I can use the Internet, among other methods. I plan to name every person, every law firm and lawyer as well as every person who has assisted in plotting to defraud me including persons who work for Penn America or Global Indemnity. Should anyone refer to my actions as defamation, I welcome any new lawsuit that allows me to further expose the injustice carried out by the following:

Tim Newton @ Murphy & Grantland South Carolina
JR Murphy @ Murphy & Grantland South Carolina
Christian Stegmaier @ Collins & Lacy P.C. South Carolina
Doreen Fournier @ Global Indemnity

Laura Paton @ Carlock, Copeland Stair LLP
Chip Emge @ Carlock, Copeland Stair LLP
Frank Gordon, Esq. based in Raleigh, N C
Bill Lyons, Esq. of Charleston, South Carolina
... To name a few.

--

803-308-2714

EXHIBIT L

From: H Hutson <hutson4444@gmail.com>

Sent: Thursday, July 16, 2020 9:22 PM

To: Christian Stegmaier <cstegmaier@collinsandlacy.com>; Tim J. Newton <tnewton@murphygrantland.com>; J. R. Murphy <jrmurphy@murphygrantland.com>

Subject: Response to PAGI's return to Appellant's Emergency Motion for Hearing

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant.

v.

Penn America Insurance Company,
Global Indemnity Group, Inc.,
Timothy J. Newton, Esq. and
J.R. Murphy, Esq., John Doe #1 and
John Doe #2

Respondents.

APPELLATE'S RESPONSE TO Stegmaier, Esq.'s. RESPONDENTS PENN
AMERICA INSURANCE COMPANY AND GLOBAL INDEMNITY GROUP,
INC.'S RETURN TO APPELLANT'S EMERGENCY MOTION FOR HEARING

Appellant grows tired of all three lawyers attempting to create long written objections against Appellant and play innocent or either dumb about what this case is really about. This entire case is about Appellant filing a lawsuit against Penn America, Global Indemnity, Tim Newton and JR Murphy, Respondents (formerly Defendants in the lower court). The charges are Fraud, Deception and Co-Conspirators to Extrinsic Fraud and direct Extrinsic Fraud. Appellant shall spearhead his charges making it

crystal clear to the Appeals Court the fraud that is being committed upon the Honorable Appeals Court at the present time.

The following are excerpts written by Tim Newton, who represented Penn America and Global Indemnity at that time: NOTE: Segments of his letter are listed and each listed paragraph subject matter is talking about issues of fraud and extrinsic fraud or his knowledge of extrinsic fraud.

1. The 16-paragraph letter written to Appellant on August 13, 2018, states, as follows:

"Mr. Hutson, I need to remind you that I don't represent you and I can't represent you because I represent Penn-America. To the extent there is a common interest, I note the following".

Newton admits he does not represent Appellant and then he writes:

"to the extent there is a common interest, I note the following..."

Respondents Tim Newton and JR Murphy, never represented Appellant and had no reason to write such an incriminating letter to Appellant except due to feelings of guilt, knowing what was happening to this Appellant (the insured). Furthermore, Newton knew what was going to happen to this Appellant at the hands of and through the actions of these Respondents, who were, or who were acting on behalf of, the insurance companies. The ultimate outcome would destroy the Appellant. There was no common interest.

2. At the bottom of par. 16, Respondent writes the following:

"However, that is something you would have to follow up with on your own. I can't undertake that. Possibly Frank could file a motion if Penn-America approves it, but he and I both have agreed to put everything on hold until the mediation".

Respondent Newton is suggesting that Appellant contact Frank Gordon, whom Newton and Penn America hired to represent Appellant asking that Gordon contact (by letter or phone) Penn America, to see if they will change their mind and agree to allow Gordon to notify the courts of the extrinsic fraud. That statement could not mean anything else. That sentence alone points directly to Respondent's knowledge of the undisclosed extrinsic fraud that TLC's attorneys had committed, which was underlying and preventing this Appellant's 'voice' from being heard in court.

3. In the last part of the same sentence Newton writes, referring to Frank Gordon, Esq. who represented this Appellant:

" he and I both have agreed to put everything on hold until the mediation".

The balance of the sentence is stating that Respondent Newton, being fully aware of the extrinsic fraud committed against Appellant by TLC attorneys, does not matter for he (Newton) has required F. Gordon, Esq. to make no effort to report the extrinsic fraud. Newton is more concerned about getting a settlement agreement with TLC and their attorneys, knowing full well had Newton decided to inform the courts and judges about the extrinsic fraud, *or even* allowed Frank Gordon to do so, they could have stopped further harm to the Appellant, as well as arrest the pending doom to the Appellant.

Additionally, the \$3.5M judgment could have then been easily set aside due to the underlying extrinsic fraud. Appellant pleaded with Frank Gordon to disclose the fraud. He refused. Gordon's reason to Appellant was that *Penn America*

opposed Newton or Gordon to bring up that subject to anyone for they did not plan to address the extrinsic fraud.

4. In paragraph (3): Respondent Newton wrote:

"The alleged lease between Big Water Resort, LLC and TLC Holdings, LLC, if it existed, was never recorded, although it was for a term of more than a year".

Respondent Newton is saying he understands that TLC and their lawyers refused to give Big Water Resort, Appellant, a legal lease or contractual agreement to have legal rights to use the 108 acres which legally prevented Appellant from having property with which to honor the Retail Membership Agreements (hereinafter RMA/RMAs) for 70 years. Newton was *acutely aware* that the contract time to purchase the 108 acres was for only 24 months for he had copies of all contracts. Newton was aware that title defects prevented Appellant from ever purchasing the 108 acres causing this Appellant the impossible task of honoring the 740 memberships for 70 years at a cost of \$22M dollars. Newton was also totally aware that the owners of TLC had pre-collected the full amount of the cost from each and every RMA. Newton was also fully aware that:

- a) the pre-collected moneys at the sales of the RMAs amounted to approximately 6 million dollars, and
- b) TLC had taken that money for themselves or spent the same on improving their *property*
- c) The property was solely owned by TLC.
- d) TLC left the Big Water Resort Campground an empty shell with no retained financial resources and no long-term lease to service the RMAs.

Appellant reminds the Honorable Court that not one attorney drafter of all the fraudulent contracts, nor any of the Respondent attorneys in this case *ever* disclosed to any of the courts the fraudulent actions or documents that this Appellant has listed, nor of their failure(s) to disclose the fraudulent actions of TLC in any courts. All these officers of the courts are now shrouded with the extrinsic fraud since they were fully aware and Appellant was not at all aware... *and* all attorneys knew and understood that Appellant did not understand. Consequently, Appellant could not win any cases.

e) TLC sold Appellant the campground via a sales document named as "Membership Interest Purchase Agreement" hereinafter referred to as MIPA, paired with a Lease/Purchase Agreement for the land, containing a clearly stated purpose of developing private residences thereon.

f) The MIPA owned no assets but 740 membership agreements to honor which became the Appellant's responsibility, along with a hidden obligation of a 22 million dollar liability for supplying those memberships with 70 years of a vacation destination....and NO LAND to operate on. TLC's attorneys concealing these issues is a text-book case of intentional extrinsic fraud.

