THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2018-000943

Dr. Gregg N. Battersby, Appellant,

v.

Pamela Reid, State Farm Mutual Automobile Insurance Company and John Wiles, Defendants,

Of whom State Farm Mutual Automobile Insurance Company and John Wiles are the Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1) DID THE TRIAL COURT ERR IN OPINING THAT APPELLANT HAD NO CONTRACT WITH RESPONDENTS?

2) DID THE TRIAL COURT ERR IN OPINING THAT APPELLANT'S ORAL CONTRACT WAS UNENFORCABLE?

3) DID THE TRIAL COURT ERR IN OPINING THAT RESPONDENTS DID NOT MAKE A FALSE STATEMENT TO APPELLANT?

4) DID THE TRIAL COURT ERR IN OPINING THAT APPELLANT COULD NOT HAVE DETRIMENTALLY RELIED ON ANY STATEMENT OF RESPONDENTS?

5) DID THE TRIAL COURT ERR IN OPINING THAT APPELLANT CANNOT ESTABLISH THAT HE HAD NO WAY OF KNOWING THAT RESPONDENTS WOULD NOT PAY HIM DIRECTLY FOR REID'S BILLS?

6) DID THE TRIAL COURT ERR IN OPINING THAT APPELLANT CANNOT ESTABLISH DETRIMENTAL RELIANCE ON ANY STATEMENT MADE BY RESPONDENTS FOR NEGLIGENT MISPREPRESENTATION AND NEGLIGENCE?

7) DID THE TRIAL COURT ERR IN OPINING THAT APPELLANT CANNOT ESTABLISH JUSTIFIABLE RELIANCE ON THE STATEMENT MADE BY RESPONDENTS?

8) DID THE TRIAL COURT ERR IN OPINING THAT RESPONDENTS HAD NO PECUNIARY INTEREST IN WHETHER PAYMENT WAS ISSUED DIRECTLY TO APPELLANT OR REID FOR NEGLIGENT MISPREPRESENTATION AND NEGLIGENCE?

STATEMENT OF THE CASE

Appellant filed this Complaint against Respondents on December 5, 2017. The causes of action are breach of contract, fraud, negligent misrepresentation, and negligence. Respondent filed an answer on December 28, 2017. Respondent filed a Motion for Summary Judgment on February 26, 2018. Respondent filed its Memorandum in Support of Motion for Summary Judgment on April 6, 2018. This Memorandum was not filed at least 10 days before the hearing under South Carolina Civil Rules 56(c). On April 12, 2018, a hearing was held on the motion. At the hearing, the court did not let Appellant present his entire position. The court told Appellant to hurry up because the court was running late. (R. p. 132, ll. 10-11). The court granted Respondents motion at the hearing without any further consideration. The Appellant served this appeal on Respondent on May 17, 2018. The trial court order did not address any cause of action outside of the breach of contract with any specificity. Appellant is drafting this brief using Respondents' Memorandum for their Motion for Summary Judgment as a guide. Appellant finds this highly unusual. Appellant is at a handicap in not knowing how to effectively challenge the order.

STATEMENT OF FACTS

On or about July 11, 2017, Pamela Reid (Reid) presented herself to Appellant's office with injuries sustained in an automobile accident. Reid stated that on July 10, 2017 she was rear ended by William Calcutt (Calcutt). Calcutt was insured by State Farm Mutual Automobile Insurance (State Farm). The claim number was 40-0756-X00. Appellant examined Reid and determined a course of treatment. Appellant initiated a course of treatment that included chiropractic manipulative therapy, manual therapy, and ultrasound treatments. On July 11, 2017,

Reid signed several documents giving an irrevocable lien to Appellant and directing any and all insurance carriers to make payment directly to Appellant for the services rendered to her. (R. p. 95). Those documents also assigned all of Reid's rights, remedies, and benefits to Appellant to the extent of his charges, as well as any causes of action that Reid may have against Calcutt in the event Respondents refuse to pay Appellant[1]. And it allowed Appellant to prosecute the claim in Appellant's name. Appellant treated Reid from July 11, 2017 until her discharge on August 14, 2017. Reid's diagnoses are cervical strain sprain, thoracic strain sprain, lumbar radiculitis, and knee strain sprain.

