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
Civil Action Case No. 2018-CP-40-06344

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.

FINAL BRIEF OF RESPONDENTS PENN AMERICA INSURANCE COMPANY AND GLOBAL INDEMNITY GROUP, INC.

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II. Did the Common Pleas Court therefore err, in failing to hold these attorneys, officers of the Court in the State of S.C. to both the standards of the law of the State of South Carolina and the S.C. Rules of Professional Conduct?

III. Did the Common Pleas Court err in failing to review all the evidence and relying exclusively on the Defendants (albeit officers of the Courts) to present totally truthful information and opinions, knowing they were the Defendants?

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Whether the Trial Court properly considered the evidence submitted in Appellant and Respondents' written filings, the argument of the parties, and the proposed orders submitted in its decision to grant summary judgment?

II. Whether the Trial Court properly granted summary judgment in favor of Respondents Penn America Insurance Company and Global Indemnity Group, Inc. where Appellant executed a valid Release in favor of Penn-America and its affiliates, which precludes the claims raised in the instant lawsuit?

III. Assuming *arguendo* that Appellant's claims are not precluded by the Release, whether the Trial Court properly granted summary judgment in favor of Respondents Penn America Insurance Company and Global Indemnity Group, Inc. where there existed no genuine issues of material fact as to any of the causes of action raised in the Amended Complaint?

STATEMENT OF THE CASE

Appellant M.B. Hutson ("Appellant" or "Hutson") commenced a civil action in the Richland County Court of Common Pleas on December 5, 2018, against Penn America Insurance Company and Global Indemnity Group, Inc. (collectively "PAIC") and against attorneys Tim Newton ("Newton") and J.R. Murphy ("Murphy") (collectively "coverage counsel").[1] (R. p. 52, Compl.). On December 28, 2018, Appellant filed his Amended Complaint, which he served on the named defendants. Construing the Amended Complaint liberally, Appellant asserted or attempted 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. (R. p. 67, Amd. Compl.' R. p. 85, Hutson Exs. 1.1-13.0). These claims relate to the defense and indemnity provided to Appellant in two prior lawsuits—a federal court class action case in which Plaintiff was sued under a third-party claim for equitable indemnity and a related state court case for defamation—as well as a coverage action filed by PAIC regarding its obligations in those two lawsuits.

PAIC filed a timely Answer to the Amended Complaint on February 14, 2019, and later filed a Motion for Summary Judgment, followed by a supporting memorandum and exhibits. (R. p. 233, PAIC Answer; R. p. 680, PAIC Mot. for Summ. Jmt.; R. p. 1140 PAIC Memo. in Support of Summ. J.). Newton and Murphy similarly filed dispositive motions, followed by subsequent memoranda, exhibits, and affidavit. (R. p. 232, Joint Mot. to Dismiss; R. p. 346, Memo. in Support of Newton Mot. with Exs. A-AA; R. p. 649, Am. Mot. to Dismiss/for Summ. J.; R. p. 650, Newton Reply Memo. with Exs. BB-CC; R. p. 724 and App'x p. 1342, Newton Aff. with Exs. 1-3; R. p. 961, Newton Am. Resp. to Supp. Memo. of Pltf. with Exs. DD-HH; R. p. 1138, Murphy Memo.).

[1] Plaintiff also listed John Doe #1 and John Doe #2 as defendants.

In response to these dispositive motions, Appellant filed a Memorandum to Defendant's Response, a Supplemental Memorandum, and an Affidavit of Huston, all accompanied with additional exhibits. (R. p. 245, Hutson Memo.); (R. p. 683, Hutson Supp. Memo.); (R. p. 703, Hutson Aff.).

A hearing on the dispositive motions was held before The Honorable Michael G. Nettles on June 26, 2019. Appellant, Newton, and Murphy represented themselves *pro se*. PAIC was represented by Christian Stegmaier of Collins & Lacy, PC. Judge Nettles heard argument from all of the parties, all of whom craved reference to their prior court filings. Judge Nettles solicited proposed orders from all parties. (R. p. 1377). On July 18, 2019, Judge Nettles entered two separate orders. The first was an Order Granting Defendants Penn America Insurance Company and Global Indemnity Group, Inc.'s Motion for Summary Judgment. (R. p. 1, PAIC Order). The second was an Order Granting Defendants Newton and Murphy's Dispositive Motions. (R. p. 27, Newton/Murphy Order).

Appellant filed a notice of appeal. PAIC filed a motion to dismiss the appeal, following which Appellant filed a motion to dismiss his own appeal. Appellant subsequently filed a motion to withdraw his request for dismissal. This Court denied PAIC's motion to dismiss, granted Appellant's motion to withdraw his request for dismissal, and Appellant filed his brief.

This Brief of Respondent follows.

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 114, 410 S.E.2d 537, 545 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. at 115, 410 S.E.2d at 545. Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Id. With respect to an issue upon

which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Id. The nonmoving 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.

"In determining whether any triable issues of fact exist, the evidence and all inferences which can be **reasonably** drawn therefrom must be viewed in the light most favorable to the non-moving party." Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997) (emphasis added). Nonetheless, a court, "cannot ignore facts unfavorable to [the 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). "[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).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976). In that way, "[a] motion for summary judgment is akin to a motion for a directed verdict" because "[i]n each instance, one party must lose *as a matter of law.*" Main v. Corley, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984) (emphasis added); see also Baughman, 306 S.C. at 115, 410 S.E.2d at 545 (standard for summary judgment "mirrors" standard for directed verdict).