5. In paragraph 13, Respondent writes:

"The Consent Order filed April 13, 2012, incorporates the Settlement Agreement but does not otherwise mention Big Water Resort, LLC or the campground members. It reads as if it pertains to a mere landlord-tenant dispute".

Laura Paton, Esquire, hired by Respondents, prepared and wrote approximately 29 different allegations against TLC. Appellant cites a few of her writings: (Please keep in mind that TLC's attorneys had prepared all the contracts (RMAs, MIPA, LPA, Settlement Agreement and associated Consent Order) and continued to represent TLC in the court cases that followed.) Paton wrote:

- "That the TLC parties had a statutory duty to record the encumbrances pursuant to Section 27-32-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27, and entitled 'Vacation Time Sharing Plans'".

- "That as a result of the TLC parties actively, intentionally, knowingly, willfully, wantonly, recklessly, and / or negligently failing to record the timeshares encumbering the property, they knowingly and / or negligently concealed such encumbrances which require disclosure by statute and induced Mr. Hutson to enter into the Agreements.

- "That in relying on the fraudulent representations and / or negligent misrepresentations, Mr. Hutson did materially change his position entering into the Agreements without knowledge of the timeshares believing, as was represented by the TLC parties, that the property was unencumbered".

- "That prior to execution of the Agreements, the TLC parties knew that the operating expenses of BWR exceeded its income".

- "That Mr. Hutson had a right to rely, and did rely, on the various representations of the TLC parties as to the condition of their business and its encumbrances, including, but not limited to, those representations expressly outlined in the Agreements signed by the TLC parties".

- "That the TLC parties actively, intentionally, willfully, wantonly, recklessly, and / or negligently misrepresented and / or concealed the financial condition, including, but not limited to, the annual income of BWR and accounting records of BWR, to induce Mr. Hutson to purchase BWR and enter into the Agreements".

- "This constitutes a breach of the Agreements with Mr. Hutson and accompanying this breach was the fraudulent acts":

- A. "Knowingly failing to disclose the outstanding debts of BWR, including, but not limited to, Black River Electric".
- B. "Advising Mr. Hutson that no financial records were kept as to BWR to conceal the losses: Financial condition of the company".
- C. "Failing to record encumbrances required by statute as outlined above".
- D. "Advising Mr. Hutson that the Retail Memberships could be divested to allow for development of the lakefront land as discussed".

Therefore, Respondent Newton was fully aware and knew that:

- a. the extrinsically fraudulent Settlement Agreement required Appellant to develop the 108 acres of land within a few months
- b. that hidden title defects would prevent any legal development.

- c. that the Settlement Agreement was craftily prepared by TLC attorneys (concealed by the TLC attorneys) and submitted to the lower court judge to execute while never disclosing to the Judge, the Court, or to this Appellant the impossibilities of any such development being possible. Again, a text – book case of extrinsic fraud
- d. of the Stewart Title Company letter dated October 2, 2015, clearly verified that the memberships for 70 years caused defective title to the 108 acres preventing any development or small home sales.
- e. that the RMA owners sued TLC in a federal class action suit (2:14-CV-01583-DCN-MGB) and won due to their contractual long term *right to use ALL of the land*.

Yet Newton, representing Penn America and Global Insurance Companies, chose to never disclose the underlying extrinsic fraud that TLC authored via their attorneys. TLC proceeded in wrongfully suing this Appellant ... and winning all their (TLC's) cases.... as they continued to hide all the underlying fraud they created from each and every Court and Judge. None of these Respondents exposed it EITHER.

6. TLC sued this Appellant in state court for slander, which was not valid and stemmed only from Appellant rightfully alerting the holders of the RMAs that TLC, et. al. were scamming them (which the Federal Court verified and awarded those RMA holders over \$2M.)

YET, Respondents required this Appellant to appear as a defendant and go through a farce of a jury trial after the Federal Case (cited above) against those who created the Extrinsic Fraud and defrauded this Appellant in the Settlement Agreement, then, again, later in Federal Court, and then afterwards in SC state court. *Never did even one of the Respondent attorneys disclose to the Court the concealments of the extrinsic fraud perpetrated by TLC's attorneys and subsequently supported by these Respondents!*

7. Respondents, further manipulating this Appellant into submission told this Appellant that *should he not attend* the jury trial, Respondents would take away Appellant's coverage and abandon his "defense". Respondents controlled attorney Frank Gordon, who they hired to replace Laura Paton. Respondents intentionally concealed critical evidence that prevented the Appellant from having his case heard; that makes the Respondents thieves and co-conspirators of that undisclosed extrinsic fraud as it robbed this Appellant of his right to be heard.

The actions of these attorneys at law, officers of the courts, have directly left this Appellant indigent and with an undeserved \$3.5M judgment on his record that has caused this Appellant severe damages and crippled his ability to return to his career in development.

Respondents knew that Appellant had been wrongfully evicted and became indigent, which also prevented him from hiring an attorney. Respondents had copies of all L. Paton's and F. Gordon's files, all the related contracts and the depositions providing them with a comprehensive knowledge of the cases. All licensed attorneys are

trained to recognize extrinsic fraud in law school. Even with complete and full knowledge of the extrinsic fraud perpetrated by TLC lawyers, and caught in the Federal Court, Respondents refused to inform the lower Courts. These Respondents are liars, professional oath breakers, disregards of the SCRPC Rules (notably #402). They have proven themselves to be unscrupulous and have operated in total disregard to the SCRPC and in total secrecy against the insured Appellant. Furthermore, and equally as serious was their demonstration of having more concern for protecting fellow attorneys' crimes than the wrongs perpetrated upon their insured.

All Respondents are fully aware of their unprofessionalism, negligence issues, and that it directly causes this Appellant to remain a victim of extrinsic fraud to this day. Nevertheless, they chose to intentionally conceal the crimes of their fellow attorneys (by protecting TLC's lawyers and willfully failing, even refusing to report the extrinsic fraud to the lower courts) which could have, and would have, allowed this Appellant to have his case(s) clearly heard. The wrongs against this Appellant could have been righted by these Respondents years earlier in Federal and in State Courts. Hopefully this Honorable Appeals Court will uphold justice, recognize that the Federal Court honored the RMA holders as having long-term rights to that land, proving that the LPA and Settlement Agreements were fraudulent and not valid. This should have put an end to the mockery attorneys have made of our court systems. Instead, these Respondents refuse to expose the Extrinsic Fraud which has already been proven in the Federal Court by their awarding the RMA holders millions of dollars for TLC's trying to sell their land rights out from under them for development! These lying, unscrupulous Respondents are a disgrace to the word "Justice".

All Respondents, courts, and judges have copies of and/or access to all the paper work, including depositions. Each Respondent fully understands that the Federal Court ruling exposes the extrinsic fraud that had been used against this Appellant, including Christian Stegmaier Esq. who now represents Penn America and Global Indemnity and appeared before Judge Nettles. Now, in the Honorable Appeals Court Stegmaier has teamed up with the other attorneys and he, too, is not making any disclosure regarding TLC attorneys' extrinsic fraud even though any attorney is required to report Extrinsic Fraud to the court if they have knowledge of the Court being defrauded by extrinsic fraud. All Respondents have and are currently conspiring against the insured Appellant through the assisting and non-disclosure of the TLC attorneys' fraudulent underlying Settlement Agreement, knowing the insured was victimized. Respondents know the Federal Court has already ruled against TLC's attempt to sell the land. The Respondent attorneys, including Stegmaier, instead use the multiple losses this Appellant has taken as leverage to attempt to convince the Appellate Court that Appellate is at fault, which is NOT the case. The attorneys are at fault and the Federal Court has already established that fact. It is time for Respondents to act accordingly.