On or about August 15, 2017, John Wiles (Wiles), a claims specialist for State Farm, told Appellant that Respondents would honor the liens signed by Reid and would make payment directly to Appellant out of the settlement. (R. p. 99, ll. 5-7). Respondents sent Appellant an Authorization for Release of Information (Release). The Release requested treatment and billing records from Appellant for Reid's care. The Release permitted "State Farm to investigate, process, and determine the amount payable". (R. p. 101). On August 21, 2017, Appellant forwarded the liens, as well as Reid's records and itemized bill, to Respondents. Since Respondents agreed to pay Appellant, he was prohibited from exercising the option to take over and prosecute the claim in Appellant's name and settle it as he saw fit.

On or about August 24, 2017, Reid reached a settlement with Respondents. Reid agreed to settle her bodily injury claim for $7,000.00. The settlement included all medical bills of which Appellant's bill was a part thereof. (R. p. 104, ll. 18-25). Wiles told Appellant that Reid told

1 On August 14, 2018, Appellant used this assignment to settle a claim against another patient. On August 29, 2018, the insurance company for the at-fault driver reached a settlement with Appellant and paid Appellant for his services. See Anderson Summary Court Case Number: 2018CV0410103120.

Respondents to pay her directly for Appellant's services to her. This was in direct violation of the documents she signed. Those documents could not be modified or revoked without written consent of Appellant. Appellant never agreed to modify or revoke the liens. Respondents had been provided with the liens and knew they could not be modified or revoked without Appellant's consent. It should be noted that Appellant has not been provided any proof from Reid that she told Respondents to pay her directly, just hearsay from Respondents. Respondents have provided no affidavits from Reid or Wiles that the conversation ever occurred. In fact, the audio recording between Reid and Wiles, presumably the only communication between the two, makes no mention of Reid saying she wants to be paid directly.

Respondents paid Reid directly for Appellant's services to Reid. This was in violation of their agreement made with Appellant on August 15, 2017 in which Wiles told Appellant that Respondents would pay Appellant directly. Respondents' actions prevented Appellant from exercising his option to take over the claim in Appellant's name and settle or resolve the matter as Appellant saw fit. If Appellant had known that Respondents weren't going to pay him directly, Appellant would have insisted Reid get an attorney to represent her in the claim to protect Appellant's interests.

Reid signed an Irrevocable Healthcare Power of Attorney (POA). This POA directed Respondents to make the check for her treatment payable to Appellant and send such checks directly to Appellant. (R. p. 107). Respondents failed to do so.

STANDARD OF REVIEW

"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." Brockbank v. Best Capital Corp., 341 S.C. 372, 378-79, 378, 534 S.E.2d 688, 692 (2000). An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP. Id. at 379, 534 S.E.2d at 692." See Bovain v. Canal Ins., 678 S.E.2d 422, 383 S.C. 100 (S.C., 2009).

"Summary judgment should be granted only when it is perfectly clear no issue of fact is involved. Koren v. National Home Life Assurance Co., 277 S.C. 404, 288 [284 S.C. 211] S.E.2d 392 (1982); Vaughn v. A.E. Green, Co., Inc., 277 S.C. 392, 287 S.E.2d 493 (1982). On motion for summary judgment, the inferences to be drawn from the underlying facts contained in the record must be viewed in the light most favorable to the party opposing the motion. See United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962); Gardner v. Campbell, 257 S.C. 209, 184 S.E.2d 700 (1971). The papers supporting the movant are to be closely scrutinized, whereas those of the opponent are to be indulgently treated. Spencer v. Miller, 259 S.C. 453, 192 S.E.2d 863 (1972). When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the plaintiff must show the court the existence of a genuine issue of fact. Taylor v. Alston, 79 N.M. 643, 447 P.2d 523, 29 A.L.R.3d 653 (1968). In such a case, the plaintiff cannot defeat the defendant's motion by relying upon the mere allegations of his complaint but must disclose the facts he intends to rely on by affidavit or other proof. Cir.Ct.R. 44; 73 Am.Jur.2d Summary Judgment Section 23 at 745 (1974); see Epprecht v. Delaware Valley Machinery, Inc., 407 F.Supp. 315 (E.D.Pa.1976)." See Dyer v. Moss, 325 S.E.2d 69, 284 S.C. 208 (S.C. App., 1984).

