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IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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Case No. 2018-CP-40-06344

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Appellate Case No. 2019-001488

MB Hutson / MB Hudson, ..... Appellant,

v.

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

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# RESPONDENTS J.R. MURPHY AND TIMOTHY J. NEWTON'S FINAL BRIEF

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Columbia, South Carolina
March 8, 2021

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## STATEMENT OF THE CASE

This is an appeal from the two Orders by the Honorable Michael G. Nettles that granted the Defendant / Respondents' dispositive motions. In this brief, Respondents Timothy J. Newton and J.R. Murphy address Plaintiff / Appellant M.B. Hutson's appeal from Judge Nettles' Order Granting Defendants Newton and Murphy's Dispositive Motions, which was filed on July 18, 2019. The other Order pertaining to Respondents Penn America Insurance Company and Global Indemnity Group, Inc. (hereinafter collectively "Penn-America") is briefed separately.

Hutson filed this action on December 5, 2018 and amended his complaint on December 28, 2018. Hutson also filed a supplemental memorandum, an affidavit, and exhibits.

Newton and Murphy filed a Motion to Dismiss on February 12, 2019. Hutson filed a responsive memorandum on May 7, 2019 with which he provided additional documents. Newton and Murphy filed a memorandum in support of their motion on May 30, 2019 and an Amended Motion on June 5, 2019 in which they requested that their motion be converted to a motion for summary judgment pursuant to Rules 12 and 56, SCRCP. Murphy also filed a Memorandum in support of his Motion to Dismiss on June 25, 2019.

Hutson filed a "Supplemental to Memorandum" and an Affidavit on June 19, 2019. Newton filed an Affidavit and a responsive memorandum on June 24, 2019. Newton amended his responsive memorandum on June 25, 2019.

Penn-America also filed a Motion for Summary Judgment on June 14, 2019. Penn-America filed a supportive memorandum on June 25, 2019.

The motions were heard on June 26, 2019. Judge Nettles filed his Orders on July 18, 2019. This appeal follows.

## STATEMENT OF THE FACTS

Respondents Newton and Murphy provide the following counter-statement of the facts of the case pursuant to Rule 208(b)(2), SCACR.

Hutson generally alleged that Respondents Newton and Murphy knew that a fraud upon the court had been committed against Hutson and yet failed to do anything about it. In particular, Hutson alleges that Respondents had a duty to "defend" or otherwise provide counsel for certain affirmative claims Hutson sought to assert against third parties. Hutson also alleges Newton and Murphy had a duty to bring alleged fraud upon the court to the court's attention. The fraud Hutson alleged relates to several prior cases in which Newton and Murphy were not involved.

### The Parties to this action

Hutson has equivocated as to the relationship of the parties. Court filings establish the following:

Penn-America is a liability insurer that issued a commercial general liability (CGL) policy to a business owned by Hutson known as BWR, Inc. (R. pp. 1164-1257.) Penn-America never issued a policy directly to Hutson. Moreover, Hutson never contracted with any of the Respondents except to enter into a Settlement Agreement in which Hutson released his claims against them. (See R. pp. 494-99.)

Penn-America retained Laura Paton, Esq. to defend Hutson in two lawsuits in which Hutson was a defendant. (R. pp. 468-77.) Frank Gordon, Esq. was subsequently substituted as counsel for Hutson. (R. pp. 645-48; 515-17.)

Penn-America retained Murphy & Grantland, P.A. as coverage counsel for a declaratory judgment Penn-America filed against Hutson. (See R. pp. 198-216.) Murphy's sole involvement was to sign off on the Complaint in the declaratory judgment action. (R. pp. 1283, 1330.) Newton acted as coverage counsel for Penn-America in prosecuting the declaratory judgment action and in negotiating resolutions to Hutson's numerous threats of litigation against Penn-America while the declaratory judgment action was pending. (R. pp. 172-77; 217-24; 929-60.)

Hutson admitted in his brief that Newton and Murphy did not represent him. (Appellant's Init. Br. p. 32.) Hutson has occasionally asserted that Newton and Murphy represented Hutson in his defense. (R. p. 1307.) This assertion is false. Neither Murphy nor Newton have ever represented Hutson in any matter. (See R. p. 175.)

Penn-America settled the claims against Hutson in both lawsuits filed against him. (R. pp. 515-17; 528-30.) After learning all claims against him were resolved, Hutson brought this action against Penn-America, Newton, and Murphy. (R. p. 52.)

**Hutson's allegations**

Hutson's allegations concern a campground known as Big Water Resort in Clarendon County. Hutson alleged that he entered into a Lease Purchase Agreement with certain non-parties to this action, TLC Holdings, LLC and its principals (hereinafter collectively "TLC"), to lease and ultimately purchase certain property located at 5215 Dingle Pond Road in Summerton (hereinafter "the Property"). Hutson alleged that when this transaction was negotiated, he notified TLC that he intended to purchase and develop lakefront condominiums on the Property. (R. p. 68 at ¶ 9.(A).)

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

Hutson further alleged that TLC failed to disclose key facts to him during these negotiations. Specifically, TLC allegedly represented that water and sewer capacity were available for a development when in fact they were not, and misrepresented the financial condition of Big Water Resort, LLC. TLC also allegedly failed to disclose certain debts owed by Big Water Resort, LLC, including a debt owed to Black River Electric. (Id. at ¶ 9.(B) and (C), p. 70 at ¶ 17.)

Hutson's key allegation is that TLC failed to disclose to Hutson that Big Water Resort, LLC had entered into Retail Membership Agreements (hereinafter "Campground Memberships") that granted the members of the campground the right to use the campground facilities for up to two lifetimes. (R. p. 69 at ¶ 11.) Hutson alleged that when he performed a title search, he did not find the Campground Memberships because they were not recorded. (Id. at ¶ 10.)

Hutson alleged that these hidden defects rendered title to the Property unmarketable. As a result, the Property was undevelopable and the Property and Big Water Resort, LLC were worthless. (R. p. 72 at ¶ 22.)