The Honorable Appeals Court can simply review any and all pleadings, motions or objections and nowhere will the Court find any disclosure by Respondents regarding the extrinsic fraud carried out by TLC's attorneys. Respondents, including Stegmaier, simply are trying use Appellant's losses to *their* own advantage...even though those actions is an attempt to ignore the Federal Court ruling in order to cover for fellow attorneys. They have no regard for honest disclosures nor do they want Appellant's case to be heard. They all plot together to cover for each other and to win for themselves, and particularly Stegmaier's client, the insurance companies, despite their

underlying failure to execute their duty in these situations according to the law, according to the SCRCF rules and rulings of the Federal Court on the underlying crime(s) and extrinsic fraud.

The question for the Court is simple:

1. Have any papers filed by Respondents reflected reporting the fraud and extrinsic fraud that TLC's attorneys committed or the extrinsic fraud the Respondents committed? No, they haven't. Aren't they skirting the Federal Ruling already issued that totally discredits TLC's actions in attempting to sell land for immediate development that was already encumbered legally by TLC to the owners of the RMAs? This farce simply can not be allowed to continue. All of these lawyers know that extrinsic fraud is against the Courts and Honorable Judges. Attorneys not reporting extrinsic fraud, and attorneys attempting to hide facts treats the Honorable Judges as naive and stupid. What a disgrace. They should be disbarred.

2. The deception by Respondents in the lower courts began after the Federal Court case ended and when these Respondents feloniously purported to this Appellant to be representing him in the lower courts, when despite their legal duty to defend him, they did not. Respondent's simply wanted to settle Appellant's case no matter how much damage it cost the Appellant. Respondents only wanted to keep their fellow attorneys' extrinsic fraud undisclosed and the insurance company satisfied.

Respondents did not care what damage came to this Appellant, *even though* Appellant

-was the insured

- had made all insurance payments to the insurance companies, and

-had been raped and tortured via the extrinsic fraud and their lack of reporting it.

Appellant prays again for justice and that this case be sent to a jury. Appellant is certain that any jury will see right through the scheme, deception, lies, lack of duty to the courts, total disregard for the Federal Courts rulings, and failure to perform their duty to defend this Appellant.

Respondents are terrified of the possibility that the Motion for Emergency Hearing might be approved, including Christian Stegmaier. Appellant has given sufficient evidence of the wrong doings of these Respondents, including Stegmaier. How can this Honorable Court ignore these facts and intentional wrong-doings and deception, that not only take advantage of the Appellant, but also flagrantly disregard rulings by the Federal Courts on the underlying issue?

The United States Court of Appeals for the Sixth Circuit has delineated five (5) elements of conduct that constitute extrinsic fraud upon the Court:

1. "On the part of an officer of the Court;"
2. "That is directed to the judicial machinery itself;"
3. "That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth;"
4. "That is a positive averment or is concealment when one is under a duty to disclose;" and
5. "That deceives the Court."

All components are met by these Respondents.

Merriam Webster's Dictionary of Law states: "extrinsic fraud: (as that involved in making a false offer of compromise) that induces one not to present a case in court or deprives one of the opportunity to be heard; also: fraud that is not involved

in the actual issues presented to a court and that prevents a full and fair hearing-called also collateral fraud". All conditions of this definition are met, as well.

Appellant prays that this Honorable Court quickly reverses the lower court's ruling, honors the Federal Court ruling, and sends this case to a jury. Furthermore, the wrongful and dishonest actions carried out by these Respondents should be duly reported to their licensing board so they can be held responsible for their actions against the Courts and its Judges.

Most importantly, "The Respondents respectfully direct this Court's attention to the Court's recent opinion in Couch v. Couch, op no.5744 (S.C. C. ct, appfiled July 15th, 2020." Without having read the case cited, Appellant assures the Respondents and the Honorable Court that no ruling or order prevents the Court from investigating extrinsic fraud intentionally brought against the Honorable Appeals Court especially since this Appellant has thoroughly presented facts and the evidence that directly points to the Respondents crimes against the Honorable Court of Appeals and the Honorable Judges as well as against the Appellant. Will the Court just sit back and allow the Respondents to make a circus out of the Honorable Court and Judges?

July 17, 2020

M B Hutson, Pro Se
Post Office Box 2755
Orangeburg, South Carolina 29116-2755
(803) 308-2714

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant,

v.

Penn America Insurance Company,
Global Indemnity Group, Inc.,
Timothy J. Newton, Esq.,
J.R. Murphy, Esq., John Doe #1 and
John Doe #2

Respondents.

PROOF OF SERVICE

I certify that I have served the APPELLATE'S RESPONSE TO RESPONDENTS (PENN AMERICA INSURANCE COMPANY AND GLOBAL INDEMNITY GROUP, INC.) RETURN TO APPELLANT'S EMERGENCY MOTION FOR HEARING on Penn America Insurance Company & Global Indemnity Insurance Company, on July 17, 2020, addressed to the insurance companys' attorney of record, Christian Stegmaier, at Collins & Lacy, 1330 Lady St., 6th Floor, Columbia, SC 29201, and also to J. R. Murphy, Esq., and Timothy Newton, Esq. (both acting as Pro Se, of record, and both at Murphy & Grantland, P.A. at Post Office Box 6648, Columbia, SC 29260.

July 17, 2020

M B Hutson, Pro Se
Post Office Box 2755
Orangeburg, South Carolina 29116-2755
(803) 308-2714

EXHIBIT M

From: "Mr. H" <hmr226621@gmail.com>

Date: July 18, 2020 at 3:17:44 PM EDT

To: "tnewton@murphygrantland.com" <tnewton@murphygrantland.com>, Christian Stegmaier <cstegmaier@collinsandlacy.com>, "hmr226621@gmail.com" <hmr226621@gmail.com>

Subject: Response by Appellant of Respondent's July 16, 2020 submittal

APPELLANT'S RESPONSE TO PENN AMERICA'S RETURNS TO APPELLANTS
EMERGENCY MOTION FOR HEARING

Comes now the victim, Pro SE Appellant who continues to severely suffer from deception, fraud and extrinsic fraud. Respondents including Christian Stegmaier intentional continuing lying, concealing and failures to disclose what they are required to do so before the Honorable Appeals Court and that is disclosing the extrinsic fraud against this Appellant by way of concealment before the court as Appellant has carefully laid out in various responses and motions.

Concerned and scared, these Respondents are attempting to prevent the Honorable Appeals Court from investigating the proven extrinsic fraud before the Court.