THE TRIAL COURT ERRED IN OPINING THAT APPELLANT HAD NO CONTRACT

WITH RESPONDENTS.

Appellant entered into a contract with Respondents. "The required elements of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of South Carolina,* 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). "A contract is an obligation which arises from actual agreement of the parties manifested by words, ***oral or written***, or by conduct." *Roberts v. Gaskins,* 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997). Valuable consideration may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship,* 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998). A benefit to the promisor or a detriment to the promisee may provide sufficient consideration for a contract. *Shayne of Miami, Inc. v. Greybow, Inc.,* 232 S.C. 161, 167, 101 S.E.2d 486, 489 (1957). If the evidence as to the existence of a contract is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury. *Hendricks v. Clemson Univ.,* 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003). With certain exceptions, ***a contract need not be in writing to be enforceable***. *Gaskins v. Firemen's Ins. Co. of Newark, N.J.,* 206 S.C. 213, 216, 33 S.E.2d 498, 499 (1945) (noting that if there is a meeting of the minds with regard to the essential elements of a contract, it is immaterial whether the contract is written or oral)." See <u>Armstrong v. Collins</u>, 621 S.E.2d 368, 366 S.C. 204 (SC, 2005).

Appellant called Respondents on August 15, 2017. Appellant asked Respondents if they would pay Appellant for his services rendered to Reid. Reid signed documents directing payment to Appellant out of the settlement funds. Respondents became liable for the injuries to

Reid once Calcutt became legally liable for the accident. This obligation was created under the insurance policy issued to Calcutt. Respondents said they would pay Appellant directly for the services provided to Reid out of the settlement. Appellant provided chiropractic care to Reid totaling $5,045.00. Respondents refused to pay Appellant; instead they paid Reid the $5,045.00 in violation of the agreement with Appellant.

A contract existed between Appellant and Respondents. Respondents breached the contract with Appellant by not paying him for his services to Reid. Appellant had damages of $5,045.00. "The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." S. Glass & Plastics Co. v. Kemper, 399 S.C. 483, 491–92, 732 S.E.2d 205, 209 (Ct.App.2012)." See Hotel & Motel Holdings, LLC v. BJC Enters., LLC, 414 S.C. 635, 780 S.E.2d 263 (S.C. App., 2015).

Appellant had an oral contract with Respondents. The trial court erred in claiming that no contract existed.

THE TRIAL COURT ERRED IN OPINING THAT THE ORAL CONTRACT WAS UNENFORCEABLE UNDER THE STATUTE OF FRAUDS.

Appellant's oral contract with Respondents falls outside the Statute of Frauds. Appellant had an oral agreement with Respondents to pay him directly for Reid's treatment out of the settlement funds. Respondents admitted that they agreed to pay Appellant directly for Reid's treatment in paragraph 41 of their Answer. A written contract was not required.

