

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas
Judge Robert Hood, Fifth Circuit

Case # 2020-CP-400-3810

Appellate # 2020-001708

RECORD ON APPEAL

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SC Court of Appeals

BINDER 1 of 6

Penn America Insurance Company and Global Indemnity
Group, LLC, Plaintiffs/Counter Defendants,

v.

Morris Beach Hutson a/k/a M.B. Hutson, Defendant/Counter-Plaintiff,

AND

Morris Beach Hutson a/k/a M. B. Hutson, Third Party Plaintiff,

v.

Timothy J. Newton, Esq.; Murphy & Grantland, P.A.; Christian Stegmaier, Esq.; and
Collins & Lacy P.C., Third Party Defendants,

of whom Morris Hutson is the Appellant,

and Penn America Insurance Company & Global Indemnity Group, LLC; Timothy J.
Newton, Esq.; Murphy & Grantland, P.A.; Christian Stegmaier, Esq.; and Collins & Lacy
P.C., are the Respondents.

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4003810

Penn America Insurance Company et al
PLAINTIFF(S)

Morris Beach Hutson et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

Defendant Morris Beach Huston filed Questions and Requests for Judge Hood on October 26, 2020. As to questions 1, 2 and 3, clarification will be made in the forthcoming order of the Court. As to requests 4 and 5, any proposed order sent to the Court by opposing counsel must first be sent to Defendant Hutson for review, as required by Rule 5(b)(3), SCRPC.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/29/2020 .

M B Hutson for M B Hutson
Morris Beach Hutson for Morris Beach Hutson
M B Hutson for M B Hutson
Timothy J. Newton
Morris Beach Hutson for Morris Beach Hutson

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Richland Common Pleas

Case Caption: Penn America Insurance Company , plaintiff, et al vs Morris Beach
Hutson , defendant, et al

Case Number: 2020CP4003810

Type: Order/Electronic Form 4

So Ordered

s/ R.E. Hood #2164

Electronically signed on 2020-10-29 09:41:59 page 3 of 3

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO: 2020-CP-40-03810

Penn America Insurance Company and Global
Indemnity Group, LLC,

Plaintiffs,

v.

Morris Beach Hutson a/k/a M.B. Hutson,

Defendant.

Morris Beach Hutson a/k/a M.B. Hutson,

Defendant/Third-Party Plaintiff

v.

Timothy J. Newton, Esq.; Murphy &
Grantland, P.A.; Christian Stegmaier, Esq.; and
Collins & Lacy P.C.,

Third-Party Defendants.

**ORDER GRANTING
THIRD-PARTY DEFENDANTS
TIMOTHY J. NEWTON AND
MURPHY & GRANTLAND, P.A.'S
MOTION TO DISMISS,
OR, IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGMENT**

This matter is before me upon a Motion to Dismiss, or, in the alternative, Motion for Summary Judgment by Third-Party Defendants Timothy J. Newton and Murphy & Grantland, P.A. (hereinafter collectively “Murphy & Grantland”). This motion was made pursuant to Rules 12(b)(1), (6) and (8) and 56 of the South Carolina Rules of Civil Procedure. This matter was heard on October 15, 2020 along with several other motions filed by Plaintiffs and Defendant/Third-Party Claimant. John M. Grantland and Newton appeared for Murphy & Grantland. After careful consideration of all arguments and materials submitted for my review, I find that Murphy & Grantland’s Motion should be granted. ¹

¹ The Court is entering several Orders related to motions filed by other parties contemporaneously with this Order. The Court’s findings and conclusions from the Orders granting Plaintiffs’ Motion for Temporary Injunction and Motions to Strike, as well as the Order denying Defendant’s Motion, are incorporated by reference herein.

This action relates to matters that have already been litigated repeatedly in prior actions. The common thread throughout the litigation is allegations of fraud by Defendant/Third-Party Plaintiff, Morris Beach Hutson a/k/a M.B. Hutson. The genesis of the litigation was a land deal in Clarendon County involving a campground known as Big Water Resort. In 2010, Hutson entered into a Lease Purchase Agreement with a non-party to this action, TLC Holdings, LLC, and its principals (hereinafter collectively “TLC”). Hutson entered into this transaction with full knowledge that a TLC-related entity, Big Water Resort, LLC, had sold lifetime memberships in the Big Water Resort campground that was being operated on some of the property.² As part of this transaction, Hutson became the sole shareholder in Big Water Resort, LLC. Through these transactions, Hutson obtained both a right to develop and sell unimproved portions of the property and a duty to protect the interests of the campground members.

Hutson breached the Lease Purchase Agreement and TLC sued to evict him.³ Hutson retained counsel to defend him and to prosecute certain counterclaims against TLC. Those matters were resolved in a Settlement Agreement and adopted into a Consent Order that was filed on April 13, 2012. Hutson’s attorney for that transaction was Paul Weissenstein, Jr., who signed the Consent Order. The 2012 Settlement Agreement contained a conditional release providing that if Hutson breached the terms of the Settlement Agreement, he would be deemed to have released TLC for all claims he may have had against them prior to his eviction.

² Reed v. Big Water Resort, LLC, Civ. Action No. 2:14-1583-DCN-MGB, 2016 WL 7435620, at *13 n.5 (D.S.C. Apr. 5, 2016), report and recommendation adopted, No. 2:14-CV-01583-DCN, 2016 WL 2935891 at *7 (D.S.C. May 20, 2016) (“There is no dispute that Hutson knew about the ‘life time’ membership agreements when he purchased BWR.”).

³ TLC Holdings, LLC v. M.B. Hudson, Civ. Action No. 2011-CP-14-00602 (Clarendon County Comm. Pl. filed Dec. 14, 2011) (hereinafter “the Ejectment Action”).

Hutson breached the 2012 Settlement Agreement. Hutson again retained counsel to represent him for the hearing. By Order filed March 21, 2014, Judge (now Justice) George C. James, Jr. found that Hutson's breach operated as a release of Hutson's claims against TLC.⁴ Based on this ruling, Hutson's counterclaims against TLC in subsequent actions were dismissed under the doctrine of *res judicata*.

When he was served with his eviction notice, Hutson sent a postcard to the campground members that led to two subsequent actions. The campground members sued TLC in federal court, and TLC asserted third-party claims against Hutson in that action.⁵ TLC also sued Hutson separately in state court for defamation.⁶ Hutson filed counterclaims against TLC in both actions.

TLC's claims against Hutson were tendered to Plaintiff Penn America Insurance Company ("PAIC"). In early 2016, PAIC accepted the tender under reservation of rights and began defending Hutson in both suits. However, PAIC denied Hutson's request for counsel to represent him in his counterclaims against TLC.

PAIC filed a declaratory judgment to adjudicate its rights under the policy it issued to one of Hutson's companies.⁷ PAIC retained Murphy & Grantland as coverage counsel for its declaratory judgment action against Hutson. On September 16, 2016, Hutson entered into a

⁴ Reed, 2016 WL 7435620 at *14 ("The Release plainly releases all claims against [TLC] for claims that arose on December 11, 2013 or before."). The 2012 Settlement Agreement and Consent Order, as well as Judge James' Order, were filed in the Ejectment Action.

⁵ Reed v. Big Water Resort, LLC, Civ. Action No. 2:14-1583-DCN-MGB (D.S.C. filed Apr. 22, 2014) (hereinafter "the Class Action").

⁶ TLC Holdings, LLC v. Hutson, Civ. Action No. 2015-CP-14-00615 (Clarendon County Comm. Pl. filed Dec. 7, 2015) (hereinafter "the Defamation Action").

⁷ Penn-America Ins. Co. v. BWR, Inc., Civ. Action No. 2:16-cv-01943-DCN (D.S.C. filed June 14, 2016) (hereinafter "the Coverage Action").

Settlement Agreement in which he released all claims against PAIC and its counsel related to his claims for coverage under the policy.

Hutson continued to maintain and prosecute his counterclaims against TLC on a *pro se* basis. Hutson's counterclaims were dismissed in both the Class Action and the Defamation Action upon findings that Judge James' Order in the Ejectment Action was dispositive.⁸ After Hutson's counterclaims were dismissed, District Judge David C. Norton granted TLC's Motion for Sanctions against Hutson in the Class Action.⁹ 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."¹⁰ 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."¹¹ 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 ¹²

⁸ Reed, 2016 WL 2935891 at *5-*8; Order Granting Pl's. Mot. for Summ. J. as to Def's. Countercls., TLC Holdings, LLC, et al. v. M.B. Hutson, Civ. Action No. 2015-CP-14-00615 (Clarendon County Comm. Pl. Mar. 2, 2017).

⁹ Reed v. Big Water Resort, LLC, Civ. Action No. 2:14-cv-1583-DCN, 2017 WL 4480195 (D.S.C. Oct. 6, 2017).

¹⁰ Id.

¹¹ Id.

¹² Id. at *2-*3.

The Defamation action was tried in January 2018, and the jury returned a verdict for TLC and against Hutson in the amount of \$3,500,000. PAIC settled TLC's claims against Hutson in the Class Action in early 2018 and their claims in the Defamation action in December 2018.

In August 2018, while negotiations to settle the Defamation suit were ongoing, Hutson made certain representations to Murphy & Grantland in an effort to induce PAIC to retain counsel for him to attempt to set aside the conditional release in the 2012 Settlement. Hutson's proposed theory was fraud upon the court. Hutson pointed out that the 2012 Settlement contemplated a condominium development on the campground property. He also stated that he had recently learned that TLC had withheld from him evidence that all of the property he purchased was subject to the lifetime campground membership agreements. Hutson provided an expert affidavit he intended to use in a forthcoming suit against Weissenstein, stated that the expert testimony would support his claim of fraud, and threatened litigation against PAIC based upon that expert's testimony. Third-Party Defendant Newton acknowledged Hutson's possible claim for fraud upon the court and provided corroborating evidence in an e-mail dated August 13, 2018. However, PAIC declined to provide counsel for Hutson with respect to any affirmative claims Hutson might assert against TLC.

Hutson subsequently sued Paul Weissenstein, the attorney who represented him for purposes of the 2012 Settlement. On February 25, 2019, Judge Kristi F. Curtis granted Weissenstein's motion for summary judgment.¹³ Judge Curtis found that Hutson could not establish fraud because he knew about the lifetime campground memberships before he entered into the 2010 lease-purchase of the Big Water Resort property.¹⁴ On November 12, 2020, the

¹³ Order Granting Def's. Mot. for Summ. J., MB Hutson v. Paul Weissenstein, Civ. Action No. 2018-CP-43-01583 (Sumter County Comm. Pl. Feb. 25, 2019).

¹⁴ Id. at 9-12.

South Carolina Court of Appeals dismissed Hutson's appeal from Judge Curtis' Order for failure to prosecute.¹⁵

Hutson used the August 13, 2018 e-mail as the basis for yet another lawsuit that he filed the day after he was notified of the settlement of TLC's \$3,500,000 verdict against him in the Defamation Action.¹⁶ Hutson alleged various causes of action against Newton and J.R. Murphy of Murphy & Grantland. These claims were all based upon a theory that Murphy & Grantland knew about fraud committed against Hutson by TLC in the Ejectment Action and failed to report it to a court. Hutson's claims were heard and on July 18, 2019, Judge Michael G. Nettles filed an Order granting summary judgment in favor of Murphy and Newton.¹⁷ Hutson's appeal from that Order is currently pending before the Court of Appeals.¹⁸

While Hutson's Bad Faith Action against PAIC was pending on appeal, Hutson filed an "Emergency Motion to Have Open Hearing Due to Respondents Committing Extrinsic Fraud on the South Carolina Court of Appeals and its Judges."¹⁹ Hutson claimed in numerous court filings and threatening e-mails that Murphy & Grantland and current counsel for PAIC are continuing to commit fraud upon the court by failing to report allegedly known fraud perpetrated against Hutson by TLC. The Court of Appeals denied Hutson's motion and other similar motions by Order filed July 28, 2020.

PAIC then filed this action seeking injunctive relief to restrain Hutson from continuing his pattern of vexatious litigation and threats of litigation against PAIC and its current and former

¹⁵ Appellate Case No. 2019-000873.

¹⁶ MB Hutson v. Penn America Ins. Co., Civ. Action No. 2018-CP-40-06344 (Richland County Comm. Pl. filed Dec. 5, 2018) (hereinafter "the Bad Faith Action").

¹⁷ Id. Murphy & Grantland had no involvement whatsoever in the Ejectment Action.

¹⁸ Appellate Case No. 2019-001488.

¹⁹ Id. (filed July 6, 2020).

counsel. Hutson responded by filing third-party claims against Murphy & Grantland. Hutson's various causes of action have precisely the same factual basis as the claims upon which Judge Nettles granted summary judgment. Hutson again alleged that Murphy & Grantland knew of extrinsic fraud upon the court and failed to report it. The evidentiary grounds for Hutson's claims in this action are the same August 13, 2018 e-mail and proposed counterclaim from the Defamation action that he raised in the Bad Faith Action. Hutson even filed copies of his briefs and motions from the pending appeal of the Bad Faith Action as the basis for his third-party claims against Murphy & Grantland in this case.

Murphy & Grantland moved to dismiss Hutson's third-party claims based upon Rule 12(b)(8) of the South Carolina Rules of Civil Procedure and the doctrine of *res judicata*. Murphy & Grantland also requested dismissal based upon Hutson's vexatious litigation.

At the hearing, Hutson made the same arguments that he previously raised to Judge Nettles in the Bad Faith Action. Hutson argued that Newton admitted he knew of fraud upon the court in the August 13, 2018 e-mail, but then contradicted himself in a letter responding to Hutson's \$500,000 settlement demand to PAIC. Newton contended that the August 13, 2018 e-mail only alerted Hutson to the potential for a fraud claim, it does not reflect knowledge of fraud. Newton's August 13, 2018 e-mail alerted Hutson to certain evidence in PAIC's possession that "might possibly" support a claim for fraud upon the court. Newton's November 8, 2018 letter states that neither PAIC nor its counsel ever acknowledged the existence of fraud upon the court, but they did recognize that certain evidence raised concerns that Hutson has a right to investigate and possibly pursue. After examining the materials Hutson provided, I am satisfied that Murphy & Grantland is not committing fraud upon the court in this action.

Moreover, Hutson made precisely the same argument to Judge Nettles.²⁰ The same issues are currently pending before the Court of Appeals in the Bad Faith Action. The Order in the Bad Faith Action is consistent with several other courts orders holding that Hutson cannot prove fraud because he was aware of the lifetime campground memberships before he ever entered into the lease-purchase transaction for the Big Water Resort property.²¹

I find that Hutson's third-party claims against Murphy & Grantland in this action are subject to dismissal because Hutson's same claims were raised in the Bad Faith Action. Claims are subject to dismissal when another action is pending involving the same parties and the same claims. Rule 12(b)(8), SCRCP. "*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Litigants are barred from raising issues that were adjudicated in the former suit or that might have been raised in the former suit. Id. Judge Nettles' Order granting summary judgment has preclusive effect unless and until reversed on appeal. RFT Mgmt. Co., LLC v. Gilbert, Civ. Action No. 8:10-02503-HFF, 2011 WL 13142633 at *4 (D.S.C. signed May 24, 2011); Dawson v. State Law Enforcement Div., Civ. Action No. 3:91-1403-17, 1992 WL 208967 (D.S.C. Apr. 6, 1992); Northern Va. Law Sch. v. Jones, No. 88-1781, 883 F.2d 69 (4th Cir. 1989); Restatement (Second) of Judgments § 13 (June 2020 Update). Hutson has also released these claims.

Furthermore, courts have the inherent authority and the duty to protect themselves and other litigants from vexatious and harassing litigation. See Ramantanin v. Poulos, 240 S.C. 13,

²⁰ See Order filed July 18, 2019 in the Bad Faith Action, at 3-4.

²¹ Id. at 21; see nn. 2, 11, and 13 and accompanying text, infra.

25, 124 S.E.2d 611, 617 (1962). Parties are not allowed to maintain vexatious, frivolous, and malicious claims. Id.

For the reasons set forth above, I find that Murphy & Grantland's Motion to Dismiss, or, in the alternative, Motion for Summary Judgment should be granted.

It is hereby

ORDERED, ADJUDGED and DECREED that judgment be entered for Third-Party Defendants Timothy J. Newton and Murphy & Grantland, P.A., that Hutson's claims against them in this action should be dismissed, and that Newton and Murphy & Grantland, P.A. and should be dismissed as parties from this action.

IT IS SO ORDERED.

The Honorable Robert E. Hood
Presiding Judge of the Fifth Circuit Court

Columbia, South Carolina
Date: _____



Richland Common Pleas

Case Caption: Penn America Insurance Company , plaintiff, et al vs Morris Beach
Hutson , defendant, et al
Case Number: 2020CP4003810
Type: Order/Other

So Ordered

s/ R.E. Hood #2164

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Penn America Insurance Company and	)	
Global Indemnity Group, LLC,	)	C.A. No: 2020-CP-40-03810
	)	
Plaintiffs/Counter-Defendants,	)	
	)	
vs.	)	ORDER DENYING THIRD-PARTY
	)	PLAINTIFF'S MOTION FOR
Morris Beach Hutson a/k/a M.B. Hutson,	)	TEMPORARY INJUNCTION
	)	
Defendant/Counter-Plaintiff.	)	
	)	
	)	
Morris Beach Hutson a/k/a M.B. Hutson	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Timothy J. Newton, Esq.; Murphy &	)	
Grantland, P.A.; Christian Stegmaier, Esq.;	)	
and Collins & Lacy P.C.,	)	
	)	
Third-Party Defendants.	)	
	)	

This matter came before the Court upon Defendant/Counter-Plaintiff Morris Beach Hutson a/k/a M.B. Hutson ("Hutson's") Motion for Temporary Injunction. A hearing on the motion was held on October 15, 2020, before the Honorable Robert E. Hood. Having reviewed and considered the written filings and exhibits, the oral arguments of the parties, and the applicable law, this Court finds that Hutson has not demonstrated that without such relief he will suffer irreparable harm, that he has a likelihood of success on the merits, or that there is no adequate remedy at law.

Hutson seeks to have the Court direct Counter-Defendants and Third-Party Defendants admit their alleged knowledge of extrinsic fraud. Hutson has failed to make a prima facie case that

any fraud has been committed or is known by the Counter-Defendants and Third-Party Defendants in order to show a likelihood of success on the merits. These allegations of fraud were previously considered in Hutson's Bad Faith Action, which is presently on appeal in the South Carolina Court of Appeals. Hutson has made several filings with the appellate court related to his allegations of continued fraud, which have or will be disposed of by the Court of Appeals. Thus, there is no evidence of irreparable injury or an inadequate remedy at law.

Accordingly, the Court **DENIES** Defendant/Counter-Plaintiff Hutson's motion.¹

AND IT IS SO ORDERED.

[JUDICIAL E-SIGNATURE PAGE TO FOLLOW]

¹ Contemporaneous with the entry of the instant Order, the Court is entering Orders granting Plaintiff's Motion for Preliminary Injunction; granting Third-Party Defendants Murphy & Grantland and Newton's Motion to Dismiss or for Summary Judgment; and granting Plaintiff's three Motions to Strike. The Court's findings and conclusions in these additional Orders are incorporated herein by reference.



Richland Common Pleas

Case Caption: Penn America Insurance Company , plaintiff, et al vs Morris Beach
Hutson , defendant, et al
Case Number: 2020CP4003810
Type: Order/Temporary Injunction

So Ordered

s/ R.E. Hood #2164

Electronically signed on 2020-12-08 14:25:55 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
	)	
Penn America Insurance Company and	)	C.A. No: 2020-CP-40-03810
Global Indemnity Group, LLC,	)	
	)	
Plaintiffs/Counter-Defendants,	)	
	)	
vs.	)	ORDER GRANTING
	)	PLAINTIFFS PENN AMERICA
Morris Beach Hutson a/k/a M.B. Hutson,	)	INSURANCE COMPANY, GLOBAL
	)	INDEMNITY GROUP, LLC,
Defendant/Counter-Plaintiff.	)	CHRISTIAN STEGMAIER, ESQ., AND
	)	COLLINS & LACY P.C.'S
	)	MOTIONS TO STRIKE
	)	
Morris Beach Hutson a/k/a M.B. Hutson	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Timothy J. Newton, Esq.; Murphy &	)	
Grantland, P.A.; Christian Stegmaier, Esq.;	)	
and Collins & Lacy P.C.,	)	
	)	
Third-Party Defendants.	)	
	)	

This matter came before the Court upon various motions, including: (1) Penn America, Global, Stegmaier, and Collins & Lacy's Motion to Stay/Strike/Dismiss Hutson's Amended Counterclaims and Third-Party Claims and Motion for Injunction; (2) Penn America, Global, Stegmaier, and Collins & Lacy's Motion to Strike Portions of Hutson's "Answer"; and (3) Penn America, Global, Stegmaier, and Collins & Lacy's Amended Motion to Strike Hutson's "Notice of Extrinsic Fraud" and "Memorandum to Defendant's Amended Cross Complaint." A hearing on the motions was held on October 15, 2020, before the Honorable Robert E. Hood. Plaintiffs/Counter-Defendants Penn America Insurance Company ("PAIC") and Global Indemnity Group, LLC

(“Global”) were represented by Christian Stegmaier, Esquire. Mr. Stegmaier also represented himself and Collins & Lacy P.C. as Third-Party Defendants. Third-Party Defendants Timothy J. Newton, Esq. and Murphy & Grantland, P.A. were represented by John Grantland, Esquire and Timothy Newton, Esquire. Defendant/Counter-Plaintiff/Third-Party Plaintiff Morris Beach Hutson a/k/a M.B. Hutson (“Hutson”) appeared *pro se*.

Having considered the written filings and exhibits, the arguments heard at the hearing on October 15, 2020, and the applicable law, this Court **GRANTS** the above-referenced motions to strike.¹ The Court presents its findings and conclusions below.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Plaintiffs PAIC and Global initiated the instant matter with the filing of a Complaint and Motion for Temporary Injunction on August 10, 2020. Defendant Hutson responded with the filing of his own Counterclaims and Third-Party Claims, a partial Answer to the Complaint, and his own Motion for Temporary Injunction. The Plaintiffs, Counter-Defendants, and Third-Party Defendants then filed their respective motions to stay, strike, and dismiss Hutson’s filings.

A motion to strike is governed by Rule 12(f) of the South Carolina Rules of Civil Procedure which provides:

Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court’s own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

¹ Contemporaneous with the entry of the instant Order, the Court is entering Orders granting Plaintiffs’ Motion for Preliminary Injunction; denying Hutson’s Motion for Temporary Injunction against Counter-Defendants and Third-Party Defendants; and granting Third-Party Defendants Murphy & Grantland and Newton’s Motion to Dismiss or for Summary Judgment. The Court’s findings and conclusions in these additional Orders are incorporated herein by reference.

Rule 12(f), SCRC.P.

**A. PAIC, Global, Stegmaier, and Collins & Lacy's Motion to Stay/Strike/Dismiss
Hutson's Amended Counterclaims and Third-Party Claims**

Throughout the "Amended Cross-Complaint," Hutson accuses the Counter-Defendants and Third-Party Defendants of engaging in a conspiracy to commit fraud upon the Courts of this State. He purports to present the following causes of action against all Counter-Defendants and Third-Party Defendants: Count One: Fraud and Extrinsic Fraud; Count Two: Document Fraud; Count Three: Defamation by Extrinsic Fraud; and Count Four: Unfair and Deceptive Trade Practice. Within Count Three, Hutson alleges obstruction of justice and seeks \$3.5 Million in damages.

At the hearing before this Court, Hutson was provided ample opportunity to explain the nature of the fraud he is alleging against Plaintiffs and the Third-Party Defendants and how it differs from what has been asserted in the past, including before Judge Nettles. Hutson pointed to two pieces of correspondence he received from Newton, who was acting in his capacity as coverage counsel for PAIC at the time. They include an August 13, 2018 e-mail and a November 8, 2018 letter. The e-mail states that, based on Huston's allegations, "there *might possibly* be extrinsic fraud on the court" but advises that Newton cannot provide legal advice or representation to Hutson regarding the same. (emphasis added). The November 8, 2018 letter denies that PAIC or its counsel has "acknowledged the existence of fraud upon the court." While Hutson claims that the two letters are inconsistent, the Court disagrees. The August 13 e-mail did not acknowledge the existence of fraud—it provided that fraud "might possibly" exist. There is no evidence that Newton had actual knowledge of any fraud or perpetrated any fraud himself. Moreover, there is nothing new about Hutson's claims that distinguish them from the claims he previously raised in Hutson v. Penn America Ins. Co., et al., Case No. 2018-CP-40-06344 (Richland Cnty. Comm. Pleas).

After reviewing Hutson's claims, they are redundant, immaterial, impertinent and scandalous. Accordingly, the Court Strikes Huston's Counterclaims and Third-Party Claims against the Counter-Defendants, Christian Stegmaier, and Collins & Lacy, P.C.

B. PAIC, Global, Stegmaier, and Collins & Lacy's Motion to Strike Portions of Hutson's "Answer"

Rule 8 of the South Carolina Rules of Civil Procedure provides the general rules of pleading. Specifically, Rule 8(b) provides that a party must admit or deny the averments upon which the adverse party relies, and provides guidance for when a party lacks knowledge or information sufficient to form a belief as to the truth of an averment or a party seeks to admit in part and deny in part. Rule 8(b), SCRCP. Rule 8(d) further provides that "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Rule 8(d), SCRCP.

Hutson's Answer fails to respond to paragraphs 1 through 8 and 16 through 111 of the Complaint. Accordingly, those allegations of the Complaint are deemed admitted. See Rule 8(d), SCRCP. Hutson further admits, without reservation, the allegations of paragraph 10 of the Complaint. Plaintiffs' Motion to Strike argues that the remainder of Hutson's Answer fails to comport with the Rules of Civil Procedure by either denying facts based upon a contention that additional information is absent from the averment of the Complaint or by making assertions non-responsive to the Complaint. The Court agrees. Accordingly, the Court strikes paragraphs 1, 3 through 9, and 11 thorough 13 of Huston's Answer to the Third-Party Complaint, as well as the textual paragraphs on pages 16 and 17 of the Answer.

C. PAIC, Global, Stegmaier, and Collins & Lacy's Amended Motion to Strike Hutson's "Notice of Extrinsic Fraud" and "Memorandum to Defendant's Amended Cross Complaint"

Plaintiff filed a "Notice of Extrinsic Fraud" and a "Memorandum to Defendant's Amended Cross Complaint," which Plaintiffs argue are not proper pleadings. The "Notice" states that "fraud is presently being perpetrated upon the Honorable Common Pleas and the Court of Appeals, its Judges, and on this Defendant by all the Plaintiffs/Third Party Defendants," who he then lists. Hutson's "Memorandum" cites a portion of Rule 3.3 of the Rules of Professional Conduct and portions of Newton's August 13, 2018 e-mail. Hutson then repeats his allegations that PAIC, Global, Stegmaier, Collins & Lacy, Newton, and Murphy & Grantland all knew about TLC Holding's fraud, are illegally protecting one another, and failed to disclose the fraud to any court. Hutson's "Memorandum" further cites to 77 paragraphs that comprised his *pro se* counterclaims filed by him and which were ultimately resolved against him on summary judgment in the prior Defamation Action, Case No. 2015-CP-14-0615.

Hutson's "Notice" and "Memorandum," which continue to make malicious allegations of criminal and professional misconduct, are impertinent and scandalous. Moreover, neither filing is a proper pleading, motion, or memorandum under our Rules. Accordingly, the Court Strikes Hutson's "Notice of Extrinsic Fraud" and "Memorandum to Defendant's Amended Cross Complaint."

AND IT IS SO ORDERED.

[JUDICIAL E-SIGNATURE PAGE TO FOLLOW]



Richland Common Pleas

Case Caption: Penn America Insurance Company , plaintiff, et al vs Morris Beach
Hutson , defendant, et al
Case Number: 2020CP4003810
Type: Order/Other

So Ordered

s/ R.E. Hood #2164

Electronically signed on 2020-12-08 14:25:44 page 6 of 6

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
	)	
Penn America Insurance Company and	)	C.A. No: 2020-CP-40-03810
Global Indemnity Group, LLC,	)	
	)	
Plaintiffs/Counter-Defendants,	)	
	)	
vs.	)	
	)	
Morris Beach Hutson a/k/a M.B. Hutson,	)	ORDER GRANTING
	)	PLAINTIFFS PENN AMERICA
	)	INSURANCE COMPANY AND GLOBAL
Defendant/Counter-Plaintiff.	)	INDEMNITY GROUP, LLC'S MOTION
	)	FOR TEMPORARY INJUNCTION
	)	
Morris Beach Hutson a/k/a M.B. Hutson	)	
	)	
Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
Timothy J. Newton, Esq.; Murphy &	)	
Grantland, P.A.; Christian Stegmaier, Esq.;	)	
and Collins & Lacy P.C.,	)	
	)	
Third-Party Defendants.	)	
	)	

This matter came before the Court upon Plaintiffs Penn America Insurance Company and Global Indemnity Group, LLC's Motion for Preliminary Injunction, as well as other motions. A hearing on the motions was held on October 15, 2020, before the Honorable Robert E. Hood. Plaintiffs/Counter-Defendants Penn America Insurance Company ("PAIC") and Global Indemnity Group, LLC ("Global") were represented by Christian Stegmaier, Esquire. Mr. Stegmaier also represented himself and Collins & Lacy P.C. as Third-Party Defendants. Third-Party Defendants Timothy J. Newton, Esq. and Murphy & Grantland, P.A. were represented by John Grantland, Esquire and Timothy Newton, Esquire. Defendant/Counter-Plaintiff/Third-Party Plaintiff Morris

Beach Hutson a/k/a M.B. Hutson (“Hutson”) appeared *pro se*. Having considered the written filings and exhibits, the oral presentations at the hearing on October 15, 2020, and the applicable law, this Court grants Plaintiffs Penn America Insurance Company and Global Indemnity Group, LLC’s Motion for Preliminary Injunction. The Court presents its findings and conclusions below.

PROCEDURAL BACKGROUND

Plaintiffs PAIC and Global initiated the instant matter with the filing of a Complaint and Motion for Temporary Injunction on August 10, 2020. Defendant Hutson responded with the filing of his own Counterclaims and Third-Party Claims, a partial Answer to the Complaint, and his own Motion for Temporary Injunction. The Plaintiffs, Counter-Defendants, and Third-Party Defendants then filed their respective motions to stay, strike, and dismiss Hutson’s filings.

The following motions were heard in an in-person hearing at the Richland County Judicial Center on October 15, 2020:

1. Plaintiffs' Motion for Temporary Injunction against Hutson;
2. Hutson’s Motion for Temporary Injunction against Counter-Defendants and Third-Party Defendants;
3. Third-Party Defendants Murphy & Grantland and Newton’s Motion to Dismiss or for Summary Judgment;
4. PAIC, Global, Stegmaier, and Collins & Lacy’s Motion to Stay/Strike/Dismiss Hutson’s Amended Counterclaims and Third-Party Claims and Motion for Injunction;
5. PAIC, Global, Stegmaier, and Collins & Lacy’s Motion to Strike Portions of Hutson’s “Answer”; and
6. PAIC, Global, Stegmaier, and Collins & Lacy’s Motion to Strike Hutson’s “Notice of Extrinsic Fraud” and “Memorandum to Defendant’s Amended Cross Complaint.”

This Order addresses the first motion, Plaintiffs' Motion for Temporary Injunction against

Hutson.¹

LEGAL STANDARD

“A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law.” Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010) (holding that there is no additional “balancing the equities” requirement). When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present “a fair question to raise as to the existence of such a right.” Williams v. Jones, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912). The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made. MailSource, LLC v. M.A. Bailey & Assocs., 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003) (citing Transcon. Gas Pipe Line Corp. v. Porter, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969)). “Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” Helsel v. City of North Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) (“[I]t would have been improper for the hearing judge who issued the temporary injunction to make a finding upon the facts in such a manner as to affect the merits of the case.”).

¹ Contemporaneous with the entry of the instant Order, the Court is entering Orders denying Hutson’s Motion for Temporary Injunction against Counter-Defendants and Third-Party Defendants; granting Third-Party Defendants Murphy & Grantland and Newton’s Motion to Dismiss or for Summary Judgment; and granting Plaintiff’s three motions to strike. The Court’s findings and conclusions in these additional Orders are incorporated herein by reference.

FINDINGS OF FACT

The documentation provided by the parties reflects that in December 2010, Hutson entered into a Membership Interest Purchase Agreement with Richard U. Clark, Jimmy S. Lovell, James Thigpen, and The Big Water Resort, LLC related to the outstanding membership interests in The Big Water Resort, LLC. Contemporaneously therewith, Hutson also entered into a Lease Purchase Agreement with TLC Holdings, LLC (“TLC”), Richard U. Clark, Jimmy S. Lovell and James Thigpen related to the purchase of property in Clarendon County, South Carolina, including a campground known as “Big Water Resort,” a convenience store facility and adjacent land known as the “Big Water Country Store and Restaurant,” and a 57.81 acre tract known as “Roger’s Tract.”