Exhibits establish that Hutson entered into the Lease Purchase Agreement with TLC in December of 2010. (R. p. 126.) Hutson also entered into a Membership Interest Purchase Agreement at the same time. (R. p. 160.) Through the Membership Interest

Purchase Agreement, Hutson became the sole principal in Big Water Resort, LLC. (R. pp. 160, 227 at ¶ 9.)

Hutson alleged that the Respondents in this action knew that TLC's attorneys had committed "Extrinsic Fraud on the Courts" in a Settlement Agreement and Consent Order. This fraud was allegedly "carried over" into a defamation action filed by TLC against Hutson. (R. pp. 72-73 at ¶ 23, 74 at ¶ 27.)

Hutson alleged that an e-mail establishes Newton's knowledge of the fraud perpetrated on him by TLC. (R. pp. 73 at ¶ 24; 122-25.) Hutson claimed that Newton's failure to act on the knowledge of this alleged fraud damaged Hutson by causing Hutson to be unsuccessful in his litigation against TLC. (R. p. 74 at ¶ 27.)

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

- TLC knew Hutson wanted to develop waterfront property;
- the Campground Memberships (as well as an alleged lease between TLC Holdings, LLC and Big Water Resort, LLC) were not recorded;
- the Lease Purchase Agreement, the Membership Interest Purchase Agreement, and the Campground Memberships do not specify which portions of the Property were part of the campground;
- one campground member testified she thought all of the Property was campground property;
- the campground members were not parties to the Settlement Agreement;
- the Settlement Agreement had provisions for an acreage release in conjunction with which Hutson agreed to submit a plat to TLC for its approval for a subdivision development on the Property; and
- exhibits to a separate bankruptcy action appeared to indicate that the subdivision TLC approved was on the campground site.

This e-mail is dated August 13, 2018. (R. pp. 122-25.) In the e-mail, Newton stated that "If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court's attention." (R. p. 124 at ¶ 15.) Newton stated that he did not represent Hutson, and that if Hutson wanted to pursue litigation against TLC, he should hire an attorney. (R. pp. 123, 124, 175.)

Hutson asserted several purported causes of action in his Amended Complaint. (R. pp. 72-83.) However, the gist of Hutson's claim appears to be that Newton's admitted knowledge of the above facts, coupled with certain statements about the law regarding these facts, created a duty on the part of the Respondents to report fraud and/or to prosecute or pay for the prosecution of Hutson's claims against TLC. Hutson made no allegations specific to Murphy. (See R. pp. 67-84)

**Evidence submitted by Respondents**

Newton denied Hutson's allegations. In response, Newton pointed to a letter Hutson attached to his Amended Complaint. (R. pp. 172-77.) That letter recounts that the e-mail Hutson quoted in his Amended Complaint was part of ongoing settlement negotiations. (R. p. 173-75.)

As set forth in the letter, Hutson had threatened to sue Penn-America for failure to procure a *supersedeas* bond while an appeal was pending from a judgment rendered against Hutson for $3,500,000. During the course of those negotiations, Hutson offered to refrain from filing suit if Penn-America would join Hutson in a lawsuit against TLC. (R. p. 175.) The e-mail Hutson quoted was in response to several e-mails from Hutson under the subject heading, "Setting Aside the Judgment," in which Hutson represented to Newton that Hutson was not aware at the time he purchased the property that *all* of the Property he

purchased was subject to the lifetime Campground Memberships. (R. pp. 932-33 at ¶¶ 2, 6-7, 945, 949-50, ¶¶ A, H.)

**Prior related litigation**

The judgment Hutson sought to set aside was part of a prior case in which none of the Respondents were involved. Because Hutson's allegations concern events that occurred in prior cases, a summary of the prior litigation and the judicial orders is necessary in order to evaluate Hutson's claims in this action.

The Ejectment Action

In late 2011, TLC filed an action for ejectment and breach of lease in the Court of Common Pleas for Clarendon County. TLC Holdings, LLC v. M.B. Hudson a/k/a M.B. Hutson, Civil Action No. 2011-CP-14-00602 (the Ejectment Action"). The Settlement Agreement and Consent Order that Hutson attached to his pleading and alleged are fraudulent were filed in the Ejectment Action. (R. pp. 180-97.)

In the Ejectment Action, TLC alleged that Hutson breached the Lease Purchase Agreement and failed to make lease payments. (R. pp. 409-14.) Hutson answered and asserted counterclaims against TLC. (R. pp. 415-33.) Among the issues Hutson raised in his counterclaims were the alleged undisclosed sewer moratorium and outstanding debt owed to Black River Electric Cooperative. (R. pp. 422-23, 425-26, 428-29.)

The Settlement Agreement, which was filed on April 13, 2012, imposes certain duties on Hutson, including the duty to make lease payments. (See R. p. 183.) Hutson was permitted to stay on the Property and the Lease Purchase Agreement remained in force.

One of the terms of the Settlement Agreement was that Hutson agreed to submit a Qualified Plat for TLC's approval for a subdivision project on the Property. (R. pp. 181-

82, ¶ 5.) Court records from the Ejectment Action appear to confirm that the agreed-upon location of the proposed subdivision would be on the campground site. (R. pp. 181 at ¶ 5, 1505 at ¶ 5, 1515-16; 1538 at ¶ 5, 1547-49.) The campground site was one of several parcels that were part of the Lease Purchase Agreement. (R. pp. 670-79.)

The Settlement Agreement specifically provided that if Hutson breached the terms of the Agreement, the Lease Purchase Agreement would be automatically terminated upon the filing of TLC's affidavit of default. (R. p. 181 at ¶ 4.) In that event Hutson would be required to immediately vacate the Property. (Id.) Additionally, Hutson would be deemed to have released TLC from any conduct involving Big Water Resort through the date of Hutson's breach. (R. pp. 181 at ¶ 4, 185-86 at ¶ 23.) The Settlement Agreement was incorporated into a Consent Order that was also filed on April 13, 2012. (R. pp. 180-81 at ¶ 2; 189-97; 1497-1516, 1529-49; 1551-70.)