Respondents issued an automobile insurance policy to Calcutt that was in effect at the time of the accident. As a part of the insuring agreement it states that "***We will pay damages an insured becomes legally liable to pay because of bodily injury to others caused by an accident***

that involves a vehicle for which that insured is provided Liability Coverage by this policy". (R. p. 110). Calcutt was found to have contributed to the collision thus legally liable for Reid's injuries. (R. p. 111). Once Calcutt became legally liable, Respondents became liable to pay for Reid's treatment. "It appears to us that the agreement here used upon was not, on the part of the insurer, a promise to answer for the debt, default, or miscarriage by another required by the Statute of Frauds to be in writing. The insurer's contract is the promise to answer for the debt, default, or miscarriage of the insured as provided in the terms of the policy. That contract is in writing. See Brown v. Noland Co., 403 S.W.2d 33 (Ky.1966); [116 Ga.App. 688] Ortis v. Travelers Ins. Co., 2 Mich.App. 548, 140 N.W.2d 791 (1966); Regus v. Schartkoff, 156 Cal.App.2d 382, 319 P.2d 721 (1958). We quote from the case of Ortis v. Travelers Ins. Co., supra: 'Travelers did agree in its written policy with (its insured) to pay certain of (its insured's) obligations which might arise in the future up to the policy limits. Travelers' oral agreement with plaintiff was within the limits of its written agreement with (its insured). Furthermore, Travelers' was settling not only (its insured's) potential liability but its own possible obligation to pay and its own duty to defend (its insured).' ***The insurer has a financial interest in the claim against the insured even though it only becomes liable to the third party when legal liability is established against the insured, and where the insurer agrees to settle its potential liability as well as the potential liability of the insured, the oral promise by the insurer to settle or pay the claim against the insured is an original undertaking and need not be in writing***. See Ferst's Sons & Co. v. Bank of Waycross, 111 Ga. 229, 36 S.E. 773. As was said by the California court in Regus v. Schartkoff, 156 Cal.App.2d 382, 319 P.2d 721 (1958): ***'The leading and main object of (the insurance adjuster) was not to become surety or guarantor for (their insured), but to***

subserve the purpose and interest of Allstate. Therefore, the promise was an original one and valid, though oral.' See also Evans v. Griffin, 1 Ga.App. 327, 57 S.E. 921; Holt v. Empire Tire & Rubber Co., 33 Ga.App. 723, 127 S.E. 803; Palmetto Mfg. Co. v. Parker, 123 Ga. 798, 51 S.E. 714; Harris v. Jones, 140 Ga. 768, 79 S.E. 841; Fuller v. Holsomback, 42 Ga.App. 483, 156 S.E. 460." See Klag v. Home Ins. Co., 158 S.E.2d 444, 116 Ga.App. 678 (Ga. App., 1967). "One test for determining whether a promise to pay the debt of another is within or without the Statute of Frauds is whether the promisor is a surety, only secondarily liable, or has accepted primary responsibility for the debt. Gulf Liquid Fertilizer Co. v. Titus, 163 Tex. 260, 354 S.W.2d 378, 382 (1962); Tex. Bus. & Com.Code Ann. § 26.01(b)(2). ***If the party is primarily liable, its promise to pay a debt is not required to be in writing by the Statute of Frauds***. See Gulf Liquid, 354 S.W.2d at 382." See Carter v. Allstate Ins. Co., 962 S.W.2d 268 (Tex.App.-Hous. (1 Dist.), 1998). The oral agreement between Appellant and Respondents did not create any additional liability than what was already in place by the insurance policy with Calcutt. Appellant merely requested that the payment for the treatment rendered to Reid be paid to Appellant and not Reid. Respondents did in fact make this payment to Reid. Respondents were primarily liable to pay for the injuries caused by Calcutt. (R. p. 124, ll. 6-10).

Respondents were settling a business and financial liability of their own. "It is important to determine in each case of an undertaking, which in form purports to be a promise to pay the debt of another, whether it is such fact; for it is well settled that, ***if an oral agreement is in effect a promise to pay the debt of the promisor himself, it is not within the statute of frauds, although the incidental result of its performance may be the discharge of the indebtedness of another person***." *** "Wherever the main purpose and object of the promisor is, not to answer