In December 2011, TLC filed an ejectment action against Hutson alleging he defaulted on the terms of the Lease Purchase Agreement. TLC Holdings, LLC v. Hutson, Case No. 2011-CP-14-602 (Clarendon Cnty. Ct. Comm. Pleas) (“the Ejectment Action”). Hutson filed counterclaims against TLC in the Ejectment Action in which he asserted that various misrepresentations and material omissions were made with respect to the Subject Property and that TLC and its members interfered with the Property’s development and operation. The parties agreed to settle the Ejectment Action, and the Settlement Agreement was adopted into a Consent Order filed April 13, 2012.

Following Hutson’s default under the terms of the 2012 Settlement Agreement and Consent Order, TLC sought to evict Hutson from the Big Water Resort property. Following a hearing, the Honorable George C. James, Jr., entered an order on March 21, 2014, which enforced the terms of the Consent Order and Settlement Agreement. Judge James found that Hutson’s claims that TLC “made ‘verbal assurances’ to Hutson that were incorrect, or that [TLC] failed to make ‘important disclosures’ to him” were the same claims alleged in the 2012 action and resolved pursuant to the 2012 Settlement Agreement and Consent Order.

Global is the parent company of PAIC, a member of Penn-America Group, which offers specialty property and casualty products designed for small businesses. PAIC issued commercial general liability (CGL) policy number PAC7045167 to “BWR, Inc. d/b/a Big Water Resort” as the named insured (“the Policy”). The Policy was in effect from October 16, 2013 through April 7, 2014. Hutson was the principal in BWR, Inc., a now defunct corporation formerly organized and existing under the laws of the State of South Carolina. Pursuant to the Policy, PAIC provided a defense and indemnity to Hutson in two lawsuits, known as the Class Action and the Defamation Action. Big Water Resort, LLC, et al. v. TLC Holdings, LLC, C/A: 2:14-1583-DCN-MGB (D.S.C.) (“the Class Action”); TLC Holdings, LLC, et al. v. Hutson, Case No. 2015-CP-14-0615 (Clarendon Cnty. Ct. Comm. Pleas) (“the Defamation Action”).

The Class Action lawsuit was brought in federal court by a group of Big Water Resort campground members against TLC and its members. TLC then asserted third-party claims for equitable indemnification against Hutson. Hutson also asserted counterclaims against TLC. TLC and Hutson filed cross motions for summary judgment, which were ruled upon in favor of TLC on May 20, 2016. Federal District Judge David C. Norton later also entered an Order granting sanctions against Hutson, explaining:

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

Class Action, Norton Order Granting Sanctions, Oct. 6, 2017.

The Defamation Action was instituted by TLC in state court on December 7, 2015. TLC’s

claims related to statements made by Hutson in the postcard he sent to campground members and certain statements Hutson made to the attorney who represented the campground members in the Class Action. Hutson raised identical counterclaims against TLC in the Defamation Action as he raised in the Class Action, which were also disposed of on summary judgment by the Honorable R. Ferrell Cothran, Jr. TLC's claims in the Defamation Action proceeded to a jury trial. The jury returned a verdict of Three Million Five Hundred Thousand Dollars (\$3,500,000) on January 26, 2018. The case was mediated during appeal and resolved.

PAIC retained Murphy & Grantland, P.A. as coverage counsel and instituted a coverage action on June 14, 2016. Penn-America Insurance Company v. BWR, Inc., et al., C/A: 2:16-cv-01943-DCN (D.S.C.) ("the Coverage Action"). On or about September 16, 2016, Hutson entered into a Settlement Agreement and Release of Certain Claims with PAIC. PAIC paid Hutson the sum of Nine Thousand Five Hundred Dollars (\$9,500.00) as consideration for the Settlement Agreement and Release in the Coverage Action.

Following resolution of both lawsuits without any personal liability to Hutson, Hutson initiated a lawsuit against PAIC, Global, and their coverage counsel, Timothy Newton and J.R. Murphy, on December 5, 2018. Hutson v. Penn America Ins. Co., et al., Case No. 2018-CP-40-06344 (Richland Cnty. Comm. Pleas) ("the Bad Faith Action"). Following a hearing before the Honorable Michael G. Nettles, the court granted summary judgment in favor of the defendants on all of Hutson's claims. Huston has appealed from those Orders, and the appeal is currently pending before the South Carolina Court of Appeals. Hutson v. Penn America Inc. Co., et al., Appellate Case No. 2019-001488 ("the Bad Faith Appeal").

Hutson has also separately sued attorney Paul Weissenstein, who represented him in the 2012 Ejectment Action and resulting Settlement Agreement. Hutson v. Weissenstein, Case No.

2018-CP-43-1583 (Sumter Cnty. Ct. Comm. Pleas) (“the Weissenstein Malpractice Action”). On February 25, 2019, the Honorable Kristi Curtis granted summary judgment in favor of Weissenstein based upon both the statute of limitations and the merits. Hutson appealed from that Order and the appeal remains pending. Hutson v. Weissenstein, Appellate Case No. 2019-873 (S.C. Ct. App.) (“the Weissenstein Appeal”). Hutson also sued attorneys Stephen “Chip” Burn and Sarah Gutherie and Burn Law Firm, LLC related to advice they purportedly gave him in the Ejectment Action. On April 10, 2019, the Honorable Frank R. Addy, Jr. entered an Order of Dismissal, finding that Hutson failed to cure the lack of expert affidavit or establish that such an affidavit was not necessary. Hutson did not appeal from the Order of Dismissal.

Plaintiffs have provided copies of numerous e-mails from Hutson to counsel for PAIC and Global, Newton, Murphy, and others threatening to bring a new lawsuit against them and claiming that they are all co-conspirators in the original fraud he claims was perpetrated by TLC in the land deal and 2012 settlement. On June 21 and 22, 2020, Huston told counsel for PAIC, Christian Stegmaier that he was “having to seriously consider bringing a[n] immediately separate action against you for participating with Tim Newton and JR Murphy in extrinsic fraud upon the Appeals Court and the lower Court.” He added: “I plan to serve the insurance companies copies of the complaint as well as serving you.” On July 6, 2020, Hutson wrote: “If I don’t hear from you within the next (5) business days, I will proceed with a complaint in State or Federal Court against you.” On July 27, 2020, Hutson accused the Plaintiffs and Third-Party Defendants of “concealing extrinsic fraud” and stated: “I plan to take these immoral actions to court rightaway [sic]. I have an abundance of evidence showing my damages and mental depression and stress that you have caused me intentionally and continue to cause on a daily basis. All are warned.”

On August 8, 2020, two days before Plaintiffs initiated the instant action, Hutson wrote: “Have no choice but to move forward with a new needed complaint, ‘Defamation by way of Extrinsic Fraud’ naming Christian Stedmaier [sic], Tim Newton, JR Murphy, Penn America and Global. Soon I will file the same ‘Defamation by way of Extrinsic Fraud’ against Turner Padgett and Tom Harper.” Then, following service with the instant Complaint and Motion for Preliminary Injunction, Hutson responded by filing counterclaims and third-party claims.

At the hearing before this Court, Hutson was provided ample opportunity to explain the nature of the fraud he is alleging against Plaintiffs and the Third-Party Defendants and how it differs what has been asserted in the past, including before Judge Nettles. Hutson pointed to two pieces of correspondence he received from Newton, who was acting in his capacity as coverage counsel for PAIC at the time. They include an August 13, 2018 e-mail and a November 8, 2018 letter. The e-mail states that, based on Huston’s allegations, “there *might possibly* be extrinsic fraud on the court” but advises that Newton cannot provide legal advice or representation to Hutson regarding the same. (emphasis added). The November 8, 2018 letter denies that PAIC or its counsel has “acknowledged the existence of fraud upon the court.” While Hutson claims that the two letters are inconsistent, the Court disagrees. The August 13 e-mail did not acknowledge the existence of fraud—it provided that fraud “might possibly” exist. There is no evidence that Newton had actual knowledge of any fraud or perpetrated any fraud himself.

CONCLUSIONS OF LAW

"The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it." Compton v. S.C. Dep’t of Corr., 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). In determining whether a preliminary injunction is proper, the Court is not ruling on the merits of the permanent injunction and request to classify Hutson as a vexatious

litigant. Rather, the Court evaluates whether Plaintiffs will suffer immediate, irreparable harm without the injunction, the likelihood of Plaintiffs' success on the merits, and whether there is an adequate remedy at law. See id.; Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010). In doing so, the Court examines the merits of the underlying case only to the extent necessary to determine whether the plaintiff has made a sufficient prima facie showing of entitlement to relief. Helsel v. City of North Myrtle Beach, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

A. Immediate and Irreparable Harm to Plaintiffs

The Court agrees that Plaintiffs will suffer irreparable harm associated with the time and costs they will incur in defending against further litigation by Hutson and they cannot be adequately compensated with monetary damages in light of Hutson's limited financial resources. Hutson has filed numerous motions in past litigation in state and federal court, as well as in the pending appeal, which impose a substantial burden of time and money for preparation of responses. A lack of response risks that the Court interpret the motion as unopposed. The issuance of this preliminary injunction will further preserve the status quo while the Court of Appeals considers the rulings on summary judgment by Judge Nettles.

B. Plaintiffs' Likelihood of Success on Merits

In evaluating this element, the court must determine only the *likelihood* of whether the Plaintiff will prevail on the merits based on the allegations in its complaint. See Compton v. S.C. Dep't of Corr., 392 S.C. at 367, 709 S.E.2d at 642. The Complaint alleges that Hutson is a vexatious litigant and seeks a permanent injunction against the initiation of *pro se* litigation against Plaintiffs or any of their officers, agents, servants, employees, attorneys, affiliates, successors and assigns, without first obtaining leave of Court. See Ramantanin v. Poulos, 240 S.C. 13, 25, 124 S.E.2d 611,

617 (1962) (recognizing a court of equity's power to prevent continued and vexatious litigation, but that there must be a showing of the pendency of other litigation between the parties or the threat of further litigation to serve as the basis for issuance of the injunction). Here, Plaintiffs have set forth a prima facie case for their request for injunctive relief, including the pendency of other litigation between the parties—the current appeal in the South Carolina Court of Appeals—and multiple threats of further litigation by Hutson, further evidenced by his counterclaims in this matter.

C. Lack of Adequate Remedy at Law

As discussed *supra*, the Court agrees that Rule 11 sanctions and the Frivolous Proceedings statute do not provide an adequate remedy at law because Hutson does not have the financial means to pay any monetary award to Plaintiffs.

D. Posting of Bond

Rule 65(c), SCRCP, provides that:

Except in divorce, child custody and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

AJG Holdings, LLC v. Dunn, 382 S.C. 43, 49, 674 S.E.2d 505, 508 (Ct. App. 2009). In Atwood Agency v. Black, our Supreme Court ruled that the circuit court erred in requiring only a nominal security bond of \$250, because it erroneously assumed the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper. 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007).

Here, the injunctive relief requested is not aimed at preventing or allowing commercial activity. Rather, its granting limits Hutson's *pro se* access to the state court. However, the fraud allegations Hutson attempts to raise have already been raised before the Honorable Michael G.

Nettles. Hutson remains free to represent himself in the currently pending appeal from Judge Nettles' Order. Thus, even if this preliminary injunction is found to be in error, there will be no significant costs or damages incurred by Hutson. Nonetheless, Rule 65 requires the giving of security in a sum deemed proper by the Court.

CONCLUSION

IT IS ORDERED Plaintiffs Penn America Insurance Company and Global Indemnity Group, LLC's Motion for Preliminary Injunction is hereby **GRANTED**. Unless and until Appellate Case No. 2019-001488 is concluded, Defendant Morris Beach Hutson a/k/a M.B. Hutson is prohibited from filing any further *pro se* litigation in state court in South Carolina (a) against Penn America Insurance Company, Global Indemnity Group, LLC, Collins & Lacy, P.C., Christian Stegmaier, Laura Baer, Murphy & Grantland, P.A., John Robert "J.R." Murphy, John Grantland, and/or Timothy Newton, or (b) related to the claims already ruled upon by the Honorable Michael G. Nettles.²

IT IS FURTHER ORDERED, pursuant to Rule 65(c), Plaintiffs are directed to file proof of bond, in the amount of Five Thousand and no/100 (\$5,000.00) Dollars within five business days of entry of this Order. The bond shall serve as security for all claims with respect to this Preliminary Injunction, and any additional injunctive relief ordered by the Court in this action.

AND IT IS SO ORDERED.

[JUDICIAL E-SIGNATURE PAGE TO FOLLOW]

² This injunction does not prevent Huston from continuing to pursue his current appeal from Judge Nettles' Order granting summary judgment in Appellate Case No. 2019-001488.



Richland Common Pleas

Case Caption: Penn America Insurance Company , plaintiff, et al vs Morris Beach
Hutson , defendant, et al
Case Number: 2020CP4003810
Type: Order/Temporary Injunction

So Ordered

s/ R.E. Hood #2164

Electronically signed on 2020-12-08 14:25:32 page 12 of 12

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4003810

Penn America Insurance Company, et al
PLAINTIFF(S)

Morris Beach Hutson, et al
DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant Hutson filed a request for an emergency hearing, which the Court scheduled for Wednesday, February 17, 2021. The Court received the attached letter from Defendant Hutson stating that his request for the emergency hearing be cancelled, therefore, the scheduled hearing is moot and hereby cancelled.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

2164

Circuit Court Judge

Judge Code

Date _____

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Richland Common Pleas

Case Caption: Penn America Insurance Company , plaintiff, et al vs Morris Beach
Hutson , defendant, et al

Case Number: 2020CP4003810

Type: Order/Form 4

So Ordered

s/ R.E. Hood #2164

Electronically signed on 2021-02-16 13:24:45 page 5 of 5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Penn America Insurance Company and	)	Civil Action No.:
Global Indemnity Group, LLC,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	SUMMONS
	)	
Morris Beach Hutson a/k/a M.B. Hutson,	)	
	)	
Defendant.	)	
	)	

TO: MORRIS BEACH HUTSON A/K/A M.B. HUTSON, DEFENDANT:

YOU ARE HEREBY SUMMONED and notified that an action has been filed against you in this court. Within thirty (30) days of the day you receive this Summons, you must respond in writing to this Complaint by filing an Answer with this Court. You must also serve a copy of your Answer to this Complaint upon the Plaintiffs' Attorney at the address shown below. If you fail to answer the Complaint, judgment by default could be rendered against you for the relief requested in the Complaint.

[SIGNATURES ON FOLLOWING PAGE]

COLLINS & LACY, P.C.

By: s/Christian Stegmaier
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ATTORNEYS FOR PLAINTIFFS PENN
AMERICA INSURANCE COMPANY
AND GLOBAL INDEMNITY GROUP,
LLC

SUMMONS

Columbia, South Carolina
August 10, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Penn America Insurance Company and	)	Civil Action No.:
Global Indemnity Group, LLC,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	COMPLAINT
	)	(Action in Equity; No Jury Trial Demanded)
Morris Beach Hutson a/k/a M.B. Hutson,	)	
	)	
Defendant.	)	
	)	

TO: MORRIS BEACH HUTSON A/K/A M.B. HUTSON, DEFENDANT:

Plaintiffs Penn America Insurance Company and Global Indemnity Group, Inc.,
 (“Plaintiffs”) allege and would show unto the Court:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Penn America Insurance Company (“PAIC”) is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania.
2. Plaintiff Global Indemnity Group, LLC (“Global”) is a limited liability company organized and existing under the law of the State of Delaware.
3. Global is the parent company of PAIC, a member of Penn-America Group, which offers specialty property and casualty products designed for small businesses.
4. Upon information and belief, Defendant Morris Beach Hutson a/k/a M.B. Hutson (“Hutson”) is a resident of Orangeburg County, South Carolina.
5. This Court has subject matter jurisdiction pursuant to Article V, Section 11, of the South Carolina Constitution.
6. This Court has personal jurisdiction over the parties.

7. Pursuant to S.C. Code Ann. § 15-7-30(C)(2), venue is proper in Richland County, where the most substantial part of the alleged acts or omissions giving rise to the causes of action herein occurred.

FACTUAL BACKGROUND

8. Plaintiffs restate the above-numbered paragraphs and incorporate the same by reference.

The Land Deal

9. In December 2010, Hutson entered into a Membership Interest Purchase Agreement with Richard U. Clark, Jimmy S. Lovell, James Thigpen and The Big Water Resort, LLC, related to the outstanding membership interests in The Big Water Resort, LLC.
10. In December 2010, Hutson also entered into a Lease Purchase Agreement with TLC Holdings, LLC (“TLC”), Richard U. Clark, Jimmy S. Lovell and James Thigpen related to the purchase of property in Clarendon County, South Carolina, including a campground known as “Big Water Resort,” a convenience store facility and adjacent land known as the “Big Water Country Store and Restaurant,” and a 57.81 acre tract known as “Roger’s Tract.”

The Ejectment Action and Hutson’s Eviction

11. In December 2011, TLC filed an ejectment action against Hutson alleging he defaulted on the terms of the Lease Purchase Agreement. See TLC Holdings, LLC v. Hutson, Case No. 2011-CP-14-602 (Clarendon Cnty. Ct. Comm. Pleas) (“the Ejectment Action”).
12. Hutson, who was represented by counsel, filed counterclaims against TLC in the Ejectment Action.
13. Hutson’s counterclaims in the Ejectment Action asserted that various misrepresentations and material omissions were made with respect to the Subject Property and that TLC and

its members interfered with the Property's development and operation.

14. The parties agreed to settle the Ejectment Action, and the Settlement Agreement was adopted into a Consent Order filed April 13, 2012.
15. Following Hutson's default under the terms of the 2012 Settlement Agreement and Consent Order, TLC sought to evict Hutson from the Big Water Resort property.
16. 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.
17. Judge James found that Hutson's claims that TLC "made 'verbal assurances' to Hutson that were incorrect, or that [TLC] failed to make 'important disclosures' to him" were the same claims alleged in the 2012 action and resolved pursuant to the 2012 Settlement Agreement and Consent Order.

The Insurance Policy

18. PAIC issued commercial general liability (CGL) policy number PAC7045167 to "BWR, Inc. d/b/a Big Water Resort" as the named insured ("the Policy").
19. The Policy was in effect from October 16, 2013 through April 7, 2014.
20. Hutson was the principal in BWR, Inc., a now defunct corporation formerly organized and existing under the laws of the State of South Carolina.

Federal Class Action

21. In the midst of TLC's efforts to evict Hutson from the Big Water Resort property, Hutson allegedly sent the campground members a postcard, asserting that both he and they were victims of a scam perpetrated by TLC.
22. On April 22, 2014, a group of Big Water Resort campground members filed a 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 (D.S.C.) (“the Class Action”).

23. In the Class Action, TLC asserted third-party claims for equitable indemnification against Hutson.
24. In the Class Action, Hutson asserted counterclaims against TLC.
25. TLC and Hutson filed cross motions for summary judgment in the Class Action as to their respective third-party claims and counterclaims.
26. TLC filed its first motion for sanctions against Hutson, pointing to a course of conduct by Hutson which they argued was tantamount to harassment and abuse of the judicial system. The conduct cited by TLC included Hutson’s repeated filing of motions lacking factual and legal support, his accusations of criminal conduct and threats to contact law enforcement, and his accusations of unethical conduct by TLC’s counsel.
27. On April 5, 2016, Federal Magistrate Judge Mary Gordon Baker issued a Report and Recommendation in the Class Action, which included a recommendation that TLC’s motion for summary judgment be granted as to Hutson’s counterclaims.
28. Judge Baker’s Report and Recommendations also recommended denial of TLC’s first motion for sanctions against Hutson, reasoning that Hutson was *pro se*, withdrew many of his objectionable filings, had not previously been warned that he was in violation of Rule 11, and would no longer be proceeding pro se if the District Judge adopted her recommendation as to summary judgment on Hutson’s counter claims.
29. On May 20, 2016, Federal District Judge David C. Norton adopted the Report and Recommendation, finding that Hutson’s counterclaims against TLC in the Class Action litigation were barred by res judicata and declining to impose sanctions against Hutson.

30. TLC filed a second motion for sanctions against Hutson in the Class Action, which incorporated the arguments in their first motion and argued that Hutson's motion to reconsider the May 20, 2016, Order was filed in bad faith, as it lacked legal support, falsely purported to offer new evidence, and repeated the same allegations he made in numerous filings throughout the course of the Class Action litigation.

31. On October 6, 2017, Judge Norton entered an Order granting the second motion for sanctions against Hutson, finding:

In his motion to reconsider, Hutson claimed to present new evidence but instead repeated the same arguments he made in his prior filings and failed to identify any new documents or evidence, despite representing to the court that he had the latter. He also asked the court for relief that it lacks jurisdiction to grant. He failed to provide evidentiary support for the factual allegations in his motion. No inference can be drawn that the motion was filed in good faith. Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass or burden third-party plaintiffs, and there is no indication that he intends to cease.

32. Judge Norton's Order found that Hutson's response to TLC's second motion for sanctions "again makes reference to the alleged fraud by third-party plaintiffs in obtaining the settlement agreement and the order signed by Judge James in the prior state court litigation." The judge found Hutson made these allegations throughout the course of this litigation, but has never specified what the fraud is or submitted evidence of it.

33. Judge Norton noted that Hutson filed identical counterclaims against TLC in the Defamation Action, referenced infra, but refused to dismiss them even after the ruling in the Coverage Action that such claims were barred by res judicata.

34. The Court found the prior warnings to Hutson had failed to alter his behavior, explaining:

Hutson's recent filing with the court makes repeated reference to his pro se status. Hutson has established a pattern of making misrepresentations to the court, of making unsupported allegations

of unethical and criminal conduct by third-party plaintiffs, and of using the judicial process as a mechanism of harassment. His meritless filings have wasted untold hours of the court's time. He lacks any evidence to support his counterclaims and other allegations against third-party plaintiffs. Indeed, Hutson routinely fails to provide factual or legal support for anything he files with the court. Accordingly, the court finds that sanctions are appropriate under the court's inherent power.

35. Judge Norton's Order imposed monetary sanctions against Hutson of \$14,908.50, but declined to impose the requested non-monetary sanction of barring Hutson from submitting further pro se filings.
36. PAIC paid the \$14,908.50 sanctions award against Hutson.
37. Subsequently, PAIC settled TLC's third-party claims against Hutson in the Class Action without any personal liability to Hutson.
38. TLC's third-party claims against Hutson in the Class Action were formally dismissed on April 11, 2018.

The Defamation Action

39. On December 7, 2015, TLC filed a separate action against Hutson in state court for defamation. See TLC Holdings, LLC, et al. v. Hutson, Case No. 2015-CP-14-0615 (Clarendon Cnty. Ct. Comm. Pleas) ("the Defamation Action").
40. TLC's claims related to statements made by Hutson in the postcard he sent to campground members and certain statements Hutson made to the attorney who represented the campground members in the Class Action.
41. Hutson raised identical counterclaims against TLC in the Defamation Action as he raised in the Class Action.

42. On March 2, 2017, The Honorable R. Ferrell Cothran, Jr., entered an Order granting TLC's motion for summary judgment as to Hutson's counterclaims in the Defamation Action, concluding that "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."
43. TLC's claims in the Defamation Action proceeded to a jury trial.
44. The jury returned a verdict in the amount of Three Million Five Hundred Thousand Dollars (\$3,500,000) on January 26, 2018.
45. Hutson's counsel appealed from the verdict in the Defamation Action.
46. During the pendency of the appeal, PAIC resolved the Defamation Action through mediation without any personal liability to Hutson.
47. PAIC's coverage counsel, Timothy Newton, informed Hutson of the settlement in the Defamation Action on December 4, 2018.

The Coverage Action

48. In or about February 2016, PAIC was notified of the Class Action and the Defamation Action.
49. PAIC provided Hutson, as a principal of BWR, Inc., a defense in both the Class Action and the Defamation Action, subject to a full reservation of rights.
50. PAIC originally retained Laura Paton and Mike Etheredge of Carlock Copeland to represent Hutson in the Class Action and the Defamation Action.
51. Frank Gordon of Millberg Gordon was later substituted as counsel for Hutson in the Class Action and the Defamation Action

52. PAIC retained Murphy & Grantland as its coverage counsel with respect to the Class Action and the Defamation Action.
53. On June 14, 2016, Timothy Newton, as coverage counsel for PAIC, filed a declaratory judgment action seeking a judicial ruling as to PAIC's coverage for TLC's claims against Hutson in the Class Action and the Defamation Action. See Penn-America Insurance Company v. BWR, Inc., et al., C/A: 2:16-cv-01943-DCN (D.S.C.) ("the Coverage Action").
54. On or about September 16, 2016, Hutson entered into a Settlement Agreement and Release of Certain Claims with PAIC.
55. PAIC paid Hutson the sum of Nine Thousand Five Hundred Dollars (\$9,500.00) as consideration for the Settlement Agreement and Release in the Coverage Action.
56. Paragraph 2 of the Settlement Agreement and Release in the Coverage Action, provides:

Hutson, for and in consideration of the sum of Nine Thousand Five Hundred and 00/100 (\$9,500.00) Dollars, receipt of which is hereby acknowledged, does hereby release and forever discharge Penn-America, its agents, servants, employees, affiliates, successors and assigns, and any and all other persons, firms or corporations from any and all actions, causes of action, demands and/or claims of any nature whatsoever which the undersigned may have against Penn-America relating to:

 - a. Penn-America's coverage for the Underlying Lawsuits; and
 - b. Penn-America's coverage for the Property Loss claim;

together with any claims relating to Penn-America's investigation and/or claim handling, including any causes of action for breach of contract, bad faith, improper claims practices, or any other cause of action which could be asserted, arising from the above-reference matters (hereinafter "Released Claims"). The consideration expressed herein constitutes payment in full to Hutson for all policy proceeds, damages, losses and/or injuries to persons or property or both, whether known or unknown, developed or undeveloped, which have resulted or may result from the incident aforesaid,

whether the claims could have been asserted against Penn-America by way of counterclaim in the Declaratory Judgment Action or by separate lawsuit.

57. Paragraph 3 of the Settlement Agreement and Release in the Coverage Action, provides:

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

58. Paragraph 4 of the Settlement Agreement and Release in the Coverage Action, provides:

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

59. Paragraph 5 of the Settlement Agreement and Release in the Coverage Action, provides:

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

60. Paragraph 6 of the Settlement Agreement and Release in the Coverage Action, provides:

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

61. Paragraph 9 of the Settlement Agreement and Release in the Coverage Action, provides:

The parties agree that entry into this Agreement is not an admission of liability or of any fact or circumstance out of which the claims and/or counterclaims in the Underlying Lawsuits or the Declaratory Judgment Action. The settlement made herein is solely for the

purpose of avoiding further litigation between the Parties and is in full and final settlement of all claims released herein.

62. Hutson was dismissed as a party to the Coverage Action on September 30, 2016.

The Weissenstein Malpractice Action and Appeal

63. On September 4, 2018, Hutson filed a legal malpractice action against Paul Weissenstein, one of the attorneys who represented him in the 2012 Ejectment Action and resulting Settlement Agreement. See Hutson v. Weissenstein, Case No. 2018-CP-43-1583 (Sumter Cnty. Ct. Comm. Pleas) (“the Weissenstein Malpractice Action”).
64. On February 25, 2019, the Honorable Kristi Curtis granted summary judgment in favor of Weissenstein.
65. In addition to being filed after the statute of limitations, Judge Curtis found that Hutson knew about the lifetime memberships and their potential impact on the title of the subject property during the purchase process. To the extent an error was made in failing to identify the title defect, Weissenstein could not be held responsible because he did not represent Hutson at that time. Moreover, there was ample evidence that Hutson was aware of the lifetime memberships, such that his counterclaim against TLC for fraud would have necessarily failed. Accordingly, she found no cognizable malpractice claim against Weissenstein for failing to pursue a counterclaim against TLC and advising Appellant to enter into the Settlement Agreement.
66. Hutson appealed from Judge Curtis’ Order granting summary judgment in the Weissenstein Malpractice Action. Hutson v. Weissenstein, Appellate Case No. 2019-873 (S.C. Ct. App.) (“the Weissenstein Appeal”).
67. Weissenstein filed a motion to dismiss the Weissenstein Appeal based upon Hutson’s failure to serve the Record on Appeal.

68. The Court of Appeals recently entered an Order denying the motion to dismiss and providing Hutson twenty days, until July 27, 2020, to serve the Record on Appeal. Thereafter, the Court granted Hutson an additional extension, until August 7, 2020, to file the Record.

The Burn Malpractice Action

69. On November 8, 2018, Hutson filed a legal malpractice action against Stephen “Chip” Burn, Sarah Guthrie, and Burn Law Firm, LLC. See Hutson v. Burn, et al., Civ. Action No. 2018-CP-32-03879 (Lexington Cnty. Ct. Comm. Pleas) (“the Burn Malpractice Action”).
70. Hutson alleged in the Complaint that Burn reviewed the documentation and improperly advised Hutson that he did not have sufficient evidence to prevail on the counterclaims he had asserted in the Ejectment Action.
71. On April 10, 2019, the Honorable Frank R. Addy, Jr. entered an Order of Dismissal, finding that Hutson failed to cure the lack of expert affidavit or establish that such an affidavit was not necessary.
72. Hutson did not appeal from the Order of Dismissal in the Burn Malpractice Action.

The Atlantic Coast Properties Action

73. On November 25, 2018, Hutson filed a lawsuit against Atlantic Coast Properties, alleging fraud in another, unrelated real estate transaction. See Hutson v. Atlantic Coast Props., et al., Case No. 2018-CP-40-06156 () (“the Atlantic Coast Properties Action”).
74. On April 11, 2019, the Honorable Robert E. Hood entered an Order of Dismissal, finding that the suit was filed in breach of a release.
75. Hutson did not appeal from the Order of Dismissal in the Atlantic Coast Properties Action.

The Bad Faith Action and Appeal

76. On December 5, 2018, the day after notification of the final settlement in the Defamation Action, Hutson filed a lawsuit against Penn America Insurance Company, Global Indemnity Group, Inc., J.R. Murphy, and Timothy Newton. See Hutson v. Penn America Ins. Co., et al., Case No. 2018-CP-40-06344 (Richland Cnty. Comm. Pleas) (“the Bad Faith Action”).
77. Construed liberally, the Complaint in the Bad Faith Action asserted causes of action for breach of contract, bad faith, fraud, misrepresentation, negligence, tortious interference with attorney-client relationship, and legal malpractice.
78. J.R. Murphy and Timothy Newton filed a joint motion to dismiss.
79. PAIC and Global filed a motion for summary judgment.
80. On June 26, 2019, a hearing was held before The Honorable Michael G. Nettles on the dispositive motions.
81. On July 18, 2019, following consideration of the written filings and proposed orders, Judge Nettles entered two Orders granting the defendants’ respective dispositive motions.
82. Hutson appealed from Judge Nettles Orders granting dismissal and summary judgment in the Bad Faith Action. See Hutson v. Penn America Inc. Co., et al., Appellate Case No. 2019-001488 (“the Bad Faith Appeal”).
83. At the time of this filing, the Bad Faith Appeal is held in abeyance pending resolution of several pending motions.
84. One of the pending motions before the Court of Appeals is Hutson’s Emergency Motion for Hearing, wherein he seeks to hold an evidentiary hearing before the appellate court and examine the defendants and their counsel. Hutson alleges that J.R. Murphy, Timothy

Newton, and PAIC and Global's current counsel, Christian Stegmaier, have all failed to disclose "extrinsic fraud" to the Court.

85. PAIC and Global recently filed a Motion for Sanctions against Hutson in the Bad Faith Appeal. The Motion for Sanctions contains a request for monetary sanctions and the alternative requests that either the appeal be dismissed or that Hutson be prohibited from making any *pro se* appellant filings without leave of Court other than the Record on Appeal and Final Briefs.

The Current Threats of Future Litigation

86. On June 22, 2020, Hutson sent an e-mail to Christian Stegmaier, counsel for PAIC and Global. Hutson also copied an employee of Global Indemnity, Paul Glenn.
87. The June 22, 2020 e-mail from Hutson stated:

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

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

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

88. On July 6, 2020, Hutson sent another e-mail to Christian Stegmaier. Hutson also copied Paul Glenn, Timothy Newton, and J.R. Murphy.