TLC subsequently filed an Affidavit of Default in December of 2013. (R. pp. 1525-28.) Hutson sought a temporary restraining order and moved to set aside the affidavit of default. On the date set for the hearing, Hutson filed bankruptcy. (R. p. 1348.) The bankruptcy court lifted the stay for a determination whether Hutson had an equitable interest in the Property. (R. pp. 458-59, 1348-49.)

In an Order filed March 21, 2014, Judge (now Justice) George C. James, Jr. ruled that Hutson breached the Settlement Agreement. He found that Hutson's breach was not caused by TLC's actions. (R. pp. 464 at ¶ 3, 466 at ¶ 9.) Judge James ruled that by the terms of the Settlement Agreement, Hutson's breach terminated the Lease Purchase Agreement and required Hutson to immediately vacate the Property. (R. pp. 466-67 at ¶¶

(a) and (c).) Pursuant to this Order, Hutson vacated the Big Water Resort property in approximately April 2013. (R. p. 229 at ¶ 18.)

Hutson's attorneys during the Ejectment Action

Hutson was represented in negotiating the Settlement Agreement and Consent Order by Paul Weissenstein. (R. p. 194.) Hutson sued Weissenstein for malpractice related to this matter. (R. pp. 434-54.) Judge Kristi F. Curtis granted Weissenstein's motion for summary judgment. (R. pp. 531-46.) An appeal from that order is also pending before this Court. M.B. Hutson v. A. Paul Weissenstein, Appellate Case No. 2019-000873.

Hutson also sued another attorney who represented him in the Ejectment Action, Stephen "Chip" Burn. (R. pp. 547-57.) Hutson's action against Burn has been dismissed. (R. pp. 558-60.)

A third attorney, H. Freeman Belser, represented Hutson at the hearing before Judge James. (R. p. 459.) Belser was substituted for Burn shortly before the hearing. (R. pp. 1372-74.)

Hutson's Postcard

Shortly after Hutson was notified of TLC's Affidavit of Default, Hutson sent a postcard (hereinafter "the Postcard") to all the campground members. In the Postcard, Hutson stated that both he and they were victims of a scam perpetrated by TLC. (R. p. 228 at ¶¶ 15-16.) This led to two additional lawsuits.

The Class Action

The campground members filed a putative class action against TLC in federal court in April of 2014. Reed v. Big Water Resort, LLC, Civil Action No. 2:14-cv-1583-DCN-MGB (hereinafter "the Class Action"). The campground members settled their claims with

TLC in February 2016. However, TLC asserted third-party claims against Hutson. Hutson also asserted counterclaims against TLC. TLC raised the automatic release provision in the 2012 Settlement Agreement as a defense to Hutson's counterclaims. Cross-motions for summary judgment were referred to Magistrate Judge Mary Gordon Baker for a hearing.

Magistrate Judge Baker's recitation of Hutson's counterclaims indicates that many of allegations Hutson raised in the Class Action are substantially the same allegations that Hutson raised in the Ejectment Action. In particular, Hutson alleged that TLC failed to disclose the financial condition of Big Water Resort, LLC, the sewer moratorium, and the debt owed to Black River Electric when Hutson purchased the Property. Reed v. Big Water Resort, LLC, 2016 WL 7435620 at *4 (D.S.C. signed Apr. 5, 2016) (R. pp. 369, 372). Hutson also alleged that TLC failed to disclose the Campground Memberships with their lifetime use rights to Hutson when he purchased the property. Id.

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

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

place before Hutson signed the Lease Purchase Agreement and the Membership Interest Purchase Agreement.

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

On May 20, 2016, District Judge David C. Norton granted TLC's motion for summary judgment as to Hutson's counterclaims. Judge Norton ruled that Hutson's counterclaims were barred by *res judicata*. Reed v. Big Water Resort, LLC, 2016 WL 2935891, *5-*8 (D.S.C. signed May 20, 2016) (R. pp. 386-95). Judge Norton adopted Magistrate Judge Baker's factual findings as to Hutson's claims of alleged fraud. Id. at *7. He also found that all of Hutson's allegations of fraud related to the original transaction and not the procurement of the release. Id. at *7-*8.

The Defamation Action

In 2015, TLC filed suit against Hutson for defamation. TLC alleged that the defamatory statements he made in the Postcard he mailed to the campground members instigated the Class Action against TLC. TLC Holdings, LLC, *et al.* v. M.B. Hutson a/k/a M.B. Hudson, Civil Action No. 2015-CP-14-00615. (R. pp. 228-29.) Penn-America originally retained Laura Paton to defend Hutson in the Defamation Action. In February 2017, Frank J. Gordon was substituted as counsel for Hutson. (R. pp. 645-48.)

Hutson also asserted counterclaims against TLC in the Defamation Action. (R. pp. 478-93.) Hutson prosecuted his counterclaims acting *pro se*. (Compare R. p. 477 with p. 493; see also pp. 105-21 (unfiled draft).)

On March 17, 2017, Judge R. Ferrell Cothran, Jr. granted TLC's motion for summary judgment as to TLC's counterclaims. (R. pp. 396-408.) After reviewing the three above-referenced orders, Judge Cothran concluded that Hutson's counterclaims were barred by *res judicata*. (R. p. 406.) Judge Cothran ruled that Hutson "never alleges that [TLC] perpetrated any sort of fraud or otherwise committed wrongful conduct, in relation to the parties' execution of the Settlement Agreement. . . . In other words, the fraud that Hutson here complains of is fraud related to the *original transaction*, not the *release*." (R. pp. 406-07.)