for another, but to subserve some purpose of his own, his promise is not within the statute, although it may be in form a promise to pay the debt of another." See Lowrance v. Caldwell, 85 S. C. 94, 67 S. E. 143 (S.C., 1910). "It is important to determine in each case of an undertaking, which in form purports to be a promise to pay the debt of another, whether it is such in fact; for it is well settled that, if an oral agreement is in effect a promise to pay the debt of the promisor himself, it is not within the statute of frauds, although the incidental result of its performance may be the discharge of the indebtedness of another person.' 20 Cyc. 167, 168. * * *" See Stackhouse v. Pure Oil Co, 176 S.C. 318, 180 S.E. 188 (S.C., 1935). "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." See Yracheta v. Stanford (),120 N. Y. . 117; Cortelyou v. Hoagland, 40 N. J. Eq. 1; Beall v. Board of Trade, 164 Mo. App. 186, 148 S. W. 386." See Am. Wholesale Corp. v. Mauldin, 122 S.E. 576, 128 S.C. 241 (S.C., 1924). Respondents were contractually liable for the injuries to Reid caused by Calcutt up to the policy limits. The insurance contract issued to Calcutt stated that Respondents will pay for the injuries caused by Calcutt. Respondents were paying a debt owed by them. (R. p. 136, ll. 8-17).

Respondents were holding the settlement funds to pay for the treatment of Reid. (R. p. 125, ll. 8-17). Respondents paid these settlement funds to Reid in violation of the agreement made between Appellant and Respondents. No written contract is needed when a promisor, Respondents, are holding funds of the debtor, Reid. "Another exception is that ***a promise to pay***

a debt out of the debtor's funds or property taken over or held by the promisor is an original undertaking, and the Statute is not applicable to the promise. See the case of Stackhouse v. Pure Oil Co., 176 S.Ct. 318, 180 S.E. 188, and the cases therein cited. Also, see 37 C.J.S. Frauds, Statute of § 18, page 525." See Campbell v. Hickory Farms of Ohio, 190 S.E.2d 26, 258 S.C. 563 (S.C., 1972).

Appellant's oral contract with Respondents falls outside of the Statute of Frauds. The trial court erred when it opined that the oral contract was unenforceable under the Statute of Frauds.

THE TRIAL COURT ERRED IN OPINING THAT RESPONDENTS DID NOT MAKE A FALSE STATEMENT TO APPELLANT.

Respondents claim that their promise to pay Appellant for Reid's treatment was not false because Reid told them that she wanted to be paid for her treatment instead of Appellant. Respondents cite several paragraphs from Appellant's complaint where he references Reid telling Respondents that she wanted to be paid directly. These alleged statements by Reid were obtained from Appellant's communication with Respondents. Appellant had no direct knowledge of any statement by Reid to Respondents that she wanted to be paid directly. (R. p. 120, ll. 3-10). In fact, Respondents have provided no proof that she ever made such a statement to them. The audio recording between Reid and Respondents makes no mention of Reid wanting to be paid directly. (R. p. 104). This audio recording was the only communication between Reid and Respondents. Respondents provided no affidavits from Reid or Respondents that this was actually said by Reid. If Reid in fact made this statement it would be easy to substantiate. The reason Respondents have no proof is that Reid never told Respondents to pay her directly. To the

contrary, Appellant has documents signed by Reid directing payment for her treatment to go to Appellant. (R. p. 95). These documents are irrevocable and could not be modified by Reid. One can come to one conclusion, which is that Respondents paid Reid against her directions in violation of Respondents' contract with Appellant. This proves that Respondents made a false statement to Appellant.

Respondents did in fact make a false statement to Appellant. The trial court erred when it opined that Respondents did not make a false statement to Appellant.