89. The July 6, 2020 e-mail from Hutson stated, in relevant part:

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

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

90. On July 8, 2020, Appellant sent an e-mail to Christian Stegmaier, Timothy Newton, J.R. Murphy, Paul Glenn, Laura Paton, Frank Gordon, and others.
91. The July 8, 2020 e-mail from Hutson threatened to "use the Internet, among other methods" to "name every person, every law firm and lawyer as well as every person who has assisted in plotting to defraud me including persons who work for Penn America or Global Indemnity."
92. The July 8, 2020 e-mail from Hutson further stated:

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

Tim Newton @ Murphy & Grantland South Carolina
 JR Murphy @ Murphy & Grantland South Carolina
 Christian Stegmaier @ Collins & Lacy P.C. South Carolina
 Doreen Fournier @ Global Indemnity
 Laura Paton @ Carlock, Copeland Stair LLP
 Chip Emge @ Carlock, Copeland Stair LLP
 Frank Gordon, Esq. based in Raleigh, N C
 Bill Lyons, Esq. of Charleston, South Carolina

... To name a few.

93. On July 27, 2020, Hutson sent another e-mail to Christian Stegmaier, Timothy Newton, and J.R. Murphy.

94. The July 27, 2020 e-mail from Hutson states:

Dear Christian Stegmaier, Tim Newton, J.R. Murphy, Penn America and Globla [sic] Indemnity;

I am putting you all on notice that your actions by concealing extrinsic fraud preventing the courts and public from knowing the truth and understanding that you all are the misleading ones for you are wrong, corrupt and intentionally damaging me. Your fraudulent determination to continue painting me as the dishonest, harassing bad person is intentionally misleading, damaging to me and results in a clear act of defamation of which damages my ability to work.

I plan to take these immoral actions to court rightaway [sic]. I have an abundance of evidence showing my damages and mental depression and stress that you have caused me intentionally and continue to cause on a daily basis. All are warned. All of you are totally out of control assuming that their [sic] are no consequences [sic] for your wrongful, willful and sporadic actions. You show no respect to the Honorable Courts nor me. In addition, all of you are and have been falsifying the real truth about me by conspiracy. The insurance companies are sponsoring most of these actions against me. I am sick and tired [sic] of having to fight for my life while you merely sit back attempting to show off. You are destroying your representations as creditable 'officers of the court'. There are laws against such actions.

95. On August 8, 2020, Huston sent another e-mail to Christian Stegmaier, Timothy Newton, and J.R. Murphy.

96. The August 8, 2020 e-mail from Hutson states:

Have no choice but to move forward with a new needed complaint, "Defamation by way of Extrinsic Fraud" naming Christian Stedmaier [sic], Tim Newton, JR Murphy, Penn America and Global. Soon I will file the same "Defamation by way of Extrinsic Fraud against Turner Padgett and Tom Harper.

This horrible intentional situation that I have been put through is the worst, most unimaginable cruelty and has caused great undue stress, damages and unbelievable depression. I do not understand how a business or attorneys could do another human being like this. Lawyers simply prefer not to inform the Courts of any on-going extrinsic fraud by fellow attorneys. It was merely by choice. This whole thing needs to end rather getting more broad.

97. The communications referenced *supra* represent just a handful of the telephone and e-mail correspondence that Hutson has sent to counsel for PAIC and Global during the course of the Bad Faith Action and Bad Faith Appeal.

FIRST CAUSE OF ACTION
(Preliminary and Permanent Injunction)

98. Plaintiffs restate the above-numbered paragraphs and incorporate the same by reference.
99. In South Carolina, a party is not permitted to maintain an action which is merely vexatious, or which is unnecessary and could not be productive of any practical results.
100. A court of equity may properly intervene to prevent continued and vexatious litigation.
101. Hutson has a history of filing frivolous litigation and claims, including the repeated assertion that some manner of fraud was committed in the Ejectment Action.
102. Hutson's claims have been repeatedly dismissed or disposed of on summary judgment based upon a lack of evidence to support Hutson's claims, waiver, and/or res judicata.
103. Hutson has a history to entering into Settlement Agreements and Releases, the terms of which he then disregards to pursue claims which he has waived the right to pursue.
104. Hutson continues to threaten additional litigation against PAIC, Global, and their officers, agents, servants, employees, attorneys, affiliates, successors and assigns, with the most recent threat made on August 8, 2020.
105. There is no objective or good faith basis for Hutson to pursue any further litigation against PAIC, Global, and their officers, agents, servants, employees, attorneys, affiliates,

- successors and assigns.
106. Hutson has continuously imposed an undue burden on the courts by presenting meritless pleadings and motions to the court.
 107. Hutson has continuously imposed an undue burden on the other parties to litigation in which he is involved by presenting meritless pleadings and motions to the court, to which the opposing parties must respond or risk their inaction being viewed as consent.
 108. Other sanctions are not adequate to protect PAIC, Global, and the agents, representatives, and employees of PAIC and Global, because, once Hutson files and serves his Complaint, the opposing parties are required to expend great time and expense to respond to the Complaint, and even if successful in obtaining a favorable disposition, to defend the case on appeal.
 109. An award of monetary sanctions pursuant to Rule 11 or the Frivolous Proceedings Act is not a sufficient deterrent for Hutson, as evidenced by Hutson's repeated filing of meritless litigation and claims.
 110. Upon information and belief, Hutson lives on a fixed income and is unlikely to have the funds to repay the attorney's fees and costs that PAIC, Global, and their officers, agents, servants, employees, attorneys, affiliates, successors and assigns must incur to defend against future litigation.
 111. Hutson is a vexatious litigant, likely to abuse the judicial process and harass other parties, without the imposition of an injunction limiting his access to the state courts.

WHEREFORE, Plaintiffs Penn America Insurance Company and Global Indemnity Group, Inc. respectfully request:

- a. Defendant Hutson be prohibited from initiating any *pro se* litigation before a state court in South Carolina against Penn America Insurance Company, Global Indemnity Group, Inc., or any of their officers, agents, servants, employees, attorneys, affiliates, successors and assigns, without first obtaining leave of Court;
- b. Defendant Hutson be required to pay the costs and attorney's fees associated with this action; and
- c. These Plaintiffs be awarded such other and further relief as this Court deems proper.

Respectfully submitted,
COLLINS & LACY, P.C.

By: s/Christian Stegmaier
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ATTORNEYS FOR PLAINTIFFS PENN
AMERICA INSURANCE COMPANY
AND GLOBAL INDEMNITY GROUP,
LLC

PLAINTIFFS' COMPLAINT

Columbia, South Carolina
August 10, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Penn America Insurance Company and	)	Civil Action No.:
Global Indemnity Group, LLC,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	NOTICE OF MOTION AND MOTION
	)	FOR TEMPORARY INJUNCTION
Morris Beach Hutson a/k/a M.B. Hutson,	)	(RULE 65, SCRPC)
	)	
Defendant.	)	
	)	

TO: MORRIS BEACH HUTSON A/K/A M.B. HUTSON, DEFENDANT:

YOU WILL PLEASE TAKE NOTICE that, pursuant to Rule 65 of the South Carolina Rules of Civil Procedure, Plaintiffs Penn America Insurance Company and Global Indemnity Group, Inc., (collectively "Plaintiffs") hereby move for a temporary injunction, following a hearing before the presiding judge at the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina (or alternatively via remote hearing as ordered by the Court), on the earliest possible time and date:

To immediately prohibit Defendant Hutson from initiating any *pro se* litigation before a state court in South Carolina, without first obtaining leave of Court, against Penn America Insurance Company, Global Indemnity Group, Inc., or any of their officers, agents, servants, employees, attorneys, affiliates, successors and assigns, until a full and complete decision on Plaintiffs' Complaint for Permanent Injunction can be finally decided.

As discussed herein, Defendant Hutson's litigation history is voluminous. In each of those actions, Hutson has pursued frivolous claims warranting his classification as a vexatious litigant. Hutson's threats of continued litigation against Plaintiffs, their employees and their agents persist. In the absence of a temporary injunction, Hutson will move forward with filing litigation in the South Carolina Court of Common Pleas, to which the opposing parties will have no choice but to expend time and resources to defend. Neither Rule 11 sanctions nor the Frivolous Proceedings Act present adequate remedies for Plaintiffs because, at least based upon Hutson's averments in his prior filings, Hutson is without the financial resources to reimburse the costs and attorney's fees that could be ordered under Rule 11 or S.C. Code Ann. § 15-36-10.

INTRODUCTION

Plaintiff Penn America Insurance Company ("PAIC") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. Plaintiff Global Indemnity Group, LLC ("Global") is a limited liability company organized and existing under the law of the State of Delaware. Global is the parent company of PAIC, a member of Penn-America Group, which offers specialty property and casualty products designed for small businesses.

Upon information and belief, Defendant Morris Beach Hutson a/k/a M.B. Hutson ("Hutson") is a resident of Orangeburg County, South Carolina.

PAIC issued commercial general liability (CGL) policy number PAC7045167 to "BWR, Inc. d/b/a Big Water Resort" as the named insured ("the Policy"). The Policy was in effect from October 16, 2013 through April 7, 2014. Hutson was the principal in BWR, Inc., a now defunct corporation formerly organized and existing under the laws of the State of South Carolina. Pursuant to the Policy, PAIC provided a defense and indemnity to Hutson in two lawsuits, known as the Class Action and the Defamation Action. Despite resolution of both lawsuits without any

personal liability to Hutson, he initiated a lawsuit against PAIC, Global, and their coverage counsel, Timothy Newton and J.R. Murphy in December 2018. The trial court entered Orders disposing of Hutson's claims following a dispositive motions hearing, from which Hutson appealed. During this appeal, Hutson has repeated his history of frivolous filings before the Court of Appeals and threatened to pursue additional litigation in state or federal court.

RELEVANT FACTS

The Land Deal, Ejection Action and Eviction

In December 2010, Hutson entered into a Membership Interest Purchase Agreement with Richard U. Clark, Jimmy S. Lovell, James Thigpen and The Big Water Resort, LLC, related to the outstanding membership interests in The Big Water Resort, LLC. Contemporaneously therewith, Hutson also entered into a Lease Purchase Agreement with TLC Holdings, LLC ("TLC"), Richard U. Clark, Jimmy S. Lovell and James Thigpen related to the purchase of property in Clarendon County, South Carolina, including a campground known as "Big Water Resort," a convenience store facility and adjacent land known as the "Big Water Country Store and Restaurant," and a 57.81 acre tract known as "Roger's Tract."

In December 2011, TLC filed an ejectment action against Hutson alleging he defaulted on the terms of the Lease Purchase Agreement.¹ Hutson filed counterclaims against TLC in the Ejectment Action in which he asserted that various misrepresentations and material omissions were made with respect to the Subject Property and that TLC and its members interfered with the Property's development and operation. The parties agreed to settle the Ejectment Action, and the Settlement Agreement was adopted into a Consent Order filed April 13, 2012. Hutson was

¹ TLC Holdings, LLC v. Hutson, Case No. 2011-CP-14-602 (Clarendon Cnty. Ct. Comm. Pleas) ("the Ejectment Action").

represented by attorney Paul Weissenstein, and briefly by attorney Stephen “Chip” Burn, in the Ejectment Action.

Following Hutson’s default under the terms of the 2012 Settlement Agreement and Consent Order, TLC sought to evict Hutson from the Big Water Resort property. Following a hearing, the Honorable George C. James, Jr., entered an order on March 21, 2014, which enforced the terms of the Consent Order and Settlement Agreement. (**Exhibit A**, Eviction Order, Mar. 21, 2014) Judge James found that Hutson’s claims that TLC “made ‘verbal assurances’ to Hutson that were incorrect, or that [TLC] failed to make ‘important disclosures’ to him” were the same claims alleged in the 2012 action and resolved pursuant to the 2012 Settlement Agreement and Consent Order. (*Id.*). Hutson was represented by attorney H. Freeman Belser in at least a portion of the eviction proceedings.

The Federal Class Action

In the midst of TLC’s efforts to evict Hutson from the Big Water Resort property, Hutson allegedly sent the campground members a postcard, asserting that both he and they were victims of a scam perpetrated by TLC. On April 22, 2014, a group of Big Water Resort campground members filed a class action against TLC in federal court.²

In the Class Action, TLC asserted third-party claims for equitable indemnification against Hutson. Hutson also asserted counterclaims against TLC. TLC and Hutson filed cross motions for summary judgment in the Class Action as to their respective third-party claims and counterclaims.

TLC filed its first motion for sanctions against Hutson, pointing to a course of conduct by Hutson which they argued was tantamount to harassment and abuse of the judicial system. The

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

conduct cited by TLC included Hutson's repeated filing of motions lacking factual and legal support, his accusations of criminal conduct and threats to contact law enforcement, and his accusations of unethical conduct by TLC's counsel.

On April 5, 2016, Federal Magistrate Judge Mary Gordon Baker issued a Report and Recommendation in the Class Action, which included a recommendation that TLC's motion for summary judgment be granted as to Hutson's counterclaims. (**Exhibit B**, Class Action Report & Recommendation, Apr. 5, 2016). Judge Baker's Report and Recommendations also recommended denial of TLC's first motion for sanctions against Hutson, reasoning that Hutson was *pro se*, withdrew many of his objectionable filings, had not previously been warned that he was in violation of Rule 11, and would no longer be proceeding *pro se* if the District Judge adopted her recommendation as to summary judgment on Hutson's counter claims. (*Id.*).

On May 20, 2016, Federal District Judge David C. Norton adopted the Report and Recommendation, finding that Hutson's counterclaims against TLC in the Class Action litigation were barred by res judicata and declining to impose sanctions against Hutson. (**Exhibit C**, Class Action Order Adopting R&R, May 20, 2016).

TLC filed a second motion for sanctions against Hutson in the Class Action, which incorporated the arguments in their first motion and argued that Hutson's motion to reconsider the May 20, 2016 Order was filed in bad faith, as it lacked legal support, falsely purported to offer new evidence, and repeated the same allegations he made in numerous filings throughout the course of the Class Action litigation.

On October 6, 2017, Judge Norton entered an Order granting the second motion for sanctions against Hutson, finding:

In his motion to reconsider, Hutson claimed to present new evidence but instead repeated the same arguments he made in his prior filings and failed to identify any new documents or evidence, despite representing to the court that he had the latter. He also asked the court for relief that it lacks jurisdiction to grant. He failed to provide evidentiary support for the factual allegations in his motion. No inference can be drawn that the motion was filed in good faith. Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass or burden third-party plaintiffs, and there is no indication that he intends to cease.

(**Exhibit D**, Class Action Order Granting Sanctions, Oct. 6, 2017). Judge Norton's Order found that Hutson's response to TLC's second motion for sanctions "again makes reference to the alleged fraud by third-party plaintiffs in obtaining the settlement agreement and the order signed by Judge James in the prior state court litigation." (*Id.*). He found that Hutson has made these allegations throughout the course of this litigation but has never specified what the fraud is or submitted evidence of it. (*Id.*). Judge Norton noted that Hutson filed identical counterclaims against TLC in the Defamation Action, referenced *infra*, but refused to dismiss them even after the ruling in the Coverage Action that such claims were barred by res judicata. (*Id.*).

Significantly, Judge Norton found the prior warnings to Hutson had failed to alter his behavior, explaining:

Hutson's recent filing with the court makes repeated reference to his *pro se* status. Hutson has established a pattern of making misrepresentations to the court, of making unsupported allegations of unethical and criminal conduct by third-party plaintiffs, and of using the judicial process as a mechanism of harassment. His meritless filings have wasted untold hours of the court's time. He lacks any evidence to support his counterclaims and other allegations against third-party plaintiffs. Indeed, Hutson routinely fails to provide factual or legal support for anything he files with the court. Accordingly, the court finds that sanctions are appropriate under the court's inherent power.

(**Exhibit D**, Class Action Order Granting Sanctions, Oct. 6, 2017). Judge Norton's Order imposed monetary sanctions against Hutson of \$14,908.50 but declined to impose the requested non-

monetary sanction of barring Hutson from submitting further *pro se* filings. (*Id.*) PAIC paid the \$14,908.50 sanctions award against Hutson.

Subsequently, PAIC settled TLC's third-party claims against Hutson in the Class Action without any personal liability to Hutson. TLC's third-party claims against Hutson in the Class Action were formally dismissed on April 11, 2018.

The Defamation Action

On December 7, 2015, TLC filed a separate action against Hutson in state court for defamation.³ TLC's claims related to statements made by Hutson in the postcard he sent to campground members and certain statements Hutson made to the attorney who represented the campground members in the Class Action.

Hutson raised identical counterclaims against TLC in the Defamation Action as he raised in the Class Action.

On March 2, 2017, The Honorable R. Ferrell Cothran, Jr., entered an Order granting TLC's motion for summary judgment as to Hutson's counterclaims in the Defamation Action, concluding that "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." (**Exhibit E**, Defamation Action Order Granting Summ. Jmt, Mar. 2, 2017).

TLC's claims in the Defamation Action proceeded to a jury trial. The jury returned a verdict in the amount of Three Million Five Hundred Thousand Dollars (\$3,500,000) on January 26, 2018.

³ TLC Holdings, LLC, et al. v. Hutson, Case No. 2015-CP-14-0615 (Clarendon Cnty. Ct. Comm. Pleas) ("the Defamation Action").

Hutson's counsel appealed from the verdict in the Defamation Action.⁴ During the pendency of the appeal, PAIC resolved the Defamation Action through mediation without any personal liability to Hutson. PAIC's coverage counsel, Timothy Newton, informed Hutson of the settlement in the Defamation Action on December 4, 2018.

The Coverage Action

In or about February 2016, PAIC was notified of the Class Action and the Defamation Action. PAIC provided Hutson, as a principal of BWR, Inc., a defense in both the Class Action and the Defamation Action, subject to a full reservation of rights. PAIC originally retained Laura Paton and Mike Etheredge of Carlock Copeland to represent Hutson in the Class Action and the Defamation Action. Frank Gordon of Millberg Gordon was later substituted as counsel for Hutson in both actions. Hutson also asserted *pro se* counterclaims against TLC in both actions.

PAIC retained Murphy & Grantland as its coverage counsel with respect to the Class Action and the Defamation Action. On June 14, 2016, Timothy Newton, as coverage counsel for PAIC, filed a declaratory judgment action seeking a judicial ruling as to PAIC's coverage for TLC's claims against Hutson in the Class Action and the Defamation Action.⁵

On or about September 16, 2016, Hutson entered into a Settlement Agreement and Release of Certain Claims with PAIC. PAIC paid Hutson the sum of Nine Thousand Five Hundred Dollars (\$9,500.00) as consideration for the Settlement Agreement and Release in the Coverage Action. Paragraph 2 of the Settlement Agreement and Release in the Coverage Action, provides:

⁴ TLC Holdings, LLC, et al. v. M.B. Hutson, Appellate Case No. 2018-000936 (S.C. Ct. App.) ("Defamation Appeal").

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

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.

(**Exhibit F**, Coverage Action Settlement Agreement and Release). Hutson was dismissed as a party to the Coverage Action on September 30, 2016.

Bad Faith Against Insurer and Their Coverage Counsel

On December 5, 2018, the day after notification of the final settlement in the Defamation Action, Hutson filed a lawsuit against Penn America Insurance Company, Global Indemnity Group, Inc., J.R. Murphy, and Timothy Newton.⁶ (**Exhibit G**, Bad Faith Amd. Complaint). Construed liberally, the Complaint in the Bad Faith Action asserted causes of action for breach of contract, bad faith, fraud, misrepresentation, negligence, tortious interference with attorney-client relationship, and legal malpractice. (*Id.*). Hutson sought \$4.5 million in damages. (*Id.*).

⁶ Hutson v. Penn America Ins. Co., et al., Case No. 2018-CP-40-06344 (Richland Cnty. Comm. Pleas).

J.R. Murphy and Timothy Newton filed a joint motion to dismiss. PAIC and Global filed a motion for summary judgment. On June 26, 2019, a hearing was held before The Honorable Michael G. Nettles on the dispositive motions.

On July 18, 2019, following consideration of the written filings and proposed orders, Judge Nettles entered two Orders granting the defendants' respective dispositive motions. (**Exhibit H**, PAIC Order, p. 10-11; **Exhibit I**, Newton/Murphy Order). The trial court found that all of the claims made in the Amended Complaint were barred under the Release that Hutson executed on September 16, 2016. Accordingly, PAIC's motion for summary judgment was granted. (**Exhibit H**, PAIC Order, p. 10-11). The trial court further found that, even if not barred by the Release, summary judgment was proper on the merits of each cause of action alleged. (*Id.* at p. 11-25).

Hutson appealed from Judge Nettles Orders granting dismissal and summary judgment in the Bad Faith Action.⁷ Hutson has repeatedly failed to comply with the South Carolina Appellate Court Rules, causing delay and increased expense. Following the Court of Appeals' recent rulings on the outstanding appellate motions, the parties are currently awaiting Hutson's filing of a Reply Brief that complies with the page limits and the filing of the Record on Appeal.

Weissenstein Malpractice Action

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

⁷ See Hutson v. Penn America Inc. Co., et al., Appellate Case No. 2019-001488 ("the Bad Faith Appeal").

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

On February 25, 2019, the Honorable Kristi Curtis granted summary judgment in favor of Weissenstein. In addition to being filed after the statute of limitations, Judge Curtis found that Hutson knew about the lifetime memberships and their potential impact on the title of the subject property during the purchase process. To the extent an error was made in failing to identify the title defect, Weissenstein could not be held responsible because he did not represent Hutson at that time. Moreover, there was ample evidence that Huston was aware of the lifetime memberships, such that his counterclaim against TLC for fraud would have necessarily failed. Accordingly, she found no cognizable malpractice claim against Weissenstein for failing to pursue a counterclaim against TLC and advising Appellant to enter into the Settlement Agreement. (**Exhibit J**, Weissenstein Malpractice Action Order Granting Summary Judgment, Feb. 25, 2019).

Huston appealed from the trial court's order.⁹ Weissenstein filed a motion to dismiss based upon Hutson's failure to serve the Record on Appeal in that case. The Court recently entered an Order denying the motion and providing Hutson twenty days, until July 27, 2020, to serve the Record on Appeal. The Court granted Huston's request for an additional extension to file the Record until August 7, 2020.

Burn Malpractice Action

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

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

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

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

Atlantic Coast Properties Action

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

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

Current Threats of Future Litigation

During the court of the Bad Faith Action and Bad Faith Appeal, Hutson has made repeated telephone calls and sent repeated e-mails to counsel for PAIC and Global, copying various other parties and individuals.

On June 16, 2020, Hutson first notified PAIC and Global's counsel of his intention to file for an emergency hearing before the appellate court, at which he would seek to examine the attorneys under oath. Appellant stated that he would "declare that you lawyers are misinforming the Court and Appeal Judges and should be removed from practicing law." (**Exhibit M**, Hutson E-mail, June 16, 2020). Subsequently, on June 21 and 22, Hutson sent a draft of his Emergency Motion along with the following:

Good morning Christian, this saddens me having to seriously consider bringing a[n] immediately separate action against you for participating with Tim Newton and JR Murphy in extrinsic fraud

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

upon the Appeals Court and the lower Court. You are sticking with Murphy & Grantland including filing documents that play their defense against me and against what's right and truthful.

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

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

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

On July 6, 2020, Hutson sent PAIC and Global's counsel another iteration of his view of the facts, concluding with the following:

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

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

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

On July 8, 2020, Hutson's e-mail threatened to "use the Internet, among other methods" to "name every person, every law firm and lawyer as well as every person who has assisted in plotting to defraud me including persons who work for Penn America or Global Indemnity." (**Exhibit P**, Hutson E-mail, July 8, 2020). The July 8, 2020 e-mail from Hutson further stated:

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

Tim Newton @ Murphy & Grantland South Carolina
 JR Murphy @ Murphy & Grantland South Carolina
 Christian Stegmaier @ Collins & Lacy P.C. South Carolina
 Doreen Fournier @ Global Indemnity
 Laura Paton @ Carlock, Copeland Stair LLP
 Chip Emge @ Carlock, Copeland Stair LLP
 Frank Gordon, Esq. based in Raleigh, N C
 Bill Lyons, Esq. of Charleston, South Carolina
 ... To name a few.

(Id.).

On July 16, 18 and 19, 2020, Hutson sent three versions of his Reply to the Return to the Emergency Motion. (**Exhibit Q**, Hutson E-mail, July 16, 2020); (**Exhibit R**, Hutson E-mail, July 18, 2020); (**Exhibit S**, Hutson E-mail, July 19, 2020). Included in two of these drafts was the following:

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

(**Exhibit R**, Hutson E-mail, July 18, 2020); (**Exhibit S**, Hutson E-mail, July 19, 2020).

On July 17, 2020, Hutson wrote:

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

(**Exhibit T**, Hutson E-mail, July 17, 2020).

On July 27, 2020, Hutson sent an e-mail stating:

Dear Christian Stegmaier, Tim Newton, J.R. Murphy, Penn America and Globla [sic] Indemnity;

I am putting you all on notice that your actions by concealing extrinsic fraud preventing the courts and public from knowing the truth and understanding that you all are the misleading ones for you are wrong, corrupt and intentionally damaging me. Your fraudulent determination to continue painting me as the dishonest, harassing bad person is intentionally misleading, damaging to me and results in a clear act of defamation of which damages my ability to work.

I plan to take these immoral actions to court rightaway [sic]. I have an abundance of evidence showing my damages and mental depression and stress that you have caused me intentionally and continue to cause on a daily basis. All are warned. All of you are totally out of control assuming that their [sic] are no consequences [sic] for your wrongful, willful and sporadic actions. You show no respect to the Honorable Courts nor me. In addition, all of you are and have been falsifying the real truth about me by conspiracy. The insurance companies are sponsoring most of these actions against me. I am sick and tired [sic] of having to fight for my life while you merely sit back attempting to show off. You are destroying your representations as creditable 'officers of the court'. There are laws against such actions.

(**Exhibit U**, Hutson E-mail, July 27, 2020).

Most recently, on August 8, 2020, Huston sent another e-mail stating:

Have no choice but to move forward with a new needed complaint, "Defamation by way of Extrinsic Fraud" naming Christian Stedmaier [sic], Tim Newton, JR Murphy, Penn America and Global. Soon I will file the same "Defamation by way of Extrinsic Fraud against Turner Padgett and Tom Harper.

This horrible intentional situation that I have been put through is the worst, most unimaginable cruelty and has caused great undue stress, damages and unbelievable depression. I do not understand how a business or attorneys could do another human being like this. Lawyers simply prefer not to inform the Courts of any on-going extrinsic fraud by fellow attorneys. It was merely by choice. This whole thing needs to end rather getting more broad.

(**Exhibit V**, Hutson E-mail, Aug. 8, 2020).

PAIC and Global's counsel has refrained from oral communications with Hutson due to his history of misrepresenting the content of his discussions with attorneys. Notably, Hutson's request for an emergency evidentiary hearing before the appellate court was denied.

LAW/ANALYSIS

With technological advances in the twentieth century increasing the ease with which non-attorneys can access the courts, pre-filing injunctions or gatekeeper orders limiting *pro se* access to the courts have also been on the rise. Some courts look to their state constitutions and inherent authority to control the judicial process and others rely upon legislative enactments. However, the concept of controlling vexatious litigation dates back to 1896, when England enacted the Vexatious Actions Act. See Michael Taggart, *Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896*, 63(3) CAMBRIDGE L. J. 656, 656-84 (2004). This was primarily a response to the actions of Alexander Chaffers, a solicitor who filed numerous actions against leading members of Victorian society. (*Id.*). When costs were awarded against him, he failed to pay. (*Id.*).

The first vexatious litigant statute in the United States was enacted in California in 1963.¹² See Cal. Civ. Proc. Code § 391, et seq. Subsequently, Hawaii, Ohio, Texas, and Florida have passed similar state legislation. See Haw. Rev. Stat. Ann. § 634J-1, et seq.; Fla. Stat. Ann. § 68.093; Ohio Rev. Code Ann. § 2323.52; Tex. Civ. Prac. & Rem. Code Ann. § 11.001, et seq.; see also Mass. Gen. Laws Ann. ch. 261, § 10.

“A state vexatious litigant statute permits restrictions on access to the courts by a litigant judicially determined to be vexatious, at least when the litigant is proceeding *pro se*.” 45 A.L.R.6th 493. “The purpose of such a statute is to prevent abuse of the judicial system by those persons who persistently and habitually file lawsuits without reasonable grounds, or who otherwise engage in frivolous conduct in the courts.” Id.

Where specific vexatious litigation statutes have not been enacted, state and federal courts have relied upon the court’s inherent powers to uphold injunctions limiting litigants’ access to the courts. See, e.g., Dalenko v. Peden Gen. Contractors, Inc., 127, 676 S.E.2d 625, 633 (N.C. Ct.

¹² Under California law, a “vexatious litigant” is defined as a person who does any of the following:

- (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.
- (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.
- (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.
- (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

Cal. Civ. Proc. Code § 391(b)(1)-(4).

App. 2009) (“As part of its inherent authority, the trial courts of this state have the power to prohibit future frivolous and repetitive litigation.”); Jordan v. State ex rel. Dep’t of Motor Vehicles & Pub. Safety, 110 P.3d 30, 41-42 (Nev. 2005), *abrogated on other grounds by*, Buzz Stew, LLC v. City of N. Las Vegas, 181 P.3d 670 (Nev. 2008) (recognizing various authorities that bestow upon Nevada courts the power to permanently restrict a litigant's right to access the courts); Cromer v. Kraft Foods N. Am., Inc., 390 F.3d 812, 818 (4th Cir. 2004) (recognizing federal courts the authority to limit access to the courts by vexatious and repetitive litigants, which if not inherent inures under the All Writs Act); Cotner v. Hopkins, 795 F.2d 900, 902 (10th Cir. 1986) (“There is strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances.”).

The North Dakota Supreme Court artfully explained:

A court’s authority to stem abuses of the judicial process arises not only from the applicable rules and statutes, ... but also from the court’s inherent power to control its docket and to protect its jurisdiction and judgments, the integrity of the court, and the orderly and expeditious administration of justice.... [T]he rule applies with equal force to *pro se* litigants, “for one acting *pro se* has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.”

Holkesvig v. Welte, 818 N.W.2d 760, 766 (N.D. 2012) (quoting Fed. Land Bank of St. Paul v. Ziebarth, 520 N.W.2d 51, 58 (N.D. 1994)). “The public interest demands that, at some point, there be an end to litigation, so the parties may go about their normal business.” Id.

In South Carolina, a party is not permitted to maintain an action which is merely vexatious, or which is unnecessary and could not be productive of any practical results. Petition of Fant, 147 S.C. 167, 145 S.E. 34, 38 (1928) (quoting 1 C.J. 975). “[A] court of equity may properly intervene to prevent continued and vexatious litigation.” Ramantanin v. Poulos, 240 S.C. 13, 25, 124 S.E.2d 611, 617 (1962); see also S.C. Const. art. V, §§ 11, 20. “[T]he power to enjoin upon such ground

should be exercised with caution and only in a clear case.” Id. At minimum, there must be a showing of the pendency of other litigation between the parties or the threat of further litigation to serve as the basis for issuance of the injunction. See id.

“A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law.” Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010).

There is no South Carolina authority specifically addressing the factors to be considered in determining whether a prefiling injunction is substantively warranted. Nonetheless, federal case law may be persuasive. In Cromer, the Fourth Circuit provided:

A court must weigh all the relevant circumstances, including (1) the party's history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternative sanctions.

390 F.3d at 818.

Here, Hutson has a history of filing frivolous litigation, claims, and motions, including his duplicative counterclaims in the Class Action and Defamation Action, his Bad Faith Action against PAIC and Global, his Emergency Motion for Hearing in in the Bad Faith Appeal, his Complaint Weissenstein Malpractice Action, his Complaint in the Burn Malpractice Action, and his Complaint in the Atlantic Coast Properties Action. The majority of these actions have included the repeated assertion that some manner of fraud was committed in the Ejectment Action. Hutson has a history to entering into Settlement Agreements and Releases, the terms of which he then disregards to pursue claims which he has waived the right to pursue. Hutson's claims have been

repeatedly dismissed or disposed of on summary judgment based upon a lack of evidence to support Hutson's claims, waiver, and/or res judicata.

In the Class Action, Judge Norton found that Hutson had "established a pattern of making misrepresentations to the court, of making unsupported allegations of unethical and criminal conduct by third-party plaintiffs, and of using the judicial process as a mechanism of harassment." (**Exhibit D**, Class Action Order Granting Sanctions, Oct. 6, 2017). Judge Norton found that Huston "lack[ed] any evidence to support his counterclaims and other allegations against third-party plaintiffs." (*Id.*). He further wrote: "Indeed, Hutson routinely fails to provide factual or legal support for anything he files with the court." (*Id.*). This conduct by Hutson has repeated itself in every litigation in which he has been involved.