STATEMENT OF FACTS

Appellant's Amended Complaint raised 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. (R. p. 65, Amd. Compl.). One of the prior lawsuits was a federal class action case ("the Class Action") in which Appellant was sued under a third-party claim for equitable indemnity. (See Big Water Resort, LLC, *et al.* v. TLC Holdings, LLC, C/A: 2:14-1583-DCN-MGB). The other prior lawsuit was a state defamation action ("the Defamation Action") against Appellant brought in the Clarendon County Court of Common Pleas. (See R. p. 225, Hutson Ex. 13.0: Defamation Action, Compl.). PAIC retained the law firm of Murphy & Grantland to determine PAIC's coverage obligations in those two lawsuits. J.R. Murphy received the initial case referral. In 2016, Tim Newton filed a declaratory judgment action ("the Coverage Action") on PAIC's behalf. (R. p. 1281, line 23 – p. 1282, line 2; p. 1283, lines 1-11; see also R. p. 198, Hutson Ex. 11.0: Coverage Action, Compl.). PAIC's named insured was BWR, Inc. d/b/a Big Water Resort, and Appellant was an officer of the company. (See R. p. 1164, PAIC Ex. A, Policy).

As discussed more fully *infra*, both of the prior lawsuits were resolved within policy limits and with no personal liability to Appellant. Nonetheless, Appellant filed this action seeking $4.5 million in damages against these Appellees. (R. p. 65, Amd. Compl.). At its crux, Appellant's lawsuit centers around his contention that PAIC breached an obligation to represent him in his counterclaims in the two prior lawsuits, in which he asserted *pro se* allegations of extrinsic fraud in a 2010 land deal that underlies all of this litigation. (See R. p. 65, Amd. Compl.). Notably, Appellant 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 claims such as those raised in this lawsuit. (R. p. 494, Newton Ex. I: 2016 Release).

Original Land Deal and Appellant's Ejectment

To provide context to the instant litigation, a brief factual background is necessary.[2] Appellant 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 sold the land to Appellant, including that upon which the Big Water Resort campground was located. (R. p. 126, Hutson Ex. 5.0: Lease Purchase Agreement). Appellant also entered into a Membership Interest Purchase Agreement, by which he became the sole member in Big Water Resort, LLC, which operated the campground. (R. p. 159, Hutson Exhibit 6.0, Membership Interest Purchase Agmt.). Big Water Resort, LLC had previously sold retail memberships in the Big Water Resort campground to the campground members. (See R. p. 88, Hutson Exs. 1.1-1.3, Sample Member Agreements). Appellant was represented by attorney Andrew Tucker in these transactions with TLC. (See R. p. 396, Newton Ex. C: Defamation Action, Cothran Order).

In December 2011, TLC filed an ejectment action against Appellant alleging he defaulted on the terms of the Lease Purchase Agreement. (R. p. 409, Newton Ex. D: Ejectment Compl.). Appellant filed counterclaims against TLC in the Ejectment Action. (R. p. 415, Newton Ex. E: Ejectment Answer). The parties agreed to settle the Ejectment Action, and the Settlement Agreement was adopted into a Consent Order filed April 13, 2012. (R. p. 180, Hutson Ex. 9.0: Settlement Agreement; R. p. 189, Hutson Ex. 10.0: Consent Order). Appellant was represented

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[2] A more detailed recitation of the factual background has been set forth in several prior judicial orders. See R. p. 368, Newton Ex. A: Class Action R&R, at *1-*4; R. p. 386, Newton Ex. B: Class Action, Norton Order, at *1-*4; R. p. 396, Newton Ex. C: Defamation Action, Cothran Order, at pp. 1-5).

by attorney Paul Weissenstein in the Ejectment Action.[3] (See R. p. 396, Newton Ex. C: Cothran Order, at pp. 2-3).

TLC sought to evict Appellant from the Big Water Resort property after he defaulted on his obligations under the 2012 Settlement Agreement and Consent Order. Following a hearing, The Honorable George C. James, Jr. 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 Appellant was required to vacate the property. (R. p. 455, Newton Ex. G: James 2014 Order). Then Judge (now Justice) James found that Hutson executed a valid release of his claims against TLC, which were known to him at the time he entered into the Settlement Agreement. (Id.). Appellant was represented by attorney H. Freeman Belser in the eviction proceedings. (See R. p. 396, Newton Ex. C: Cothran Order; at pp. 2-3).

Class Action and Defamation Action Litigation

In the midst of TLC's efforts to evict Appellant from the Big Water Resort property, Appellant 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.[4] (See R. p. 396, Newton Ex. C:

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[3] On September 4, 2018, Hutson filed a legal malpractice action against Paul Weissenstein. (R. p. 434, Newton Ex. F: Weissenstein, Malpractice Compl.). 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 expired, Judge Curtis found Weissenstein was not responsible for any error in failing to identify a title defect 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, Judge Curtis found no cognizable malpractice claim against Weissenstein for failing to pursue a counterclaim against TLC and advising Hutson to enter into the Settlement Agreement. (R. p. 531, Newton Ex. Q: Weissenstein, Curtis Order). Hutson appealed from Judge Curtis' Order to the South Carolina Court of Appeals, where the appeal is currently pending. See Hutson v. Weissenstein, Appellate Case No. 2019-000873.

[4] TLC vehemently denied that it committed any fraud or set out to scam Hutson, asserting that Hutson's claims that he was unaware of the lifetime memberships or that their existence prevented development of the unimproved property is patently false. (See R. p. 1015, Newton Ex. GG: Class Action, TLC's Memo. in Opp. to Hutson's Mot. for Summ. J.).

Cothran Order at p. 4). On April 22, 2014, a group of Big Water Resort campground members filed the Class Action against TLC in federal court. (See Big Water Resort, LLC, *et al.* v. TLC Holdings, LLC, C/A: 2:14-1583-DCN-MGB). TLC asserted third-party claims for equitable indemnification against Appellant, and Appellant filed counterclaims against TLC. (See R. p. 386, Newton Ex. B: Class Action, Norton Order at *2).

On December 7, 2015, TLC filed a separate action, the Defamation Action, against Appellant in state court related to the statements allegedly made in the postcard and to the attorney who represented the campground members in the Class Action. (See R. p. 225, Hutson Ex. 13.0: Defamation Action, Compl.). Appellant again asserted counterclaims against TLC in the Defamation Action. (See R. p. 468, Newton Ex. H: Defamation Action, Answer w/ *Pro Se* Countercl.).