The Sanctions Order

In 2017, Hutson, acting *pro se*, filed a motion for reconsideration of the order granting summary judgment to TLC as to his counterclaims in the federal Class Action. Judge Norton denied Hutson's motion and also granted TLC's motion for sanctions. (R. pp. 506-14.) Judge Norton found that "Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass or burden [TLC], and there is no indication that he intends to cease." (R. p. 511.) Judge Norton noted that Hutson "again makes reference to the alleged fraud by [TLC] in obtaining the settlement agreement and the order signed by Judge James in the prior state court litigation. Hutson has made these allegations throughout the course of this litigation. He has never, however, specified what the fraud is or submitted evidence of it." (Id.) Judge Norton concluded that:

> Hutson has established a pattern of making misrepresentations to the court, of making unsupported allegations of unethical and criminal conduct by

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

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

Court records reflect that Penn-America settled TLC's claims against Hutson in early 2018. (R. pp. 515-17.) As part of that settlement, TLC released its claim for sanctions against Hutson. (R. p. 516.)

The trial and appeal in the Defamation Action

In early 2018, TLC's case against Hutson in the Defamation Action proceeded to trial. The jury returned a verdict against Hutson in the amount of $3,500,000. (R. pp. 518-20.) Counsel defending Hutson (Frank Gordon) filed an appeal from that judgment. (R. pp. 521-23.)

The e-mail Hutson attached to his pleading (R. pp. 122-25) was sent during the pendency of Hutson's appeal. The Defamation Action settled for $1,875,000. The judgment was marked satisfied on December 20, 2018. (R. pp. 528-30.) After receiving notice of the settlement, Hutson filed this lawsuit. (R. p. 52.)

The Coverage Action

One other prior lawsuit is pertinent to this case. Penn-America filed a declaratory judgment action in federal court on June 14, 2016. Penn-America Ins. Co. v. BWR, Inc., *et al.*, Civil Action No. 2:16-cv-01943-DCN (D.S.C.) (R. pp. 198-216.) (hereinafter, "the Coverage Action"). Hutson was named as a defendant in the Coverage Action. Respondents Murphy and Newton signed the Complaint. In the Coverage Action, Penn-America contested its coverage for Hutson as to TLC's claims against him in the Class

Action and the Defamation Action. Among other things, Penn-America contended that Hutson was not an insured for purposes of the actions for which TLC sued him. (R. pp. 210-12.) Penn-America also contended that the claims were excluded because Hutson knowingly violated TLC's rights and/or knowingly published false information. (R. pp. 214-15.)

**The Release**

In conjunction with Hutson's dismissal from the Coverage Action, Hutson entered into a settlement agreement with Penn-America. (R. pp. 494-99.) Another first-party claim on the policy by Hutson was also included in this settlement. As part of the settlement agreement, Hutson agreed to release Penn-America and its agents from any further claims related to the Coverage Action. Hutson alleged that Murphy and Newton acted as agents for Penn-America. (R. pp. 67 at ¶ 3, 80 at ¶ 47.)

**Proceedings before Judge Nettles**

At the hearing, Hutson realleged the same facts that he has alleged in every case since 2011. Hutson sought to develop waterfront property. (R. p. 1299.) When he contracted for the Property, he also acquired the Campground Memberships. (R. pp. 1300-01.) A title search did not reveal any title defects. (R. p. 1301.) After taking possession of the Property, Hutson realized Big Water Resort was losing $300,000 per year. (R. p. 1302.) Hutson believes he was duped into taking the loss from TLC. (R. p. 1303.)

Judge Nettles asked Hutson why these claims were not resolved by the settlements. (R. pp. 1304-05.) Hutson argued that extrinsic fraud supersedes the settlement. (R. p. 1305.) Hutson argued that it was impossible for him to comply with the court order requiring him to develop property that had defective title. (R. p. 1307.)

When asked what Murphy did wrong, Hutson argued that Penn-America and the lawyers it hired knew Hutson was defrauded and failed to report it. (R. pp. 1307, 1311-12.) As evidence of fraud, Hutson quoted from an unfiled pleading from the Defamation Action. (R. pp. 1309-12; see pp. 97-121.) According to Hutson, Newton had a duty to file a motion informing the court in the Defamation Action (which was on appeal at the time) that TLC defrauded Hutson by hiding from him that the property he purchased had defective title, that Big Water Resort was not making a profit, and that there was not a contract in place authorizing use of the property. (R. p. 1313.) Hutson argued that if these things had been reported, the results of all the prior cases would have been reversed. (R. p. 1314.)

All of these claims relate to Hutson's original purchase transaction. Before Newton and Murphy became involved, courts had ruled that the release in the Settlement Agreement and Consent Order barred all of Hutson's claims against TLC related to the original purchase transaction. Reed v. Big Water Resort, LLC, 2016 WL 7435620 at *14. Moreover, all of these issues were raised in prior cases.

Hutson next alleged that Newton's knowledge that the campground members were not parties to the Settlement Agreement and the Consent Order in the Ejectment Action constitutes knowledge of extrinsic fraud. (R. pp. 1316-17.) Hutson argued this contradicted Newton's statement in a letter responding to one of Hutson's settlement demands in which Newton stated that Penn-America has not acknowledged fraud upon the court. (R. pp. 1320-21; see p. 175.) Hutson admitted Penn-America had a common interest with Hutson in defeating TLC's claims against Hutson. (R. p. 1321.)

The fact that the campground members were not parties to the settlement of the Ejection Action is irrelevant unless Hutson can prove that all of the Property he purchased from TLC is subject to the Campground Membership agreements. Newton's e-mail notes that there is some evidence to corroborate Hutson's claim, but the cited evidence is not sufficient to demonstrate fraud upon the court. (R. pp. 124 at ¶¶ 7-14.)

## STANDARD OF REVIEW

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

The trial court in this case considered matters outside the pleadings. Therefore, the appropriate standard is that found in Rule 56, SCRCP.

An appellate court's review of an order granting a summary judgment motion is based upon the same standard that governs the trial court under Rule 56, SCRCP. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 546, 694 S.E.2d 1, 4 (2010). "Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 323-24, 566 S.E.2d 536, 540 (2002). "In determining whether a genuine question of fact exists,

the court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving party." Id.