Hutson continues to threaten additional litigation against PAIC, Global, and their officers, agents, servants, employees, attorneys, affiliates, successors and assigns, with the most recent threat made on August 8, 2020. There is no objective or good faith basis for Hutson's past litigation against Plaintiffs and their officers, agents, servants, employees, attorneys, affiliates, successors and assigns. Likewise, there is no objective or good faith basis for any future claims against Plaintiffs and their officers, agents, servants, employees, attorneys, affiliates, successors and assigns. Huston continues to concoct a conspiracy theory of fraud, which past courts have repeatedly rejected. He makes claims of new evidence when none exists. Moreover, Hutson's e-mails reflect that his purpose is nothing other than harassment and gamesmanship.

Hutson has continuously imposed an undue burden on the courts and the parties by presenting meritless pleadings and motions to the court. The parties involved are required to respond to the pleadings and motions or else risk their inaction being viewed as consent or waiver. Plaintiffs have already spent thousands of dollars defending against Huston's spurious claims.

Other sanctions are not adequate to protect Plaintiffs and their agents, representatives, and employees, because, once Hutson files and serves his Complaint, the opposing parties are required to expend great time and expense to respond to the Complaint, and even if successful in obtaining a favorable disposition, to defend the case on appeal. An award of monetary sanctions pursuant to Rule 11 or the Frivolous Proceedings Act after the filing of litigation is not a sufficient deterrent for Hutson, as evidenced by Hutson's repeated filing of meritless litigation and claims. Upon information and belief, Hutson lives on a fixed income and is unlikely to have the funds to repay the attorney's fees and costs that Plaintiffs and their officers, agents, servants, employees, attorneys, affiliates, successors and assigns must incur to defend against future litigation.

Applying these same factors to the request for permanent injunction, Plaintiffs are likely to succeed on the merits of their request for a permanent injunction. Hutson has proven that no matter how many courts tell him that his claims are frivolous, he will continue to assert them against the same and new parties.

In sum, Hutson is a vexatious litigant, likely to abuse the judicial process and harass other parties, without the imposition of a narrowly tailored injunction requested, limiting his access to the state courts. Under these circumstances, Plaintiffs need a temporary injunction to avoid irreparable harm, for which there is no adequate remedy at law, and they are likely to succeed on the merits.

CONCLUSION AND REQUEST FOR HEARING

Based on the foregoing, Plaintiff respectfully request that this Court enter an temporary injunction prohibiting Defendant Hutson, without first obtaining leave of Court, from initiating any *pro se* litigation before a state court in South Carolina against Penn America Insurance Company, Global Indemnity Group, Inc., or any of their officers, agents, servants, employees,

attorneys, affiliates, successors and assigns, until a full and complete decision on Plaintiffs' Complaint for Permanent Injunction can be finally decided.

This motion is based upon the pleadings in this action, exhibits and affidavits attached hereto or which will be filed prior to the hearing, upon any memoranda in support of this motion and attachments thereto, upon Rule 65 of the South Carolina Rules of Civil Procedure, and upon such additional law and argument as shall be just and proper.

Plaintiffs respectfully request argument on this motion. Plaintiffs reserve the right to amend this motion prior to argument and disposition of the motion. Further, Plaintiffs reserve the right to supplement their argument by written memoranda of law, affidavits, and other materials permitted under Rule 65, SCRPC to facilitate this Court's review.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted,
COLLINS & LACY, P.C.

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ATTORNEYS FOR PLAINTIFFS PENN
AMERICA INSURANCE COMPANY
AND GLOBAL INDEMNITY GROUP,
LLC

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR TEMPORARY
INJUNCTION (RULE 65, SCRCP)**

Columbia, South Carolina
August 10, 2020

EXHIBIT A

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 11 CP- 14 - 602

TLC Holdings, LLCMr. B. Hester

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

The CourtAttorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant ☐

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (format order to follow) ☐ Statement of Judgment by the Court:CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE

3/21/14This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

ORDER INFORMATION

Bonnie H. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

21433/20/14

For Clerk of Court Office Use Only

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

Thomas L. Harper, Jr.
R. Wright Byrd, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

H. Freeman Belsa, Esq.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

SCRCP Form 4C (03/2013)

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CLARENDON)

CASE NUMBER: 11-CP-14-602

TLC Holdings, LLC,)

Plaintiff,)

v.)

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

Defendant.)

ORDER

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

Defendant and Third Party Plaintiff,)

v.)

Richard U. Clark, Jimmy S. Lovell and)
James C. Thigpen,)

Third Party Defendants.)

**CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE**DATE 3/21/14Bentley S. Roberts
CLERK OF COURT
CLARENDON COUNTY, SCBEULAH C. FORTIS
CLERK OF COURT
2014/03/21 AM 11:56

Before the Court is the Motion to Set Aside Affidavit of Default (the "Affidavit of Default Motion") and Motion for Temporary Restraining Order ("TRO Motion" and, together with the Affidavit of Default Motion, the "Motions") filed in the above-captioned action on December 30, 2013 by Defendant and Third Party Plaintiff, M.B. Hudson a/k/a M.B. Hutson ("Defendant", "Hutson" or the "Debtor"). On January 8, 2014 (the "Petition Date"), during this Court's previous hearing on the Motions, Defendant filed a bankruptcy petition under chapter 11 of the United States Bankruptcy Code, 11 U.S.C. Section 101 *et seq.* (the "Bankruptcy Code"), which is pending in the United States Bankruptcy Court for the District of South Carolina (the "Bankruptcy Court"), Case Number 14-00165-jw (the "Bankruptcy Case"). By Order Granting Limited Relief from the Automatic Stay filed on February 21, 2014 (the "Stay Relief Order"), the Bankruptcy Court granted relief from the automatic bankruptcy stay to Plaintiff, TLC Holdings, LLC ("Plaintiff" or "TLC"), for the limited purpose of allowing this Court to determine "whether the Debtor had any property interest in the Property" as of the bankruptcy

¹ The term "Property", as used in the Stay Relief Order, means the property located generally at 5277 Dingle Pond Road, Summerton, Clarendon County, South Carolina, along Lake Marion, upon which the Defendant has been operating a business known as the "Big Water Resort". The Consent Order and Settlement Agreement, as defined below, use a similar definition for the term "Property", and this Court will adopt the same definition of that term for purposes of this Order.



petition date, January 8, 2014, and, if so, whether the Debtor presently has any remaining property interest in the Property". Stay Relief Order at 4.

This Court conducted a hearing on March 6, 2014 (the "March Hearing"), attended by Plaintiff and its attorneys, R. Wayne Byrd and Thomas L. Harper, Jr., and by Defendant and his attorney, H. Freeman Belser, to consider the Motions and the issues presented to this Court through the Stay Relief Order.

This Court has given careful consideration to the Stay Relief Order, and to the scope of the issues properly before this Court for ruling in light of the procedural posture of this case as of the Petition Date. As set forth more fully below, this Court has concluded that, pursuant to the Stay Relief Order, this Court is authorized by the Bankruptcy Court to decide the Motions that were pending in this action on the Petition Date. To the extent that the Stay Relief Order could be interpreted as requesting or directing that this Court decide issues or matters beyond the scope of the Motions, this Court has concluded that such issues are beyond what has been presented to this Court, and declines to do so. As to the Motions before the Court, for the reasons set forth below, the Court concludes that the Motions should be denied.

The court notes that after advising counsel of the ruling set forth herein, the court, by email, inquired of the parties as to their positions on the issue of whether the court had the authority to rule on the issues set forth in this order. The potential predicament is that the Bankruptcy Court issued the fourteen day stay so this court could rule on the issue of whether the Defendant had any interest in the Property; however, the court is not addressing that specific question in this order. The Defendant maintains that the granting of the stay was to address only that narrow issue and that since this court is not addressing that narrow issue, this court is precluded from addressing any other issues. The Plaintiff maintains the court has the authority to address the issues set forth in this order. The court concludes the stay does not prohibit it from issuing the ruling set forth herein.

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On December 14, 2011, Plaintiff filed its Summons and Complaint in this action (the "Complaint"), seeking to eject Defendant from the Property and recover money damages from Defendant for Defendant's alleged breach of a Lease Purchase Agreement related to the Property, which was dated on or about December 15, 2010, and entered among Plaintiff, Defendant and the Third Party Defendants named above (the "Lease Purchase Agreement").

2. By Answer and Counterclaim and Affirmative Defense and Motion to Dismiss and Third Party Complaint filed in this action on January 3, 2012 (the "Answer and Counterclaims"), Defendant, through counsel, asserted various affirmative defenses, counterclaims and third party complaints against Plaintiff and the members of Plaintiff relating to the Lease Purchase Agreement and the circumstances surrounding the parties' execution of the same and the Defendant's prospective lease and purchase of the Property from Plaintiff. In the Answer and Counterclaims, Defendant asserted, *inter alia*, that he had obtained an equitable interest in the Property and was entitled to a right of redemption therefor, and that Plaintiff had made various misrepresentations or material omissions regarding facts related to the Property, and had interfered with Defendant's development and/or operation of the Property.

3. Plaintiff and Defendant settled all claims brought in Plaintiff's Complaint and in Defendant's Answer and Counterclaims by virtue of a Settlement Agreement dated as of March 30, 2012, among Plaintiff, Defendant, and the Third Party Defendants (the "Settlement Agreement"). The parties sought this Court's approval of the Settlement Agreement, and its adoption as the Order of this Court, which was effected by virtue of a Consent Order entered in this action on April 13, 2012 (the "Consent Order"). The Consent Order expressly incorporates the Settlement Agreement by reference, and approves the terms thereof.

4. The Settlement Agreement, as approved by the Consent Order, amended the Lease Purchase Agreement in several respects, including the following:

a. It extended the term of the lease contained in the Lease Purchase Agreement, whereby Hutson was obligated to pay base rent each month to TLC, as well as the property taxes owing on the Property and the rent owing to the South Carolina Public Service Authority (the "Santee Cooper Rent").

b. It imposed an "Approval Deadline" by which Hutson must obtain the "Approvals", which was defined as all necessary governmental approvals for the development and subdivision of the Property, so that Hutson's subdivision plat of the Property could be recorded. The Approval Deadline was July 31, 2012, with three thirty (30) day extension rights which, if exercised, could extend the Approval Deadline to approximately November 1, 2012.

c. It required Hutson to close on the purchase of a portion of the Property within 15 days after he received his Approvals, which thus would have to occur prior to the end of November, 2012.

d. It contained a provision whereby Hutson acknowledged that he owed an "Arrearage" under the Lease Purchase Agreement of \$199,969.19 as of March 31, 2012, and it expressly obligated Hutson to repay the Arrearage not later than December 31, 2012. Settlement Agreement ¶ 4.

e. It obligated TLC to review any "Qualified Plat" provided to it by Hutson, and either approve or provide comments thereto. It defined a "Qualified Plat" as "a proposed subdivision plat of a portion of the [Property], which is prepared by a registered South Carolina land surveyor, and which meets the minimum standards for the practice of land surveying under South Carolina law". Settlement Agreement ¶ 5. If TLC approved a Qualified Plat presented to it, then it was obligated to write a letter to the Clarendon County Planning Commission (the "Planning Commission") requesting that the Planning Commission approve that Qualified Plat.

f. Except for a letter due from TLC to the Planning Commission by April 3, 2012, as to which there is no dispute that TLC delivered, TLC was not obligated to deliver other letters to the Planning Commission unless and until it was presented with a Qualified Plat.

g. It expressly and conspicuously provided, in all capital letters, that Hutson's obligations under the Settlement Agreement were not conditioned upon his receipt of the Approvals. Settlement Agreement ¶ 8.

5. In addition, Section 3 of the Settlement Agreement provides that in the event that Defendant fails to comply with the terms of the Settlement Agreement, "unless such failure is a direct and proximate result of TLC's failure to perform an action expressly required of it in this Settlement Agreement", then the Plaintiff was entitled to "the following immediate relief, without further order of the Court or notice to Defendant or his counsel of record: (a) termination of the [Lease Purchase] Agreement, (b) cancellation of the Lis Pendens [filed by Defendant in this case], (c) immediate vacation of the Property by Defendant except for his personal residence thereon, which shall be vacated within fifteen (15) days; and (d) the provisions of Section 23 shall be effective".

6. Section 23 of the Settlement Agreement contains an automatic release by Defendant, as of the date of termination of the Lease Purchase Agreement, whereby Defendant is deemed to have released, forever discharged and promised never to sue TLC, the Third Party Defendants, and parties related thereto (defined more fully therein as the "TLC Parties") from all claims, known or unknown, and arising at law or in equity, relating to the Lease Purchase Agreement or the relationship between the parties (herein, the "TLC Release").

7. By December 31, 2012, Defendant had breached several provisions of the Settlement Agreement, including:

- a. failing to obtain the Approvals by the Approval Deadline;
- b. failing to close upon the purchase of at least eight acres of the Property by the closing deadline imposed therein (which was approximately November 15, 2012); and
- c. failing to pay the Arrearage prior to December 31, 2012.

8. It is undisputed by the parties that each of the foregoing breaches remains uncured at present. Defendant acknowledges that he has not received his Approvals, nor purchased any portion of the Property, nor repaid the Arrearage.²

9. By letter from Plaintiff's counsel to Defendant dated February 7, 2013, Plaintiff notified Hutson that he was in default of the Settlement Agreement and Lease Purchase Agreement for, among other things, failing to pay the Arrearage, failing to pay rent owing thereunder, permitting a mechanics' lien to be filed against the Property by Blue Line Consulting, LLC, and failing to pay the 2012 property taxes for the Property prior to their delinquency on or before January 15, 2013.

² Plaintiff alleges that other defaults by Hutson exist under the Lease Purchase Agreement, including failing to pay the 2012 property taxes for the Property prior to their delinquency, failing to pay the Santee Cooper Rent arising after the date of the Settlement Agreement, permitting a mechanic's lien to be filed against the Property, failing to construct certain road improvements to the Property, and failing to comply with certain covenants governing insurance as required under the Settlement Agreement.

10. Defendant did not cure the defaults outlined in the February 7, 2013 letter.

11. By letter dated December 10, 2013, Hutson was advised by Plaintiff's counsel that Plaintiff had exercised its right under the Settlement Agreement to terminate the Lease Purchase Agreement (the "LPA Termination Letter").

12. On December 11, 2013, in accordance with the Consent Order, Plaintiff filed an Affidavit of Default in this action (the "Affidavit of Default"). Plaintiff enclosed a copy of the Affidavit of Default in the LPA Termination Letter.

13. On December 30, 2013, prior to being ejected from the Property, Hutson filed the Motions, along with a supporting affidavit by Hutson (the "Hutson Affidavit"). In the Motions, Hutson alleged that TLC failed to perform an action expressly required of it in the Settlement Agreement, and that it was that failure by TLC which caused Hutson to be unable to perform his obligations under the Settlement Agreement. Hutson Affidavit ¶ 4.a. Specifically, Hutson alleges the following:

a. that Plaintiff approved the proposed subdivision plat, but failed to provide a letter to the Planning Commission that requested that the Planning Commission approve the subdivision. See TRO Motion ¶ 7.a.

b. that Plaintiff made "verbal assurances" to Hutson that were incorrect, and/or that Plaintiff failed to make "important disclosures" to him regarding the Property. See TRO Motion ¶ 7.b.; Hutson Affidavit ¶ 4.b.

c. that Plaintiff failed to provide notice to Defendant regarding the filing of liens against the Property, or of Defendant's failure to pay property taxes with regard to the Property. TRO Motion ¶ 7.c.; Hutson Affidavit ¶ 4.c.

14. This Court issued a Temporary Restraining Order (the "TRO") on December 30, 2013, enjoining Plaintiff from pursuing further proceedings arising from its issuance of an Affidavit of Default. The TRO was to be in effect through January 9, 2014, pursuant to Rule 65, SCRCP.

15. The sole relief requested in the Motions was for this Court to set aside the Plaintiff's Affidavit of Default due to the alleged failure of the Plaintiff to perform actions required of it in the Settlement Agreement and Consent Order. The pertinent issues before this Court in the Motions were whether the Plaintiff had failed or refused to perform certain obligations owing by it under the Settlement Agreement and Consent Order, and whether any such failure had been the "direct and proximate" cause of the Defendant's failure to perform his obligations. ~~The Motions and the Hutson Affidavit did not assert any claim by Defendant to a right of redemption or other equitable interest in the Property.~~

16. The Court scheduled a hearing on the Motions for January 8, 2014 (the "January Hearing"). The sole purpose of the January Hearing was for this Court to determine whether the TRO should be extended. At no time prior to March 6, 2014 was this Court presented with the issue of whether the Defendant had an equitable interest in the Property that

survived the entry of the Settlement Agreement and Consent Order, and the filing of the Affidavit of Default.

17. During the course of the January Hearing, the Court was advised by the Defendant's attorney that the Defendant had just filed a Chapter 11 petition in the Bankruptcy Court. Therefore, this Court adjourned the hearing, as the Chapter 11 filing automatically stayed further proceedings.

18. On January 24, 2014, Plaintiff filed a Motion for Relief from Automatic Stay or, in the Alternative, for an Order Determining that the Automatic Stay is Inapplicable (the "Stay Relief Motion") in the Bankruptcy Court. It appears that, in the Stay Relief Motion, Plaintiff argued, *inter alia*, that the Property should not be considered property of the Debtor's bankruptcy estate because the Lease Purchase Agreement had been terminated prior to the Petition Date, thereby extinguishing any property interest the Defendant had in the Property. It also appears that Defendant argued in defense of the Stay Relief Motion that he had an equitable interest in the Property, which Plaintiff claimed was asserted previously in Defendant's Answer and Counterclaims, and resolved with finality by the Consent Order and Settlement Agreement.

19. On February 21, 2014, the Bankruptcy Court entered the Stay Relief Order in which it determined that the issue of whether the Defendant has any interest in the Property is a matter of state law, and that considerations of judicial economy, and this Court's familiarity with the dispute, supported its conclusion that this Court is the more appropriate forum to consider the arguments of the parties and to determine what interest, if any, the Defendant has in the Property. The Stay Relief Order granted relief from the automatic bankruptcy stay to Plaintiff for the limited purpose of allowing either Plaintiff or Defendant to seek a determination by this Court of "whether the Debtor had any property interest in the Property as of the bankruptcy petition date, January 8, 2014, and, if so, whether the Debtor presently has any remaining property interest in the Property". Stay Relief Order at 4.

20. On or about February 28, 2014, counsel for the Plaintiff contacted this Court for the purpose of scheduling a hearing. The March Hearing was held in Florence County on March 6, 2014.³ At the March Hearing, counsel for Defendant submitted a supporting memorandum of law in which Defendant argued that it was a "vendee in possession" of the Property as of the Petition Date, and that, accordingly, Defendant was entitled to claim an equitable interest, and right of redemption, in the Property.

CONCLUSIONS OF LAW

1. In the Stay Relief Order, the Bankruptcy Court determined that this Court was better situated to determine (a) whether the Debtor had any property interest in the Property as of the Petition Date, and (b) if so, whether he has any property interest in the Property at present. At the March Hearing, this Court repeatedly inquired of the parties whether they believed this Court had the authority, based on the matters pending before it, to issue a final decision on the

³ This Court notes that, with the consent of the parties, the March Hearing was conducted within fourteen days of the entry of the Stay Relief Order, and that this Order is being entered more than fourteen days following the entry of the Stay Relief Order. This Court makes no determination of whether any stay under Fed. R. Bankr. P. 4001(a)(3) has now expired, nor any determination of the legal effect of the existence or expiration thereof.

merits on these two issues. The parties, through their counsel, insist that this Court does. This Court concludes it does not. All that was presented to this Court prior to the Petition Date was the issue raised in the two Motions. While the issue of whether the Lease Purchase Agreement was properly terminated was before the Court on the Petition Date, the question of whether that termination, if it stands, thereby extinguished any property interest the Defendant had in the Property was not. Again, the issue presented by the Motions is whether the Defendant's failure to perform under the Settlement Agreement and Consent Order was directly and proximately caused by the Plaintiff's failure to perform, not whether the Defendant has retained some sort of equitable or legal interest in the Property by virtue of improvements or other value he has added to the Property. Any notation in the Defendant's Motions, or in the Plaintiff's Stay Relief Motion, that the movant was also seeking "such other and further relief as may be just and proper", does not expand the matters presented to this Court, or this Court's jurisdiction, into the one now urged by the parties.

2. As to the TRO Motion, the Court will now address the issue of whether the TRO should be extended. In so doing, the Court will address the relevant issues raised at the March Hearing as if they had been raised at the January Hearing, when the TRO was still in effect.⁴ The law is well-settled in South Carolina that an injunction is a drastic remedy and may only be granted when the party seeking the relief demonstrates (1) he will suffer irreparable harm if the injunction is not granted, (2) he will likely succeed on the merits of the litigation, and (3) there is an inadequate remedy at law. *See AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009). The remedy of an injunction is drastic and should only be applied when legal rights are unlawfully invaded or legal duties are willfully or wantonly neglected. *LeFurgy v. Long Cove Club Owners Assoc., Inc.*, 313 S.C. 555, 443 S.E.2d 577 (Ct. App. 1994). The party seeking an injunction is not required to prove an absolute legal right, but must present a reasonable question as to the existence of such a right. The court may consider the merits of a case to the extent necessary to determine whether a temporary injunction is warranted. "Once a *prima facie* showing has been made entitling the [moving party] to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits." *AJG Holdings, LLC*, 382 S.C. at 50-51.

3. Having considered the arguments of Defendant and the evidence presented by the parties, this Court concludes that the Defendant has not demonstrated that his failure to perform his obligations under the Settlement Agreement is a direct and proximate result of Plaintiff's failure to perform an action expressly required of it under the Settlement Agreement. The evidence presented at the March Hearing was convincing that the Defendant breached several provisions of the Settlement Agreement approved by the Court, and made part of the Order of this Court in the Consent Order filed on April 13, 2012. For example, Defendant admits that he has not repaid the Arrearage, nor did he obtain the Approvals by the Approval Deadline, nor has he purchased any portion of the Property. Evidence of other defaults by Defendant was presented at the March Hearing, including his failure to pay rent and property

⁴ Pursuant to S.C.R.Civ.P. 65, the TRO was scheduled to expire ten days after its issuance, on January 9, 2014. *See* TRO. This Court knows of no authority, and none was presented by the parties, addressing whether the Chapter 11 automatic stay also stayed the expiration of the TRO, and, if so, whether the expiration of the fourteen day 4001(a)(3) Stay has now caused the TRO to expire.

taxes required under the Lease Purchase Agreement as modified by the Settlement Agreement, and permitting a mechanic's lien to be filed against the Property.

4. Defendant contends in the Hutson Affidavit that TLC approved a subdivision plat of the Property but failed to submit a requisite letter to the Planning Commission. See TRO Motion ¶ 7.a. The Settlement Agreement does require TLC to consider a proposed Qualified Plat submitted by Hutson and, if approved, submit a letter in support thereof to the Planning Commission. But in his sworn examination taken in the Bankruptcy Case pursuant to F. R. Bankr. P. 2004 (the "2004 Examination"), Hutson admitted that he had not provided a "Qualified Plat" to TLC for consideration prior to January, 2014, well past the Approval Deadline in November, 2012. 2004 Examination p. 460 lns.16-18.

5. With respect to Defendant's allegations in Paragraph 7.b. of the TRO Motion that Plaintiff made "verbal assurances" to Hutson that were incorrect, or that Plaintiff failed to make "important disclosures" to him, Hutson made those same allegations in his Answer and Counterclaims filed in this action on January 3, 2012, and those allegations were included in the settlement of this action pursuant to the Settlement Agreement, which was approved by the Consent Order. Hutson admitted in his 2004 Examination that these all arose prior to the Settlement Agreement. 2004 Examination p. 515, ln.4 – p. 516, ln. 21. Thus, those alleged misstatements or omissions, even if true, were known to Defendant prior to the entry of the Consent Order, and were the basis of the settlement of this action pursuant to the Settlement Agreement which was approved by the Consent Order.

6. With respect to Defendant's allegations in Paragraph 7.c. of the TRO Motion that no notice was provided by Plaintiff to Defendant regarding liens placed on the Property, or any nonpayment of real property taxes, those allegations are likewise unfounded. In the letter from Plaintiff's counsel to Defendant dated February 7, 2013, Plaintiff expressly advised Hutson that he was in default for, among other things, "permitting a lien to be filed against the Property by Blue Line Consulting, LLC" and "failing to pay the 2012 property taxes for the Property prior to their delinquency on or before January 15, 2013". While the mechanic's lien may have subsequently lapsed by statute, the 2012 property taxes were never paid by Defendant.

7. Accordingly, there has been no *prima facie* showing by the Defendant that the injunction should be extended. The allegations contained in the Hutson Affidavit are refuted by his own testimony in the 2004 Examination, and by the documentary evidence presented by Plaintiff. Defendant has failed to establish that he would be likely to succeed on the merits of his claim that his breaches of the Settlement Agreement were caused by the Plaintiff. The assertions set forth in the Hutson Affidavit must have a reasonable factual basis, and this Court concludes that they do not.

8. Because the Defendant has not established that he is likely to prevail on the merits of his claim, there is no need for this Court to examine whether the Defendant will suffer irreparable harm if the relief is not granted, nor whether the Defendant has an adequate remedy at law. This Court declines to extend the TRO or otherwise to grant an injunction in Defendant's favor against the enforcement of the Consent Order and Settlement Agreement according to their terms.

9. As to the Affidavit of Default Motion, because this Court concludes that Defendant defaulted under the terms of the Consent Order and Settlement Agreement, and that those defaults were not the "direct and proximate result of TLC's failure to perform an action expressly required of it" under the Settlement Agreement, the Defendant's Motion to Set Aside Affidavit of Default is likewise denied.

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

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

12. In the TRO Motion, Defendant acknowledges receiving a copy of the Affidavit of Default on December 18, 2013. TRO Motion ¶ 4. Even if this Court were inclined to commence the fifteen (15) day period for vacating his residence from the date Defendant says he received the Affidavit of Default on December 18, 2013, Defendant was still required to vacate that residence by January 2, 2014. Defendant's rights to possession of the remainder of the Property, other than his residence, expired no later than December 18, 2013, and his right to remain in his residence would have lapsed not later than January 2, 2014.

ORDER

NOW, THEREFORE, it is hereby:

ORDERED, that this Court declines to extend the TRO or otherwise grant an injunction against Plaintiff's enforcement of the Consent Order and Settlement Agreement.

FURTHER ORDERED, that the Motion to Set Aside Affidavit of Default is denied.

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

FURTHER ORDERED, that, in conjunction with enforcing the Consent Order according to its terms, pursuant to Paragraph 2 of the Consent Order, upon the filing of the Affidavit of Default on December 11, 2013, Plaintiff was and is entitled to, and is hereby awarded, the following immediate relief, without the need for further Order of this Court:

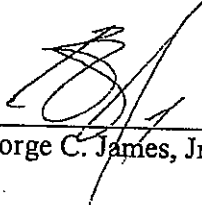
(a) The Lease Purchase Agreement was deemed automatically terminated and of no further force or effect;

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

(c) Defendant was required immediately to vacate the Property, except only with respect to his personal residence located thereon, as to which he was obligated to vacate the same within fifteen (15) days following receipt of a copy of the Affidavit of Default, or the posting of a copy of the Affidavit of Default upon such residence, whichever first occurs.

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

IT IS SO ORDERED.


George C. James, Jr., Circuit Judge

March 20, 2014



EXHIBIT B

2016 WL 7435620

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

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

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

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

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

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

Signed 04/05/2016

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Third-Party Plaintiffs.

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

MARY GORDON BAKER, UNITED STATES
MAGISTRATE JUDGE

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

FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

(*Id.* ¶¶ 144-45.)

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

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

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

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

(*Id.* ¶ 56.)

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

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

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

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

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

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

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

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

(Dkt. No. 75 at ¶¶ 71-74.)

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- On June 29, 2015, Hutson filed a Motion "to be Allowed to Use Tape Recordings Found During Jury Trial." (Dkt. No. 138.)² Third-Party Plaintiffs assert this motion was "an attempt ... to circumvent this Court's Order compelling him to respond to Third-Party Plaintiffs' first set of requests for production by May 24, which he did not comply with." (Dkt. No. 179-1 at 4.) During his 2014 deposition, Hutson stated that he had not recorded anybody in the room (which included Clark); in this motion, however, he asserts he was able to find a 2011 recording he made of Clark. (See Dkt. No. 138; Dkt. No. 179-5 at 10, 13 of 14.)
- On July 5, 2015, Hutson sent an email to Mr. Wilkerson stating that if they were not able to settle, Hutson "plan[s] to quickly move in some new directions to get justice and restitution regarding [his] case that will soon go in another direction plus the civil with [sic] also remain." (Dkt. No. 179-6.) Third-Party Plaintiffs assert this is a "thinly-veiled threat at instituting criminal prosecution of Third-Party Plaintiffs." (Dkt. No. 179-1 at 5.)

***6** • On July 11, 2015, Hutson emailed a copy of a draft complaint against Turner Padgett Graham & Laney to Attorneys Byrd, Wilkerson, and Cromer. (Dkt. No. 179-7; Dkt. No. 179-8.) The email itself was blank other than the subject line of "Revised Federal Complaint, final draft." (Dkt. No. 179-7.) In the draft complaint, Hutson complained about his treatment when deposed by Attorney Byrd at Turner Padgett's office. (Dkt. No. 179-8.) Hutson also accused Turner Padgett of, *inter alia*, "unprofessional behavior" and violating the "SC Bar Association's Code of Conduct." (Dkt. No. 179-8 at 2 of 2.)

- One day later, on July 12, 2015, Hutson emailed Attorneys Byrd, Wilkerson, and Cromer with an updated draft of the complaint against Turner Padgett. (Dkt. No. 179-9; Dkt. No. 10.) In the email, Hutson told Wilkerson that the draft complaint "will be filed this coming Wed. and also an additional motion request[ing] that your law firm be barred from representing the Class Action/TLC Holdings/ Third Party Defendant MB Hutson based on multiple conflicts of interest." (Dkt. No. 179-9.) Hutson also told

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The Orders in the State Court Case

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

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

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

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

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

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

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

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

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

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

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

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

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

[I]t is hereby:

...

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

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

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

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

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

...

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

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

3. Release

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon;

and (9) the hearer's consequent and proximate injury.

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

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

4. Defamation

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

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

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

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

*16 ...

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

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

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

(Dkt. No. 77-17.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Dkt. No. 248 at 3 of 10.) The fact that Defendants pled the statute of limitations as a defense does not mean that they cannot also argue that Plaintiffs' damages were caused by a third party, as inconsistent defenses may be pleaded. See *FED. R. CIV. P. 8(d)(3)* ("A party may state as many separate claims or defenses as it has, regardless of consistency."); see also *Little v. Texaco, Inc.*, 456 F.2d 219, 220 (10th Cir. 1972) ("[A] defendant is at liberty to deny and at the same time advance an affirmative defense.").

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

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

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

IT IS SO RECOMMENDED.

CONCLUSION

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

All Citations

Not Reported in Fed. Supp., 2016 WL 7435620

Footnotes

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

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

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

4 Hutson has counsel as to the claim against him for equitable indemnity. (See Dkt. No. 253.) Counsel does not represent Hutson as to Hutson's counterclaims against Third-Party Plaintiffs. (*Id.*)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT C

2016 WL 2935891

Only the Westlaw citation is currently available.

United States District Court,
D. South Carolina, Charleston Division.

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

v.

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

v.

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

No. 2:14-cv-01583-DCN

|

Signed 05/20/2016

ORDER

DAVID C. NORTON, UNITED STATES DISTRICT
JUDGE

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

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

I. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. STANDARD

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

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

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

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

III. DISCUSSION

A. Third-Party Plaintiffs' Motion for Summary Judgment

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

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

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

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

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

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

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

Id. The Settlement Agreement further provides:

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

*6 *Id.* at 2 (emphasis added).

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

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

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

Id. at 6–7 (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSION

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

AND IT IS SO ORDERED.

All Citations

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

Footnotes

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

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

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

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EXHIBIT D

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

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

Plaintiffs,

vs.

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

Defendants.

ORDER

TLC Holdings, LLC, Richard Clark, James
Thigpen, Jimmy “Steve” Lovell, and Ocoee,
LLC,

Third-Party Plaintiffs,

vs.

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

Third-Party Defendant.

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

BACKGROUND

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

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

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

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

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

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

STANDARD

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

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

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

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

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

DISCUSSION

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

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

In his motion to reconsider, Hutson claimed to present new evidence but instead repeated the same arguments he made in his prior filings and failed to identify any new documents or evidence, despite representing to the court that he had the latter.¹ He also asked the court for relief that it lacks jurisdiction to grant.² He failed to provide evidentiary support for the factual allegations in his motion. No inference can be drawn that the motion was filed in good faith. Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass or burden third-party plaintiffs, and there is no indication that he intends to cease.

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

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

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

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

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

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

Third-party plaintiffs request monetary sanctions in the amount of \$14,908.50.