1. On July 16, 2020, Respondents submitted Rule 208 (b) (7), SCACR, arguing "the South Carolina Court of Appeals appellate jurisdiction does not include the holding of an evidentiary hearing and the taking of testimony". No Appeals Court Judges should be defrauded and toyed with by officers of the court and made to look naive, hand-tied and unable to responsibly conduct their duties and maintain a honest court In the State of South Carolina. Can Appellate Judges willingly set around and not take action to report the crimes of Extrinsic Fraud being perpetrated upon the SC State Courts and its Judges to the Attorney General's Office and other governing bodies that oversee Lawyer Conduct?

Therefore, Appellant respectfully request that the Honorable Court:

-Immediately stop all hearings and not rule on anything until the extrinsic fraud evidence submitted by Appellant to Honorable Appeals Court (with unquestionable evidence) be submitted to the Attorney General's Office for investigation and prosecution. Respondents' fraud upon the courts MUST be addressed and STOPPED.

Should this honorable Appeals Court take NO ACTION to stop the on-going extrinsic fraud by these Respondents (officers of the Court), Appellant would be forced to view this inaction as the Honorable Court co-conspiring with those officers of the court and against this Appellant. These lawyers (sworn officers of the court) must be

stopped. This has already been going on for years. If the Appellate Court does not act to clear their court of fraud, Appellant must consider all means which may be open to him, even, possibly, contacting local and national news departments.

Appellant begs for help from this Honorable Court to protect his rights and clear the fraud shrouding the courts of the State of South Carolina.

Respectfully submitted on the 20th day of July, 2020

MB Hutson Pro Se

EXHIBIT N

From: H Hutson <hutson4444@gmail.com>

Sent: Sunday, July 19, 2020 9:46 PM

To: Christian Stegmaier <cstegmaier@collinsandlacy.com>; Tim J. Newton <tnewton@murphygrantland.com>; J. R. Murphy <jrmurphy@murphygrantland.com>; Kim M Jackson. Torus <kjackson@boviskyle.com>; Frank Gordon <fgordon@mgsattorneys.com>

Subject: Appellant Revisits Response to PAGI Return to Appellant's Emergency Motion

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant.

v.

Penn America Insurance Company,
Global Indemnity Group, Inc.,
Timothy J. Newton, Esq. and
J.R. Murphy, Esq., John Doe #1 and
John Doe #2

Respondents.

APPELLATE'S RESPONSE TO PENN AMERICA'S RETURNS TO
APPELLANT'S EMERGENCY MOTION FOR HEARING

Comes now the victim, Pro Se Appellant, who continues to severely suffer from deception, fraud and extrinsic fraud at the hands of officers of the court. Respondents, including Christian Stegmaier, intentionally continue lying, concealing and failing to disclose fraud they are required disclose, now even before the Honorable Appeals Court. Failures by Respondents to disclose underlying Extrinsic Fraud initiated by TLC's lawyers which underlie the

Extrinsic Fraud against this court was carefully conspired and executed by these Respondents.

These Respondents are attempting to prevent the Honorable Appeals Court Judges from investigating alleged Extrinsic Fraud upon their own court. On July 16, 2020, Respondents submitted Rule 208 (b) (7), SCACR, arguing that "the South Carolina Court of Appeals appellate jurisdiction does not include the holding of an evidentiary hearing and the taking of testimony". No Appeals Court Judge should be defrauded and toyed with by officers of the court and made to look naive, hand-tied and unable to responsibly conduct their duties and maintain a honest court in the State of South Carolina. Can Appellate Judges willingly sit around and not take action to report the crime of Extrinsic Fraud upon the SC State Courts and its Judges to the Attorney General's Office and any other governing bodies that oversee Lawyer Conduct?

Therefore, Appellant respectfully requests that the Honorable Court:

Immediately stop all hearings and not rule on anything until the extrinsic fraud evidence submitted by Appellant to the Honorable Appeals Court be reviewed and appropriate action taken on that investigation or submit it to the Attorney General's Office to investigate, evaluate and execute any appropriate prosecution. Respondents' fraud upon the courts MUST be addressed and STOPPED.

Should this honorable Appeals Court take NO ACTION to stop the on-going Extrinsic Fraud by these Respondents (officers of the Court), Appellant would be forced to view that inaction as this Honorable Court co-conspiring with these Respondents, officers of the court, and against Appellant. These lawyers (albeit sworn officers of the court) must be stopped. This has already been going on now for years before both the Federal and SC State Courts. If the Appellate Court cannot, does not, or will not act to clear the Court(s) of fraud, this Appellant must pursue any and all means, which may be legally available to him, possibly even, contacting local and national news media. Appellant's health cannot take much more of this horrible abuse. Appellant's depression deepens due to such law breaking right in front of the Appeals Court and Appellant. Appellant has reached a decision that the Respondents can defraud, lie, degrade the Courts and Judges without consequences all at the expense of the Appellant. The Appellant will be doomed for ever should this continue. Appellant is fighting for his life at this point.

Appellant begs this Appellate Court to uphold the laws and governing regulatory standards of the court systems. May this Honorable Appellate Court vindicate the deceived Judges, validate the rights of law abiding citizens (such as this Appellant), expose and firmly address the attorneys guilty of not disclosing the underlying Extrinsic Fraud (put in place by conspiring officers of the court and insurance carriers) that is now shrouding the courts of the State of South Carolina and this Appellant's life. This Appellant has and is damaged for life due to the Respondents being 1) fully aware of the extrinsic fraud by TLC's attorneys, and 2) Respondent Newton's statement that "lawyers don't do each other like that

for someone might go to jail". Had the Respondents disclosed to Judge Nettles the truth about the underlying Extrinsic Fraud by TLC's attorneys clouding all the cases Respondents have repeatedly blamed Appellant for losing, Appellant would have won and consequently been sent to a jury trial. Since that did not transpire, we are now in the Appeals Court clouded by the same Extrinsic Fraud. *Not even one* of the Respondents have disclosed the truth about the Extrinsic Fraud upon the Courts which was perpetrated by officers of the court to deceive the court and to destroy this Appellant. Newton's statement and email to Hutson verifies that the attorneys were, and are, very much aware of the underlying Extrinsic Fraud that was causing Hutson's losses in court – even though now Respondents purport that it was this Appellant Hutson's fault. Attorney professional conduct rules required them to expose known fraud upon the court but they simply chose not to do so...."because lawyers just don't do each other that way." (-Newton, Respondent). Apparently they do not do each other "that way" and perhaps they should all go down together for their illegal activity.

The United States Court of Appeals for the Sixth Circuit has delineated five (5) elements of conduct that constitute extrinsic fraud upon the Court:

1. "On the part of an officer of the Court;"
2. "That is directed to the judicial machinery itself;"
3. "That is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth;"
4. "That is a positive averment or is concealment when one is under a duty to disclose;" *and*

5. "That deceives the Court."

All Respondents actions have met the criteria for Extrinsic Fraud in all five areas.

Merriam Webster's Dictionary of Law: (def.) "extrinsic fraud: (as that involved in making a false offer of compromise) that induces one not to present a case in court or deprives one of the opportunity to be heard; also: fraud that is not involved in the actual issues presented to a court and that prevents a full and fair hearing-called also collateral fraud".

Respectfully submitted on the 20th day of July, 2020,

M B Hutson, Pro Se
Post Office Box 2755
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hutson4444@gmail.com

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant.

v.