In 2016, the Class Action and the Defamation Action were tendered to PAIC. PAIC retained Murphy & Grantland as its coverage counsel and Newton filed the Coverage Action seeking a judicial ruling as to PAIC's coverage for TLC's claims asserted against Appellant in the Class Action and the Defamation Action on June 14, 2016. (R. p. 198, Hutson Ex. 11.0: Coverage Action, Compl.). On September 16, 2016, Appellant 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 claims such as those asserted in this lawsuit. (R. p. 494, Newton Ex. I: 2016 Release). The Coverage Action was accordingly dismissed. (R. p. 500, Newton Ex. J: Coverage Action, Order of Dismissal).

Meanwhile, PAIC continued to defend Appellant in both underlying actions under a reservation of rights but declined to provide counsel to Appellant for purposes of prosecuting his counterclaims. PAIC originally retained Laura Paton and Mike Etheredge of Carlock Copeland to represent Appellant in both matters, but Frank Gordon of Millberg Gordon was later substituted

as counsel for Appellant. Huston continued to pursue his counterclaims in both actions *pro se*. (See R. p. 468, Newton Ex. H: Defamation Action, Answer w/ *Pro Se* Countercl.; R. p. 645 Newton Ex. AA: Defamation Action, Order Substituting Counsel).

On April 5, 2016, Magistrate Judge Mary Gordon Baker issued her Report and Recommendation in the Class Action, part of which recommended granting TLC's motion for summary judgment on Hutson's counterclaims. (R. p. 368, Newton Ex. A: Class Action R&R). In the Order adopting the findings of the Report and Recommendation, entered May 20, 2016, The Honorable 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 2012 Settlement Agreement. (R. p. 386, Newton Ex. B: Norton Order). Consequently, Judge Norton ruled that Hutson's counterclaims against TLC in the Class Action were barred by res judicata in light of Judge James' 2014 Order. (Id.). On October 6, 2017, the federal court entered a separate Order granting TLC's motion for sanctions against Appellant and ordering payment of $14,908.50 in attorney's fees. [5] (R. p. 506, Newton Ex. K: Class Action, Sanctions Order).

On March 2, 2017, the state court similarly granted TLC's motion for summary judgment as to Appellant's counterclaims in the Defamation Action. (R. p. 396, Newton Ex. C: Cothran

[5] 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 Hutson. However, when renewed in a motion for sanctions, 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." (R. p. 506, Newton Ex. K: Class Action, Sanctions Order, Oct. 6, 2017).

Order). The Honorable R. Ferrell Cothran, Jr. also found that Hutson's counterclaims were barred by res judicata. (Id.).

In early 2018, Penn-America settled TLC's claims against Appellant in the Class Action. This settlement protected Appellant from personal liability for both TLC's third-party claims against Appellant in the lawsuit and from the sanctions previously awarded against him. TLC's equitable indemnification claims against Appellant were formally dismissed on April 11, 2018. (R. p. 515, Newton Ex. L: Class Action, Stipulation of Dismissal).

While the settlement of TLC's claims against Appellant in the Class Action were being finalized, the Defamation Action was tried to a jury. The jury returned a verdict against Appellant in the amount of $3,500,000.00 on January 26, 2018. (R. p. 518, Newton Ex. M: Defamation Action, Verdict Form). 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. (R. p. 521, Newton Ex. N: Defamation Action, Notice of Appeal). While the appeal was pending, Penn-America mediated the case with TLC and ultimately paid its policy limits to settle the Defamation Action in late 2018. TLC accepted the settlement in satisfaction of the judgment against Appellant in the Defamation Action. (R. p. 528, Newton Ex. P: Defamation Action, Satisfaction of Judgment). Newton informed Appellant that TLC's claims against him were settled on December 4, 2018. The next day, Appellant filed this lawsuit. (R. p. 1283, line 11 – p. 1284, line 2).

The Instant Lawsuit

Generally speaking, Appellant 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. Appellant makes various claims regarding his perception of PAIC's obligations to expose and address the "extrinsic fraud." (See R. p. 65, Amd. Compl.).

At the June 24, 2019 hearing, PAIC craved reference to the detailed memorandum that it filed with this Court and orally articulated the eight separate bases for granting its motion. PAIC requested 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 existed no genuine issues of material fact such that PAIC was entitled to judgment as a matter of law as to all causes of action raised in Appellant's Amended Complaint. (R. p. 1288, line 22 – p. 1296, line 11; R. p. 1327, line 17 – p. 1329, line 5).

In his presentation to Judge Nettles, Appellant craved reference to the voluminous filings he made with the Court. Appellant began his presentation by stating that he is a victim and citing the "scintilla of evidence" standard. (R. p. 1297, line 21 – p. 1298, line 7). Appellant 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." (R. p. 1299, line 13 – p. 1303, line 3). Appellant contended that attorneys from Turner Padgett, who represented TLC, prepared the sale documents that they knew were based upon "extrinsic fraud," intending for Appellant to shoulder a twenty-two-million-dollar obligation. (R. p. 1303, line 3 – p. 1304, line 11). He further contended that this "extrinsic fraud" supersedes the settlement agreement he entered in 2012. (R. p. 1304, line 12 – p. 1307, line 6).

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." (R. p. 1307, line 7 – p. 1308, line 7). While Appellant agreed that Laura Paton in Charleston was the attorney actually retained to represent him, he stated that Tim Newton coordinated that and was his "contact person" at PAIC. (R. p. 1309, lines 17-23). Hutson read portions of a pleading filed by Paton that asserted Huston's *pro*

se counterclaims against TLC.[6] (R. p. 1310, line 8 – p. 1311, line 21; see R. p. 1328, lines 13-24; see R.468, Newton Ex. H: Defamation Action, Answer w/ *Pro Se* Countercl. pp. 10-25). Hutson then repeated the allegations contained in his pleadings regarding Newton's correspondence with Appellant, which Appellant characterized as "a letter of legal advice" and perceived to validate his theory of "extrinsic fraud." Appellant noted that the letter form Newton explicitly stated that Newton represented Penn America and did not represent Hutson. Appellant even admitted: "Newton has not represented me." (R. p. 1311, line 21 – p. 1317, line 14). Judge Nettles asked Appellant to gather his thoughts and explained:

> [W]hat I'm going to do is I'm going to take a considerable amount of time to review all these documents and review your complaint and I'm going to do all that and I'm going to study the matter and I'm going to allow all of these parties to submit proposed orders and you; all the parties are going to submit proposed orders and I'm going to take all of that into consideration. I'm going to review all of your affidavits, your pleadings, and take everything into consideration, so if you want to, you can just take this moment, sort of encapsulate what else you want to say in the next 15 minutes and I'll be glad to hear from you.