Third-party plaintiffs’ counsel submitted an affidavit of their qualifications and

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

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

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

CONCLUSION

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

AND IT IS SO ORDERED.

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

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

October 4, 2017
Charleston, South Carolina

EXHIBIT E

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

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

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

Plaintiffs,

vs.

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

Defendant.

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

BEULAH DISTRICT COURT
CLARENDON COUNTY, SC
2017 MAR 2 PM 059

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LEGAL STANDARD

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

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

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the Court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Simmons v. Tuomey Regional Medical Center*, 341 S.C. 32, 533 S.E.2d 312 (2000).

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

DISCUSSION

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

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

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

....

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

....

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

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

Pursuant to the express terms of the Consent Order, effective upon the filing of the Affidavit of Default in this action on December 11, 2013, Plaintiff was entitled to have the following immediate relief, without further order of the Court or notice to Defendant or his counsel of record: (a) termination of the [Lease-Purchase Agreement], (b) cancellation of the Lis Pendens [filed by Defendant in this case], (c) immediate vacation of the Property by Defendant except for his personal residence thereon, which shall be vacated with fifteen (15) days; and (d) the provisions of Section 23 shall be effective. Consent Order at ¶12.

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

....

[I]t is hereby:

....

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

....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

AND IT IS SO ORDERED.

By:


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

March 2, 2017

Manning, S.C.

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

EXHIBIT F

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

Penn-America Insurance Company,

Plaintiff,

v.

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

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

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

Defendants.

**SETTLEMENT AGREEMENT
AND RELEASE
OF CERTAIN CLAIMS**

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

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

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

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

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

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

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

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

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

2. Hutson, for and in consideration of the sum of Nine Thousand Five Hundred and 00/100 (\$9,500.00) Dollars, receipt of which is hereby acknowledged, does hereby release and forever discharge Penn-America, its agents, servants, employees, affiliates, successors and assigns, and any and all other persons, firms or corporations from any and all actions, causes of action,

demands and/or claims of any nature whatsoever which the undersigned may have against Penn-America relating to:

- a. Penn-America's coverage for the Underlying Lawsuits; and
- b. Penn-America's coverage for the Property Loss claim;

together with any claims relating to Penn-America's investigation and/or claim handling, including any causes of action for breach of contract, bad faith, improper claim practices, or any other cause of action which could be asserted, arising from the above-referenced matters (hereinafter "the Released Claims"). The consideration expressed herein constitutes payment in full to Hutson for all policy proceeds, damages, losses and/or injuries to persons or property or both, whether known or unknown, developed or undeveloped, which have resulted or may result from the incident aforesaid, whether the claims could have been asserted against Penn-America by way of counterclaim in the Declaratory Judgment Action or by separate lawsuit.

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

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

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

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

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

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

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

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

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

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

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

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

WITNESSES:

Carlyle R. Ruler
[Signature]

[Signature] (SEAL)
M.B. HUTSON a/k/a M.B. HUDSON

PENN-AMERICA INSURANCE COMPANY

By: _____

Its: _____

EXHIBIT G

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

MB Hutson/MB Hudson,

Plaintiff,

vs.

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

Defendants

IN THE COURT OF COMMON PLEAS

Civil Action # 2018 CP 400 6344

SUMMONS

RICHLAND COUNTY
FILED
2018 DEC 28 PM 4:11
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

TO THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint upon its subscribers, at the address shown below, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

Penn America Insurance Company
Three Bala Plaza East, Suite 300
Bala Cynwyd, Pennsylvania 19004
610-660-8877

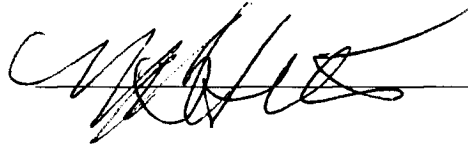
Timothy J. Newton, Esq.
4406-B Forest Drive
Columbia, SC 29206
803-782-4100

Global Indemnity Group, Inc.
Three Bala Plaza, Suite 300
Bala Cynwyd, Pennsylvania 19004
610-664-1500

J. R. Murphy, Esq.
4406-B Forest Drive
Columbia, SC 29206
803-782-4100

(Signature Page Follows)

By:



M B Hutson, PRO SE

Post Office Box 2755

Orangeburg, SC 29116-2755

Telephone: (803) 308-2714

E-mail: hutson4444@gmail.com

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

MB Hutson/MB Hudson,

Plaintiff

vs.

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

Defendants

IN THE COURT OF COMMON PLEAS

Civil Action No. 2018 - CP - 400-6344

**AMMENDED COMPLAINT
FOR BREACH OF CONTRACT,
NEGLIGENCE AND FAILURE TO
PERFORM DUTIES**

RICHLAND COUNTY
FILED
2018 DEC 28 PM 4:12
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

The Plaintiff, upon information and belief, would respectfully show unto this Honorable

Court as follows:

JURISDICTION AND VENUE

1. Plaintiff M. B. Hutson is a resident of Orangeburg County, South Carolina.
2. Defendant, Penn America Insurance Company is located in Pennsylvania.
3. Defendant, Penn America Insurance Company, employed J. R. Murphy, Esq. and Timothy J. Newton, Esq. of Murphy & Grantland, P.A., of Columbia, S.C. as their corporate counsel regarding the subject of this complaint.
4. T. Newton, Esq. attended court mediation on behalf of this case that involved Plaintiff as a Defendant, in Charleston, S.C.
5. Venue is proper in this court pursuant to S. C. Code Ann. §15-7-30 (C) because Defendant's counsel's office is located in Richland County, S.C., and that the most substantial part of the alleged acts giving rise to this cause of action occurred there.
6. This Court has jurisdiction over the parties and the subject matter of this action.

HISTORY of BACKGROUND FACTS**Taken from Laura Paton's filing¹**

Numbers in parenthesis are Paton's.

7. (42) "on or about 2010 ... Hutson was introduced to TLC Holdings, LLC's owners Richard Clark and Steve Lovell (hereinafter collectively TLC parties) ... for the purpose of purchasing the land at 5215 Dingle Pond Road, Summerton, SC (hereinafter "the property")."

8. (43-45) "That Richard Clark, Steve Lovell, with James Thigpen, owned and operated TLC Holdings, LLC ... (and) BWR... and other corporate entities hereinafter referred to as "John Doe Corporations," which were created to perform single purpose functions in order to effectuate the sole will of Messrs. Clark and Lovell"

9. (46-56) "in or around December 2010, ..."

- (A) "Hutson met with the TLC parties and advised the TLC parties that he sought to purchase the lake-front property, and develop water-front condominiums on the land...TLC parties advised ...Hutson that the property was owned by TLC Holdings and the campground business was owned by Big Water Resort, LLC ("BWR") and in order to purchase the land, he would be required to purchase BWR as well..."
- (B) "TLC parties advised Mr. Hutson that there was water and sewer adjacent to the property for development but failed to disclose the moratorium of approximately 5 years preventing development of the property..."
- (C) "TLC parties advised Mr. Hutson that BWR had no known debt ... and ... concealed BWR's \$300,000.00 annual losses... (and) advised Mr. Hutson that BWR had no accounting records."

¹ Exhibit 3.0: "Amended Answer to Complaint and Counter-Claims Back" filed by Laura Paton, Esq.

10. (57) "...prior to executing the Lease Purchase Agreement² and the Membership Interest Purchase Agreement³ (hereinafter collectively "the Agreements") ... Mr. Hutson searched the property title record; no liens or encumbrances were found."

11. (68) "That the TLC parties knowingly and / or negligently failed to disclose and / or concealed information that the Retail Membership Term Agreements⁴ provided ... each holder:"

A) "a (the) right to use campground facilities, and services solely for members recreational and enjoyment, (emphasis supplied)," ⁵

B) "this right to use the facilities ranges from 5 years up to two lifetimes."⁶

12. (70-1) "...the TLC parties knowingly and / or negligently failed to record the timeshares encumbering the property as required by statute and, therefore, hid from disclosure the encumbrances upon the property prior to ... Mr. Hutson's execution of the Agreements... TLC parties had a statutory duty to record the encumbrances pursuant to Sections 27-30-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27..."

13. (73-4) "... the TLC parties had a pecuniary interest in knowingly and / or negligently concealing the encumbrances on the property to induce Mr. Huston to enter into the Agreements to secure a maximum profit to the TLC parties and to disgorge a failing business⁷... failing to record the timeshares ... encumbering the property, they knowingly and / or negligently concealed such encumbrances ... and induced Mr. Hutson to enter into the Agreements."

14. (76-77) "... as a result of such fraudulent and / or negligent misrepresentations, Mr. Hutson has been damaged, and continues to be damaged, and has suffered pecuniary loss as a

² Lease Purchase Agreement: Exhibit 5.0

³ Membership Purchase Agreement: Exhibit 6.0

⁴ Retail Membership Agreements: Exhibits 1.1-1.3

⁵ Retail Membership Agreement: page one, line 2, and Item "1. Purpose," ll. 1-2)

⁶ Retail Membership Agreement: page one, Item "6. Duration of the Membership."

⁷ Lovell Deposition, 2/16/11, page 113, ll. 3-18. Exhibit 2.0

direct and proximate result of his reliance on the TLC parties representations ... as a direct and proximate result of the TLC parties' actions, Mr. Hutson is entitled to actual, direct, consequential, incidental, special, and punitive damages as aforesaid all in an amount to be determined by the trier of fact and any attempts in a contractual agreement for the limitation or disclaimer of same or any other waiver or other limitation are null, void, unenforceable, and subject to rescission as a matter of law."

15. (78-82) "... prior to execution of the Agreements, the TLC parties..."

(A) "...advised Mr. Hutson that the value of BWR was \$500,000 and the value of the land at 5215 Dingle Pond Road, Summerton, SC was \$6 million."

(B) "...advised Mr. Hutson that BWR had an annual income of approximately \$200,000.00...did not advise Mr. Hutson that BWR was operating at a substantial loss upwards of \$300,000.00 per year, outstripping its income."

(C) "advised Mr. Hutson that BWR had no accounting records"... (yet) "TLC parties knew that the operating expenses of BWR exceeded its income."⁸

16. (86-88, 90) "That Mr. Hutson had a right to rely, and did rely, on the various representation of the TLC parties" ... (yet) "the TLC parties intentionally, ... and / or negligently ... concealed the ... operating costs and expenses... the annual income ...and accounting records of BWR, to induce Mr. Hutson to purchase BWR and enter into the Agreements... (thereby) he has suffered irreparable harm including, but not limited to significant financial harm."

17. (99) "This constitutes a breach of the Agreements with Mr. Hutson and accompanying this breach were the fraudulent acts:" (caused by Extrinsic Fraud upon the Courts):

a. Knowingly failing to disclose the outstanding debts of BWR, including, but not limited to, Black Water Electric;

⁸ Lovell testimony under deposition in 2011. Exhibit 2.0

- b. Advising Mr. Hutson that no financial records were kept as to BWR to conceal the losses / financial condition of the company;
- c. Failing to record encumbrances required by statute as outlined above;
- d. Advising Mr. Hutson that the Retail Memberships could be divested to allow for development of the lakefront land as discussed; and,
- e. Other such concealments misrepresentations as may be discovered.”

18. (102) “The TLC parties and the John Doe Corporations and each of them, though, their act and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S.C. Code Section 29-5-140(a) and 27-31-430, S. C. Code of Laws as amended:

- a) in failing to disclose the Vacation Time Shares encumbering the property;
- b) In failing to record the memberships as required pursuant to Sections 27-32-10 through 27-32-250 of the 1976 Code are designated as Article 1 of Chapter 32, Title 27 and entitled ‘Vacation Time Sharing Plans’;
- c) In failing to pay and subsequently hiding the debt owed to Black River Electric;
- d) in failing to provide any additional consideration for subsequent attempts to modify their agreement;
- e) in failing to properly disclose the true conditions of the business and properties at issue in the Agreements and putting them into the stream of commerce;
- f) in making false representations as to the condition of the business and properties at issue in the Agreements and / or representations as to the condition of the business and properties at issue in the Agreements in reckless disregard as to the truth of the representations; and
- g) In failing to analyze and preserve reserves for maintenance and operation of the business and concealing same.”

19. (103) “The conduct of the TLC parties in their ownership and management of TLC Holdings, BWR, and the John Doe Corporations, as described above, was knowing and

willful, and the TLC parties knew or should have known that such conduct was a violation of S.C. Code Section 39-5-20 and 27-31-430.”

20. (104) Mr. Hutson is a person within the meaning of S. C. Code Section 39-5-140(a) and has suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of the TLC parties, in an amount to be determined by the trier of fact.

21. (118-119) “There would exist a broad element of injustice and fundamental unfairness if the acts of the TLC parties, including Messrs. Lovell, Clark and TLC Holdings LLC, and the John Doe Corporations, and each of them individually, were not regarded as the acts of one another. At the time BWR and the Lease-Purchase Agreement were offered and placed in the stream of commerce by the TLC parties and the John Doe Corporations, the faulty defects and deficiencies heretofore described were hidden and concealed through the acts and omissions of the TLC parties and the John Doe Corporations.”

22. (121) “These hidden defects, including, but not limited to un-marketable title ad outstanding and oppressive debts...rendered the business and the Lease Purchase Agreement undevelopable and worthless.” (Emphasis mine.)

FOR A FIRST CAUSE OF ACTION

Failure to Deliver When under a “DUTY” or in the Alternative, Breach of Contract in Failure to Execute a Duty to Investigate and Defend on behalf of the Plaintiff)

23. Defendants were well versed on the details of the case and cognizant that TLC Holdings, LLC’s attorneys had committed Extrinsic Fraud on the Courts in the Settlement Agreement⁹ and Consent Order¹⁰, carrying that Extrinsic Fraud over into their Defamation

⁹ Exhibit 9.0: Settlement Agreement with approved map for development area, April 13, 2012.

¹⁰ Exhibit 10.0: Consent Order, April 13, 2012, Judge George James, S.C. State Court.

Complaint filed by TLC parties in S.C. State Court¹¹, and the trial. This was due to the fact that the Lease Purchase Agreement¹², upon which the Settlement Agreement and Consent Order were formed, was recognized and remained “worthless” (See ¶ 25. below.) **Plaintiff, Hutson, had asked Defendant, Tim Newton, to give him some legal information and advice.** Defendant, Penn America’s counsels, put their thoughts to record, as follows: (Emphases mine.)

24. *‘Mr. Hutson, I need to remind you that I don’t represent you and I cant represent you because I represent Penn America. To the extent there is a common interest, I note the following: ... I can see how you could argue that the Consent Order is invalid because it attempts to adjudicate the rights of parties¹³ 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....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 undevelopable because it was already obligated to double lifetime memberships as a private club....Since attorneys were involved, and it resulted in your inability to present your case in court,.....there might possibly be extrinsic fraud on the court to support setting aside the Consent Order. See Chewning v. Ford Motor Company 354 S.C. 72, 579 S.E. 2d 605 (2003).’*

“However, that tis 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. Tim”
–Timothy J. Newton, Esq. (8-13-18)¹⁴

25. *“...These hidden defects, including but not limited to, defective, un-marketable title and outstanding and oppressive debts, which unbeknownst to Mr. Hutson, rendered the business and the Lease-Purchase Agreement undevelopable and worthless”*

–L. Paton, Esq. (8-08-16)¹⁵

¹¹ Exhibit 13.0 – Complaint 2015-CP-14-615, filed 12/7/15.

¹² Lease Purchase Agreement (2010); Exhibit 5.0.

¹³ Owners of Retail Membership Agreements, holding a sole right to use all the land for their recreation and enjoyment. See footnotes 3 and 4 referring to Exhibits 1.1-1.3.

¹⁴ Emailed letter to Hutson from Newton, Subject: Setting Aside the Judgment, including items 15-16, Exhibit 4.2.

¹⁵ Exhibit 3.0 “Amended Answer to Complaint and Counter-Claims Back” filed August 8, 2016 by Laura Paton, Esq., page 24, ¶ 121.

26. The attorneys for the TLC Parties, who drafted the fraudulent Lease Purchase Agreement and Settlement Agreement for TLC Parties, and also drafted the Consent Order for Judge George James, thereby executed Extrinsic Fraud on the Courts (State and Federal). This was planned and orchestrated for the targeted purpose of injury to the Plaintiff, now the Defendant's client and policy holder. Yet, the Defendants' trained attorneys, and in spite of their obligation as officers of the courts,

- a) chose to neglect their fiduciary duty to legally expose this Extrinsic Fraud on the Courts, and
- b) chose not to defend their client against the injustice created by the Extrinsic Fraud upon the Court.

27. The Extrinsic Fraud on the Court provided a great disadvantage to Defendant's insured, Plaintiff, and an unfair advantage to TLC Holdings, LLC. The Fraud upon the Court was perpetrated in behalf of TLC Holdings, LLC, by their attorneys, and was recognized by at least two of the attorneys hired by Penn American Insurance Company: Penn America nor it's attorneys dared to take a public or legal stand against the Extrinsic Fraud upon the Court, allowing TLC's attorneys to continue to dominate the courts with their Extrinsic Fraud, while Penn America's client was losing all the court hearings due to that crippling disadvantage. Thus, TLC's attorneys held a great advantage by concealing, once again, the material facts of the fraudulent contracts, agreements, and orders they had put into place creating Extrinsic Fraud upon the Court noted by Tim Newton, Esq., as follows:

*"I can see how you could argue that the Consent Order is 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."*¹⁶

¹⁶ EXHIBIT 4.2: Email from Tim Newton, Esq. to Plaintiff 8/13/2018, Item # 15.

28. Plaintiff had no chance to win as the Plaintiff had no knowledge of the contents of the concealed material facts and TLC's attorneys knew that. This Extrinsic Fraud blind-folded the Plaintiff during depositions, while testifying in court and provided a great disadvantage to Plaintiff in presenting his full case before the court in all matters.

FOR A SECOND CAUSE OF ACTION

(Failure to Deliver When under a "DUTY" or in the Alternative, Breach of Contract in Failure to Execute a Duty to Investigate and Defend on behalf of the Plaintiff)

29. Defendants filed for dismissal of all responsibility in filing for a Declaratory Judgment¹⁷ and a Summary Judgment¹⁸ in Federal Court (6/14/16 and 11/08/18, respectively). In Defendant's counsel's letter of 11/08/18, to Plaintiff, Tim Newton, Esq. states:

*"Penn America has filed a declaratory judgment action regarding whether it owes a duty to defend and/or indemnify you ... Penn-America continues to reserve its right to deny coverage should the court find that coverage does not exist...including the right to withdraw its defense."*¹⁹

30. Defendants asked the Judge to fully dismiss coverage that would leave their insured, Plaintiff, stranded financially while also noticing TLC Holdings, LLC's attorneys that they would pay their policy limit²⁰ of one million dollars (\$1,000,000.00) toward the \$3.5M judgment in favor of TLC Holdings LLC. The Defendants filed for Summary Judgment²¹ on November 8, 2018, in an attempt to exclude themselves from their fiduciary duty and responsibility to investigate and defend their client, the Plaintiff. No judgment would have been

¹⁷ EXHIBIT 11.0--Complaint (Declaratory Judgment) filed by J. R. Murphy, Esq., Attorney for Penn-America. p.14;

¹⁸ EXHIBIT 12.0 – Motion for Summary Judgment filed by Timothy J. Newton, Esq., Attorney for Penn-America. p. 7.

¹⁹ T. J. Newton, Esq. letter to Hutson dated November 8, 2018, p.4, ¶ 6. Exhibit 7.0

²⁰ T. J. Newton, Esq. e-mail to Hutson dated November 19, 2018. Exhibit 8.0

²¹ EXHIBIT 12.0

obtained had TLC Holdings, LLC's lawyers been honest with the court and disclosed to the Honorable Courts that they were broadcasting Extrinsic Fraud upon the Courts and fraud upon Mr. Hutson, the Plaintiff, by failing to properly disclose the concealed facts about the entire purchase and sale which was all fabricated with fraud and fully disclosed by L. Paton, Esq., who stated the Lease Purchase Agreement was "worthless."²²

31. The Defendants' attempt to wiggle out of the responsibility of paying *any* of the judgments is evidenced when they filed for a Summary Judgment²³ in Federal Court. Defendants were asking the Court to protect them from being held liable for any financial responsibility placed against Plaintiff, including the \$3.5M judgment. Nevertheless, had Defendants cured the Extrinsic Fraud issue, Plaintiff would have prevailed in all courts.

32. Defendants actions were clearly to avoid their duty to investigate and defend their client, Plaintiff, against the embedded Extrinsic Fraud Upon the Court, citing, "we lawyers just don't do each other that way" – T. Newton, Esq. (verbally).

FOR A THIRD CAUSE OF ACTION
Fraud /Bad Faith

33. Penn America and their umbrella partner, Torus, including counselor(s) for the same, conducted the following act: Prepared a letter for the Plaintiff consisting of 16 legal paragraphs. The letter (Exhibit 4.1-4.3) dated August 13, 2018, was prepared by the carriers' counsel at Murphy & Grantland, P.A. This sixteen point document was prepared and emailed on August 13, 2018, to Plaintiff by Murphy & Grantland's Tim Newton, Esq.

²² EXHIBIT 3.0, page 24, par. 121.

²³ Exhibit 12.0 – Summary Judgment filing by Defendants. November 8, 2018.

34. That letter's purpose and intent was for Plaintiff to be able to use the information to aid the Plaintiff's lawsuit that he was preparing at that same time against Turner Padget's lawyers for their Extrinsic Fraud Upon the Court. The purpose was to intimidate Turner Padget into accepting less monies to settle the \$3.5M judgment against the Plaintiff, which was being negotiated by Murphy and Grantland and the two insurance companies.

35. By strengthening Plaintiff's case against Tuner Padget, it was hoped that the information in that August 13 letter would save the carriers money while at the same time weakening Turner Padget's position. On several occasions, Tim Newton, Esq. strongly suggested (verbally) that Plaintiff hurry and get his complaint against Turner Padget filed and served prior to the mediation. Plaintiff did not.

36. It should be noted, that Hutson, Plaintiff, had *nothing* to do with the mediation. Plaintiff was not invited to attend, nor was he involved in *any* Settlement Negotiations. The mediation meeting was exclusively between: 1) the mediator, 2) counsel from Murphy & Grantland, 3) TLC Holdings, LLC's owners with their counselors from Turner Padget, and 4) Penn America and Torus representatives.

FOR A FOURTH CAUSE OF ACTION **General Misrepresentation**

37. Tim Newton, Esq., in his August 13, 2018 letter to Plaintiff, wrote:

"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 undevelopable because it was already obligated to double lifetime memberships as a private club. It appears that could easily have averted the entire fiasco. Since attorneys were involved, and it resulted in your inability to present your case in court, and possibly led to the sanctions order and judgment against you, there might possibly be

extrinsic fraud on the court to support setting aside the Consent Order. See Chewning v. Ford Motor Co. 354 S.C. 72, 579 S.E. 2d 605 (2003)."

38. In a subsequent letter (November 8, 2018²⁴), Tim Newton wrote:

"At no point has Penn-America or its counsel ever acknowledged the existence of Fraud Upon the Court."

39. "It's hard to see why" What does this mean? If something is hard to see logically the thing that is not hard to see is just the opposite. What Newton is saying is that it would be difficult for TLC and its lawyers not to have a duty to disclose the fact that the Big Water Resort property was undevelopable.

40. Newton then states a legal remedy that would reverse the harmful effects of TLC and their lawyers' failure to disclose that fact to Plaintiff. Newton states a fact, "Since attorneys were involved." Newton then states another fact, "it (the failure to disclose when a duty to disclose was present) resulted in your inability to present your case in court."

41. Newton then uses those two facts to draw a conclusion regarding a "possible" third fact, it (the failure to disclose when a duty was present) leading to the sanctions order and judgment against you (Plaintiff). This possible third fact demonstrates the damage caused to the Plaintiff out of the failure of TLC and its lawyers to disclose when a duty to disclose those facts existed.

42. Further, Newton then sets forth a legal basis for righting the wrong Newton has described. Newton wrote, "there might possibly be '**extrinsic fraud on the court**' to support setting aside the Consent Order. Newton, so that there would be no confusion about what he was

²⁴ Exhibit 7.0

referring to then cites the following case, See *Chewning v. Ford Motor Co.* 354 S.C. 72, 579 S.E. 2d 605 (2003)".

43. Using only the information provided by Newton to the Plaintiff, what conclusion may be drawn? Newton gave the Plaintiff the framework for a complaint and/or motion to bring against TLC and its lawyers. Newton provided case law to support Newton's legal theory. Newton is an attorney licensed to practice law in the state of South Carolina. Since Newton is a licensed attorney he is governed by certain ethics and rules.

44. Considering those rules, it would not be logical or ethical for Newton to propose/outline/provide a framework for/ or suggest a legal theory that was not supported by the facts and the law of the particular situation. So, one reasonable conclusion that can be drawn from the letter and its contents is that Newton believed that the facts and law would support a legal action as Newton had set forth. Newton himself used the terms **"extrinsic fraud on the court."** This was a term first used in communication between Plaintiff and Newton and/or Penn.

45. Concerning the use of the phrase "might possibly", what might one reasonably conclude, that Newton as an attorney would not give a guarantee of a result but would use softer language to avoid such an implication.

46. The second letter demonstrates what Newton/Defendant was up to. In the second letter Newton makes a universal statement, "At no point". When we see such a universal statement it must be viewed with skepticism. What was Newton trying to exclude? That Penn-America or its counsel had "ever" (universal language again) "acknowledged" the existence of Fraud Upon the Court.

47. That is a difficult position for Newton and Penn-America to sustain. Newton was Penn-America's counsel. Newton had the actual and apparent authority to act for Penn-America. Newton laid out the facts and legal basis for Plaintiff to support a claim for extrinsic fraud upon the court. Newton himself used those very terms, and cited case law to back it up. It logically must have been Newton's legal opinion that "Extrinsic Fraud Upon the Court" existed or it would have been illogical and unethical for Newton to provide that legal theory for the Plaintiff. Newton must have anticipated that the Plaintiff would act on Newton's suggestion. Newton could not do through the Plaintiff what he could not do himself, to do so or suggest it would at the least be unethical and negligent and much worse if Newton intentionally took such an action.

48. Newton's attempt to distance himself and Penn-America from the very terms and legal action he himself proposed demonstrate his and Penn-America's delayed realization of the implication of just what Newton revealed to Plaintiff. The fact that such a delayed rejection of Newton's own theory makes any such attempt futile. The attempted rejection simply shines the spotlight on the excellent quality and reality of the absolute defense and counter argument to the unlawful action that the Plaintiff was exposed to by TLC and its lawyers and exposes Newton and Penn-America to liability for their failure to act upon Newton's correct legal theory. The attempted rejection actually confirms the very thing they attempt to deny.

49. Plaintiff hereby alleges that Penn America and Torus Insurance Companies' counselors were fully aware of the Extrinsic Fraud upon the Court, and intentionally misrepresented in their communications to their client, the Plaintiff.

FOR A FIFTH CAUSE OF ACTION
Ethical violations of attorneys

50. Plaintiff herein realleges all paragraphs of the complaint as if full set forth herein.

51. Defendants have tortuously interfered with Plaintiff attorney client relationship with the attorney they have hired for Plaintiff.

52. The Preamble of the Rules of Professional Conduct for Attorneys state the following: [2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer **zealously asserts the client's position** under the rules of the adversary system.

53. Defendants have caused the attorneys they hired and controlled to violate this rule.

54. Defendants have also caused the attorneys they hired and controlled to violate preamble rule [4] "In all professional functions a lawyer should be competent, prompt and diligent." The defendants have limited the attorneys' ability to be competent, prompt and diligent by restricting actions of those attorneys, by not allowing them to expose the fraud upon the court that they were fully aware of, and by further restricting the attorneys' ability to present all valid defenses and claims of the plaintiff.

55. These actions have caused irreparable harm to the plaintiff, herein as previously stated, which are incorporated herein by reference.

56. Yes, the scope of representation may be limited, but it cannot be limited to the extent it would create an ethical violation. Any attempt to do so is void. Any contract that would so require is also void. There is an ongoing requirement that any licensed attorney in South Carolina has to expose a fraud on the court once it is known.

DAMAGES TO PLAINTIFF CAUSED BY DEFENDANTS
(Neglect/ Failure to Defend/Improper Defense of Plaintiff)

57. Damages caused directly and proximately by Defendants' neglect, and failure to defend/improper defense of Plaintiff, both intentional and negligent performed by Defendants and the inaction by Penn-America and Newton, Murphy and Grantland, P.A. and any other John Does as may be revealed in discovery, against extrinsic fraud upon the courts and fraud upon Plaintiff, which caused the following damages:

- a) TLC's attorneys were using extrinsic fraud in causing Plaintiff to have a great disadvantage in presenting Plaintiff's counterclaims, consequently Plaintiff had no chance to win any hearings, suffered great disadvantages having his depositions taken by TLC's lawyers for the attorneys held and concealed material facts, that had Plaintiff been aware of, would have allowed Plaintiff to win all hearings and trials.
- b) Plaintiff would have won counterclaims consequently damages in favor of the Plaintiff would have been in the millions based on the intentional fraud and extrinsic fraud upon the courts and fraud against the plaintiff perpetrated by TLC and their attorneys.
- c) A claim of wrongful eviction was lost due to Plaintiff's intentional disadvantage caused by TLC's attorney's extrinsic Fraud Upon the Court and fraud upon the Plaintiff.
- d) Plaintiff's written and sworn appraisal by Bon Gardner, of Plaintiff's equitable Interest, appraised at \$700,000.00 to \$1.4M lost by losing all counterclaims due to TLC Holdings, LLC's attorneys extrinsic Fraud Upon the Court and fraud upon the Plaintiff.
- e) All hearings, deposition and trials could have been dismissed had TLC Holdings, LLC's attorneys not perpetrated the extrinsic fraud upon the courts and fraud against the Plaintiff simply by disclosing the facts that the property could not be developed, and that big water resort had no legal method to permit the use of land due to the lack of contractual agreement between TLC Holdings, LLC and Big Water Resort, LLC.

f) Plaintiff could have recovered his moneys spent to operate the Big Water Resort and all payments to TLC Holdings, LLC amounting more than \$800,000.00 thousand dollars.

g) Plaintiff loss of over five years of work without any profit other than loses and lack of ability to go seek other jobs due to TLC's attorneys extrinsic fraud upon the courts and fraud upon the plaintiff totaling more than \$300,000.00 dollars.

h) A worth to be determined by a jury regarding Plaintiff's inability to mediate claims against TLC Holdings, LLC and loss due to TLC's Holdings, LLC's attorneys' intentional extrinsic fraud that could and would have been avoided had Penn America defended Plaintiff by requiring TLC's attorneys to disclose all of which they were concealing intentional.

i) Plaintiff, being fined by way of sanctions by the federal judge of \$14,900.00, causing much mental suffering for fear of going to jail. A jury would have to decide the value of a situation like this caused by all Defendants.

58. Defendants Penn-America and Newton caused and contributed to all the damages set forth in paragraph 50 "a" through "i" above and those damages and loses are herein restated as if fully set forth herein, and are incorporated herein.

59. Plaintiff alleges additional damage claims will be revealed through discovery and claims the right to claim recovery of all those damages once all of them are revealed.

60. Therefore, Plaintiff asks for not less than \$4.5M in damages.

Therefore, the Plaintiff PRAYS as follows:

1. Send this case to jury trial.
2. Allow this case to be speedy.
3. Allow for damages and punitive damages due to Defendant's intent.

4. Hold Penn America, Tim Newton, Esq. and associated attorneys at Grantland, responsible for all damages, losses, financial losses, and mental and physical suffering by Defendant.
5. Allow any and all disputed issues to be judged by a jury.
6. Give special consideration to Plaintiff as Pro Se.
7. Allow for two John Does.

Respectfully submitted on this 28th day of December, 2018.

A handwritten signature in black ink, appearing to read 'MB Hutson', with a stylized, cursive flourish at the end.

MB Hutson, PRO SE
P.O. Box 2755
Orangeburg, South Carolina 29116-2755
(803) 308-2714

1.1-1.3	Retail Membership Agreements (3 samples), 2008
2.0	Lovell Deposition re: losses; <i>February 16, 2011</i>
3.0	Amended Answer to complaint & Counter-Claims, Laura Paton, Esq., <i>August 8, 2016</i>
4.1-4.3	Tim J. Newton, Esq., <i>Letter via e-mail</i> , <i>August 13, 2018</i>
5.0	Lease Purchase Agreement with property description 2010
6.0	Membership Interest Purchase Agreement, 2010
7.0	Tim J. Newton, Esq., <i>Letter of</i> <i>November 8, 2018</i>
8.0	E-mail to Hutson, Timothy J. Newton, Esq. (#9807) <i>November 19, 2018</i>
9.0	Settlement Agreement, with map, 9 pp., <i>April 13, 2012</i>
10.0	Consent Order, 8 pp., <i>April 13, 2012</i>
11.0	Complaint (Declaratory Judgment), 19 pp. by J. R. Murphy, Esq. (#3119) <i>June 14, 2016</i>
12.0	Memorandum... Summary Judgment, by T.J. Newton, Esq. (#9807) November 8, 2018
13.0	Defamation Suit December 7, 2015

CIVIL ACTION COVERSHEET

M. B. HUTSON, PRO SE

Plaintiff(s)

2018 - CP - 400 - 6344

vs.