A party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings. SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). Rule 56(e) requires a party opposing summary judgment "to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial." Doe ex rel. Doe v. Batson, 345 S.C. 316, 320, 548 S.E.2d 854, 856 (2001). Although only a scintilla of evidence is required, a party must present some evidence to avoid summary judgment. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330-31, 673 S.E.2d 801, 802-03 (2009); Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 452-53 (Ct. App. 1988). Moreover, a party may not avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. Hoard, 387 S.C. at 549, 694 S.E.2d at 6.

This Court exercises *de novo* review of questions of law. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

## ARGUMENT

Newton and Murphy raised numerous defenses to Hutson's claims. In particular, neither Newton nor Murphy have ever represented Hutson. Hutson failed to allege any conduct by Murphy relative to his claims, much less any misconduct by Murphy. Hutson lacks standing, and he has failed to establish the elements of a professional malpractice claim. Hutson's claim is also barred by a release. But even in the absence of Newton and Murphy's defenses, Hutson's claim fails on the merits.

### I. The Amended Complaint does not allege any conduct by Murphy causing damage to Plaintiff.

Hutson's Amended Complaint does not contain any factual allegation involving

Murphy other than the fact he served as counsel for Penn America in the Coverage Action. This is insufficient to establish any cause of action against Murphy. Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012) (holding that a motion to dismiss should be granted when the facts alleged would not entitle the plaintiff to relief under any theory).

In addition, with respect to fraud or misrepresentation, there are no allegations involving any conversations, written, oral or otherwise, between Hutson and Murphy, and no such communications or conversations ever existed. Therefore, Judge Nettles properly granted Murphy's Motion to Dismiss.

**II. Newton and Penn-America satisfied any duty to protect Hutson's rights.**

Newton and Penn-America acted to protect Hutson's rights. This case is not a new matter, but rather the latest in a series of litigated cases stretching back for nearly a decade. Several prior unappealed judicial orders have already directly established that Hutson has released all claims against TLC of fraud arising from Hutson's lease-purchase transaction. Hutson's only claim that is possibly not barred is for fraudulent inducement with respect to the Settlement Agreement in the Ejectment Action. The duty Hutson alleges does not merely involve providing counsel for his counterclaims in pending litigation. Hutson would require a liability insurer and its coverage counsel to initiate and prosecute legal proceedings to set aside the results of prior cases on behalf of their insureds.

Hutson cited one case in support of his argument that Penn-America owed a duty to defend his counterclaims against TLC. Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co., 766 F. Supp. 324, 333-34 (E.D. Penn. 1991), aff'd in part and rev'd in part on other grounds, 961 F.3d 209 (Table), 1992 WL 12915247 at *5 (3rd Cir. 1992). Other courts

hold that insurers do not have a duty to pay costs associated with litigating an insured's counterclaims. Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 679-80, 384 S.E.2d 36, 46 (Ct. App. 1989). South Carolina courts have not ruled on this issue.

Even when insurers have been found to owe a duty to pay the cost of litigating counterclaims, that duty is not unlimited. Only costs associated with counterclaims that are "inextricably intertwined" with the insured's defense must be paid. Post v. St. Paul Travelers Ins. Co., 691 F.3d 500, 521-22 (3rd Cir. 2012). These courts adhere to a "bright-line and sensible rule" that an insurer does not owe a duty to pay litigation costs associated with filing a separate action. Id. at 522.

These cases, should they be found to apply, stand for the proposition that a liability insurer should investigate to ascertain whether an insured's counterclaims are "inextricably intertwined" with the insured's defense. Courts do not require insurers to file separate actions to vindicate rights of their insureds. Respondents complied with these guidelines.

Hutson's counterclaims, as they stood when Penn-America was notified of TLC's claims against Hutson, all related to alleged misconduct by TLC that was the subject of a settlement and release. The draft counterclaim in the Defamation Action, which Hutson made the backbone of his factual allegations in the matter, was ultimately dismissed by Judge Cothran upon a finding that the release in the Settlement Agreement in the Ejectment Action barred Hutson's counterclaims. (R. pp. 68-72; 105-21; 396-408.) Even if insurers are required to pay the cost of prosecuting counterclaims, this rule should not extend to counterclaims that are patently frivolous.

It was Penn-America's decision whether to provide counsel for Hutson's counterclaims. Murphy and Newton owed no duty to defend or represent Hutson.

Furthermore, Newton and Penn-America satisfied any duty to investigate. The documents Hutson produced in support of his claim in this action prove that Newton made every effort to protect Hutson's rights. When Hutson alleged certain facts that might have provided meritorious grounds for seeking relief from the prior judgments, Newton, acting as coverage counsel for Penn-America, investigated Hutson's claim. The evidence cited in Newton's e-mail demonstrates that the facts Hutson provided were inconclusive as to any fraud that might prejudice Hutson. Additionally, Penn-America owed no duty to initiate separate litigation to set aside the result of a case in which it was not involved.

On the other hand, Newton recognized that, as a putative insured, Penn-America owed Hutson certain duties. In that capacity, Newton sought to avoid prejudicing any potential interest Hutson may have. Additionally, Hutson and Penn-America had a common interest in defeating or minimizing TLC's claims against Hutson, even though Hutson and Penn-America were adverse as to coverage issues. Moreover, Hutson was threatening suit against Penn-America at the time for failure to obtain a *supersedeas* bond during the appeal of the Defamation Action. (See R. pp. 174-75.) Hutson offered to abstain from pursuing that claim if Penn-America would provide information for counsel Hutson hoped to retain for the purpose of asserting Hutson's claim of fraud upon the court. (Id.) The length of the recitation of facts and the size of the record in this case sufficiently demonstrates that any attorney considering whether to take Hutson's case would face a daunting task and would be tempted to decline the case without looking into it.