(R. p. 1317, line 15 – p. 1319, line 11; see also R. p. 1322, line 14 – p. 1323, line 23). Appellant continued to discuss Newton's letter. Appellant contended that "by settling with knowledge of extrinsic fraud, they [presumably referring to Respondents] are co-conspirators in the fraud." (R. p. 1319, line 14 – p. 1322, line 13). Appellant never articulated any fraud or other basis to set aside the Release that he executed in favor of PAIC on September 16, 2016. (See R. p. 1327, line 10 – p. 1328, line 2).

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[6] Appellant's lower court filings and brief to this Court attempt to pass these counterclaims off as proof that attorney Paton found merit in Hutson's claims against TLC. (See Br. of Appellant, pp. 7-8, 16-18). However, a complete review of the filed Answer and *Pro Se* Counterclaims reveals that the filing contained distinct sections. The first portion was executed by Laura Paton as counsel f and responded to the Amended Complaint and asserted affirmative defenses. The second portion was executed by Hutson alone and asserted ***pro se*** counterclaims. (See R. p. 468, Newton Ex. H: Defamation Action, Filed Answer w/ *Pro Se* Countercl.).

After submission of the proposed orders for review, Judge Nettles entered two separate orders granting the dispositive motions, the first of which was the Order Granting PAIC's Motion for Summary Judgment. (R. p. 1, PAIC Order). The trial court reviewed the terms of the Settlement Agreement and Release in the Coverage Action, which Hutson executed on September 16, 2016 and which released Penn America, its agents, and its affiliates, from liability for exactly the Released Claims, as defined therein. (R. p. 1, PAIC Order, p. 10). The trial court found that at all of the claims made in the Amended Complaint were barred under the Release. Accordingly, PAIC's motion for summary judgment was granted. (R. p. 1, 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. (R. p. 1, PAIC Order, p. 11-25).

LAW/ANALYSIS

I. The Trial Court Properly Granted Summary Judgment in Favor of Respondents PAIC Where Appellant Executed a Valid Release in Favor of Penn-America and Its Affiliates, Which Precludes the Claims Raised in the Instant Lawsuit.

Before addressing the lack of merit on the individual causes of action raised in Appellant's Amended Complaint, the trial court ruled that Appellant's claims were all barred by the Settlement Agreement and Release executed by Hutson on September 16, 2016 in the Coverage Action. (R. p. 1, PAIC Order, pp. 10-11). The Release explicitly provided:

> 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.

(R. p. 494, Newton Ex. I: Settlement Agreement and Release). Global Indemnity Group, Inc. is the parent company of Penn-America Insurance Company, such that it is encompassed within the Release's specification that it applies to Penn-America's "affiliates" and "any and all other persons, firms or corporations."

The trial court recognized that Hutson neither articulated a policy or law prohibiting the September 16, 2016 agreement, nor did he deny that he received the consideration specified therein. (R. p. 1, PAIC Order, pp. 10-11). Appellant's brief acknowledges Respondents' argument regarding the preclusive effect of the Release. (Br. of Appellant, p. 29). He then states that "Appellant refutes that Respondent's claim is valid" and recites the elements of civil fraud. (Brief of Appellant, pp. 29-30). Appellant now attempts to argue invalidity of the Release by stating that "Respondents misrepresented to Appellant the material fact that they were defending Appellant in those cases, when, in fact (due to the known extrinsic fraud) it was impossible for these Respondents to effectively defend the Appellant...." (Br. of Appellant, p. 30). Thus, Appellant contends that his dispute over whether his claims are barred by the Release necessitates submission of the issue to the jury.

As an initial matter, a party is precluded from raising an issue for the first time on appeal. In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ("An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon

by the trial court."). Here, PAIC raised the preclusive effect of the Release in its three-page Motion for Summary Judgment, filed and served on June 14, 2019. (R. p. 680, PAIC Mot. for Summ. Jmt.; see also R. p. 365-366, Newton Memo., pp. 21-22). Nonetheless, Appellant failed to make any argument that the 2016 Release was invalid to the trial court. Instead, Appellant harped on the alleged fraud in the original land deal and subsequent ejectment and enforcement proceedings, which he claims warranted coverage for prosecuting counterclaims in the Class Action and Defamation lawsuits.

Beyond this procedural issue, the trial court properly analyzed the 2016 Release and found it applicable to preclude Appellant's claims against Respondents. "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, 241-42, 672 S.E.2d 799, 803 (Ct. App. 2009). When an agreement is plain and unambiguous on its face, the court does not have the authority to modify its terms. Patricia Grand Hotel, LLC v. MacGuire Enters., 372 S.C. 634, 640, 643 S.E.2d 692, 695 (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).

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." The "above-referenced matters" in the Release included both of the underlying lawsuits, i.e. the Class Action 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 were barred under the Release. Further, at the time that Hutson entered into the 2016 Release, he was well aware of the declaratory judgment action in which it was entered and his prior attempt to set aside the 2012 Consent Order, which was rejected by Judge James. (See R. p. 198, Hutson Ex. 11.0: Coverage Action, Compl.; (R. p. 455, Newton Ex. G: James 2014 Order). Accordingly, this Court should affirm that grant of PAIC's motion for summary based upon the 2016 Release.