Penn America Ins. Co., Global Indemnity Group, Inc.,

Timothy J. Newton, Esq., J. R. Murphy, Esq.,

John Doe #1, John Doe #2.

Defendant(s)

(Please Print)

Submitted By: M. B. Hutson, PRO SE

Address: Post Office Box 2755
Orangeburg, SC 29116-2755

SC Bar #: NONE: PRO SE

Telephone #: (803) 308 - 2714

Fax #: NONE

Other: NONE

E-mail: hutson4444@gmail.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☒ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☒ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
- Intentional Damages**
- | | | | |
|--|---|--|--|
| Inmate Petitions
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799) | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
|--|---|--|--|
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Other (699)

Submitting Party Signature: 

Date: December 28, 2018

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

EXHIBIT H

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

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

PROCEDURAL BACKGROUND

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

Judgment, on June 5, 2019. Newton subsequently filed a Memorandum in Support of his motion, with accompanying Exhibits A – AA, on May 30, 2019; a Reply Memorandum, with accompanying Exhibits BB – CC, on June 13, 2019; a Response to Plaintiff’s Supplemental Memorandum and an Affidavit from Newton on June 24, 2019; and an Amended Response to Plaintiff’s Supplemental Memorandum and Exhibits 1 – 3 to Newton’s Affidavit on June 25, 2019.

PAIC filed its timely Answer on February 14, 2019. PAIC filed its Motion for Summary Judgment on June 14, 2019, and filed its Memorandum in Support of its motion, with accompanying Exhibits A – B, on June 25, 2019.

In response to the dispositive motions, Hutson filed a Memorandum to Defendant’s Response on May 7, 2019,¹ and a Supplemental Memorandum and Affidavit of Huston, with attachments, on June 19, 2019.

A hearing was held on June 26, 2019, at which time the Court heard arguments on the motions from the parties. This Order addresses only the Motion for Summary Judgment brought by PAIC.

STANDARD OF REVIEW

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the court must view both the evidence and all reasonable inferences able to be drawn from the evidence in the light most favorable to the non-moving party. Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000). Nonetheless, a court “cannot ignore facts unfavorable to [the

¹ Plaintiff’s May 7, 2019 filing references accompanying Exhibits 14.0 – 30.0, but these exhibits were not included with the filing submitted to the Richland County Circuit Court.

non-moving] party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts.” Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). Accordingly, the court must search the proof to ascertain whether it discloses a real issue, rather than a formal, perfunctory or shadowy one. Saluda Motor Lines v. Crouch, 300 S.C. 43, 46, 386 S.E. 2d 290, 292 (Ct. App. 1989).

The plain language of Rule 56(c), SCRCPP, mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to the party’s case and on which that party will bear the burden of proof at trial. Bray v. Marathon Corp., 347 S.C. 189, 553 S.E.2d 477 (Ct. App. 2001). With respect to an issue on which the non-moving party has the burden of proof, the moving party may point out to the trial court that there is an absence of evidence to support the non-moving party’s case. Hedgepath v. AT&T, 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001). The non-moving party must then “do more than simply show that there is some metaphysical doubt as to the materials facts[,]” but “must come forward with specific facts showing that there is a genuine issue for trial.” Id. A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment. Shupe v. Settle, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (Ct. App. 1994). “[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted.” Moore v. Barony House Restaurant, LLC, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009).

RELEVANT FACTS

Stated succinctly, Hutson’s Amended Complaint raises claims in contract and tort against his former insurer and their coverage counsel related to the defense under right of reservation rendered to him in two prior lawsuits—a federal class action case in which Hutson was sued under

a third party claim for equitable indemnity and a related state defamation action—as well as a declaratory judgment action regarding PAIC’s coverage obligations in those two lawsuits. PAIC’s named insured was BWR, Inc. d/b/a Big Water Resort, and Hutson was an officer of the company. Construing his Complaint liberally, Hutson asserts, or attempts to assert, causes of action against PAIC for breach of contract, bad faith, fraud, misrepresentation, negligence, tortious interference with attorney-client relationship, and legal malpractice. Hutson seeks \$4.5 million in damages.

Original Land Deal and Hutson’s Ejectment

To provide context to the instant litigation, a brief factual background is necessary.² Hutson entered into a land deal with TLC Holdings, LLC and its members (collectively “TLC”) in late 2010. Under the terms of the Lease Purchase Agreement, TLC agreed to sell the land upon which the Big Water Resort campground was located to Hutson. As part of that same transaction, Hutson entered into a Membership Interest Purchase Agreement, by which he became the sole member in Big Water Resort, LLC, which operated the campground. Big Water Resort, LLC had previously sold retail memberships in the Big Water Resort campground to the campground members. Hutson was represented by attorney Andrew Tucker in these transactions.

In December 2011, TLC filed an ejectment action against Hutson alleging he defaulted on the terms of the Lease Purchase Agreement. Hutson filed counterclaims against TLC in the Ejectment Action. The parties agreed to settle the Ejectment Action, and the Settlement

² A more detailed recitation of the factual background has been set forth in several prior judicial orders. See Report and Recommendation of Mag. J., Big Water Resort, LLC, et al. v. TLC Holdings, LLC, et al., 2016 WL 7435620 at *1-*4 (D.S.C. Apr. 5, 2016), recommendation adopted, 2016 WL 2935891 at *1-*4 (D.S.C. May 20, 2016); Order Granting Pl’s. Mot. for Summ. J. as to Def’s. Countercls., TLC Holdings, LLC, et al. vs. M.B. Hutson a/k/a M.B. Hudson, Civ. Action No. 2015-CP-14-00615, pp. 1-5 (Clarendon Ct. Comm. Pl. filed Mar. 2, 2017).

Agreement was adopted into a Consent Order filed April 13, 2012. Hutson was represented by attorney Paul Weissenstein in the Ejectment Action.³

Hutson subsequently defaulted upon his obligations under the 2012 Settlement Agreement and Consent Order. TLC sought to evict Hutson from the Big Water Resort property. Following a hearing, the Honorable George James entered an order on March 21, 2014, which enforced the terms of the Consent Order and Settlement Agreement, by operation of which the Lease Purchase Agreement was terminated and Hutson was required to vacate the property. Hutson was represented by attorney H. Freeman Belser in the eviction proceedings.

Prior Lawsuits

In the midst of TLC's efforts to evict Hutson from the Big Water Resort property, Hutson allegedly sent the campground members a postcard dated December 18, 2013, asserting that both he and they were victims of a scam perpetrated by TLC.

On April 22, 2014, a group of Big Water Resort campground members filed a class action against TLC in federal court ("the Class Action litigation"). TLC asserted third-party claims for equitable indemnification against Hutson, and Hutson filed counterclaims against TLC.

On December 7, 2015, TLC filed a separate action against Hutson in state court for defamation ("the Defamation Action"). TLC's claims related to certain statements in the postcard

³ On September 4, 2018, Hutson filed a legal malpractice action against Paul Weissenstein. On February 25, 2019, the Honorable Kristi Curtis granted summary judgment in favor of Weissenstein. In addition to being filed after the statute of limitations, Judge Curtis found that Hutson knew about the lifetime memberships and their potential impact on the title of the subject property during the purchase process. To extent an error was made in failing to identify the title defect, Weissenstein could not be held responsible because he did not represent Hutson at that time. Moreover, there was ample evidence that Hutson was aware of the lifetime memberships, such that his counterclaim against TLC for fraud would have necessarily failed. Accordingly, she found no cognizable malpractice claim against Weissenstein for failing to pursue a counter-claim against TLC and advising Hutson to enter into the Settlement Agreement. Hutson v. Weissenstein, Case No. 2018-CP-43-1583 (Sumter Cnty. Comm. Pleas).

and certain statements Hutson made to the attorney who represented the campground members in the Class Action litigation. Hutson again asserted counterclaims against TLC in the Defamation Action.

In 2016, the Class Action litigation and the Defamation Action were tendered to PAIC. PAIC retained Murphy & Grantland as its coverage counsel and Newton filed a declaratory judgment action seeking a judicial ruling as to PAIC's coverage for TLC's claims asserted against Hutson in the Class Action and the Defamation Action. On September 16, 2016, Hutson executed a Settlement Agreement and Release in the declaratory judgment action, in exchange for monetary consideration, whereby he released Penn-America, its agents, and its affiliates, from liability for certain claims.

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

Huston continued to pursue his counterclaims in both actions *pro se*. However, on May 20, 2016, the federal court granted TLC's motion for summary judgment as to Hutson's counterclaims in the Class Action litigation.⁴ On March 2, 2017, the state court similarly granted TLC's motion for summary judgment as to Hutson's counterclaims in the Defamation Action.

⁴ On April 5, 2016, Magistrate Judge Mary Gordon Baker issued her Report and Recommendation in the Class Action litigation, part of which recommended granting TLC's motion for summary judgment on Hutson's counterclaims. Report & Recommendation, Apr. 5, 2016, 2:2014-cv-01583. In his May 20, 2016, Order adopting the findings of the Report and Recommendation, Federal District Judge David C. Norton found that all of the evidence of fraud Hutson submitted related to the original purchase transaction, and that Hutson submitted no evidence of fraud in the inducement as to the Settlement Agreement. Consequently, Judge Norton ruled that Hutson's counterclaims against TLC in the Class Action litigation were barred by res judicata. Order Adopting R&R, May 20, 2016, 2:2014-cv-01583.

In early 2018, Penn-America settled TLC's claims against Hutson in the Class Action. This settlement protected Hutson from personal liability for both TLC's third-party claims against Hutson in the lawsuit and from the sanctions previously awarded against him.⁵ TLC's equitable indemnification claims against Hutson were dismissed on April 11, 2018.

While the settlement of TLC's claims against Hutson in the Class Action were being finalized, the Defamation Action was tried to a jury. The jury returned a verdict against Hutson in the amount of \$3,500,000.00. Following denial of the posttrial motions, the defense attorney retained by Penn-America filed a Notice of Appeal and filed the Initial Brief of Appellant. See TLC Holdings, LLC, et al. v. M.B. Hutson, Appellate Case No. 2018-000936. While the appeal was pending, Penn-America mediated the case with TLC and ultimately paid its policy limit to settle the Defamation Action in late 2018. TLC accepted the settlement in satisfaction of the judgment against Hutson in the Defamation Action. Newton informed Hutson that TLC's claims against him were settled on December 4, 2018. The next day, Hutson filed the instant lawsuit.

The Instant Lawsuit

Generally speaking, Hutson continues to assert that TLC and its attorneys committed "extrinsic fraud" upon the courts in the 2012 settlement, which he alleges carried over into and tainted all of the subsequent litigation. Hutson makes various claims related to what he avers was PAIC's obligation to expose and address the "extrinsic fraud."

⁵ Though the federal court declined to impose the requested sanctions in its order granting summary of judgment in favor of TLC on the counterclaims brought by Huston, a subsequent motion for sanctions led an award of \$14,908.50 against Huston. Judge Norton found: "Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass or burden third-party plaintiffs, and there is no indication that he intends to cease." Judge Norton further found that "Hutson has established a pattern of making misrepresentations to the court, of making unsupported allegations of unethical and criminal conduct by the third-party plaintiffs, and of using the judicial process as a mechanism of harassment. His meritless filings have wasted untold hours of the court's time." Order Granting Sanctions, Oct. 6, 2017, 2:14-cv-01583.

At the June 24, 2019 hearing, Hutson made no objection to the Court hearing PAIC's timely filed motion for summary judgment. PAIC craved reference to the detailed memorandum that it filed with this Court but orally articulated the eight separate bases for granting its motion. Attached to its memorandum, PAIC provided a copy of the commercial general liability policy pursuant to which PAIC defended Hutson and an affidavit of Thomas L. Harper, Jr. with accompanying exhibits, including excerpts of Hutson's prior Rule 2004 Examination. PAIC requests an order granting summary judgment in its favor because: (a) Plaintiff executed a valid Release in favor of Penn-America and its affiliates, which precludes the instant claims; and (b) there exists no genuine issues of material fact and PAIC is entitled to judgment as a matter of law as to all causes of action articulated in Plaintiff's Amended Complaint.

Hutson also craved reference to the voluminous filings he has made with the Court. Hutson began his presentation by stating that he is a victim and citing the "scintilla of evidence" standard. Hutson admitted that the terms of the agreements related to Big Water Resort and the Lease Purchase Agreement sent up "red flags" and seemed "suspicious" to him, but contended that his attorney(s) at the time reviewed the title and advised him that things looked "okay." Hutson contended that attorneys from Turner Padgett prepared documents that they knew were based upon "extrinsic fraud." Hutson contends that this "extrinsic fraud" supersedes the settlement agreement he entered in 2012. When asked to narrow his focus to the allegations in the instant action, Huston claimed that J.R. Murphy "breached his duty to represent me." While Hutson agreed that Laura Paton in Charleston was the attorney actually retained to represent him, he stated that Tim Newton was his "contact person" at PAIC. Huston then repeated the allegations contained his pleadings regarding Newton's correspondence with Hutson, which Hutson perceived to validate his theory of "extrinsic fraud" and to later be inconsistent. Hutson then said: "Newton knew he didn't

represent me.” He averred that the “common interest” between Hutson and PAIC in Newton’s letter referred to the upcoming mediation to reduce the \$3.5 million judgment. Hutson contends that “by settling with knowledge of extrinsic fraud, they (presumably referring to the defendants) are co-conspirators in the fraud.” Hutson did not articulate any fraud or other basis to set aside the Release that he executed on September 16, 2016.

The court is cognizant that, ordinarily, a court will not consider statements of fact presented only in an attorney’s argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment. West v. Gladney, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct. App. 2000). However, Hutson filed an affidavit with the Court on June 19, 2019. Though directly contradicted by the written correspondence from Newton, Hutson states that Newton verbally acknowledged to him in August 2018 that he was aware of the extrinsic fraud by TLC Holdings and their attorneys. Hutson contends that Newton initially refused to aid him in his efforts to expose the “extrinsic fraud” but later decided to assist Hutson, reviewing his drafted pleadings and providing him with a 16-point letter of legal advice. He avers that Newton had a duty to bring the “extrinsic fraud” to the attention of the state court, which would have prevented the \$3.5 million judgment. Notably, Hutson’s affidavit admits that Frank Gordon and Laura Paton were the attorneys who actually represented Hutson in the Class Action litigation and the Defamation Action. He further admits that Paton’s filing with the court “listed approximately ten direct concealments and lack of disclosures” that had been committed, apparently referring to the Answer to Amended Complaint and Pro Se Counter-Claims Back filed in the Defamation Action on December 16, 2016.

LAW/ANALYSIS

I. Summary judgment is proper because Plaintiff's claims are barred pursuant to the Settlement and Release Agreement he executed on September 16, 2016, releasing any present or future claims against Penn-America.

On September 16, 2016, Hutson executed a Settlement Agreement and Release in the declaratory judgment action, whereby he released Penn-America, its agents, and its affiliates, from liability for exactly the kinds of claims he raises in the instant action. The Release explicitly provides:

Hutson, for and in consideration of the sum of Nine Thousand Five Hundred and 00/100 (\$9,500.00) Dollars, receipt of which is hereby acknowledged, does hereby release and forever discharge Penn-America, its agents, servants, employees, affiliates, successors and assigns, and any and all other persons, firms or corporations from any and all actions, causes of action, demands and/or claims of any nature whatsoever which the undersigned may have against Penn-America relating to:

- a. Penn-America's coverage for the Underlying Lawsuits; and
- b. Penn-America's coverage for the Property Loss claim;

together with any claims relating to Penn-America's investigation and/or claim handling, including any causes of action for breach of contract, bad faith, improper claims practices, or any other cause of action which could be asserted, arising from the above-reference matters (hereinafter "Released Claims"). The consideration expressed herein constitutes payment in full to Hutson for all policy proceeds, damages, losses and/or injuries to persons or property or both, whether known or unknown, developed or undeveloped, which have resulted or may result from the incident aforesaid, whether the claims could have been asserted against Penn-America by way of counterclaim in the Declaratory Judgment Action or by separate lawsuit.

"Litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law." Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App.2007). General contract principles apply to the construction of a settlement agreement because a settlement agreement is a contract. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 672 S.E.2d 799 (Ct.App. 2009). When an agreement is plain and

unambiguous, the court does not have the authority to modify its terms. Patricia Grand Hotel, LLC v. MacGuire Enters., 372 S.C. 634, 643 S.E.2d 692 (Ct.App.2007). The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); Jordan v. Security Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993).

Huston has not articulated any policy or law prohibiting the September 16, 2016, agreement, or denied that he received the consideration specified therein. The plain language of the Release specified that the Released included "any claims relating to Penn-America's investigation and/or claim handling, including any causes of action for breach of contract, bad faith, improper claims practices, or any other cause of action which could be asserted, arising from the above-reference matters." Those matters included both of the underlying lawsuits, i.e. the Class Action litigation and the Defamation Action. Global Indemnity Group, Inc. is the parent company of Penn-America Insurance Company, and is thus encompassed within the Release's specification that it applies to Penn-America's "affiliates" and "any and all other persons, firms or corporations." Thus, all of the claims made in Hutson's Amended Complaint are barred under the Release. Accordingly, PAIC's motion for summary judgment as to all claims against them must be granted.

II. Summary judgment is proper because Plaintiff's claim for breach of contract must fail because there is no evidence that PAIC failed to comply with its contractual duty to defend Plaintiff in both underlying actions.

Even if it were not barred by the Release referenced *supra*, Hutson's claim for breach of contract fails as a matter of law. To establish a claim for breach of contract, a plaintiff must establish (1) the existence of a contract, (2) its breach, and (3) the damages caused by such breach. Branche Builders, Inc. v. Coggins, 686 S.E.2d 200, 202 (S.C. Ct. App. 2009). Section 1.a

of the applicable commercial general liability policy between Penn-America and BWR, Inc. provides:

We [the insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result.

Hutson cannot point to any evidence that this provision was either breached or that he has suffered any damages from an alleged breach.

PAIC did defend him, under a reservation of rights, with respect to the claims against him both in the Class Action litigation and the Defamation Action. See Twin City Fire Ins. Co. v. Ben Arnold-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, 193 S.E.2d 527, 530 (1972) (holding that insurance company, operating under a reservation of rights, “had the right and the duty to control the defense until such time as it was determined that it had no liability insurance coverage”). Both the federal third party claim and defamation case were ultimately settled without any personal liability to Hutson.

Hutson’s contention that PAIC owed a duty to prosecute his affirmative counter-claims, which he pursued *pro se* and lost, is without merit. While the South Carolina courts have not specifically ruled on whether an insurer’s duty to defend includes an obligation to prosecute an insured’s affirmative counter-claims, other jurisdictions have found no such obligation arises under the ordinary insurance contract. See, e.g., Mount Vernon Fire Ins. Co. v. Visionaid, Inc., 76 N.E.3d 204, 209-10 (Mass. 2017) (holding insurer has no duty to prosecute an affirmative claim

against the plaintiff in the underlying suit unless explicitly provided for in the policy); Morgan, Lewis & Bockius LLP v. Hanover Ins. Co., 929 F.Supp. 764, 771 (D.N.J. 1996) (same); Shoshone First Bank v. Pacific Employers Ins. Co., 2 P.3d 510, 516 (Wyo. 2000) (same); Aldous v. Darwin Nat'l Assur. Co., 851 F.3d 473, 483 (5th Cir. 2017) (same). Even those jurisdictions which more broadly interpret the insured's duty do so only under narrow circumstances. See, e.g., Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co., 766 F.Supp. 324, 333-334 (E.D. Pa. 1991) (duty to defend requires insurer to bring any counterclaim that is factually "inextricably intertwined" with underlying claim).

Our Supreme Court has held that "[a]n insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law." Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 484, 487 (2008). "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." Beaufort Cty. Sch. Dist. v. United Nat'l Ins. Co., 392 S.C. 506, 709 S.E.2d 85, 90 (S.C.Ct.App.2011) (citing Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 579 S.E.2d 132, 134 (2003)). "If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect." Id. (citing Schulmeyer, 579 S.E.2d at 134). "However, an insurance contract which is 'in any respect ambiguous or capable of two meanings must be construed in favor of the insured.'" Id. (quoting Reynolds v. Wabash Life Ins. Co., 251 S.C. 165, 161 S.E.2d 168, 169 (1968)).

The plain meaning of "defend" is "to work to defeat a claim that could create liability against the individual being defended." Mount Vernon, 76 N.E.3d at 208-09. To impose a broader duty where none was explicitly included "is far beyond interpreting the language of the contract."

Id. at 210. Here, there is no provision in the policy requiring PAIC to pursue counter-claims, much less ancillary or collateral litigation, on behalf of its insured. Hutson has not provided any authority for his contention that PAIC or his retained counsel had a duty to re-open the 2011 case and attempt to set aside the 2012 Consent Order and Settlement Agreement entered therein. PAIC adhered to its duty to defend, which did not include prosecuting Hutson's counter-claims and which did not include pursuing a separate course of litigation to set aside a 2012 Settlement Agreement and Consent Order. Moreover, Hutson cannot show that he was damaged by any alleged breach where the Class Action litigation and Defamation litigation were both settled without any personal liability as to Hutson. Accordingly, PAIC's motion for summary judgment as to the breach of contract claim against them must be granted.

III. Summary judgment is proper because Plaintiff's claim for bad faith must fail because there is no evidence that PAIC failed to act reasonably.

Even if it were not barred by the Release referenced *supra*, Hutson's claim for bad faith fails as a matter of law. The South Carolina courts recognize an insured's ability to sue its insurer both in contract and for bad faith in tort. Tadlock Painting Co. v. Maryland Cas. Co., 322 S.C. 498, 502-03, 473 S.E.2d 52, 54 (1996). There is an implied "duty of good faith and fair dealing in the performance of *all* obligations undertaken by the insurer for the insured." Id. at 501, 473 S.E.2d at 53-54 (emphasis in original). Our Supreme Court specifically recognizes the existence of a cause of action for breach of the implied covenant of good faith and fair dealing by an insured against his or her insurer for consequential damages allegedly suffered because of the insurer's bad faith handling of third party claims. Id. at 504, 473 S.E.2d at 55. Breach of an express contractual provision is not a prerequisite to bringing a bad faith action. Id.

"[T]he covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed." Mixson, Inc. v. American

Loyalty Ins. Co., 562 S.E.2d at 662. Under South Carolina law, an insurer acts in bad faith when there is no reasonable basis to support the insurer's decision. Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996). "If there is a reasonable ground for contesting a claim, there is no bad faith." Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992).

"South Carolina courts have found that where a policy provides an insurer with the right and duty to defend, the insurer has 'the right and the duty to control the defense until such time as it is determined that it has no liability insurance coverage.'" Founders Ins. Co. v. Richard Ruth's Bar & Grill LLC, 2016 WL 3219538, at *9 (D.S.C. June 8, 2016) (quoting Allstate Ins. Co. v. Wilson, 193 S.E.2d 527, 530 (S.C. 1972)). "If courts allowed insureds to create a genuine issue of material fact on a bad faith processing claim by engaging in a 'nit-picky' analysis of each action the insurance adjustor took or did not take in handling claims, every bad faith action would survive a motion for summary judgment." Id. There must still be an evaluation of the reasonableness of the insurer's conduct...." Id.

Here, PAIC did not refuse to defend Hutson; rather, PAIC provided a defense under a reservation of rights and ultimately settled both of the suits without any personal liability to Hutson. Hutson complains PAIC acted unreasonably in failing to "expose extrinsic fraud on the courts" and in failing to represent him in his counter-claims against TLC and its members. Hutson raised this alleged fraud to several courts, including as part of his *pro se* counterclaims in both the federal Class Action litigation and the Defamation Action. Each court has found that Hutson's claims of fraud relate to the underlying land transaction and were validly waived in the 2012 Settlement Agreement and Consent Order between Huston and TLC and its members. See Judge James' Order, Mar. 21, 2014, Civ. Action No. 2011-CP-14-00602; Judge Norton's Order, May 20,

2016, Civ. Action No. 2:2014-cv-01583; Judge Baker's Report & Recommendation, April 5, 2016, Civ. Action No. 2:2014-cv-01583; Judge Cothran's Order, Mar. 2, 2017, Civ. Action No. 2015-CP-14-00615. Thus, Hutson's bald and speculative averment that the outcome of his counter-claims would have been different had PAIC provided legal representation to prosecute them is insufficient to survive this motion for summary judgment.

Hutson points to no legal authority for the proposition that PAIC would have any duty to go even further to pursue collateral litigation to set aside the 2012 Settlement Agreement. Further, any such action would have likely been fruitless. See Robinson v. Estate of Harris, 388 S.C. 630, 641, 698 S.E.2d 222, 228 (2010) ("If a judgment procured by extrinsic fraud could have been avoided if the challenging party exercised due diligence, a court generally will not grant relief from the judgment."); id. ("The doctrine of laches is applicable in determining whether an action is time-barred even if extrinsic fraud is established.").

To the extent Hutson complains about the settlement reached, there was no contractual requirement for the insured's consent to settle. Rather, the policy provides: "We [the insurer] may, at our discretion, investigate any 'occurrence' and settle any claim or 'suit' that may result." PAIC had a duty to settle the claims if settlement was "the reasonable thing to do." Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001). Hutson has not pointed to any evidence that PAIC did not act reasonably. Additionally, where – as here – an insurance contract provides that the insurer may, as it deems appropriate, settle any claim or action brought against its insured, a cause of action alleging breach of the insurer's good faith will not lie where the insurer has settled such a claim within the monetary limits of the policy. See, e.g., Marginian v. Allstate Ins. Co., 481 N.E.2d 600 (Ohio 1985); Casualty Ins. Co. v. Town & Country Pre-School Nursery, Inc., 498 N.E.2d 1177 (Ill. App. Ct. 1986); Feliberty v.

Damon, 129 A.D.2d 207 ((N.Y. App. Div. 1987); Shuster v. South Broward District Physicians' Professional Liability Insurance Trust, 570 So.2d 1362, 1366 (Fla. 4th DCA 1990).

To the extent that Hutson alleges that the declaratory judgment action regarding coverage was brought in bad faith, Hutson has failed to articulate how or why that filing was unreasonable. PAIC, through its counsel, requested declarations that Hutson was not an insured with respect to the personal misconduct alleged against him in the federal class action or in the state defamation action, that the coverage provided for in the insurance policy did not extend to the types of claims asserted in those actions, and that PAIC had no duty to defend or indemnify Hutson in either action. The arguments in the declaratory judgment action were based upon the plain language of the policy. Moreover, PAIC ultimately resolved the underlying cases by settlement and dismissed the declaratory judgment action and satisfied the judgments.

In sum, there is no evidence that PAIC, either directly or vicariously, acted in bad faith. Accordingly, PAIC's motion for summary judgment as to the bad faith claim against them must be granted.

IV. Summary judgment is proper because Plaintiff's claim for fraud must fail because there is no evidence (a) that PAIC or its agents made any material or false representation to Hutson, (b) that Hutson relied on such representation, or (c) that Hutson was consequently and proximately injured.

Even if it were not barred by the Release referenced *supra*, Hutson's claim for fraud fails as a matter of law. In order to prevail on a claim of fraud, the plaintiff must prove: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d

267, 269 (Ct.App.1993). “A complaint is fatally defective if it fails to allege all nine elements of fraud.” Id.

Hutson’s claims of fraud center on Newton’s e-mail to him regarding the possible argument of the existence of extrinsic fraud on the court. Hutson contends that Newton wanted Hutson to file an action to set aside the 2012 Settlement Agreement and Consent Order, as it would have benefited and provided leverage in PAIC’s defense of the other cases. Hutson never claims that anything written in the letter to him by Newton was false; rather, he later argues that the contents of the e-mail were all true in paragraphs 37-49 of his Amended Complaint. Further, in paragraph 35 of his Amended Complaint, Hutson admits that he never filed any such action to set aside the Agreement and Order. Thus, regardless of its truth or falsity, Hutson failed to allege any reliance upon the representation. Lastly, and perhaps most importantly, Hutson has not been injured. The claims against Hutson, and the federal sanctions awarded against him, were settled without any personal liability to Hutson. Accordingly, PAIC’s motion for summary judgment as to the fraud claim against them must be granted.

V. Summary judgment is proper because Plaintiff’s claim for misrepresentation must fail because there is no evidence (a) that PAIC or its agents made any false representation to Hutson, (b) that PAIC or its agents failed to exercise due care; (c) that Hutson relied on such representation, or (d) that Hutson proximately suffered a pecuniary loss.

Even if it were not barred by the Release referenced *supra*, Hutson’s claim for misrepresentation fails as a matter of law. In order to prevail on a claim for negligent misrepresentation, the plaintiff must prove (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his

reliance on the representation. Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680–81 (Ct. App. 2001). Thus, a key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement. Id.

Like his claims of fraud, Hutson’s claims of misrepresentation center on Newton’s e-mail to him regarding the possible argument of the existence of extrinsic fraud on the court. Hutson contends that Newton wanted Hutson to file an action to set aside the 2012 Settlement Agreement and Consent Order, as it would have benefited and provided leverage in PAIC’s defense of the other cases. Hutson never claims that anything written in the letter to him by Newton was false; rather, he later argues that the contents of the e-mail were all true in paragraphs 37-49 of his Amended Complaint. Further, in paragraph 35 of his Amended Complaint, Hutson admits that he never filed any such action to set aside the Agreement and Order. Thus, regardless of its truth or falsity, Hutson failed to allege any reliance upon the representation. Lastly, and perhaps most importantly, Hutson has not suffered any pecuniary loss. The claims against Hutson, and the federal sanctions awarded against him, were settled without any personal liability to Hutson. Accordingly, PAIC’s motion for summary judgment as to the misrepresentation claim against them must be granted.

VI. Summary judgment is proper because Plaintiff’s claim for negligence must fail because there is no evidence that PAIC breached any duty to its insured or caused any harm to its insured.

Even if it were not barred by the Release referenced *supra*, Hutson’s claim for negligence fails as a matter of law. To establish a cause of action for negligence a plaintiff must show the concurrence of three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by negligent act or omission; and (3) damage proximately resulting from the breach of duty. Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 474, 377 S.E.2d 343,

348 (Ct. App. 1988). The absence of any one of these elements renders the cause of action insufficient. *Id.* An insurer can be found negligent in its handling of a claim or suit even in absence of fraud or bad faith. See Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346, 348 (1933).

As discussed more fully *supra*, Hutson believes that PAIC should have gone above and beyond its contractual duty to defend by either providing representation for his counter-claims against TLC or by instituting a separate action to set aside the 2012 Consent Order and Settlement Agreement. PAIC's failure to exceed its duty to Hutson is not evidence of its failure to meet its duty to Hutson. Hutson cannot establish that there was any duty for PAIC to act in the manner he suggests was required, much less that there was a breach of the actual duty owed to him. Moreover, Huston's claims of damages are baseless and speculative. Accordingly, PAIC's motion for summary judgment as to the negligence claim against them must be granted.

VII. Summary judgment is proper because Plaintiff's claim for tortious interference with the attorney-client relationship must fail because there is no evidence that PAIC acted wrongfully, that there was any breach of the attorney-client relationship, or that PAIC was unjustified in its control and settlement of the underlying litigation.

Even if it were not barred by the Release referenced *supra*, Hutson's claim for tortious interference fails as a matter of law. South Carolina recognizes a cause of action for wrongful interference with an attorney-client relationship. DeBerry v. McCain, 275 S.C. 569, 574, 274 S.E.2d 293, 296 (1981) (citing Keels v. Powell, 207 S.C. 97, 34 S.E.2d 482 (1945)). [I]nterference by a third party with contractual relationships, without justification, is a violation of a primary legal right. Keels, 207 S.C. at 100, 34 S.E.2d at 484. It is "an actionable injury to cause another to violate his contract with a third person, without a legal justification, or, as otherwise stated, where the breach is induced or caused maliciously, 'malice' having the meaning in this connection

of the intentional doing of a wrongful act without justification or excuse.” Id. at 101, 34 S.E.2d at 484. “[T]he interference must have been willful and unjustified.” Id. The Keels Court cited 7 C.J.S., Attorney and Client, § 53, p. 836, which provides: “Third persons unlawfully interfering with the relationship of an attorney and his client... are liable to the attorney for the damages caused thereby.” Id. The DeBerry Court clarified the elements of interference with contractual relations, which include: “(1) the contract; (2) the wrongdoer’s knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom.” 275 S.C. at 574, 274 S.E.2d at 296.