Accordingly, Newton provided Hutson with the evidence gleaned from Penn-America's investigation and advised Hutson that he had a right to pursue such a claim. Newton did not withhold anything from Hutson because the information was not relevant

to Penn-America's case. Newton clearly stated that he could not represent Hutson and urged Hutson to retain counsel. (R. pp. 123, 124.) This satisfied any duty Respondents may have had to protect Hutson's potential claim of fraud upon the court.

Newton denies ever making the statement Hutson attributes to him in paragraph 32 of his Amended Complaint (R. p. 76) and on page 12 of his Initial Brief in this appeal. Hutson appears to have cobbled together two separate comments and taken both out of context. Moreover, Hutson's allegation relates to his proposed lawsuit against TLC's lawyers. Such a claim is unrelated to potential coverage for Hutson's defense.

Hutson's admission that he did not sue TLC or its lawyers (R. p. 77 at ¶ 35) is telling as to the veracity of Hutson claim. Rather than pursue the alleged *perpetrators* of the fraud, Hutson turned on those who he alleges have merely admitted *knowledge* of the fraud. Hutson seeks to use Newton and Penn-America's efforts to safeguard his rights against them. He attempts to turn their knowledge of allegations of a *possible* fraud claim into knowledge of *provable* fraud upon the court.

## III. Hutson cannot demonstrate knowledge of provable fraud.

Despite Hutson's repeated allegations, he has never produced evidence of provable fraud that caused harm to him that has not already been ruled upon in prior judicial orders. By the time Respondents became involved, several judges had ruled that Hutson released all claims against TLC arising from the original purchase transaction by breaching the Settlement Agreement and Consent Order. (R. pp. 455-467 (James Order); 368-85 (Baker R&R); 386-95 (Norton Order); and 396-408 (Cothran Order.) As late as October 6, 2017, Judge Norton, in issuing sanctions against Hutson, found that Hutson had never produced

evidence of fraud inducing him into entering into the Settlement Agreement with TLC. (R. p. 511.)

Hutson's allegation that all of the Property he purchased was subject to the Campground Memberships was the first indication of facts that could support a claim for fraudulent inducement. But even that was insufficient. As will be shown below, several key facts undercut any claim Hutson may have of fraudulent inducement.

First, Hutson knew about the lifetime campground memberships before he ever entered into the lease-purchase transaction for the Property he intended to develop for sale of condominiums. Reed v. Big Water Resort, LLC, Civ. Action No. 2:14-cv-1583-DCN-MGB, 2016 WL 7435620 at *13 n.5. (D.S.C. signed Apr. 5, 2016). Newton obtained copies of the Hutson's realtor's e-mail during this case. (See R. pp. 643-44.)

Second, the Settlement Agreement and Consent Order that Hutson claims were fraudulent did not involve property upon which a question existed as to the applicability of the lifetime memberships. In the settlement, Hutson agreed to construct a residential development on the campground itself. (R. pp. 1560 at ¶ 5, 1570.) Hutson's belated claim that he was fraudulently induced to enter into the settlement with TLC might have some merit if he had attempted to build on some of the undeveloped property. But the existence of the campground was open and obvious.

Third, even if the absence of the campground members from the TLC-Hutson settlement constituted fraud, Hutson has no standing to assert it. The parties injured by the settlement were the campground members, who stood to potentially lose the benefit of their lifetime memberships in the campground if Hutson razed it and built a residential development on the campground site. The absence of the campground members from the

settlement raised concerns for Newton, and he communicated those concerns to Hutson. (R. p. 124 at ¶ 15.) However, the campground members had already filed—and settled—a lawsuit against TLC before Newton became involved in this case. See Reed v. Big Water Resort, LLC, 2016 WL 374816 (D.S.C. signed Feb. 1, 2016) (preliminarily approving settlement); 2016 WL 7438449 (D.S.C. signed May 26, 2016) (giving final approval). Any fraud claim by the campground members appeared to be barred by either the settlement or the statute of limitations. Moreover, Hutson had a duty to protect the campground members as principal in Big Water Resort, LLC. (See R. pp. 88-94, 160, 227 at ¶ 9.)

Fourth, Hutson's representation to Newton (and to this Court (Appellant's Init. Br., pp. 5 and 11)) that all of the Property was subject to the lifetime Campground Memberships appears to be inaccurate. Hutson has never identified a ruling in the federal Class Action that deems all of the Property unmarketable. (See id.) Hutson knew from prior litigation of evidence that he could have developed some of the property. On May 20, 2015, Hutson participated in the deposition of TLC's realtor, Susan Stroman. (R. pp. 985, 1001 (p. 65 at l. 22).) Under Hutson's cross-examination, Stroman testified that all of the Property Hutson purchased from TLC was *not* subject to the Campground Memberships. (R. pp. 992-93, 1006 (p. 86, ll. 13-24).) Additionally, TLC argued in support of its motion for summary judgment as to Hutson's counterclaims that Hutson could have built on the undeveloped portions of the property. (R. pp. 1018-19.) Judge Norton granted TLC's motion. (R. pp. 386-95.) This corroborated TLC's Rule 30(b)(6) testimony in a deposition taken in the Coverage Action. (R. pp. 669-79.) Hutson's claim that TLC misled him into believing he could develop some of the property was, at best, a factual issue that Hutson would have to prove in order to demonstrate fraud upon the court.

Fifth, by the time Hutson brought the alleged fraud to Respondents' attention, it was far too late to bring legal action. The case against Hutson had already been tried to a jury verdict. The appeal was pending before this Court. TLC Holdings, LLC v. M.B. Hutson, Appellate Case No. 2018-000936 (filed May 21, 2018). Hutson's counterclaims in the federal class action had already been dismissed, and Hutson had been sanctioned for continuing to assert them after their dismissal. Reed v. Big Water Resort, LLC, 2016 WL 2935891 (D.S.C. signed May 20, 2016) and 2017 WL 4480195 (D.S.C. filed Oct. 6, 2017) (R. pp. 386-95; 506-14). Moreover, Hutson's claim in this case does not merely involve seeking to set aside the jury verdict and the federal court orders, it also would have required an action to set aside a Settlement Agreement, Consent Order, and the Order granting summary judgment against Hutson in the Ejectment Action.