II. Assuming *Arguendo* that Appellant's Claims Are Not Precluded by the Release, the Trial Court Properly Granted Summary Judgment in Favor of Respondents PAIC Where There Existed No Genuine Issues of Material Fact as to Any of the Causes of Action Raised in the Amended Complaint.

A. Summary judgment was properly granted on the breach of contract claim where there was no evidence that PAIC failed to comply with its contractual duty to defend plaintiff in both underlying actions.

The trial court ruled that PAIC provided a defense to Appellant in both the Class Action and the Defamation Action and that the plain language of the insurance contract did not include a requirement that PAIC prosecute Appellant's counterclaims, much less take action outside of that litigation to set aside the 2012 Consent Order. Additionally, the trial court found that Appellant could not show that he was damaged where PAIC settled both cases at or within the policy limits such that there was no personal liability to Appellant. (R. p. 1, PAIC Order, pp. 11-14).

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." Branche Builders, Inc. v. Coggins, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). It was undisputed that an insurance contract existed under which Hutson

was a beneficiary. 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 defense 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.

(R. p. 1188, CGL Policy at PAIC-024).

Appellant cannot point to any evidence that any specific provision of the insurance contract was breached or that he has suffered any damages from an alleged breach. Appellant's brief improperly conflates the concepts of a duty to defend with a duty to prosecute counterclaims. (See Br. of Appellant, pp. 2-9, 14, 19-21). Appellant's false perception of the scope of PAIC's obligation is made plain when he writes: "PAIC contracted to Appellant to defend Appellant should any legal occasion arise; they failed to do so. These Respondents intentionally elected not to defend, misleading this Appellant." (Br. of Appellant, p. 23).

PAIC did defend Appellant, under a reservation of rights, with respect to the claims against him both in the Class Action and the Defamation Action. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt 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, 592, 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 third-party claim in the Class Action and the Defamation Action were ultimately settled without any personal liability to Hutson.

Hutson's contention that PAIC owed a duty to prosecute his affirmative counterclaims, 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 counterclaims, 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), vacated in part on reh'g, 889 F.3d 798 (5th Cir. 2018) (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, 606, 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, 526, 709 S.E.2d 85, 90 (Ct. App. 2011) (citing Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 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, 353 S.C. at 496, 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, 168, 161 S.E.2d 168, 169 (1968)).

The Massachusetts Supreme Court recently applied these same principles to this issue in Mount Vernon Fire Ins. Co. v. Visionaid, Inc., 76 N.E.3d 204, 208-10 (Mass. 2017). Because "defend" was not contractual defined, the court construed it "using its 'usual and accepted meaning.'" Id. at 208. The court found the plain meaning of "defend" clear, meaning "to work to defeat a claim that could create liability against the individual being defended." Id. at 208-09. The Mount Vernon court further noted that "[w]here the language of an insurance policy is clear and unambiguous, we rely on that plain meaning, and do not consider policy arguments in interpreting the plain language." Id. at 209. The insured suggested that "defend" should mean "anything a reasonable defense attorney would do to reduce the liability of the insured." Id. at 210. The court wrote: "Imposing such requirements where none was included explicitly is far beyond interpreting the language of the contract." Id. Here too, the insurance policy does not include any explicit duty to pursue an insured's counterclaims; consequently, no such duty exists.

To the extent that Hutson goes even further to suggest that PAIC had a duty to re-open the 2011 case and attempt to set aside the 2012 Consent Order and Settlement Agreement entered therein, there is simply no authority for such a contention.

In sum, PAIC adhered to its duty to defend, which did not include prosecuting Hutson's counterclaims and pursuit of a separate course of litigation to set aside a 2012 Settlement Agreement and Consent Order. This Court should accordingly affirm the grant of summary judgment in favor of PAIC on Appellant's breach of contract cause of action.

B. Summary judgment was properly granted on the bad faith claim where there was no evidence that PAIC failed to act reasonably.

The trial court ruled that there was no evidence that PAIC acted in bad faith in its handling of the Appellant's defense or in bringing a Coverage Action. PAIC provided Appellant a defense in the Class Action and Defamation Action under a reservation of rights but did not provide representation to Appellant in the pursuit of his counterclaims against TLC. The evidence before the trial court showed that Appellant first raised his allegations of extrinsic fraud against TLC in the ejectment proceedings before Judge James, who enforced the Consent Order. (R. p. 1, PAIC Order, pp. 14-16); (R. p. 455, Newton Ex. G: James 2014 Order). Appellant raised these allegations again in his *pro se* counterclaims against TLC in both the Class Action and the Defamation Action, where he lost again based upon both courts' findings that Appellant's claims were barred by res judicate based upon Judge James' prior Order. (See R. p. 386, Newton Ex. B: Norton Order; R. p. 396, Newton Ex. C: Cothran Order, Mar. 2, 2017). The trial court found that Appellant provided no evidence to support his bald assertion that PAIC acted in bad faith by failing to provide attorney representation on his counterclaims. There was no evidence to support a finding that the outcome of the counterclaims would have been any different with an attorney involved or that Hutson would have heeded any advice of counsel that his counterclaims were barred. (R. p. 1, PAIC Order, pp. 15-16). To the extent he complained that PAIC overpaid on the claims, such action was not in bad faith where the insurer had a duty to settle within policy limits if reasonable, there was no personal liability to Appellant, and the insurance contract did not require Appellant's consent to settle. (R. p. 1, PAIC Order, pp. 16-17).

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). Breach of an express contractual provision is not a prerequisite to bringing a bad faith action. Id. at 504, 473 S.E.2d at 55.

"[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., 349 S.C. 394, 400, 562 S.E.2d 659, 662 (Ct. App. 2002). Under South Carolina law, an insurer acts in bad faith when there is no reasonable basis to support the insurer's decision to deny benefits. Cock–N–Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 6, 466 S.E.2d 727, 730 (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.