Penn America Insurance
Company, Global Indemnity
Group, Inc., Timothy J.
Newton, Esq., J.R. Murphy,
Esq., John Doe #1 and John
Doe #2,

Respondents,

PROOF OF SERVICE

I certify that I have served the APPELLATE'S RESPONSE TO PENN AMERICA'S RETURNS TO APPELLANT'S EMERGENCY MOTION FOR HEARING with a copy of this Proof of Service on Penn America Insurance Company, Global Indemnity Insurance Company, J. R. Murphy, Esq., and Timothy Newton, Esq. by depositing a copy of it in the United States Mail, postage prepaid, on July 20, 2020, addressed to the insurance companies' attorney of record, Christian Stegmaier, Esq., @ Post Office Box 12487, Columbia, South Carolina 29211-12487, *and also to* J.R. Murphy, Esq. and Timothy J. Newton, Esq., both of Murphy and Grantland, P.A. (both acting as Pro Se, of record), at Post Office Box 6648, Columbia SC 29260-6648.

July 20, 2020

M B Hutson, Pro Se
Post Office Box 2755
Orangeburg, South Carolina 29116-2755
(803) 308-2714
Hutson4444@gmail.com

EXHIBIT O

From: H Hutson <hutson4444@gmail.com>
Sent: Friday, July 17, 2020 5:24 PM
To: Christian Stegmaier <cstegmaier@collinsandlacy.com>
Subject: Hutson v. Penn America

Christian, I would hope that you would understand that all Respondent's are basically in Checkmate. This condition has mostly worsen no matter how hard Respondent's defend for evidence clearly points to guilt. Why don't we talk and stop this thing? Why put me and the Respondent's through such a legal mess that will most likely get much worse. I am willing to talk.

Respectfully,

MB Hutson

--

803-308-2714

EXHIBIT P

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
MB HUTSON A/K/A MB HUTSON,

Plaintiff,

vs.

PAUL WEISSENSTEIN (Attorney)/
PAUL WEISSENSTEIN,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

CASE NO.: 2018-CP-43-1583

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on Defendant's motion for summary judgment. The parties have filed submissions in support of their respective positions, and the Court heard oral arguments from Plaintiff, pro se, and counsel for the Defendant on December 10, 2018. After careful consideration of the pleadings, affidavits, documentary evidence and the arguments of the parties, the Court grants the Defendant's motion for summary judgment.

BACKGROUND

This matter arises out of a long-term dispute between Plaintiff, M.B. Hutson, and non-parties TLC Holdings, LLC, and the individual members of TLC Holdings, LLC (collectively the "TLC Parties"). Defendant, Attorney Paul Weissenstein, represented Plaintiff in one of several lawsuits between Hutson and the TLC Parties. Although not directly related to Weissenstein's representation of the Plaintiff, a recitation of the history between Hutson and the TLC Parties aids in the disposition of this motion.

In fall of 2010, Plaintiff and the TLC Parties began discussing a potential real property and business transaction wherein Hutson would take over a campground known as "Big Water Resort"

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("BWR"), along with the real property on which it was located. At the time of the BWR Transaction, Hutson was not represented by the Defendant Weissenstein, but was represented by a lawyer based out of Tennessee, Andrew Tucker, Esq.

In connection with the BWR transaction, on December 10, 2010 Hutson executed a lease purchase agreement ("LPA") related to real property in Clarendon County, South Carolina on which BWR was located. Plaintiff also purchased the limited liability company that operated BWR ("BWR, LLC").

Prior to the BWR Transaction, BWR, LLC sold what the parties refer to as "lifetime retail membership agreements" ("Lifetime Memberships") to individuals and families who then became members of BWR. These agreements were entered into between BWR, LLC and the campground members, and purported to give the members exclusive access to the campground. Hutson alleges that he did not want to operate a campground, but rather wished to develop residential structures on certain portions of the unimproved Property¹. At the time of the transaction, Hutson was aware of the Lifetime Memberships.

On November 11, 2010, Hutson's realtor wrote to the realtor for the TLC Parties:

Attached is Susan's lifetime membership info. (sic) regarding Big Water camp ground. My buyer is concerned about the "life time" members and the impact they can have on the future development of the property. In other words, in your opinion, what is the easiest, legal way to terminate the lifetime memberships of Big Water? Will these memberships have an impact on obtaining clear title for the property.?

¹ For purposes of this motion, the evidence and all inferences which can be reasonably drawn from the evidence are viewed in the light most favorable to the Plaintiff.

Consistent with Hutson's intention to develop the property, the LPA provided Hutson an opportunity to examine marketable title to the Property, identify any title defects, and potentially terminate the transaction if title defects were not cured. Page 5 of the LPA states:

Purchaser shall, within ninety (90) days after the Effective Date [of the LPA], investigate Seller's title to the Premises and identify any exceptions to title which are not acceptable to Purchaser. Purchaser shall within ninety (90) days after the Effective Date provide Seller notice of any such Title Exception. If Purchaser does not notify Seller in writing of Title Exceptions within ninety days after the Effective Date, then the Purchaser shall be deemed to have accepted title to the premises with all exceptions and conditions. If Purchaser timely notifies Seller of Title Exceptions (other than the Title Exceptions that can be cured by the payment of money to satisfy any liens as of the Closing, which Title Exceptions shall be cured as of the Closing), Seller may (but shall not be required to) cause all Title Exceptions to be deleted as Exceptions from the Title Commitment, as the case may be, on or prior to 30 days prior to closing (the "Cure Deadline"). If Seller fails or refuses to cure any Title Exceptions prior to the Cured Deadline, then Purchaser may, as its sole and exclusive remedy for the existence of, or Seller's failure to cure, such Title Exceptions before the Cured Deadline, elect to terminate this Agreement, or waive its right to terminate this Agreement in writing and accept the Title Commitment with all uncured Title Exceptions.

Hutson and the TLC Parties signed the LPA and related transaction documents in December of 2010.

By November 29, 2011, Hutson defaulted under the LPA and the TLC Parties filed to eject him from the subject property. Defendant Weissenstein represented Hutson in this ejectment action, in which Hutson asserted counterclaims against the TLC Parties for various misrepresentations, including a sewer moratorium, issues with the utility provider, and pending litigation which was to have been dismissed prior to closing on the LPA, but allegedly remained pending as of November 2011. Weissenstein, on behalf of Hutson, did not file a counterclaim

alleging fraudulent concealment of title defects created by the Lifetime Memberships and there is no evidence in the record that such a counterclaim was considered.

Ultimately, the 2011 ejectment action ended in a settlement incorporated into a consent order that, *inter alia*, extended Hutson's time to comply with his payment obligations and attempts to develop the property.

Thereafter, Hutson defaulted under the terms of the settlement agreement, and the TLC Parties again initiated an action to eject Hutson from the subject property. Defendant Weissenstein did not represent Hutson in this subsequent ejectment proceeding, which concluded with an order ejecting Hutson from the property.

In April 2014, a class action lawsuit was filed against the TLC Parties in Federal District Court by over 1,000 putative class members who purchased Lifetime Memberships. *Reed et al. v. Big Water Resorts et al.*, Case no. 2:14-cv-01583 (U.S. Dist. Court, D.S.C.). The TLC Parties filed a third-party complaint against Hutson alleging he was responsible for the damages alleged by the putative class members.