Finally, evidence uncovered during this action suggests that Hutson knew the effect his building project would have on the campground soon after he took possession of the Property. An affidavit was found in the court file from the Ejectment Action (R. pp. 1383-86) in which Hutson testified as follows:

> 6. After the LPA and MIPA were executed in December 2010, I quickly learned that there were two major obstacles to the successful development of the Resort and the operation of the business. Neither of these obstacles were disclosed to me prior to the signing of the LPA and the MIPA.
>
> 7. The first obstacle was that TLC and [its principals] had entered into lifetime membership contracts with the members of the public that allowed them to use the Resort for free. These contracts, the full nature of which was not disclosed to me, substantially impaired my ability to operate the business at a profit, which in turn impaired my ability to fund the development. I was able to work my way through these problems only by (a) substantially reducing the number of employees at the Resort, and (b) reducing the number of memberships by increasing the costs at the Resort, which outraged the members.

(R. p. 1384.) Hutson's own testimony, years before Newton and Penn-America became involved, is that he was attempting to force the campground members out so he could build on the Property. It appears that Hutson is the perpetrator, not the victim, in this matter.

Hutson cannot demonstrate that Respondents knew of any provable fraud against Hutson. Moreover, Hutson's claims in this case are barred by several defenses.

## IV. Hutson lacks standing to sue Murphy and Newton.

Murphy and Newton represented an adverse party in the DJ Action against Hutson. South Carolina does not recognize any duty flowing from Murphy or Newton to Plaintiff, whether based upon negligence, fraud, bad faith, professional malpractice or otherwise. Moreover, any communication between adversaries cannot be the basis for a subsequent action based upon negligence, misrepresentation or fraud. An attorney is obligated to represent his own client zealously and therefore, must be protected from any duty to also represent, advise, assist, or otherwise direct or provide guidance to an adverse party. Preamble to Rules of Professional Conduct, ¶ [8] and R. 1.7(a)(1), Rule 407, SCACR. If such actions are allowed, an attorney's professional duties to his own client will be compromised by the danger that representation of his own client could expose him to an action from an adversarial party for not also looking out for that party's interests. This has never been and cannot be the law of South Carolina.

In South Carolina, attorneys are generally immune from liability to third parties arising from their actions as counsel for their clients. Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528, 339 S.E.2d 857, 889 (Ct. App. 1986). Attorneys are generally not liable to a party opponent for conduct in the course of litigation. Ronald E. Mallen & James A. Roberts, The Liability of a Litigation Attorney to a Party Opponent, 14

Willamette L. J. 387 (1978). Statements made in the course of litigation are absolutely privileged. Oesterle v. Wallace, 272 Mich. App. 260, 264, 725 N.W.2d 470, 474 (Mich. Ct. App. 2006). Every state that has considered the issue has held that the absolute judicial privilege from suit applies to statements made by attorneys during settlement negotiations. Id. at 266-67, 725 N.W.2d at 475-76.

The only exception to the rule that attorneys are immune from liability to third parties while representing party opponents is when misrepresentation or fraud is committed by the attorney. 7A C.J.S. Attorney & Client § 228 (Feb. 2021 Update); Rucker v. Schmidt, 768 N.W.2d 408, 411-12 (Minn. Ct. App. 2009). Fraud generally requires proof of nine distinct elements. M.B. Kahn Constr. Co. v. S.C. Nat'l Bank, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980).

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

Hutson alleged that the purpose of Newton's e-mail was to provide leverage in settlement negotiations with TLC. (R. p. 77 at ¶¶ 34-35.) A letter from Penn-America that Hutson attached to his pleading further explains that the e-mail served the dual purpose of providing leverage against TLC and also attempting to resolve Hutson's threatened lawsuit against Penn-America for failing to provide a *supersedeas* bond during the pendency of the appeal of the judgment in the Defamation Action. (R. pp. 173-75.)

Newton's e-mail was part of ongoing settlement negotiations. The communication was made by Newton, acting as counsel for Hutson's opponent in the Coverage Action,

Penn-America. Therefore, Hutson lacks standing to sue Newton or Murphy because they were acting as counsel for a party opponent in ongoing settlement negotiations.

## V. Hutson cannot prove professional malpractice liability

In order to bring a claim for professional malpractice, Hutson must establish an attorney-client relationship. Fabian v. Lindsay, 410 S.C. 475, 483, 765 S.E.2d 132, 136 (2014). Contractual privity is necessary to establish standing. Id. at 482, 765 S.E.2d at 136. The remaining elements of a legal malpractice action are a breach of duty by the attorney and proximately caused damages. Fabian, 410 S.C. at 483, 765 S.E.2d at 136. Hutson cannot establish the requisite elements for a professional malpractice claim.

### A. Duty

Hutson does not allege the existence of a contract creating an attorney-client relationship between himself and Newton. In fact, in the e-mail Hutson relies upon, Newton expressly stated several times that he does not represent Hutson and that Newton represented Hutson's opponent, Penn-America. Hutson cannot demonstrate the existence of an attorney-client relationship to support a claim for professional malpractice against Newton.

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

affidavit to his Complaint in this action. Therefore, Hutson has failed to state a claim for professional malpractice.

**B. Breach of duty**

Even if Hutson's allegations demonstrate the existence of a legal duty, Hutson fails to show a breach of that duty under the circumstances of this case. Hutson does not allege that Newton or Murphy defrauded Hutson, but rather that they failed to take action to counteract known fraud perpetrated by TLC. Hutson presented no evidence that Newton or Murphy ever represented TLC.