THE TRIAL COURT ERRED IN OPINING THAT APPELLANT COULD NOT HAVE **DETRIMENTALLY RELIED ON ANY STATEMENT OF RESPONDENTS.**

The trial court mistakenly believes that detrimental reliance is a required element in Appellant's causes of action. (R. p. 131, ll. 3-9). Detrimental reliance is not an element in any of Appellant's causes of action. (R. p. 125, ll. 18-23). Respondents failed to cite any authority where detrimental reliance must be established. Respondents deceptively cite Stringer v. State Farm Mut. Auto. Ins., 687 S.E.2d 58, 386 S.C. 188 (S.C. App., 2009) as an authority regarding this matter. Stringer at 62 refers to estoppel in Respondents' citation. Here is the full citation, "In addition, ***nothing in the record demonstrates Stringer satisfied the remaining elements of estoppel.*** Namely, Stringer has failed to prove that he suffered a prejudicial change in position or detrimentally relied on the representations of Jennings." Plaintiff has no causes of action for estoppel.

Detrimental reliance is not a cause of action in South Carolina. "Because the court can locate no South Carolina law providing for detrimental reliance as a cause of action, the court understands Plaintiffs' claim of detrimental reliance to be one of either promissory estoppel or

equitable estoppel." See Weber v. Bank of Am. NA (D.S.C., 2013).

Black's Law Dictionary 5th Edition defines detrimental reliance as a "response by promisee by way of act to offer of promisor in a unilateral contract. See also Promissory Estoppel." A unilateral contract is one in which "one party makes an express engagement or undertakes a performance, without receiving in return any express engagement or promise of performance from the other". "***Promissory estoppel comes into play in situations where actual consideration is not present***," and is thus "inapplicable in situations where a contract exists since a necessary element of a valid contract is consideration." Glover v. Lockheed Corp., 772 F.Supp. 898, 907 (D.S.C. 1991); see also Carlson v. Arnot-Ogden Memorial Hosp., 918 F.2d 411, 416 (3d Cir.1990) (relief under theory of promissory estoppel is "unwarranted" where a contract exists)" See White v. Roche Biomedical Laboratories, Inc., 807 F.Supp. 1212 (D.S.C., 1992).

There was consideration by Appellant in giving treatment to Reid for her injuries sustained in the automobile accident caused by Calcutt. Respondents were liable to pay for Reid's treatment under the insurance policy with Calcutt. Respondents agreed to pay Appellant for the treatment to Reid. This constituted consideration by Respondents. It was this consideration that Respondents breached. This was not a unilateral contract.

For arguments sake, let's assume that detrimental reliance is an element in Appellant's causes of action. Appellant did indeed prove that he detrimentally relied on Respondents' statement that they would pay Appellant directly. Reid agreed to assign all her rights, remedies, and benefits to Appellant to the extent of his charges, as well as any causes of action that she might have against Calcutt, to prosecute such causes of action in Appellant's name and settle or otherwise resolve such causes of action as Appellant sees fit, if Respondents did not agree to pay

him directly. (R. p. 95). Reid has never challenged this agreement. Since Respondents agreed to pay Appellant directly, Appellant could not take over the claim and settle it as he saw fit. In addition, if Appellant knew that Respondents were not going to pay him directly, Appellant would have required that Reid obtain a lawyer to settle her claim against Calcutt and protect Appellant's interests. This would have cost Respondents more money.

Appellant was not required to establish detrimental reliance in his causes of action. Even so, detrimental reliance was established by Appellant's actions. The trial court erred when it opined that detrimental reliance was not established when it was not required.

THE TRIAL COURT ERRED IN OPINING THAT APPELLANT CANNOT ESTABLISH THAT HE HAD NO WAY OF KNOWING THAT RESPONDENTS WOULD NOT PAY HIM DIRECTLY FOR REID'S BILLS.

Respondents claim that Appellant cannot establish the element of fraud of the hearer's ignorance of the false statement. Appellant had no way of knowing that Respondents would not pay him as promised. Respondents told Appellant that they would pay him directly if Reid told them to do so. Appellant told Respondents that Reid had signed documents directing payment to Appellant. Appellant asked Respondents if they would honor the documents. Respondents said they would. Appellant provided those documents to Respondents. Appellant had every right to believe Respondents. Appellant had no reason to believe that Respondents would lie to him. Respondents have provided no proof from Reid that she told them to pay her directly. It made no difference whether Appellant asked Respondents at the beginning of Reid's treatment or at the end of Reid's treatment if they would pay him directly. It was Reid's wishes all along to have Appellant paid directly.