With respect to PAIC's refusal to either prosecute Hutson's counterclaims against TLC within the ongoing litigation or attempt to reopen the prior ejectment proceedings, there is no evidence that this decision was unreasonable. As an initial matter, there is no evidence that any extrinsic fraud on the courts was committed in the procurement of the 2012 Settlement Agreement or Consent Order, which included a release of Hutson's claims of fraud and misrepresentation

against TLC and its members. On the contrary, it appears that Hutson and his representatives were well aware of potential encumbrances during the original land deal. (See R. p. 643, Newton Ex. Z: E-mail from Realtor, Nov. 11, 2010; R. p. 1258, PAIC Ex. B: Affidavit of Thomas L. Harper, Jr. with attachments).

In the 2014 Order, Judge James found that Hutson's claims against TLC with respect to the original land deal were raised in the 2012 proceedings and resolved by virtue of the 2012 Settlement Agreement and Consent Order. (R. p. 455, Newton Ex. G: James 2014 Order; see R. p. 180, Hutson Ex. 9.0: Settlement Agreement, §23; R. p. 189, Hutson Ex. 10.0: Consent Order). Judge James enforced the Settlement Agreement and Consent Order, finding that the alleged misstatements or omissions were known to Hutson when he entered into the 2012 settlement. (R. p. 455, Newton Ex. G: James 2014 Order). Thus, Hutson—represented by counsel, H. Freeman Belser—asserted his claims of extrinsic fraud in 2014 and lost.

In the Class Action, Hutson asserted counterclaims against TLC and its members for breach of contract, breach of contract accompanied by fraud, fraud and fraud in the inducement, negligent misrepresentation, constructive fraud, breach of covenant of good faith and fair dealing, and negligence, recklessness, willfulness, and wantonness, and defamation. In their motion for summary judgment, TLC and its members argued that these claims were all barred by res judicata and the Release settling the state court action. Hutson averred that an exception to the res judicata doctrine applied because the Release was procured by fraud. In granting summary judgment against Appellant on the counterclaims, Judge Norton cited both the 2012 Consent Order and Judge James' 2014 Order. Judge Norton found Hutson's claim that he did not have knowledge to pursue a fraud claim against TLC and its members until after the entry of the Settlement Agreement to be belied by the record. He found there to be no dispute that Hutson knew about the lifetime membership agreements when he purchased BWR and that the remainder of Hutson's allegations

of fraud related to the original transaction rather than to the procurement of the Release. As a result, Judge Norton found no basis to set aside the Release. (See R. p. 368, Newton Ex. A: Class Action R&R; R. p. 386, Newton Ex. B: Norton Order).

Hutson asserted similar counterclaims against TLC and its members in the Defamation Action, including fraud, negligent misrepresentation, defamation, libel per se, breach of contract, breach of contract accompanied by a fraudulent act, violation of SCUPTA, amalgamation/alter ego/piercing the corporate veil. In granting TLC's motion for summary judgment on Hutson's counterclaims, Judge Cothran noted the prior state and federal court orders in the case. Hutson again asserted that the Release provisions were unenforceable due to fraud. Just like the federal court, Judge Cothran found that Hutson "failed to demonstrate or even allege any fraud that would bar the application of the Settlement Agreement." Rather, the fraud complained of related to the original transaction, not the Release. Thus, like the federal court, Judge Cothran found Hutson's claims barred by res judicata. He wrote: "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." (R. p. 396, Newton Ex. C: Cothran Order). Hutson was not entitled to have PAIC attempt to revive his procedurally barred and frivolous claims against TLC. See generally 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."(emphasis added)); id. ("The doctrine of laches is applicable in determining whether an action is time-barred even if extrinsic fraud is established.").

Any contention that PAIC's settlement of the claims in the Class Action and Defamation was unreasonable is similarly without merit. Despite his lack of personal liability under the settlements that were entered, Appellant would have forced PAIC to pursue the equitable

indemnification case to trial in federal court and continue its post-trial appeal of the state court defamation action. In essence, Appellant claims that PAIC overpaid in the settlement. Here, there was no contractual requirement for the insured's consent to settle. Rather, the policy provides: "We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result." (R. p. 1164, PAIC Ex. A, Insurance Policy). Further, 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).

Moreover, several other jurisdictions have held that where 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). While Hutson may disagree with the business decision PAIC made to settle the cases against him, it was made after the disposition of Hutson's counterclaims on summary judgment and within the policy limits. Thus, there is no evidence that the settlements were entered in bad faith.

Lastly, to the extent Appellant alleged that the declaratory judgment action regarding coverage was brought in bad faith, Appellant failed to articulate how or why that filing was unreasonable. (See R. p. 198, Hutson Ex. 11.0: Coverage Action, Compl.).

This Court should accordingly affirm the grant of summary judgment in favor of PAIC on Appellant's bad faith cause of action.

C. Summary judgment was properly granted on the fraud and misrepresentation claims where there was no evidence (a) that PAIC or its agents made any material or false representation to Appellant, (b) PAIC or its agents failed to exercise due case; (c) that Appellant relied on such representation, or (d) that Appellant suffered an injury or loss.

The trial court found that Appellant's fraud and misrepresentation claims centered on an e-mail sent from Tim Newton to Appellant regarding the possible existence of an argument regarding extrinsic fraud. (R. p. 1, PAIC Order, p. 18); (see R. p. 588, Newton Ex. V: E-mail from Newton to Hutson, Aug. 13, 2018 10:50 a.m.). Hutson argued to the trial court 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. (R. p. 1312, line 2 – p. 1314, line 19). Importantly, however, Appellant never claimed that anything written in the letter to him by Newton was false. Instead, Appellant argued in his Amended Complaint that everything in Newton's e-mail was true. (See Amd. Compl. ¶¶37-49). Additionally, Appellant never filed any subsequent action to set aside the Agreement and Order. (See Amd. Compl. ¶35). Thus, the trial court ruled that "regardless of its truth or falsity, Hutson failed to allege any reliance upon the representation." (R. p. 1, PAIC Order, p. 18). Further, the trial court found that Hutson had not been injured, as PAIC paid the federal sanctions awarded against him and settled the two lawsuits without any personal liability to Hutson. (R. p. 1, PAIC Order, p. 18). Consequently, the trial court found that Hutson could not support his claims for fraud or misrepresentation.