South Carolina has not specifically recognized the applicability of a tortious interference cause action in the context of an insurer’s purported interference with an insured’s relationship with the retained defense counsel. However, South Carolina recognizes that “[w]hen an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured—his client.” Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 426 S.C. 154, 157, 826 S.E.2d 270, 271 (2019). “Pursuant to that relationship, the attorney owes the client—not the insurer—a fiduciary duty.” Id. “However, an insurance company that hires an attorney to represent its insured is in a unique position in relation to the resulting attorney-client relationship.” Id. at 157, 826 S.E.2d at 272.

An insurer’s contractual “right to control the litigation carries with it certain duties, including the duty not to prejudice the insured’s rights by failing to request special interrogatories or a special verdict in order to clarify coverage of damages.” Harleysville Grp. Ins. v. Heritage Communities, Inc., 420 S.C. 321, 341, 803 S.E.2d 288, 299 (2017) (internal quotations omitted); Id. (“[B]y virtue of its duty to defend, an insurer gains the advantage of exclusive control over the litigation....”). Moreover, “a liability insurer owes its insured a duty to settle a personal injury

claim covered by the policy, if settlement is the reasonable thing to do.” Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass’n, 347 S.C. 642, 649, 557 S.E.2d 670, 674 (2001). The duty of good faith requires the insurer to act reasonably in protecting the insured from liability in excess of the policy limits. Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346, 348 (1933). Thus, PAIC’s control over the litigation was justified by the terms of the insurance policy providing its duty to defend.

PAIC’s actions in determining the scope of the representation, i.e. that it would defend the cases against Hutson under reservation but would not prosecute his counterclaims, and decision to settle the claims, do not constitute tortious interference with Hutson’s attorney-client relationship with retained counsel Frank Gordon. As discussed *supra*, Huston pursued his counterclaims and lost. Further, the settlement agreements were not entered until after the disposition of the counterclaims in the federal case and until after the disposition of the counterclaims and loss at trial in the state defamation case. There is no evidence that PAIC acted without justification or with malice. To rule otherwise, and allow an insurer to pursue such a claim against its insured anytime that it gives instructions to retained counsel in contravention to the instructions of the insured, would strip the insurer of its right to exclusively control the litigation. Moreover, Hutson cannot prove any damages from any alleged interference, as the claims against Huston were resolved without any personal liability to him. Hutson’s allegations otherwise are baseless and speculative. Accordingly, PAIC’s motion for summary judgment as to the negligence claim against them must be granted.

VIII. Summary judgment is proper because Plaintiff's claim for legal malpractice must fail because (a) Plaintiff failed to accompany his pleadings with the statutorily required affidavit regarding malpractice; (b) PAIC is not vicariously liable for any malpractice of counsel it retains to defend its insured or of coverage counsel; and (c) even if vicarious liability applied to coverage counsel, Plaintiff lacked the necessary attorney-client relationship with coverage counsel to sustain a claim of legal malpractice.

Even if it were not barred by the Release referenced *supra*, Hutson's claim for legal malpractice fails as a matter of law. In order to prevail in a cause of action for legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "In South Carolina, attorneys are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000).

PAIC is not vicariously liable for any malpractice of counsel it retains to defend its insured. Mike Etheredge, Laura Paton or Frank Gordon. Vicarious liability does not fall on the carrier by virtue of their having retained them as attorneys to defend their insured. See Feliberty v. Damon, 129 A.D.2d 207, 210-11 (N.Y. App. Div. 1987) (holding "[i]f the acts are performed solely by the attorney (in his capacity as an attorney) and are directly related to the representation of the insured in litigation, the attorney's negligence will not be imputed to the insurance carrier."). Even if vicarious liability did apply, Hutson has not pointed to any evidence that any of the attorneys who actually represented him breached any duty to him or any damage to Hutson therefrom. Hutson's bald allegations that these attorneys should have prosecuted his counterclaims, and that had they done so, he would have prevailed, is without merit.

To the extent that Hutson asserts a legal malpractice action against Tim Newton or other attorneys at Murphy & Grantland, PAIC is not vicariously liable for the actions of its coverage

counsel. Generally, an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.” Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Sols., 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010). Further, an attorney owes no duty to a non-client unless he “breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client.” Id. (quoting Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). In his professional capacity the attorney is not liable, except to his client and those in privity with his client, for injury allegedly arising out of the performance of his professional activities. Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 529, 339 S.E.2d 887, 889 (Ct. App. 1986).

Despite Hutson’s efforts to muddy the waters, neither Tim Newton nor any other attorney at Murphy & Grantland ever provided direct representation to Hutson. Hutson admitted as much at the hearing on this motion and in his filed affidavit. Tim Newton and the attorneys at Murphy & Grantland represented PAIC. Newton reminded Hutson of that fact in his August 13, 2018 e-mail to Hutson, writing: “I need to remind you that I don’t represent you and I can’t represent you because I represent Penn-America.” Newton again stated at the end of the same e-mail: “I highly recommend that you get a lawyer involved, even if it’s a pro bono lawyer.” Thus, no attorney-client relationship existed to support a legal malpractice claim against Newton or Murphy. With no attorney-client relationship between Hutson and any Murphy & Grantland attorney, Hutson cannot sustain a legal malpractice action against them, much less against their client, PAIC. See Fabian v. Lindsay, 410 S.C. 475, 483, 765 S.E.2d 132, 136 (2014) (“Privity for legal malpractice has traditionally been established by the existence of an attorney-client relationship.”); Williams

v. Burns, 463 F. Supp. 1278, 1285 (D. Colo. 1979) (“Clients are not insurers of actions taken by attorneys, despite the fact that such actions are taken on the clients behalf.”).

Accordingly, PAIC’s motion for summary judgment as to the legal malpractice claim(s) against them must be granted.

CONCLUSION

Plaintiff’s claims against PAIC are barred by the Release that Plaintiff executed on September 16, 2016. Notwithstanding the bar to Plaintiff’s claims, Plaintiff’s claims that PAIC, either directly or vicariously, breached its contract, acted in bad faith or negligently, engaged in fraud or misrepresentation, tortuously interfered with his attorney-client relationship, or committed legal malpractice, each must fail as a matter of law. Accordingly, the Court concludes that PAIC is entitled to a grant of summary judgment, which thereby dismisses Plaintiff’s claims against them.

IT IS ORDERED Defendants Penn America Insurance Company and Global Indemnity Group, Inc.’s Motion for Summary Judgment is hereby granted.

AND IT IS SO ORDERED.

THE HONORABLE MICHAEL G. NETTLES
Presiding Judge of the Fifth Judicial Circuit

_____, South Carolina
July _____, 2019



Richland Common Pleas

Case Caption: MB Hutson , plaintiff, et al vs Penn America Insurance Company ,
defendant, et al
Case Number: 2018CP4006344
Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140

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EXHIBIT I

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

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

MB Hutson/MB Hudson,

Plaintiff,

vs.

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

Defendants.

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

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

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

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

PLAINTIFF'S ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

NEWTON’S CONTENTIONS

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

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

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

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

PRIOR RELATED LITIGATION

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

The Ejectment Action

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

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

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

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

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

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

Hutson's postcard

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

The Class Action

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

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

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

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

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

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

The Defamation Action

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

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

The Sanctions Order

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

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

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

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

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

The trial and appeal in the Defamation Action

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

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

The Coverage Action

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

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

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

The Release

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

STANDARD

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

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

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

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

CONCLUSIONS OF LAW

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

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

I. Standing

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

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

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

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

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

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

II. Duty created by gratuitous undertaking

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

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

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

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

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

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

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

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

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

III. Professional malpractice liability

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

A. Duty

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

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

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

B. Breach of duty

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

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

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

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

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

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

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

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

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

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

C. Proximate cause

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

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

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

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

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

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

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

In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery.

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

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

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

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

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

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

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

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

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

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

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

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

IV. Release

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

A release is a contract by which a plaintiff relinquishes rights or claims against persons against whom those rights could have been enforced. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 492, 649 S.E.2d 494, 198 (Ct. App. 2007). "A release is a contract and contract principles of law should be used to determine what the parties intended." Id. at 497, 649 S.E.2d at 501. "The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully." Id. at 500, 649 S.E.2d at 503.

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

CONCLUSION

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

It is hereby

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

IT IS SO ORDERED.

Columbia, South Carolina

Date: _____

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



Richland Common Pleas

Case Caption: MB Hutson , plaintiff, et al vs Penn America Insurance Company ,
defendant, et al
Case Number: 2018CP4006344
Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140

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EXHIBIT J

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

Plaintiff,

vs.

PAUL WEISSENSTEIN (Attorney)/
PAUL WEISSENSTEIN,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

CASE NO.: 2018-CP-43-1583

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

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

BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

LEGAL STANDARD

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

ANALYSIS

I

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

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

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

II

Moving next to an analysis of Hutson's allegations under the framework of a legal malpractice claim, under South Carolina law, a plaintiff must establish four elements in a legal malpractice action: "(1) The existence of an attorney-client relationship; (2) A breach of duty by the attorney; (3) Damage to the client; and (4) Proximate cause of the client's damages by the breach." *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 402, 697 S.E.2d 551, 555 (2010) (quoting *Rydde v. Morris*, 381 S.C. 643, 647, 675 S.E.2d 431, 433 (2009)). Failure to establish any one of the four elements of legal malpractice renders the legal malpractice claim insufficient as a matter of law. *See, e.g., Henkel v. Winn*, 346 S.C. 14, 18, 550 S.E.2d 577, 579 (Ct. App. 2001).

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

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

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

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

III

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

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

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

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

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

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

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

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

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

To establish fraud, the following nine elements must be shown: 1) a representation or nondisclosure of a material fact, 2) its falsity, 3) its materiality, 4) either knowledge of its falsity or a reckless disregard of its truth or falsity, 5) intent that the representation be acted upon, 6) the hearer's ignorance of its falsity, 7) the hearer's reliance on its truth, 8) the hearer's right to rely thereon, and 9) the hearer's consequent and proximate injury. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 338 S.C. 572, 586, 527 S.E.2d 371, 378 (Ct.App.2000).

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

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

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

IV

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

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

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

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

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

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

V

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

[Judge's Electronic Signature to Follow]



Sumter Common Pleas

Case Caption: M B Hutson VS Paul Weissentein

Case Number: 2018CP4301583

Type: Order/Summary Judgment

So Ordered

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

Electronically signed on 2019-02-23 11:27:58 page 15 of 15

EXHIBIT K

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2018 CP-32-3879

M. B. HUTSON

BURN LAW FIRM, LLC.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: COURT

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____



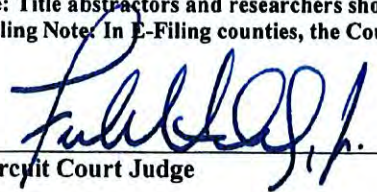
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

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


Circuit Court Judge

2159

Judge Code

April 10, 2019

Date

For Clerk of Court Office Use Only

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

Pro Se

William Hammond Jordan

J. Calhoun Watson

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

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

EXHIBIT L

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

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

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

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

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

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

NOW, THEREFORE,

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

Robert E. Hood, Judge, Fifth Judicial Circuit

April _____, 2019



Richland Common Pleas

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

So Ordered

s/ R.E. Hood #2164

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

ELECTRONICALLY FILED - 2019 Apr 11 3:35 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4006156
ELECTRONICALLY FILED - 2020 Aug 10 3:31 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4003810

EXHIBIT M

From: H Hutson <hutson4444@gmail.com>
Sent: Tuesday, June 16, 2020 7:30 AM
To: Tim J. Newton <tnewton@murphygrantland.com>; J. R. Murphy <jrmurphy@murphygrantland.com>; Christian Stegmaier <cstegmaier@collinsandlacy.com>
Cc: Hmr226621@gmail.com
Subject: Notice

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

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

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

Respectfully,

MB Hutson

--

803-308-2714

EXHIBIT N

From: H Hutson <hutson4444@gmail.com>

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

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

Subject: Emergency Filing

Exhibits Attached to filing will be:

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

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

CONTINUATION:

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

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

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

Exhibits Attached to filing will be:

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

From: H Hutson <hutson4444@gmail.com>
Sent: Monday, June 22, 2020 8:14 AM
To: Christian Stegmaier <cstegmaier@collinsandlacy.com>; Insurance Glenn Paul <gpaul@global-indemnity.com>
Cc: Hutson4444@gmail.com
Subject: Participating in extrinsic fraud

June 22, 2020

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

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

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

Respectfully,

MB Hutson

--

803-308-2714

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant.

v.

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

Respondents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SCRCR Rule 4.1 Truthfulness In Statements to Others

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

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

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

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

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

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

Appellant asks that the Honorable Appeals Court:

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

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

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

Appellant has provided sufficient evidence to fully establish these allegations.

July 1, 2020

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

EXHIBIT O

From: H Hutson <hutson4444@gmail.com>

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

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

Cc: Hutson4444@gmail.com

Subject: You can't win this case

July 6, 2020

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

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

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

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

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

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

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

Respectfully,

MB Hutson

--

803-308-2714

EXHIBIT P

From: H Hutson <hutson4444@gmail.com>

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

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

Subject:

Dear Christian,

Simply wish to give you a heads up.

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

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

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

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

--

803-308-2714

EXHIBIT Q

From: H Hutson <hutson4444@gmail.com>

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

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

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant.

v.

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

Respondents.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. In paragraph 13, Respondent writes:

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

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

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

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

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

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

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

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

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

A. "Knowingly failing to disclose the outstanding debts of BWR, including, but not limited to, Black River Electric".

B. "Advising Mr. Hutson that no financial records were kept as to BWR to conceal the losses: Financial condition of the company".

C. "Failing to record encumbrances required by statute as outlined above".

D. "Advising Mr. Hutson that the Retail Memberships could be divested to allow for development of the lakefront land as discussed".

Therefore, Respondent Newton was fully aware and knew that:

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

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

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

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

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

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

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

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

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

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

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

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

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

The question for the Court is simple:

1. Have any papers filed by Respondents reflected reporting the fraud and extrinsic fraud that TLC's attorneys committed or the extrinsic fraud the Respondents committed? No, they haven't. Aren't they skirting the Federal Ruling already issued that totally discredits TLC's actions in attempting to sell land for immediate development that was already encumbered legally by TLC to the owners of the RMAs?

This farce simply can not be allowed to continue. All of these lawyers know that extrinsic fraud is against the Courts and Honorable Judges. Attorneys not reporting extrinsic fraud, and attorneys attempting to hide facts treats the Honorable Judges as naive and stupid. What a disgrace. They should be disbarred.

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

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

-was the insured

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

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

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

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

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

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

All components are met by these Respondents.

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

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

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

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

July 17, 2020

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant,

v.

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

Respondents.

PROOF OF SERVICE

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

July 17, 2020

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

EXHIBIT R

From: "Mr. H" <hmr226621@gmail.com>
Date: July 18, 2020 at 3:17:44 PM EDT
To: "tnewton@murphygrantland.com" <tnewton@murphygrantland.com>, Christian Stegmaier
<cstegmaier@collinsandlacy.com>, "hmr226621@gmail.com" <hmr226621@gmail.com>
Subject: Response by Appellant of Respondent's July 16, 2020 submittal

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

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

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

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

Therefore, Appellant respectfully request that the Honorable Court:

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

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

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

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

Respectfully submitted on the 20th day of July, 2020

MB Hutson Pro Se

EXHIBIT S

From: H Hutson <hutson4444@gmail.com>

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

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

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

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant.

v.

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

Respondents.

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

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

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

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

Therefore, Appellant respectfully requests that the Honorable Court:

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

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

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

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

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

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

5. "That deceives the Court."

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

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

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

M B Hutson, Pro Se
Post Office Box 2755
Orangeburg, South Carolina 29116-2755
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hutson4444@gmail.com

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

[MB Hutson/ MB Hudson

Appellant.

v.

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

Respondents,

PROOF OF SERVICE

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

July 20, 2020

M B Hutson, Pro Se
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Hutson4444@gmail.com

EXHIBIT T

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

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

Respectfully,

MB Hutson

--

803-308-2714

EXHIBIT U

From: H Hutson <hutson4444@gmail.com>
Sent: Monday, July 27, 2020 8:16 AM
To: Christian Stegmaier; Tim J. Newton; J. R. Murphy
Subject: Notice of pending lawsuit

Dear Christian Stegmaier, Tim Newton, J.R. Murphy, Penn America and Globla Indemnity;

I am putting you all on notice that your actions by concealing extrinsic fraud preventing the courts and public from knowing the truth and understanding that you all are the misleading ones for you are wrong, corrupt and intentionally damaging me. Your fraudulent determination to continue painting me as the dishonest, harassing bad person is intentionally misleading, damaging to me and results in a clear act of defamation of which damages my ability to work.

I plan to take these immoral actions to court rightaway. I have an abundance of evidence showing my damages and mental depression and stress that you have caused me intentionally and continue to cause on a daily basis. All are warned. All of you are totally out of control assuming that there are no consequences for your wrongful, willful and sporadic actions. You show no respect to the Honorable Courts nor me. In addition, all of you are and have been falsifying the real truth about me by conspiracy. The insurance companies are sponsoring most of these actions against me. I am sick and tired of having to fight for my life while you merely sit back attempting to show off. You are destroying your representations as creditable 'officers of the court'. There are laws against such actions.

Respectfully, Submitted on this 27th day of July, 2020

MB Hutson

Mailing a copy of this notice to the Appeals Court today.

--

803-308-2714

EXHIBIT V

From: H Hutson <hutson4444@gmail.com>
Date: August 8, 2020 at 11:00:20 AM EDT
To: Christian Stegmaier <cstegmaier@collinsandlacy.com>, "Tim J. Newton"
<tnewton@murphygrantland.com>, "J. R. Murphy" <jrmurphy@murphygrantland.com>
Subject: Final subject:

Have no choice but to move forward with a new needed
complaint, "Defamation by way of Extrinsic Fraud"
naming Christian Stedmaier, Tim Newton, JR Murphy,
Penn America and Global. Soon I will file the same
"Defamation by way of Extrinsic Fraud against Turner
Padgett and Tom Harper.

This horrible intentional situation that I have been put through is the worst, most unimaginable cruelty
and has caused great undue stress, damages and unbelievable depression. I do not understand how a
business or attorneys could do another human being like this. Lawyers simply prefer not to inform the
Courts of any on-going extrinsic fraud by fellow attorneys. It was merely by choice. This whole thing
needs to end rather getting more broad.

MB Hutson

I will copy by mail this short notice to the Appeals Court saving you the trouble.

--

803-308-2714

IN THE COURT OF COMMON PLEAS

Civil Action No. 2020-CP- 4003810

Plaintiffs

DEFENDANT'S AMMENDED CROSS

COMPLAINT WITH
NOTICE OF MOTION

AND

MOTION FOR TEMPORARY AND

PERMANENT INJUNCTION
(RULE 65M SCRPC)

JURY TRIAL DEMANDED

Penn America Insurance Company,
Global Indemnity Group, LLC,
Timothy J. Newton, Esq.,
Murphy & Grantland, P.A., and
Christian Stegmaier, Esq.,
Collins & Lacy P.C.

WICKLAND COUNTY
FILED
2020 AUG 26 AM 9:25
JENNIFER W. McBRIDE
C.G.P. & G.S.

the fact of their committing Extrinsic Fraud. The actual Extrinsic Fraud is within their application for a restraining order against Defendant. Deny Plaintiff's motion to prohibit Defendant Hutson from initiating any Pro Se litigation before any state court in South Carolina.

2. "The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court orders". *Kornblum v. Schneider*, 609 So. 2d 138, 139 (Fla. 4th DCA 1992).

3. Within, and in Attachment "B," **Laura Paton Esq., engaged by Penn America Insurance Company and Global Indemnity, clearly cites 77 counts of fraud of which these Plaintiffs and Third Party Defendants were fully aware, that originated through attorneys for TLC Holdings, LLC in an underlying case.** However, Plaintiffs and their legal counsel at Murphy and Grantland, P.A. (and now also at Collins & Lacy P.C.) intentionally avoided exposing that Extrinsic Fraud upon the court when they had a legal obligation so to do:

"As a self-regulating profession, lawyers are expected to report serious misconduct by other lawyers to appropriate disciplinary authorities. The duty to report the misconduct of others extends even to misconduct by another lawyer in the same firm". See **Rule 8.3 (b) SCRPC 2016** (p. 406), and cmt. 1. & "Mandatory Duty to Report Serious Misconduct". Also see in re Rivers, 285 S.C. 492, 331 S.E. 2nd 332 (1984)."

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

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

Count One:
Plaintiff and Third Party Defendants committing fraud and Extrinsic Fraud

4. The Plaintiffs, (Pagi) / Third Party Defendants had knowledge that underlying fraud and Extrinsic Fraud (upon the court) was concealed from, rather than disclosed to, the S. C. Courts. Their actions, or more accurately their inactions, caused extreme, direct and proximal damages to this Defendant/Appellant. Those are outlined herein: (L. Paton, Esq. page 22, paragraph 124) and including Paton's 77 counts of fraud (beginning on Paton's document p. 13, par. 47, (as attached to this Amended Cross Complaint) and going thru par. 124). These were committed by TLC's attorneys, of which Plaintiff and Third Party Defendants were and are totally aware). Attorneys for the Plaintiff (Pagi) / and Third Party Defendants failed to fulfill their legal obligations as officers of the S.C. Court to fully defend or report -- via disclosure of known fraud and Extrinsic Fraud upon the court, in the underlying case/cases: in Clarendon County, (# 2015-CP-140615) as well as in other related cases (# 2018-CP-4006344 and # 2020-CP-4003810) with the same Defendant. Had attorneys for this Plaintiff fulfilled their legal obligation to disclose the known Extrinsic Fraud upon the Court, all issues could already have

been avoided and/or resolved prior to this action. This issue is currently in the S.C. Appellate Court (# 2019-001488). Plaintiffs and now Third Party Defendants are now also defrauding this Common Pleas Court as they have other state court proceedings (listed above) and the Federal Court (# 214-CV-01583-DCN-MGB). These illegal acts are intentional in hopes of tilting the Justice scales in their favor *preventing the Defendant from having his case fully heard*.

5. Plaintiffs and all Third Party Defendants were entwined within a conspiracy to commit Extrinsic Fraud Upon the Courts, including in this action. This is the very reason that Defendant sued Plaintiff and Third Party Defendants. Plaintiff and Third Party Defendants are intentionally obstructing justice through the continued concealments of fraud and Extrinsic Fraud and are totally ignoring their required responsibility to fully disclose. They refuse to report the Extrinsic Fraud as required (See Rule 402). This constitutes Obstruction of Justice for their claims are nothing short of deception, fraud upon the court, intentional misrepresentation by way of refusing to disclose the concealments and complete and total damages to the Defendant / Appellant who was their insured.

6. Hutson submits proof with this cross complaint to the Common Pleas Court, via attached creditable documents, that Extrinsic Fraud was concealed and not disclosed in Federal and State Courts by these Plaintiffs and Third Party Defendants and is on going in the Appellate Court (# 2019-000873). Now, they are seeking this injunction here in the Common Pleas Court to hide their intentional wrong-doings and unclean hands.

7. Defendant Hutson has attached documents that he has presented in the Appellate Court against these Plaintiffs to prove Plaintiffs and Third Party Defendants are engaged with fraud and Extrinsic Fraud upon the courts that they used to benefit themselves. These attached documents will show a clear pattern and explicit, written knowledge of fraud, deceit, breach of contract and Extrinsic Fraud. This Defendant has lost millions of dollars by way of Plaintiff's

and Third Party Defendants concealing the extrinsic fraud upon the courts by their fellow attorneys (who were representing TLC Holdings, LLC) while these Third Party Defendants and Plaintiffs were fully aware of that fraud which existed against Defendant Hutson. Yet, these Plaintiff's and Third Party Defendants conspired to continue to commit and conceal the Extrinsic Fraud to protect themselves and fellow attorneys as the attached documents prove while they continue to operate in violation of their oath, SCRPC and case law (See attached list).

Count Two:
Plaintiff and Third Party Defendants committing Document Fraud

Penalties for document fraud: "Falsely make for purposes of this section, the term "falsely make" means to prepare or provide an application or document, with knowledge, or in reckless disregard, of the fact that the application or document contains a false, fictitious, and/or fraudulent statements or material representations, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted." U.S. Code 1324c

8. Respondents prepared papers to protect their client and themselves which were fraudulent due to the absolute concealed knowledge and intentional failure to disclose that prevented Appellant/Defendant from his cases being heard while deceiving the courts and judges. This is intentional plotted attack against Defendant who continues to be severely damaged which has destroyed his life and a normal person.

9. U.S. Code 1324c. Penalties for document fraud:
"Falsely make for purposes of this section, the term "falsely make" means to prepare or provide an application or document, with knowledge or in reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material

representation, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted"

10. Respondents prepared papers to protect their client and themselves which were fraudulent due to the absolute concealed knowledge and intentional failure to disclose that prevented Appellant/Defendant from his cases being heard.

Count Three:
Defamation by way of Extrinsic Fraud

11. Penalties for document fraud are clear. For the purposes of this section "*Falsely make*, means to prepare or provide an application or document, with knowledge, or in reckless disregard, of the fact that the application or document contains a false, fictitious, or fraudulent statement(s) or material representation, *or* has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted" U.S. Code 1324c. (Emphasis mine.)

12. Plaintiff's/Third Party Defendants' prepared court submissions/papers were targeted to protect the PAGI and the attorneys and were intentionally fraudulent due to the known, yet concealed, knowledge of the underlying fraud and Extrinsic Fraud including their *intentional failure to disclose* those pertinent facts to the courts. Their decisions prevented this Defendant / Plaintiff from having his cases heard while, at the same time, deceiving the courts and judges and the general public, as all courts records are public, of which this Plaintiff and all Third Party Defendants were fully aware.

13. In this case, Defendant is entitled to actual incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact before a Jury. Defendant asks that Plaintiffs and all Third Party Defendants be made responsible to this Defendant in an

amount of not less than Three and One Half Million Dollars (\$3.5 M) for their intentional Obstruction of Justice, deception, intentionally concealing critical facts to deprive Defendant from his case being heard and preventing the Defendant from a fair trial with justice involving this Common Pleas Case which has drug on for approximately nine (9) years.

Count Four:
Unfair and Deceptive Trade Practice

14. Plaintiff and Third Party Defendants participated in Unfair and Deceptive Trade Practices (S.C. Code 39-5-10, et seq.) by creating a pattern of multiple attempts to damage the Defendant/Appellant who was not aware of the underlying Extrinsic Fraud for many years and is now seventy-six (76) years of age and suffering from indigency and Severe Depression. Plaintiff/Third Party's sole purpose was to tilt the scales of "so called" 'Justice' in their direction, for if they disclosed what they know and are concealing from the courts, all the courts would throw out their harassing and frivolous lawsuits due to underlying Extrinsic Fraud and many attorneys could be facing disbarment.

Listing of Paper Evidence

15. Laura Paton, Esq.'s written document showing seventy-seven (77) counts of fraud written while she was being paid by Penn America/Global Indemnity (Plaintiffs) to prepare documents to represent Defendant/Appellant. All attorneys, including Plaintiff and their Legal Department, had access to or had full documents, contracts, and depositions. Plaintiff's attorneys had no interest in justice, only getting low settlement and the case "off their books" (exhibit provided). They all knew that Defendant/Appellant would be permanently and financially destroyed, having had left him with a \$3.5M judgment on the public record against him after

dragging him through years of court with no intention of exposing the fraud he'd become victimized by.

16. A multitude of South Carolina Rules and laws included and listed below provide complete and clear evidence that all parties were required to stop concealing known critical evidence and disclose the Extrinsic Fraud upon the Court and its perpetrators, albeit fellow attorneys, to the court yet the disadvantaged Defendant/Appellant was left a legal hostage of these unscrupulous officers of the Court who artfully, deceitfully, and criminally chose NOT to expose that Extrinsic Fraud perpetrated, and co-conspired by all the attorneys upon the Courts. While in court, Plaintiff's attorneys *never did disclose* to the court or the judges the 77 counts of fraud, nor the contractual underlying Extrinsic Fraud. When the authors of the initial Extrinsic Fraud appeared in court, *none* of the attorneys disclosed one word about the underlying fraud or Extrinsic Fraud... instead, attorneys on all sides of the cases concealed them. Where is Justice? Even the attorneys paid by the Plaintiff, themselves officers of the court, never mentioned nor reported the Extrinsic Fraud. They "covered" their colleagues and simply concealed it. When Defendant/Appellant Hutson asked Timothy J. Newton, Esq. of Murphy & Grantland, P.A. why he did not report the Extrinsic Fraud to the Court, or notify the Courts in writing, Newton's reply was honest and straight-forward: "we lawyers don't do each other like that, someone might go to jail". Such a response and lack of action is like violent rape against this aged, Defendant / Appellant.

17. Third Party Defendant T.J. Newton, Esq. at Murphy & Grantland, handled Defendant/Plaintiff's case for PAGI until PAGI engaged Christian Stegmaier, Esq., of Collins & Lacy, P.C. which replaced Newton who had written a lengthy email to Defendant/Appellant. Newton's frank and detailed, 16 paragraph letter of August 13, 2018 to Defendant/Appellant states:

- Item(15): "I can see how you could argue that the Consent Order is 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".

- Item (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 undevelopable because it was already obligated to double lifetime memberships as a private club. It appears that could easily have averted the entire fiasco. **Since attorneys were involved, and it resulted in your inability to present your case in court,** and possibly led to the sanctions order and judgment against you, there might possibly be **extrinsic fraud on the court to support setting aside the Consent Order.** See *Chewning v. Ford Motor Co.*, 354 S.C. 72m 579 S.E. 2d 605 (2003) (Emphasis mine.)

18. Christian Stegmaier/Collins & Lacy P.C., Tim Newton, JR Murphy/Murphy and Grantland are simply lawbreakers of many of the South Carolina Rules and written laws including their Oath (Rule 402). Evidenced by their own actions, legal rules of the State of South Carolina, their sworn Oath to the courts upon licensure, and even the written and case law are simply taken as a joke to these dishonest attorneys. Winning is everything to them...after protecting themselves...with no regard as to how innocent people are damaged or ruined. Defendant/Appellant finds Plaintiff's action regarding this lawsuit structured to protect the guilty to be a disgrace to the integrity and honor of the South Carolina Court system.

19. Representing this Defendant in with a conspired, fraudulent 'defense' and concealing evidence by way of Extrinsic Fraud, these Plaintiffs intentionally prevented Appellant from being heard. That IS "Obstruction of Justice". **Obstruction of Justice:** (def.) "the crime or act of willfully interfering with the process of justice and law esp. by influencing, threatening, harming, or impeding a witness, potential witness, juror, or judicial or legal officer, or by furnishing false information in or otherwise impeding an investigation or legal process."

Merriam-Webster's Dictionary of Law.

20. Plaintiffs, however, cite Defendant's failed cases (who was under their legal care as "the insured") as a 'defense' for themselves. However, those cases failed *exclusively due to* Plaintiffs' refusal to disclose the Extrinsic Fraud. Why? Their motives were:

- 1) to prevail for their client Penn America & Global Indemnity thereby minimizing their clients' 'time in court' (and hopefully expenditures), while
- 2) constructing a defense to hide the underlying Extrinsic Fraud (originally and intentionally created by fellow attorneys).

However, (cloaked in their own non-disclosure of that fraud upon the courts to the courts) *they became co-conspirators of the Extrinsic Fraud* enacted against the courts while knowingly sacrificing this Defendant, the policyholder.

21. These facts more than prove Defendant/Plaintiff's case beyond any reasonable doubt. How can this Honorable Court or any Court ignore the laid out proof of the continued extrinsic fraud by Penn America and Global Indemnity, as well as the two law-firms perpetrating extrinsic fraud while holding badges and claiming to be "officers of the Court"? No Court or Honorable Judge should allow fraudulent conduct to exist in their courts once clearly shown what attorneys, such as these, have clearly done.

ATTACHMENT "A"

RULES AND LAWS

I. The United States Court of Appeals for the Sixth Circuit has delineated five (5) elements of conduct that constitute Extrinsic Fraud upon the Court;

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

II. Rule 3.3. Candor Towards the Tribunal: "One who intentionally conceals critical evidence for the sole purpose of self preservation at the cost of disgracing, deceiving, plotting and defrauding the Honorable Court, is creating Extrinsic fraud upon the court".

III. Rule 3.3. Candor Towards the Tribunal: (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal

IV. Rule 402, Attorney Oath: *"I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the Judge or Jury by a false statement of fact or law"*. Note: "any attorney who will mislead, hold by concealing critical evidence regarding the opposing side and the Courts, while fully knowing that the

opposing side does not understand or perhaps is not aware of such critical evidence preventing the opposing side to properly and fully presenting their case, makes that or those attorneys to violating his or their 402 oath." --Hutson

V. Lawyer's Oath South Carolina Appellate Court Rule 402 (k). "To opposing parties and their counsel, I pledge fairness, integrity and civility, not only in court, but also in all written and oral communications."