Respondents claim that Appellant cannot prove that Respondents intended that its representation be acted upon because Reid's treatment had already occurred at the time of the representation. Reid assigned all her rights to the claim to Appellant ***only*** if Respondents refused to pay him directly. Since Respondents told Appellant that they would pay him, Appellant was prevented from taking over the claim and prosecuting it in his name. Respondents knew this since they were provided with Reid's signed documents. The fact that Appellant had finished treating Reid had no bearing on this. Appellant could take over Reid's claim at any point if Respondents would refuse to pay him.

Respondents also claim that Appellant cannot prove a proximate injury resulting from the false representation. Appellant was not paid for his treatment as a result of Respondents failed promise to pay him directly. Once again, it made no difference when Respondents made their promise. Appellant could only take over Reid's claim if Respondents refused to pay him directly. Since Respondents promised to honor Reid's liens directing payment to Appellant, Appellant could not take over Reid's claim and prosecute it in Appellant's name.

The trial court erred when it opined that Appellant could not establish that he had no way of knowing Respondents would not pay him directly.

THE TRIAL COURT ERRED IN OPINING THAT APPELLANT CANNOT ESTABLISH DETRIMENTAL RELIANCE ON ANY STATEMENT MADE BY RESPONDENTS FOR NEGLIGENT MISPREPRESENTATION AND NEGLIGENCE.

The causes of action of negligent misrepresentation and negligence do not have detrimental reliance as an element. The elements of negligent misrepresentation are as follows.

"To establish liability for negligent misrepresentation, the plaintiff must show by a preponderance of the evidence: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (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 representatio[n]. *Quail Hill, LLC v. County of Richland,* 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010)." See John v. Milliman, 392 S.C. 116, 708 S.E.2d 766 (S.C., 2011). Justifiable reliance is the only type of reliance needing to be established in this cause of action.

The elements of negligence are as follows. "To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty." Vinson v. Hartley, 324 S.C. 389, 399, 477 S.E.2d 715, 720 (Ct.App.1996)." See Hinds v. Elms, 595 S.E.2d 855, 358 S.C. 581 (S.C. App., 2004). No form of reliance needs to be established in this cause of action.

Appellant discussed the issue of detrimental reliance previously. Even if detrimental reliance was an element of any causes of action, Appellant did establish that he detrimentally relied on Respondents false statement by not taking over Reid's claim and settling it in his name as Reid had directed.

The trial court erred in opining that detrimental reliance was an element of Appellant's causes of action.

THE TRIAL COURT ERRED IN OPINING THAT APPELLANT CANNOT

ESTABLISH JUSTIFIABLE RELIANCE ON THE STATEMENT MADE BY RESPONDENTS.

Appellant justifiably relied on Respondents statement that they would pay Appellant directly. If Appellant would have believed that Respondents were not truthful in its agreement to pay Appellant, Appellant would have taken over the claim and settle it as he saw fit or require Reid get a lawyer to represent her to settle the claim. "Whether reliance is justified in a given situation requires an evaluation of the circumstances involved, including the positions and relations of the parties. Id.; see Giles v. Lanford & [286 S.C. 234] Gibson, --- S.C. ---, 328 S.E.2d 916 (Ct.App.1985)." See Elders v. Parker, 286 S.C. 228, 332 S.E.2d 563 (S.C. App., 1985). "We hold ***that reliance can only be justified in these cases if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made.***" See Gruber v. Santee Frozen Foods, Inc., 419 S.E.2d 795, 309 S.C. 13 (S.C. App., 1992). Respondents were the only people to know if their statement to Appellant was truthful or not. Appellant had no way of knowing that Respondents were not being truthful in their promise to pay Appellant. Appellant could only trust that Respondents were telling the truth.

The trial court erred in opining that Appellant could not prove justifiable reliance on Respondents false statement.