Appellant appeared to allege the similar but distinct causes of action for both fraud and negligent misrepresentation. (See R. p. 65, Amd. Compl. ¶33-49). In order to prevail on a claim for fraud a 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. In order to prevail on a claim for negligent misrepresentation, a 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.

The e-mail sent from Newton to Hutson on August 13, 2018, upon which Appellant fixates, provided:

> 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:
> ...
>
> 15. I can see how you could argue that the Consent Order in invalid because it attempts to adjudicate the rights of parties not before it. 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. Furthermore, I can see how you could argue you did not realize you were being obligated to violate the rights of the campground members by developing since TLC never specified exactly which property was subject to the campground memberships.
>
> 16. It's 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 undeveloped 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.
>
> I highly recommend that you get a lawyer involved, even if it's a pro bono lawyer. If you need the documents supporting the above, let me know.

(R. p. 588, Newton Ex. V: E-mail from Newton to Hutson, Aug. 13, 2018 10:50 a.m.). Hutson never claimed that anything in Newton's e-mail was false or that he relied upon it.

Notably, this correspondence was sent well after Hutson's counterclaims in the Class Action and Defamation Action were disposed of on summary judgment on May 20, 2016 and March 2, 2017. (See R. p. 386, Newton Ex. B: Norton Order; R. p. 396, Newton Ex. C: Cothran Order). Newton explained the context of the e-mail to the trial court, which was that Appellant came to Newton stating that he had new evidence that all of the property sold to him by TLC was encumbered by the campground memberships. Appellant contended this new evidence would support a claim of more than just fraud in the original land deal and constituted extrinsic fraud upon the court. (R. p. 1330, line 13 – p. 1336, line 15). Newton's explanation is supported by a review of the other e-mail correspondence between Newton and Appellant, which reveals that it was Appellant who suggested and believed filing a separate action to set aside the 2014 Consent Order would benefit him. (See Newton Ex. V: Newton/Hutson Corr.). Newton reiterated in another e-mail to Appellant, sent the same day, that all proceedings were "on hold" until mediation, which was to Appellant's benefit since they hoped to negotiate a settlement that would not expose Appellant to personal liability. (R. p. 588, Newton Ex. V: E-mail from Newton to Hutson, Aug. 13, 2018 1:23 p.m.).

Newton sent a follow-up letter to Hutson on November 8, 2018, rejecting Hutson's demand for $500,000 from PAIC and reiterating PAIC's position that it would not pursue any action to reopen and set aside the judgment in the Ejectment proceeding, though Hutson could take any action individually that he desired. (R. p. 172, Hutson Ex. 7.0: Newton Letter).

In Appellant's brief, he contends that "Respondents misrepresented to Appellant the material fact that they were defending Appellant in those cases, when, in fact (due to known extrinsic fraud it was impossible for these Respondents to effectively defend this Appellant because they chose NOT to expose the Fraud Upon the Courts by those suing this Appellant under the cloak of Fraud and res judicata." (Br. of Appellant, p. 29-30). The evidence presented to the trial court reflected that PAIC did provide a defense to Appellant in both the Class Action and the Defamation Action, both of which were resolved within policy limits. The fact that Appellant had previously waived his claims against TLC and was previously unsuccessful in attempting to set that waiver aside is not the fault of PAIC. Appellant's perception that a true "defense" would have garnered millions of dollars to Hutson on his counterclaims is entirely baseless. Respondents, on the other hand, need not speculate on whether Appellant's counterclaims were meritorious, as they were raised *pro se* in both of the underlying actions and determined to be barred by res judicata.

This Court should accordingly affirm the grant of summary judgment in favor of PAIC on Appellant's fraud and misrepresentation causes of action.

D. Summary judgment was properly granted on the negligence claim where there was no evidence that PAIC breached any duty to Appellant or caused any harm to Appellant.

The trial court found that Appellant could not support his claim of negligence where PAIC did not owe any duty beyond the duty to defend in the insurance contract, there was no evidence that PAIC breached the duty actually owed, and Appellant's alleged damages were baseless and speculative. (R. p. 1, PAIC Order, pp. 19-20).

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, e.g., Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346, 348 (1933).

Appellant again argued that PAIC should have gone above and beyond its contractual duty to defend by either providing representation for his counterclaims against TLC or by instituting a separate action to set aside the 2012 Consent Order and Settlement Agreement. (See Amd. Compl. ¶¶23-32). 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

This Court should accordingly affirm the grant of summary judgment in favor of PAIC on Appellant's negligence cause of action.

E. Summary judgment was properly granted on the tortious interference with the attorney-client relationship claim where there was 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.

The trial court recognized PAIC's contractual right to control the litigation and the duty to settle within the policy if it is the reasonable thing to do. (R. p. 1, PAIC Order, pp. 20-22). The trial court found that PAIC's refusal to provide counsel to prosecute Appellant's counterclaims did not prevent him from pursuing them *pro se*, which is exactly what Appellant did. The trial court

found no evidence that PAIC's decision was made without justification or with malice and that Appellant's alleged damages were baseless and speculative. (R. p. 1, PAIC Order, p. 22).

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." DeBerry, 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 Appellant's attorney-client relationship with retained counsel Frank Gordon or his predecessors. Hutson was left free to pursue his counterclaims, for which he could have retained personal counsel but instead proceeded *pro se*. PAIC did not enter into the Settlement Agreement with TLC until long after the disposition of Appellant's counterclaims through dispositive motions. Appellant's consent to settle was not required under the insurance contract and the settlement prevented any personal liability to Hutson. Thus, there is no evidence that PAIC engage in any conduct that procured a *breach* of any

contractual relationship, that PAIC lacked a justification for its conduct, or that Hutson suffered any damages.

This Court should accordingly affirm the grant of summary judgment in favor of PAIC on Appellant's tortious interference cause of action.