As discussed above, the evidence does not support Hutson's allegation that Newton or Murphy knew Hutson was defrauded. At the time of the settlement discussions upon which Hutson's claims in this action are based, Hutson's counterclaims against TLC were only viable if the Settlement Agreement and Consent Order could be set aside due to fraud upon the court. Hutson knew this because he made this argument in the federal Class Action. Hutson, acting *pro se*, filed memoranda distinguishing between extrinsic fraud and intrinsic fraud. (R. p. 622.) He argued the Settlement Agreement should be set aside due to fraud. (R. pp. 625-32.) Hutson also argued that the release and *res judicata* should not apply due to fraud upon the court. (R. pp. 635-36.) All of this occurred before Hutson raised this issue to Newton. (See R. pp. 929-33.)

Fraud upon the court is an equitable doctrine. Chewning v. Ford Motor Co., 354 S.C. 72, 82, 579 S.E.2d 605, 610 (2003); Bryan v. Bryan, 220 S.C. 164, 167, 66 S.E.2d 609, 610 (1951). Equitable relief is not available to a party who has unclean hands. Straight v. Goss, 383 S.C. 180, 206-07, 678 S.E.2d 443, 457–58 (Ct. App. 2009).

Fraud upon the court requires proof of a deliberate scheme to defraud. Chewning, 354 S.C. at 78, 579 S.E.2d at 608. A judgment will not be set aside due to intrinsic fraud which should have been discovered during the litigation itself. Id. at 82, 579 S.E.2d at 610. The fraud must be directed to the judicial machinery itself: false statements between the parties do not constitute fraud upon the court. Bulloch v. U.S., 763 F.2d 1115, 1121 (10th Cir. 1985). Fraud upon the court must be proved by clear and convincing evidence, and all doubts must be resolved in favor of finality of a judgment. Id.

In order to prevail in an action to set aside a prior judgment based upon fraud, Hutson would have to prove that he was not aware at the time he entered into the Settlement Agreement that all of the Property was subject to the Campground Memberships, and that TLC deliberately prevented him (and the court) from discovering it during the Ejectment Action. Chewning, 354 S.C. at 81, 579 S.E.2d at 610. This involves Hutson's knowledge as to facts pertaining to prior transactions and legal actions. This information is not in the possession of any of the Respondents in this case.

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

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

Rule 1.2(d) prohibits a lawyer from engaging or assisting a client in committing a crime or a fraud. Hutson does not allege that Murphy or Newton represented TLC, who allegedly defrauded Hutson. Therefore, this rule does not apply to them in this case.

Importantly, this Rule does not impose any duties upon an attorney based upon mere knowledge of a fraud perpetrated upon an opposing litigant. The rule applies to fraud perpetrated by an attorney's client. Murphy and Newton's client was Penn-America. Hutson does not allege that Penn-America committed any fraud.

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

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

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

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

### C. Proximate cause

Even if a duty was breached, Hutson fails to allege any basis for proximate cause. Hutson essentially claims that the results of the Ejectment Action, the Class Action, and the Defamation Action would have been different had the Respondents in this suit acted on Hutson's behalf to counteract the fraud. (R. pp. 1313-14.) Court records reflect that Newton and Murphy were not involved in those actions. By the time Newton's e-mail was sent, the Ejectment action was concluded, the Class Action had been settled, and a judgment had been entered against Hutson in the Defamation Action. Hutson provides no authority for the proposition that a lawyer representing an adverse party must attempt to re-open judgments in prior actions merely because of an awareness that those judgments may have been tainted by fraud.

It is doubtful that Hutson could prevail on a claim of fraud upon the court because he appears to have unclean hands due to Hutson's breach of his duties to the campground members. Straight, 383 S.C. at 206-07, 678 S.E.2d at 457-58. At a minimum, the outcome of any litigation initiated by Hutson to set aside prior court orders is uncertain. Hutson cannot prove that merely informing the court in the Defamation Action of the content of Newton's e-mail would have, in and of itself, reversed the outcome of prior cases.

## VI. Hutson's claims are barred by a Release.

Finally, even if all of the above could be established, Hutson's claims are subject to dismissal because they are barred by a release. Hutson's settlement agreement with Penn-America releases his claims against not only Penn-America, but also Penn-America's agents. (R. pp. 494-99.)

A release is a contract by which a plaintiff relinquishes rights or claims against persons against whom those rights could have been enforced. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 492, 649 S.E.2d 494, 498 (Ct. App. 2007). Rules of interpretation of contracts should be used to determine what the parties intended. Id. at 497, 649 S.E.2d at 501. "The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Id. at 500, 649 S.E.2d at 503.

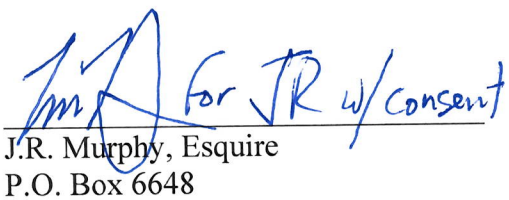
Hutson made no attempt either in briefing or at the hearing to contest the authenticity or enforceability of the release. Hutson failed to provide any reason why it should not apply to his claims in this case. The release bars any further claims against Penn-America relating to its coverage and claim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

## CONCLUSION

Hutson's claim fails on the merits regardless of whether any defenses apply. In addition, Hutson lacks standing to sue counsel for a party opponent. Hutson cannot establish the requisite elements for a professional liability claim. His claim is barred by a release. Accordingly, Respondents Newton and Murphy respectfully request that Judge Nettle's ruling in their favor be affirmed.

[*Signature page follows*]

Respectfully submitted,



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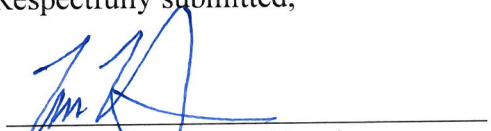

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Columbia, South Carolina
March 8, 2021

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IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

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Case No. 2018-CP-40-06344

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Appellate Case No. 2019-001488

MB Hutson / MB Hudson, ..... Appellant,

v.

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

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**CERTIFICATE**

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I, Timothy J. Newton, Esquire certify that the Respondents' Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court.

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