Hutson then counterclaimed against the TLC Parties alleging, *inter alia*, that the TLC Parties defrauded him by failing to disclose that the Lifetime Memberships created a title defect,² and that the settlement agreement resolving the 2011 ejectment action was procured by fraud since he was unaware of the alleged title defect created by the Lifetime Memberships.

The District Court adopted the Magistrate Judge's Report and Recommendation dismissing Hutson's counterclaims based upon a theory of *res judicata*. The Court held that

² Hutson alleges that the Lifetime Memberships were leases that clouded title to the subject property. For purposes of this motion, this allegation is construed in favor of the nonmoving party, Hutson. However, the Court expressly makes no ruling on the merits of this allegation as it is not material to the disposition of the motion.

settlement of the 2011 ejectment action precluded the re-litigation of counterclaims that were or could have been asserted in the 2011 ejectment action.

In their decisions, the Magistrate Judge and District Judge noted that documentary evidence, deposition testimony, and open court statements by Hutson established that he was aware of the Lifetime Memberships prior to closing, he was aware they may impact title prior to closing, and was, thus, aware of these issues prior to entering into the settlement agreement as part of the 2011 ejectment action. In light of these findings, the Federal Court held that the subject settlement agreement was not procured by fraud. *Reed et al. v. Big Water Resorts et al.*, case no. 2:14-cv-01583 (U.S. Dist. Ct., D.S.C.) (5-20-2016 order of Judge D. Norton) (4-5-2016 Report & Recommendation of Judge M. Baker).

Hutson now alleges that Weissenstein committed legal malpractice by failing to recognize the title defect created by the Lifetime Memberships. In his Amended Complaint, Hutson advances two theories. First, Hutson alleges that Weissenstein failed to advise him that the Lifetime Memberships were a cloud on title that TLC concealed at the time of the LPA. Second, Hutson alleges that, but for Weissenstein allowing him to enter into the settlement agreement as part of the 2011 eviction action, Hutson would not have lost his counterclaim in the Federal class action. Hutson alleges that Weissenstein committed malpractice by failing to assert a counterclaim in the 2011 ejectment action for fraud based upon the TLC Parties' concealment of the cloud on title created by the Lifetime Memberships. Hutson alleges that he would have prevailed on a claim of fraudulent concealment against the TLC Parties.

In support of his claim, Hutson also submitted the expert affidavit of Mark Hardee, Esq., which alleges:

h. M.B. Hutson intended to purchase and develop property on lake Marion through a lease purchase agreement which also included an on going business.

i. Unknown to Mr. Hutson was that a title defect existed on the property due to hundreds of 70 year right to sole use agreements which had been sold by TLC Holdings, LLC and Big Water Resort.

j. Mr. Hutson was unaware that these agreements constituted a title defect on the property which would keep him from developing the property as planned.

...

o. Mr. Weissenstein fell below the standard of care expected of attorneys in similar situation at the time, by failing to advise Mr. Hutson that the existence and effect of the long term leases would prevent him from ever developing the property as he intended, and that his default of the settlement agreement was inevitable, and that he would be forever barred from prosecuting and using as a defense the fraud perpetrated on him by TLC Holding LLC.

Weissenstein argues that he cannot be liable for Hutson's failure to discover the alleged title defect, as Hutson was represented by a different lawyer with respect to the initial transaction with the TLC Parties, including the LPA.

Weissenstein further argues that the evidence shows Hutson was both aware of the Lifetime Memberships before closing on the LPA, and aware that the Lifetime Memberships could potentially impact title prior to closing on the LPA. Weissenstein avers that after the LPA's ninety day examination period expired, Hutson's could not seek recourse against the TLC Parties for alleged title defects, including in the 2011 ejectment action.

Finally, Weissenstein argues that Hutson's legal malpractice claim is barred by the statute of limitations, since Hutson knew or should have known that no counterclaim for concealment of the alleged title defect created by the Lifetime Memberships was brought in the 2011 ejectment action at the time he signed the settlement agreement.

LEGAL STANDARD

"Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56, SCRPC; *South Carolina Prop. & Cas. Guar. Ass'n. v. Yensen*, 345 S.C. 512, 528, 518, 548 S.E.2d 880, 883 (Ct.App.2001). "When ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits." *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006)). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

ANALYSIS

I

In his Amended Complaint, Hutson asserts twelve causes of action styled as "counts of malpractice": (1) breach of duty by attorney #1; (2) breach of duty by attorney #2; (3) negligence; (4) damage to the client/plaintiff; (5) proximate causation of the client's damages by the breach; (6) fraudulent coverup by defendant(s); (7) gross negligence damaging plaintiff; (8) gross negligence; (9) gross negligence: failure to introduce S.C. Law 27-33-30; (10) negligence and lack of concern; (11) allowing fraud upon the court; (12) on-going damages from malpractice.

As an initial matter, although Hutson separately lists his counts of malpractice, each separate count alleges the same thing; that Defendant Weissenstein breached a duty arising out of

the attorney-client relationship. Accordingly, the Court construes all of these allegations as asserting a single claim for legal malpractice consistent with South Carolina Supreme Court precedent. *See, RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 336, 732 S.E.2d 166, 173 (2012) (where a separately plead cause of action is premised on the duty inherent in the attorney-client relationship and arises out of the same factual allegations, the claim for legal malpractice will encompass the separately plead claim).

II

Moving next to an analysis of Hutson's allegations under the framework of a legal malpractice claim, under South Carolina law, a plaintiff must establish four elements in a legal malpractice action: "(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." *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 402, 697 S.E.2d 551, 555 (2010) (quoting *Rydde v. Morris*, 381 S.C. 643, 647, 675 S.E.2d 431, 433 (2009)). Failure to establish any one of the four elements of legal malpractice renders the legal malpractice claim insufficient as a matter of law. *See, e.g., Henkel v. Winn*, 346 S.C. 14, 18, 550 S.E.2d 577, 579 (Ct. App. 2001).

Here, it is undisputed that Hutson and Wiessenstein were in an attorney-client relationship with respect to the 2011 ejectment action. Thus, Hutson has established the first element of a legal malpractice claim with respect to the 2011 ejectment action.

It is likewise undisputed that no attorney-client relationship was present between Hutson and Wiessenstein with respect to the initial transaction between Hutson and the TLC Parties, including the examination of title.

The Court finds that the undisputed facts show that Weissenstein cannot be held liable for an alleged failure to identify title defects created by the Lifetime Memberships. It is indisputable that *before* closing on the LPA, Hutson's realtor sent an email to the TLC Parties' realtor stating, *inter alia*, "my buyer is concerned about the "life time" memberships and the impact they can have on future development of the property...will these memberships have an impact on obtaining clear title for the property."

Hutson had knowledge that the Lifetime Memberships could potentially impact title to the subject property. Pursuant to the terms of the LPA, Hutson was required to examine the possible impact of these Lifetime Memberships within ninety days of closing on the LPA. To the extent that an error was made in failing to identify a title defect caused by the Lifetime Memberships, Weissenstein cannot be held liable for such error.