F. Summary judgment was properly granted on the legal malpractice claim where (a) Appellant 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, Appellant lacked the necessary attorney-client relationship with coverage counsel to sustain a claim of legal malpractice.

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).

The trial court found that PAIC could not be held vicariously liable for any legal malpractice committed by the attorneys actually retained by them to defend Appellant, who included Mike Etheredge, Laura Paton and Frank Gordon, merely by the fact of their retention by the insurer. (R. p. 1, PAIC Order, p. 23). While South Carolina courts have not directly ruled on the issues, the New York case of Feliberty v. Damon, 129 A.D.2d 207, 210-11 (N.Y. App. Div. 1987), discusses the differing views of an insurance carrier's vicarious liability for the negligence of its insured's defense counsel. In adopting the rationale that vicarious liability does not fall on the carrier, which is required to retain independent trial counsel to conduct litigation on behalf of its insured, the Feliberty court found that a carrier must rely on counsel to conduct the litigation.

129 A.D.2d at 211. The court ruled that "[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." Id. Further, even if vicarious liability were applicable, the trial court found no evidence that defense counsel breached any duty to Appellant or caused him any actual damages. (R. p. 1, PAIC Order, p. 23).

With respect to Appellant's allegations of malpractice against Tim Newton and J.R. Murphy, the trial court recognized that coverage counsel is not liable for acts committed in their professional capacity except to their own client and those in privity with their client. (R. p. 1, PAIC Order, p. 24); see 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. An attorney's combination of education, experience and code of ethics effectively places the responsibility on him or her for any tortious or unethical conduct. The attorney's license and independent status likewise create duties owed by the attorney not only to the client but also to the public and to the courts.").

Here, the trial court found that Newton and Murphy represented PAIC and never represented Appellant. (R. p. 1, PAIC Order, p. 24). The lack of attorney-client relationship with Hutson was even memorialized in Newton's August 13, 2018 e-mail to Hutson, wherein Newton wrote: "I need to remind you that I don't represent you and I can't represent you because I represent Penn-America." (R. p. 588, Newton's Ex. V, E-mail from Newton and Hutson, Aug. 13, 2018 10:50 a.m.). Accordingly, the trial court ruled that Appellant failed to show the requisite attorney-client relationship to form the basis of any legal malpractice action against Newton and Murphy, much less Newton and Murphy's client, PAIC. (R. p. 1, PAIC Order, p. 24); 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."); Am. Fed. Bank, FSB v. No.

One Main Joint Venture, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996) ("Before a claim for malpractice may be asserted, there must exist an attorney-client relationship."); see also LeCates v. Barker, 242 F.3d 389, at *3 (10th Cir. 2000) (finding Utah law does not recognize a cause of action for legal malpractice against opposing counsel because of the lack of attorney-client relationship).

This Court should accordingly affirm the grant of summary judgment in favor of PAIC on Appellant's legal malpractice cause of action.

III. The Trial Court Properly Considered the Evidence Submitted in Appellant and Respondent's Written Filings, the Argument of the Parties, and the Proposed Orders Submitted in Its Decision to Grant Summary Judgment.

The third issue listed in Appellant's brief is whether the trial court erred "in failing to review all the evidence and relying exclusively on the Defendants (albeit officers of the courts) to present totally truthful information and opinions, knowing they were the Defendants?" (Brief of App., p. 1, Stmt. of Issues). However, Appellant presents no argument in support of his third issue in his brief. Thus, this Court should find that Appellant abandoned this issue. See Mulherin–Howell v. Cobb, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding party abandoned an issue on appeal due to failure to cite any supporting authority and making only conclusory arguments).

To the extent this Court does consider the issue, the South Carolina Rules of Civil Procedure provide: "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Rule 56(b), SCRCP. The Rules further provide: "The judgment sought shall be rendered forthwith if 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.

Here, the trial court had before it the pleadings, motions, memorandums, responses, affidavits and exhibits from Appellant, Newton and Murphy, and PAIC. A review of the Record on Appeal reveals that these filings were voluminous and discussed in-depth by the parties in their pleadings and referenced during the dispositive motions hearing held on June 24, 2019. Appellant points to no argument made by Respondents at the hearing that were inconsistent with or unsupported by the documents submitted to the trial court in advance of the hearing. Notably, the trial court took the matter under advisement and accepted proposed orders from all parties before ruling. (R. p. 1317, line 15 – p. 1319, line 11; R. p. 1322, line 14 – p. 1323, line 23). There was no insufficiency in the evidence presented to the trial court or indication that the trial court failed to consider anything before it. Accordingly, the PAIC Order should be affirmed.

CONCLUSION

Based upon the foregoing, Respondents PAIC respectfully requests that this Court affirm the trial court's grant of summary judgment to PAIC. PAIC further incorporates by reference any and all arguments raised in the Brief of Respondent filed by Newton and Murphy to the extent the same is not inconsistent with the arguments made herein.

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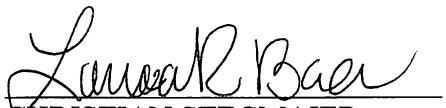
Respectfully submitted,

COLLINS & LACY, P.C.



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FINAL BRIEF OF RESPONDENTS PENN AMERICA INSURANCE COMPANY AND GLOBAL INDEMNITY GROUP, INC.

Columbia, South Carolina
March 8, 2021

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
Civil Action Case No. 2018-CP-40-06344

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.

PROOF OF SERVICE

I hereby certify that I served this **Final Brief of Respondents Penn America Insurance Company and Global Indemnity Group, Inc.** upon all parties, by placing a copy in the United States mail, postage prepaid, and /or on March 8, 2021, addressed to the following:

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CERTIFICATE OF COUNSEL

The undersigned certifies that Final Brief of Respondents Penn America Insurance Company, Global Indemnity Group, Inc. complies with Rule 211(b), SCACR.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,
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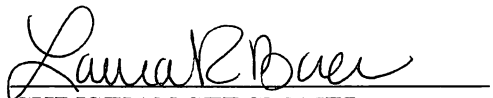

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