THE TRIAL COURT ERRED IN OPINING THAT RESPONDENTS HAD NO PECUNIARY INTEREST IN WHETHER PAYMENT WAS ISSUED DIRECTLY TO APPELLANT OR REID FOR NEGLIGENT MISPREPRESENTATION AND NEGLIGENCE.

Respondents were liable to pay for the treatment rendered to Reid in the insurance policy

issued to Calcutt. Respondents had a pecuniary interest in the claim. "In Hirst v. St. Paul Fire & Marine Insurance Co., 106 Idaho 792, 683 P.2d 440 (Ct.App.1984), we noted a distinction between an insurance company's pecuniary liability upon a claim and its duty to defend the insured." See Maxson v. Farmers Ins. of Idaho, Inc., 107 Idaho 1043, 695 P.2d 428 (Idaho App., 1985). "This is true for the simple reason that a fire insurance policy, like many forms of insurance, is a contract of pecuniary indemnity." See *United States v. Globe & Rutgers Fire Ins. Co., 104 F. Supp. 632 (N.D. Tex., 1952)*. "In Liddell v. Detroit Automobile Inter-Ins. Exchange, 102 Mich.App. 636, 649, 302 N.W.2d 260 (1981), where the Court reasoned: "In our view, ***a contract for no-fault insurance benefits, like uninsured motorist coverage and disability insurance, is a pecuniary contract requiring the insurance company to pay certain sums upon the occurrence [116 Mich.App. 120] of a specified event.***" See Schaible v. Michigan Mut. Ins. Co., 321 N.W.2d 860, 116 Mich.App. 116 (Mich. App., 1982).

Whether payment was made to Appellant or Reid had no effect on Respondents' pecuniary interest. The basis of this Complaint is the assurance by Respondents that they would pay Appellant for his services to Reid. Appellant reached a settlement with Reid in which a portion of that settlement was Appellant's services to Reid.

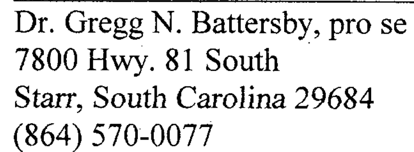
The trial court erred in opining that Respondents had no pecuniary interest in the payment of Reid's injuries.

CONCLUSION

Appellant's cause of action for breach of contract falls outside of the statute of frauds in three ways. Respondents were settling a debt owed by them, Respondents were liable for the injuries caused by their insured, William Calcutt and Respondents were holding settlement funds

for Pamela Reid. These make the oral contract between Appellant and Respondents enforceable. Appellant has established the elements of fraud as Respondents raised their concerns. The court was silent on the issue of detrimental reliance. It gave no citations supporting its position. Detrimental reliance is not an element of any causes of action set forth by Appellant. Justifiable reliance was established by Appellant having no way of knowing that Respondents were not telling him the truth. Respondents had a pecuniary interest in the claim against their insured, William Calcutt, in that they were contractually liable to pay for the injuries caused by their insured, William Calcutt. Appellant requests this Court reverse the decision of the trial court.

Dated November 8, 2018



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CERTIFICATE OF COUNSEL IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Circuit Court Judge

Appellate Case No. 2018-000943

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v.

Pamela Reid, State Farm Mutual Automobile Insurance Company and John Wiles, Defendants,

Of whom State Farm Mutual Automobile Insurance Company and John Wiles are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

November 8, 2018

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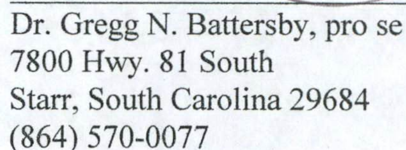
PROOF OF SERVICE

I certify that I have served the Final Appeal Brief on State Farm Mutual Automobile Insurance Company and John Wiles by depositing a copy of it in the United States Mail, postage prepaid, on November 23, 2018, addressed to his attorney of record, Charles Norris, 151 Meeting Street/Sixth Floor Charleston, South Carolina 29401-2239.

November 15, 2018



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