III

Hutson also alleges that Weissenstein committed malpractice by allowing him to sign the settlement agreement ending the 2011 ejectment action without litigating a counterclaim for fraudulent non-disclosure of the title defects created by the Lifetime Membership. Hutson alleges that, as a result of signing the settlement agreement instead of litigating a fraudulent non-disclosure counterclaim, he was precluded from making the same claim in the Federal class action lawsuit against the TLC Parties, on which he would have prevailed. The Court disagrees.

Integral to defeating summary judgment on a claim for legal malpractice is expert testimony expressly stating that the Plaintiff "most probably" would have obtained a better result in the underlying matter "but for" the alleged breach of an attorney's standard of care. *See, Doe v. Howe*, 367 S.C. 432, 445-46, 626 S.E.2d 25 (Ct. App. 2005)(affirming summary judgment for attorney when plaintiff's expert did not testify that plaintiff would have received a greater

settlement “but for” the attorney’s breach of the standard of care); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 290, 701 S.E.2d 742 (2010)(affirming summary judgment for attorney when plaintiff’s expert did not testify that plaintiff would have obtained a better outcome had the attorneys not breached their standard of care). The question of the success of the underlying claim is a question of law. *Holmes v. Haynsworth, Sinkler, & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399 (2014) citing, *Howe*, 367 S.C. at 442.

Here, the Court finds that Hutson cannot establish that he would have prevailed on a claim for fraudulent nondisclosure of title defects created by the Lifetime Memberships. First, Hutson’s expert does not assert that Hutson “most probably” would have achieved a better result. Thus, Hutson cannot establish this essential element.

Furthermore, while ordinarily the issue of proximate cause is a jury question, where there is no genuine issue of material fact concerning proximate cause, the Court may grant summary judgment. *Singleton v. Sherer*, 377 S.C. 203, 659 S.E.2d 196, 206 (Ct. App. 2008). The Court finds that there is no genuine issue of material fact precluding summary judgment.

Here, the evidence is capable of only one reasonable inference. Hutson was aware of the Lifetime Memberships prior to closing on the LPA. Page 5 of the LPA required Hutson to “within ninety (90) days after the Effective Date [of the LPA], investigate Seller’s title to the Premises and identify any exceptions to title which are not acceptable to Purchaser.” The LPA further states “if Purchaser does not notify Seller in writing of Title Exceptions within ninety days after the Effective Date, then the Purchaser shall be deemed to have accepted title to the premises with all exceptions and conditions.”

Accordingly, by the time the TLC Parties initiated the 2011 ejectment action, Hutson had accepted title to the premises with all exceptions and conditions based upon the plain and

unambiguous terms of the LPA. Thus, Hutson could not prevail on a claim alleging title defects during the 2011 ejectment, as he had already contractually agreed to accept title “with all exceptions and conditions.”

Moreover, Hutson had knowledge of the Lifetime Memberships *before* he closed on the LPA, and also was on notice that the Lifetime Memberships could impact clear title to the property *before* he closed on the LPA. Thus, a fraud claim against the TLC Parties with respect to alleged concealment of title defects created by the Lifetime Memberships would necessarily fail.

To establish fraud, the following nine elements must be shown: 1) a representation or nondisclosure of a material fact, 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. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 338 S.C. 572, 586, 527 S.E.2d 371, 378 (Ct.App.2000).

Although Hutson's expert affidavit suggests that Hutson was “unaware” the Lifetime Memberships created a title defect, the documentary evidence in the record before the Court shows that Hutson was, in fact, aware that the Lifetime Memberships could impact title to the subject property. In fact, the Federal District Court made very specific factual findings that Hutson knew about the membership agreements at the time he purchased the Big Water Resort. (4-5-16 Report & Recommendation of Judge Baker at 23, note 5.). Among other things, the District Court notes that Hutson's real estate agent contacted an attorney regarding the lifetime memberships and how they would impact obtaining clear title to the property, Hutson admitted at the District Court hearing he knew there were memberships, and Hutson stated he and his original attorney “sat at the table together and went over” the membership agreements before closing. Therefore, to the

extent that Hutson alleges the TLC Parties fraudulently concealed that the Lifetime Memberships could impact clear title to the property, the evidence establishes that Hutson was not ignorant to this fact. Accordingly, as a matter of law, Hutson cannot show that he “most probably” would have prevailed against the TLC Parties in a claim for fraudulent nondisclosure of title defects.

The Court finds that, viewing the evidence in the light most favorable to Hutson, no material facts are in dispute and Hutson cannot satisfy all four elements of a legal malpractice claim against Weissenstein.

IV

Weissenstein also argues that Hutson’s legal malpractice claim is barred by the statute of limitations. The Court agrees.

The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005) (stating the statute of limitations for “an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law” is three years); *see Berry v. McLeod*, 328 S.C. 435, 444-45, 492 S.E.2d 794, 799 (Ct.App.1997) (concluding that section 15-3-530(5) of the South Carolina Code provides a three-year statute of limitations for legal malpractice actions).

Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist. *Burgess v. Am. Cancer Soc’y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct.App.1989); *see* S.C. Code Ann. § 15-3-535 (2005) (“[A]ll actions initiated under Section 15-3-530(5) must be commenced within three

years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.”). “This standard as to when the limitations period begins to run is *objective* rather than subjective.” *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800. “Therefore, the statutory period of limitations begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.” *Id.*

As the Court has described in detail, Hutson was aware of the Lifetime Memberships and the possibility that the Lifetime Memberships could impact clear title to the property prior to closing on the LPA. Therefore, to the extent that Hutson believes a fraud counterclaim should have been asserted by Weissenstein in the 2011 ejectment action against the TLC Parties related to nondisclosure of alleged title defects created by the Lifetime Memberships, Hutson knew or should have known of this claim prior to the conclusion of the 2011 ejectment action. The 2011 ejectment action concluded on April 13, 2012 when Judge James entered a consent order adopting the settlement agreement signed by the parties.

The Court finds that Mr. Hutson knew or should have known that Mr. Weissenstein did not assert a cause of action for fraudulent nondisclosure of alleged title defects caused by the Lifetime Memberships at that time. This action, alleging malpractice against Weissenstein was filed on September 9, 2018. The Court finds that this action was filed after the expiration of the three-year statute of limitations.

V

After consideration of the material in the record, the relevant law, the parties’ memoranda, and the oral arguments of the parties, Defendant’s motion for summary judgment is GRANTED.

[Judge's Electronic Signature to Follow]

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Sumter Common Pleas

Case Caption: M B Hutson VS Paul Weissentein

Case Number: 2018CP4301583

Type: Order/Summary Judgment

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

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EXHIBIT Q

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2018 CP-32-3879

M. B. HUTSON

BURN LAW FIRM, LLC.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: COURT

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter initially came before the Court on January 24, 2019 for a hearing on Defendant's motion to dismiss. By a form order dated February 12, 2019, the Court denied the Defendant's motion to dismiss and granted Plaintiff thirty-five (35) days to file an expert affidavit as required pursuant to Section 15-36-100.

The Plaintiff subsequently filed a motion for reconsideration on March 18, 2019 and an addendum on March 26, 2019. Defendant filed a memorandum in opposition on March 26, 2019. The Court has reviewed all subsequent filings and considered fully the issues in this case.

The requirements of Section 15-36-100 are clear. In a legal malpractice action, an expert affidavit must be filed with the pleadings attesting to the validity of the underlying action. Although Plaintiff maintains that his factual scenario represents a common knowledge exception to the affidavit requirement, the Court disagrees. As much as this Court may sympathize with Plaintiff's loss and the emotional stress this has caused him, this Court cannot ignore the law.

Accordingly, the Court finds that this matter must be dismissed due to Plaintiff's failure to file the affidavit required pursuant to Section 15-36-100 within the timeframe of the Court's February 12, 2019 Order.

ORDER INFORMATION

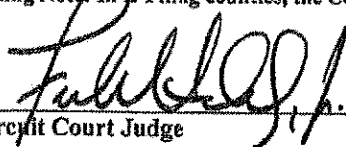
This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

[Handwritten signature]

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details. E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


 Circuit Court Judge

2159

Judge Code

April 10, 2019

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Pro Se

William Hammond Jordan

J. Calhoun Watson

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: Theima Salters (for hearing of January 24, 2019)

EXHIBIT R

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	CA#: 2018-CP-40-06156
MB Hutson/MB Hudson,	)	
	)	
Plaintiff,	)	
	)	ORDER GRANTING DEFENDANT'S
vs.	)	MOTION TO DISMISS
	)	PLAINTIFF'S COMPLAINT
Atlantic Coast Properties, John Doe #1,	)	
John Doe #2,	)	
	)	
Defendants.	)	

THIS MATTER came to be heard after proper notice, on March 12, 2019 upon Defendant's Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Present at the hearing was the Plaintiff, who appeared *pro se*, and Brian L. Boger, counsel for Defendant Atlantic Coast Properties ("Defendant" hereinafter).

This matter concerns the sale of real estate by the Defendant to the Plaintiff. The sale was not consummated. When the sale did not go through, the Defendant gave the Plaintiff another ninety days to complete the sale. Additionally, the parties agreed that at the end of ninety days, if the sale was not completed, the Plaintiff agreed to release and discharge, *inter alia*, the Defendants from any and all claims, demand, damages, and causes of action. The agreement was prepared by counsel; the Plaintiff and Defendant signed it.

A few months later, in contravention of the agreement, the Plaintiff filed this action for "Breach of Contract/Duress, Fraud for Non-Disclosure, and Equitable Interest." Defendant asserted that Plaintiff's Complaint failed to state a cause of action upon which relief can be granted, and offered as evidence the above-mentioned signed Agreement. The Plaintiff, at the

Motion hearing, argued that he signed the Agreement under duress, yet provided no evidence whatsoever which would support such an assertion.

After due consideration of arguments from both the Plaintiff and the Defendant, this court finds that the Motion to Dismiss should be granted. The Agreement that was signed by Plaintiff speaks for itself and prohibits Plaintiff from initiating legal action against Defendant for the allegations upon which Plaintiff's Complaint was based.

NOW, THEREFORE,

IT IS HEREBY ORDERED that the Motion to Dismiss filed by Defendant is granted. Accordingly, Plaintiff's Complaint is hereby dismissed with prejudice.

Robert E. Hood, Judge, Fifth Judicial Circuit

April _____, 2019



Richland Common Pleas

Case Caption: Mb Hutson , plaintiff, et al vs Atlantic Coast Properties , defendant,
et al
Case Number: 2018CP4006156
Type: Order/Dismissal and Cancellation of Lis Pendens

So Ordered

s/ R.E. Hood #2164

Electronically signed on 2019-04-11 15:01:22 page 3 of 3

EXHIBIT S

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2019-001488

MB Hutson/MB Hudson, ...Appellant,

v.

Penn America Insurance Company,
Global Indemnity Group, Inc.,
Timothy J. Newton, Esq., J.R. Murphy, Esq.,
John Doe #1, John Doe #2, ...Respondents.

**AFFIDAVIT OF COUNSEL FOR RESPONDENTS PENN AMERICA INSURANCE
COMPANY AND GLOBAL INDEMNITY GROUP, INC.**

PERSONALLY APPEARED BEFORE ME, the undersigned, Christian Stegmaier, who after
being duly sworn, deposes and says:

1. I am a member of the South Carolina Bar, S.C. Bar No. 68648, and, on behalf of the
firm of Collins & Lacy, P.C., am attorney of record for Respondents Penn America Insurance
Company and Global Indemnity Group, Inc. (collectively, "PAIC") in the above-captioned case
presently pending South Carolina Court of Appeals.

2. Appellant MB Hutson/ MB Hudson filed his initial Notice of Appeal on September 3,
2019.

3. Since the filing of Appellant's Notice of Appeal the following fees and costs were incurred in defending this Appeal:

- a. \$14,221.50, in total attorneys' fees from September 3, 2019 through the date of this Affidavit; and
- b. \$429.20, in costs from September 3, 2019 through the date of this Affidavit.

4. The above reasonable fees and expenses would have been avoided if Appellant had not pursued this frivolous appeal and engaged in conduct aimed at burdening and harassing Respondents and their counsel.

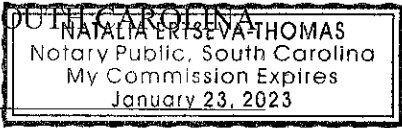
FURTHER, THE AFFIANT SAYETH NAUGHT.



CHRISTIAN STEGMAIER

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 24 DAY OF JULY, 2020



NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 

Jul 24 2020

SC Court of Appeals

Christian Stegmaier | D: 803.255.0454 | E: cstegmaier@collinsandlacy.com

July 23, 2020

VIA U.S. MAIL AND EMAIL

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

Re: MB Hutson/MB Hudson v. Penn America Insurance Company, Global Indemnity Group, Inc., Timothy J. Newton, Esq., J.R. Murphy, Esq., John Doe #1, and John Doe #2
Appellate Case No. 2019-001488
Claim No. 16011284
C&L File No. 000774-01021

Dear Ms. Kitchings:

Please find enclosed for filing the unbound original and one (1) copy of *Respondents Penn America Insurance Company and Global Indemnity Group, Inc.'s Motion for and Memorandum in Support of Imposition of Sanctions against Appellant*, together with our firm's check in the amount of \$50.00 for filing in the above referenced matter. Please file the original and return a clocked copy of same in an envelope provided for your convenience.

Pursuant to the Supreme Court's Amended Order "re: Operation of the Appellate Courts During the Coronavirus Emergency" (2020-05-29-02, Appellate Case No. 2020-000447), we have not included any additional copies. If any additional copies are required, please let us know.

By copy of this letter and enclosure, we are serving same on all parties.

Thank you for your time and attention. Should you have any questions or concerns, please do not hesitate to contact us.

Respectfully,



Christian Stegmaier

CS/net
Encl.

The Honorable Jenny A. Kitchings

July 23, 2020

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cc (via U.S. Mail and email):

M. B. Hutson, Appellant *pro Se*

John Robert Murphy, Esquire, Murphy & Grantland, P.A.

Tim Newton, Esquire, Murphy and Grantland, PA