VI. Conspiracy (18 U.S. C. 371): A a combination or agreement to accomplish an unlawful purpose, or to use illegal means in accomplishing a lawful purpose.

VII. Merriam-Webster's Dictionary of Law: "a fellow conspirator-Under Federal law, a statement made by a co-conspirator during and to further the conspiracy is admissible as evidence, but there must be other evidence establishing both the conspiracy and the defendant's participation".

VIII. The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court order. *Kornblum v. Schneider*, 609 So. 2d 138, 139 (Fla. 4th DCA 1992).

IX. Annotated South Carolina Rules of Professional Conduct 2016--South Carolina Bar: Rule 1.2 (d) forbids a lawyer from assisting a client in known fraudulent conduct.

X. Annotated South Carolina Rules of Professional Conduct 2016--South Carolina Bar: *Criminal, Fraudulent and Prohibited Transactions:*

(10) When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may

not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter.

XI. Rule 1.0 -Annotated South Carolina Rules of Professional Conduct 2016--
page 13, par. (f) states: "Fraud" or "Fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction *or which has a purpose to deceive*.

XII. Rule 1.0 Annotated South Carolina Rules of Professional Conduct 2016--
"Serious crime." Terminology, (p. 14) Denotes any felony; crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; or, any crime a necessary element of which, as determined with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, willful failure to file income tax returns, or an attempt, conspiracy or solicitation of another to commit a serious crime.

XIII. South Carolina Appellate Court Rule 407: page (7) in the middle of paragraph (3) For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, receipt or misrepresentation. *See Rule 8.4*

XIV. South Carolina Appellate Court Rule 407: page (7) (8) paragraph (5) "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official actions, it is also a lawyer's duty to uphold legal process."

XV. South Carolina Appellate Court Rule 407: page (8) in the middle of par. (6):

"A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

ACFE - Association of Certified Fraud Examiners, World Headquarters-The GREGOR BUILDING Austin, TX. Criminal Fraud Charges; page (8) second paragraph..."This is because one of the elements of civil fraud requires that the defendant knew that the statement was false and intended the victim to rely upon it.

XVI. U.S. Code 1324c. Penalties for document fraud: "Falsely make for purposes of this section, the term "falsely make" means to prepare or provide an application or document, with knowledge or in reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material representation, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted."

XVII. SCRPC: Rule 8.3. Reporting Professional Misconduct -- "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority".

XVIII. Rule 8.4. 'Misconduct' is to "commit a criminal act involving moral turpitude"; "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"; "engage in conduct that is prejudicial to the administration of justice"

XIX. Rule 8.2 Judicial and legal Officials: A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the

qualifications or integrity of a judge, adjudicators, officer(s) or public legal officer, or of a candidate for election or appointment to judicial or legal office.

XX. Fraud Upon The Court: ... Rules of Professional Conduct: Preamble & Scope:

A. “ in the Third Circuit,[the requisite fraud on the court occurs where “it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party’s claim or defense.” *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). . . .

B. It is thus fraud where . . . the impartial functions of the court have been directly corrupted.”p.175

C. Extrinsic Fraud is fraud that induces one not to present a case in court *or deprives one of the opportunity to be heard* or is not involved in the actual issues. [1] More broadly, it is defined as fraudulent acts which keep a person from obtaining information about his/her rights to enforce a contract or getting evidence to defend against a lawsuit.

D. Merriam-Webster's Dictionary of Law: Defamation: "communication to third parties of false statements about a person that injure the reputation of or deter others from associating with that person". Therefore, the definition of defamation by way of extrinsic fraud:

An attorney or attorneys (representing themselves or a plaintiff client and has a legal duty to disclose to the courts) who intentionally conceals critical positive evidence in favor of the defendant for the sole purpose of self gain for himself and or his clients while fully understanding that illegal extrinsic fraud is the source of transportation preventing the defendant's case from being heard resulting in the defendant losing their case(s). Consequently, the loss(es) reflect to the courts, judges and on public records (for all to see and believe) and permanently damages the defendant.

THEREFORE: Since

-- Plaintiffs were represented by attorneys who:

- a) failed to disclose to the court and chose to conceal their knowledge of fraud and Extrinsic Fraud in underlying case(s), and thereby
- (b) directly prevented Defendant Hutsen (the PAGI/Plaintiff's policy holder) from having his cases "heard, " and receiving justice;
- c) prepared and submitted fraudulent papers to the courts through their counsel to protect:
 - (i) their insurance company,
 - (ii) their fellow attorneys who *originally* perpetrated the Extrinsic Fraud, and
 - (iii) attorneys who via intentional and covert non-disclosure, became entangled as co-conspirators with the attorneys who originally perpetrated the underlying Extrinsic Fraud,
 - (iv) attorneys, such as these Plaintiffs, who *intentionally deceived* the courts and judges with no regard for justice.

Defendant prays that the court will:

1. Require Plaintiffs, all Third Party Defendants, who are officers of the courts and/or were thereby represented, to no longer (illegally) conceal, but instead to fully disclose their complete knowledge of the Extrinsic Fraud Upon the Courts in detail (as Laura Paton, Esq. cited in her seventy-seven counts of fraud while she was she was counsel engaged by Plaintiffs Penn America and Global Indemnity (PAGI), in behalf of Defendant Hutson, but who, after her research, documentation, and writing of her complaint/defense was *prevented from actively*

defending Defendant Hutson in court by PAGI and was replaced by Plaintiffs / Third Party Defendants.

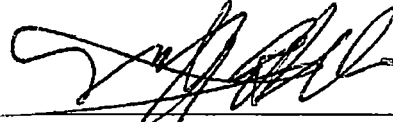
2. Sanction Plaintiffs and Third Party Defendants for intentionally obstructing Justice against Defendant (Pro Se) Hutson and denying his ability to present his case in and to any court in the future, including this court. These unscrupulous attorneys should be stopped by the Honorable Court of Richland County, SC.
3. Deny and dismiss Plaintiffs' Motion for temporary Injunction against Defendant Hutson due to Plaintiff's unclean hands and dishonesty upon the Courts evidenced by their unconscionable fraud upon the Court *and* the honorable Judges that also targets Defendant Hutson, Pro Se, for the explicit purpose of self-aggrandization while denying justice to Defendant Hutson. Plaintiffs are and/or are represented in all underlying actions by officers of the Court sworn to uphold justice, while they are acting covertly to save their own badges & those of their fellow attorneys at the expense of victims of large insurance companies.
4. Require Christian Stegmaier, Esq. and his firm (Collins & Lacy P.C.) to immediately withdraw from representing Plaintiffs Penn America and Global Indemnity Insurance Companies due to a direct conflict of interest: Christian Stegmaier, Esq. and Collins & Lacy P.A. are named Third Party Defendants in this case.
5. Allow this case to be heard by a Jury to allow for further discovery.
6. Allow this case to be expedient due to the on-going Extrinsic Fraud.

"The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a

fraud on the court, or where a party refuses to comply with court order”.

Kornblum v. Schneider, 609 So. 2d 138, 139 (Fla. 4th DCA 1992).

Respectfully Submitted on this 28th day of August, 2020.



M.B. Hutson

P.O. Box 2755

Orangeburg, South Carolina 29116-2755

Telephone: (803) 308-2714

Copies have been placed in the USPS on Tuesday, August 25th, 2020, to:

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ATTACHMENT " A "

ATTACHMENT "A": RULES AND LAWS:

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

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

Rule 3.3. Candor Towards the Tribunal: "One who intentionally conceals critical evidence for the sole purpose of self preservation at the cost of disgracing, deceiving, plotting and defrauding the Honorable Court, is creating Extrinsic fraud upon the court".

Rule 3.3. Candor Towards the Tribunal: (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal

Rule 402, Attorney Oath: *"I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the Judge or Jury by a false*

statement of fact or law". Note by Hutson, any attorney who will mislead, hold by concealing critical evidence regarding the opposing side and the Courts while fully knowing that the opposing side does not understand or perhaps is not aware of such critical evidence preventing the opposing side to properly and fully presenting their case makes that or those attorneys to violating his or their 402 oath.

Lawyer's Oath South Carolina Appellate Court Rule 402 (k). "To opposing parties and their counsel, I pledge fairness, integrity and civility, not only in court, but also in all written and oral communications."

Conspiracy (18 U.S. C. 371): A a combination or agreement to accomplish an unlawful purpose, or to use illegal means in accomplishing a lawful purpose.

Merrimack-Webster's Dictionary of Law: "a fellow conspirator-Under Federal law, a statement made by a co-conspirator during and to further the conspiracy is admissible as evidence, but there must be other evidence establishing both the conspiracy and the defendant's participation".

The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court order. ***Kornblum v. Schneider, 609 So. 2d 138, 139 (Fla. 4th DCA 1992).***

Annotated South Carolina Rules of Professional Conduct 2016--**South Carolina Bar: Rule 1.2 (d)** forbids a lawyer from assisting a client in known fraudulent conduct.

South Carolina Appellate Court Rule 407: page (7) in the middle of paragraph (3) For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, receipt or misrepresentation. See Rule 8.4

South Carolina Appellate Court Rule 407: page (7) (8) paragraph (5) "A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official actions, it is also a lawyer's duty to uphold legal process.

South Carolina Appellate Court Rule 407: page (8) in the middle of paragraph (6): A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyer's should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

ACFE - Association of Certified Fraud Examiners, World Headquarters-The GREGOR BUILDING Austin, TX. Criminal Fraud Charges; page (8) second paragraph..."This is because one of the elements of civil fraud requires that the defendant knew that the statement was false and intended the victim to rely upon it. **POINT:**

Annotated South Carolina Rules of Professional Conduct 2016--South Carolina Bar:

Criminal, Fraudulent and Prohibited Transactions:

(10). When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter.

Rule 1.0 Terminology page 13, paragraph (f) of the Annotated South Carolina Rules of Professional Conduct 2016--**SCRCP**: "Fraud" or "Fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or which has a purpose to deceive.

Rule 1.0 Terminology page 14 paragraph (0) of the Annotated South Carolina Rules of Professional Conduct 2016--**SCRCP**: "Serious crime". Denotes any felony; crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; or, any crime a necessary element of which, as determined with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, willful failure to file income tax returns, or an attempt, conspiracy or solicitation of another to commit a serious crime.

U.S. Code 1324c. Penalties for document fraud:

"Falsely make for purposes of this section, the term "falsely make" means to prepare or provide an application or document, with knowledge or in reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material representation, or has no basis in law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted"

THEREFORE:

Plaintiff's prepared papers (to protect their insurance company client, fellow attorneys, and themselves) which were fraudulent due to the concealed knowledge from the court and Plaintiff's intentional failure to disclose extrinsic fraud underlying the case prevented Defendant from having his cases "heard" because the attorneys' non-disclosure of the underlying extrinsic fraud intentionally deceived the courts and judges.

Plaintiffs, then used Defendant's failed cases under their care as a defense. However, those cases failed *exclusively due to* the hidden extrinsic fraud. Their motives were: 1) to prevail for their client Penn America & Global to minimize time in court, and hopefully expenditures, and 2) construct a defense to hide the underlying extrinsic fraud originally created by fellow attorneys and then by their own non-disclosure of that fraud they became co-conspirators of those extrinsic fraud actions and deception enacted against both the courts and this Defendant. Prosecuting a defense against this Defendant and concealing evidence by way of extrinsic fraud to prevent Appellant from being heard is "Obstruction of Justice". Merriam-Webster's Dictionary of Law
Obstruction of Justice: *the crime or act of willfully interfering with the process of justice and law esp. By influencing, threatening, harming, or impeding a witness, potential witness, juror, or*

judicial or legal officer or by furnishing false information in or otherwise impeding an investigation or legal process.

SCRPC: Rule 8.3. Reporting Professional Misconduct

(A) "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority".

Rule 8.4. Misconduct

(C) "commit a criminal act involving moral turpitude";

(D) "engage in conduct involving dishonesty, fraud, deceit or misrepresentation";

(E) "engage in conduct that is prejudicial to the administration of justice"

Rule 8.2 Judicial and legal Officials

(A) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicators officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Extrinsic fraud is fraud that induces one not to present a case in court or deprives one of the opportunity to be heard or is not involved in the actual issues.

[1] More broadly, it is defined as:

-fraudulent acts which keep a person from obtaining information about his/her rights to enforce a contract or getting evidence to defend against a lawsuit. This could include destroying evidence or misleading an ignorant person about the right to sue. Extrinsic fraud is distinguished from "intrinsic fraud," which is the fraud that is the subject of a lawsuit.

[2] Extrinsic fraud often involves fraud on the court, but may arise in other contexts. Extrinsic fraud does not mean merely lying or perjury, nor misrepresentations, nor intrinsic fraud, nor "to matters that could have been raised during the divorce proceeding."

[3] It must involve "collateral ... circumstances" such as:

"bribery of a judge or juror,"

"fabrication of evidence by an attorney,"

"preventing another party's witness from appearing,"

"intentionally failing to join a necessary party," or

"misleading another party into thinking a continuance had been granted...."[3]

Model Rules of Professional Conduct: Preamble & Scope:

5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. **A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.** A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Since Hazel-Atlas, a considerable number of courts have had the opportunity to dissect the meaning of “fraud on the court” and several definitions have been attempted. A number of courts have held that a ***“fraud on the court” occurs “where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.”***¹⁷⁴

Fraud on the court is a very high bar. The Tenth Circuit has held that it is fraud “directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents It is thus fraud where . . . the impartial functions of the court have been directly corrupted.”¹⁷⁵

And “only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court.”¹⁷⁶

Some courts require the moving party to meet certain elements in order to set aside a judgment for fraud on the court. For example, in the Third Circuit, the requisite fraud on the court occurs where “it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party’s claim or defense.” *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). . . . The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court orders. *Kornblum v. Schneider*, 609 So. 2d 138, 139 (Fla. 4th DCA 1992).

Mercian-Webster's Dictionary of Law:

Defamation: "communication to third parties of false statements about a person that injure the reputation of or deter others from associating with that person". Therefore, the definition of defamation by way of extrinsic fraud:

An attorney or attorneys (representing themselves or a plaintiff client and has a legal duty to disclose to the courts) who intentionally conceals critical positive evidence in favor of the defendant for the sole purpose of self gain for himself and or his clients while fully understanding that illegal extrinsic fraud is the source of transportation preventing the defendant's case from being heard resulting in the defendant losing their case.

Consequently, the loss reflects to the courts, judges and then to the public records for all to see and believe permanently damaging the defendant.

EXHIBIT 1

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant

v.

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

Respondents

APPELLANT'S RESPONSE TO (PENN AMERICA, et. al.) RESPONDENTS' INITIAL BRIEF

Comes now Appellant who responds to the Initial Brief of Respondents Penn America Insurance Company, Global Indemnity Group, Inc., et. al.

The Respondents (Penn America 'master') and (Attorneys TJ Newton and JR Murphy, 'servants') were provided with all contracts, documents and papers and had ample time to investigate. They fully understood Appellant's position of having been defrauded by way of fraud and extrinsic fraud by TLC Holdings, LLC and their lawyers in underlying actions (a \$6M real

estate project in Manning, South Carolina). Insured Appellant had paid thousands of dollars to the Respondent Insurance Companies, for protection should the need ever exist. Penn America, thru Murphy & Grantland (Murphy and Newton, Respondents) employed Laura Paton, Esq. to represent Appellant. She researched this case and wrote an in-depth account, copying Respondents and Appellant. Portions of her work will be cited below verifying Respondents had full and detailed knowledge of facts as stated by Appellant.

Respondents never advised Appellant / victim that by intentionally NOT exposing the identified, underlying, extrinsic fraud, that they would be directly causing Appellant to lose any and all court hearings and the subsequent jury trial on defamation (the latter, of which resulted in a recorded \$3.5 million judgment against this Appellant, which still cripples this Appellant). Respondents, nevertheless, chose to assure Appellant that they *would represent him* while actually Respondents were choosing to cooperate with TLC Holdings, LLC's attorneys in lawsuits against Appellant. This collaboration was only realized by this Appellant when that collaboration became so overt during the defamation trial that the Judge stated aloud in court that he had "never seen *opposing* attorneys get along so well together in all my years as a judge." Consequently, this Appellant was never truly defended nor was his case heard; Appellant was destroyed. The recorded \$3.5M judgment continues to harm his Appellant.

Respondents had decided that they were not going to address the underlying extrinsic fraud --even at the cost of sacrificing this Appellant. However, Insurance Companies all across this country have been held accountable for acting in bad faith all hoping to evade expenses for themselves, rather than provide the coverage and representation due to their insured. (*See S.C. F.D.C. Feb. 6, 2017 WL 479507, at *3-4 (D.S.C. Feb. 6, 2017)*). Therein the court concluded that the trier of fact could find *the insurer acted in bad faith*, and declined the insurer's motion for summary judgment on the bad faith claims.

Additionally, the courts have upheld that the insurer's "duty to defend, is not strictly controlled by the complaint, and Extrinsic Facts known by the insurer may be considered." USAA Prop. & Cas. Ins. Co. v. Clegg, 661 S.E.2d 791, 798 (S.C. 2008).

These Respondents, professional insurance companies and their attorneys, had a legal and moral obligation to bring that underlying extrinsic fraud to the attention of both the Courts and Judges. Instead, Respondents concealed the Fraud upon the Courts from the Courts, the jury, and the Judges, and intentionally threw hundreds of irrelevant pages having nothing to do with this case. Respondents:

A) required Appellant to be confronted with a jury trial knowing full well that Appellant had no chance of prevailing due to the intentional, existing, extrinsic fraud and lack of concern for the Appellant who had been victimized by TLC Holdings, LLC and their attorneys,

B) informed Appellant that if he failed to appear for the Jury trial his coverage would be denied, while fully understanding that Appellant was going to lose due to Respondents' intentionally failing to disclose to the Judge and jury that extrinsic fraud existed, and that this Appellant's case would never be heard during the jury trial or any other hearing until the extrinsic fraud was addressed. The following Codes and Rulings were blatantly ignored and violated by these Respondents:

"Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should NEVER be participated in or condoned by lawyers."--ABA CODE, EC 8-5

A LAWYER SHALL NOT 'engage in conduct involving dishonest, fraud, deceit, or misrepresentation, nor be guilty of willful misconduct.' DR 1-102(A) (4).

The court specifically upheld that ***"by not disclosing information to the court, Sullins had perpetrated a fraud on the court."*** --Sullins v. State Bar 15 Cal. 3d 609, 542 P. 2d 631 125 Cal. Rptr. 471 (1975), cert. denied 425 U.S. 937 (1976).

Likewise, by not disclosing information that they knew, via their research and review of documents, to the court, ALL Respondents, including Penn America Insurance Company(s), also perpetrated fraud on the court and acted in bad faith. Respondents *must be held accountable* for their fraud upon the court and subsequent damages to this Appellant.

NOTE: Not reporting the underlying extrinsic fraud and having the underlying fraudulent order cleared, was not only a breach of their professional duties, it was akin to demanding a kidnapped Appellant to get out of the trunk of a car at gun point and ordered to walk into the woods for execution.

Respondent refers to a Settlement Agreement executed by Appellant and Penn America (p. 15 of Respondent PAIG's initial brief). Appellant reminds the Honorable Appellate Court that the Supreme Court has ruled that no settlement is valid when intentional fraud is part of the settlement agreement. (Zurich Insurance Company PLC v. Colin Hayward). At the time of the Settlement Agreement, Respondents were acting in bad faith, attempting to evade their duty to defend against the known Extrinsic Fraud in the underlying Settlement Agreement and Consent Order executed by TLC Holdings, LLC's attorneys, who were the authors of the underlying Extrinsic Fraud upon the Court with the insured, this Appellant. It has already been established in the courts that EVEN "*if it is not clear from the face of the complaint that the policy provides coverage, but coverage could exist...the insurer must investigate and give the insured the benefit of the doubt that the insurer has a duty to defend.*" (Campbell v. Ticor Title Ins. Co., 209 P.3d 859, 861 (Wash 2009).) Penn America was also, thereby, ignoring the rulings against insurance companies that even when "*the allegations of the complaint are controlling and, even if ambiguous, must be construed most favorably to the insured to establish the duty to defend.*" (Baron Oil Company v. Nationwide Mut. Fire Ins. Co., 470 So. 2d 810 (Fla. App. 1985); accord

Merchs. Fast Mortor Lines, Inc., supra at 141. Case law clearly supports that these Respondents *had an unquestionable duty to defend* this Appellant, their insured. They did not.

By not addressing the underlying extrinsic fraud, and acting in bad faith, Penn America, and those employed by them, became participants themselves, engaged in the fraud and extrinsic fraud. *Woo v. Fireman's Fund Ins. Co.* 164 P, 3d 454, 459 (Wash, 2007), has already established that "*The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend, and may do so only to trigger the duty.*"

As a result of Respondents failure to act appropriately on behalf of this Appellant, their insured, the following results befell this Appellant:

- 1) was prevented from prevailing against TLC Holdings, LLC and their owners (worth multi-millions) (hereinafter TLC) in a defamation jury trial. TLC had initially and intentionally deceived and defrauded this Appellant (and the Honorable SC Courts) in a case directly underlying that defamation action. Respondents were supposedly acting on *behalf* of this Appellant (then Defendant).
- 2) Suffered great financial losses including:
 - a) Appellant's becoming indigent for years with only an approximate monthly income of \$650.00,
 - b) -losing potential income from three (3) development opportunities directly due to those Court losses and the recorded \$3.5M judgment on his record,
 - c) not being compensated for work and monies lost in Big Water Resort,
 - d) not to be compensated for the mental stress and loss of years suffered with extreme depression directly due to those unjust long-term financial losses and humiliation, to the point of seriously considering suicide, but resulting

instead, by Appellant having sought medical assistance and being subsequently referred to a psychiatrist due to the severe depression.

- 3) The mental torment, inflicted upon Appellant, a 70+ year old man was directly caused by *Respondents' intentional refusal and failure to execute their duties to:*
- a) expose and address the underlying Extrinsic Fraud in underlying Court rulings, despite case law that requires attorney(s) to do so, and
 - b) faithfully adhere to established ethical, professional responsibilities.
 - c) now, at seventy-five years of age, Appellate is *still* struggling to receive justice from the Court System, and its officers, who are sworn in to:
 - i. *“not pursue or maintain any suit or proceeding which appears to me to be unjust”* (injustice was fully disclosed by their attorney L. Paton, Esq.)
 - ii. *“nor maintain any defenses except those I believe to be honestly debatable under the law of the land.”* (Paton, Esq. laid out and shared the fraud in contracts prepared by TLC's lawyers and other paper work,
 - iii. *“maintain the dignity of the legal system...unless REQUIRED by the justice of the cause with which I am charged; I will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause FOR PROFIT OR MALICE” “So Help me God.”* –Lawyer's Oath, SCRCF page one. (emphases mine)

One would reasonably assess that the “for profit/malice, so help me God,” is clearly violated by Penn America's “Settlement” which Respondent clung to in his Initial Brief, and to which motivation was disclosed by Respondent Tim Newton's e-mail to this Appellant at

10:54AM on November 30, 2018, stating "... and Torus ... "threatened to sue Penn America if it didn't hurry up and settle." No regard was given for the destruction of the insured-Appellant.

Respondent, Penn America, further states on page 25 of his initial brief, "In order to prevail on a claim for fraud a plaintiff must prove...

(1) **"a representation"**... Respondents stated that they would represent to protect Appellant. The Appellant was holder of their Insurance Policy and Penn-America engaged employees in their home office legal department in Pennsylvania, Murphy and Grantland and other legal representation, including attorneys, Laura Paton, Esq. of Charleston, SC and Frank Gordon, from Raleigh, NC. Gordon, Esq. appeared with Appellant in SC during the defamation jury trial court in which the \$3.5M judgment was recorded against this Appellant. Not even the slightest hint of a defense was made and NO MENTION of the known underlying Extrinsic Fraud upon all of the courts was made...and TLC's attorneys were right in the court representing TLC's claim for Defamation against this Appellant. (Recall that this was the Judge who was cited above for remarking on the amazing collaboration between the opposing attorneys.

(NOTE: Paton, Esq. nor other attorneys, formerly engaged by Penn America, were present then. One can only ask why the changes, except perhaps there are some lawyers out there with ethics who would not play Penn America's game. The last one, Gordon, was recruited from out of state yet was licensed in South Carolina.)

(2) **"its falsity."** Respondent's fully understood they could never win nor protect Appellant without addressing the underlying extrinsic fraud and subsequent order. Yet, at all times, representatives at Penn America convinced Appellant they would fight to win his cases. One must ask WHY did they not inform this Appellant that they:

- i. could not succeed due to the underlying extrinsic and related fraud,

- ii. would not be able to successfully defend this Appellant, and
- iii. refused to address the underlying fraud, which they knew, because Paton knew and reported in great detail to the carrier company.

(3) **“its materiality”** Respondent’s and attorneys (noted above) were given access to all documents and thereby should have fully understood the facts of why this Appellant was being fraudulently sued and defrauded. Furthermore, being trained attorneys, they each should have been able to recognize that the underlying case and contract was fraudulent and that Extrinsic Fraud had taken place at the initial court ruling under Judge George James. There, TLC’s attorney hid from court and from the hundreds of contractual holders of Retail Membership Agreements (who held contractual “rights to use the land” for up to two lifetimes) that the landowners (TLC) had agreed to sell the land within two (2) years under that Settlement Agreement and Consent Order for private home development. TLC’s attorneys thereby denied those land use agreement holders a voice and an opportunity to be heard. The proof of this lies in their winning a follow-up Federal Class Action Suit 2:14-CV-01583-DCN-MGB. Further evidence shows that at least one attorney (Respondent / Newton) *did recognize* that Extrinsic Fraud. (See Respondent Newton’s 16 point letter to Hutson emailed 8/13/2018 and submitted to the lower court as Hutson’s Exhibit 4.1-4.3. Therefore, the attorneys knew, but did not act on the Appellant’s behalf, instead, *attorneys intentionally chose to conceal the known fraud* protecting their fellow attorneys instead of the courts and this Appellant, who at that time was their insured.

(4) **“either knowledge of its falsity or a reckless disregard of its truth or falsity.”**
Respondents fully understood they could not defend nor represent Appellant until the Extrinsic Fraud had been exposed and removed from the courts. Since they willfully chose NOT TO EXPOSE THE EXTRINSIC FRAUD UPON THE COURT, *they actively chose to allow the Extrinsic Fraud to remain and this Appellant’s “representation and defense” to be a total farce.*

(5) “intent that the representation be acted upon.” Respondents faithfully and repeatedly assured this Appellant of positive legal outcomes while they fully understood, as attorneys, that they would be defeated unless they exposed the Extrinsic Fraud. Respondents purported to be acting on the insured’s defense (this Appellant) when, in fact, they were repeatedly defeated in court because the Respondents, attorneys “at law” did not expose the Extrinsic Fraud upon the Courts, *nor* the fraud against this Appellant, both of which shrouded this Appellant’s case(s).

- Penn America’s attorneys knew it would be impossible to present a victorious case for this Appellant, their insured, without first disclosing to the Courts and Judges that the contracts and underlying Settlement Agreement and Consent Order (all prepared by TLC Holdings, LLC’s attorney, Thomas Harper, Esq., of Womble, Carlyle, Sandridge & Rice, of Charleston, and being actively defended by attorneys at another legal powerhouse, Turner Padgett, also of Charleston), were filled with fraud. Furthermore, the fraud had been signed by Judges in Orders who had confidence in the sworn oath taken by attorneys as officers of the court. The question is who will have the wherewithal, guts, fortitude, or courage to take on the criminal fraud being wielded by greedy attorneys in our halls of “Justice”? thus making it impossible for this Appellant to comply with the fraudulent contracts.

(6) “the hearer’s ignorance of its falsity.” Appellant relied upon what the Respondents told him (directly and/or indirectly through their hired attorneys at that time). Appellant believed them while not understanding that the extrinsic fraud would totally prevent a court victory for his insurer (Penn America, et. al.). Respondents knew they would not win justice for their insured (Appellant), or any rightful and just outcome based because of the Extrinsic Fraud Upon the

Courts, WHICH IS STILL IN PLACE DUE TO THEIR FAILURE TO REPORT IT, but these Respondents withheld that knowledge from the Appellant, their insured.

(7) **“the hearer’s reliance on its truth.”** Appellant fully believed in the insurance companies’ protection, and that Appellant would acquire restitution. Appellant did not understand that the Extrinsic Fraud was being used by TLC’ Holdings, LLC’s attorneys so that this Appellant (not an attorney) would *never* win any hearings, motions, rulings or trials.

(8) **“the hearer’s right to rely thereon.”** Appellant believed that since he paid for the insurance protection if sued or damaged and was represented by this insurance carrier – and the umbrella company-- that the insurer would make it right for him. Appellant did not, and does not believe that he had ever acted in bad faith regarding the TLC contracts nor the Respondents’.

(9) **“the hearer’s consequent and proximate injury.”** Due to the intentional fraud perpetrated against Appellant, Appellant was prevented from making \$5 million in developments that could not happen due to hidden defective title and approximately 20 other major and fraudulent issues cited by Laura Paton, Esq. which have been shown in Appellant’s initial brief in the Circuit Court as EXHIBIT 3.0.

Respondent quotes, “A complaint is fatally defective if it fails to allege all nine elements of fraud.” Clearly the aforementioned addresses ALL nine elements.

Furthermore, Respondent cites at the top of page 26 in his Initial Brief, what Respondent Tim Newton wrote to Appellant, "I need to remind you that I don't represent you I can't represent you because I represent Penn-America. To the extent there is a common interest, I note the following" :

Paragraph 15. "I can see how you could argue that the Consent Order is invalid because it attempts to adjudicate the rights of parties not before it." (referring to the owners of the aforementioned Retail Membership Agreements assuring long term “right to use” the land

and its amenities.) "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 blighted to violate the rights of the campground members by developing since TLC never specified exactly which property was subject to the campground memberships".

Paragraph 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)".

Appellant reminds the Court that there is no common interest since the person who wrote paragraph (15) and (16) was Timothy Newton, Esq., another Respondent in this case who, in his own words, 'represented Penn America and did not represent Appellant'. The question is why did Newton (Penn America's servant attorney) give Appellant legal advice including the 16 paragraph letter citing case law to support his 16 paragraph letter? Paragraph (15) and (16) makes one wonder why Penn America's attorney would write such an incriminating letter to the insured, this Appellant. This is yet another reason why this case should have complete discovery and a jury trial for these two paragraphs certainly reflect that 'master' and 'servant' were very much aware of the extrinsic fraud. Discovery will open up the complete truth.

In summary, Courts generally liberally construe the allegations of the complaint and resolve any doubt in favor of a defense for the insured..."extrinsic facts KNOWN BY THE INSURER (emphasis mine) can create a defense obligation even where the complaint is silent as to those facts...unpleaded facts that potentially trigger coverage under the policy can lead to extra contractual exposure for the insurer." "The Duty to Defend: The Four(ish) Corners Rule" Rawls, R. Steven, Nov. 2009.

All Respondents are guilty of bad faith, deception, fraud, cover-up, concealing the true facts from the Courts which only creates more fraud upon the courts. Such conduct is not to be allowed within the Court systems and against Honorable Judges who are trying to make sense out of the information that is provided to them in order to make an honest ruling. The Court system cannot function honorably while Extrinsic Fraud is active and covered up by "Officers of the Court."

These Respondents simply pretended, in bad faith, to represent the insured in order to get the case off their books (and not be sued by Torus). This scenario victimized this Appellant. Why did these Respondents never inform this Appellant that they could "never win" on behalf of this Appellant – their client and policyholder? It is because they were being negligent of their duty to defend and operating in bad faith.

What was the purpose of pretending to represent Appellant once Respondents were aware of the Extrinsic Fraud, when they were unwilling to bring it to the attention of the Court and Judges? Those actions are fraudulent to the Appellant, Courts and Judges. Penn America was acting in bad faith and should be held accountable for that.

As outlined earlier, here is some of the evidence, authored by Laura Paton, Esq. (hired by Penn America) to investigate and represent Appellate. This was submitted to all Respondents and

submitted by this Appellant to the lower court as Exhibit 3.0. All Respondents had a copy or access to her work:

47. That during the December 2010 meeting the TLC parties advised Appellant Hutson that the property was owned by TLC Holdings and the campground business was owned by Big Water resort, LLC (BWR).

48. That during the December 2010 meeting the TLC parties advised Mr. Hutson that in order to purchase the land, he would be required to purchase BWR as well.

49. That during the December 2010 meeting the TLC parties advised Mr. Hutson that there was water and sewer adjacent to the property for development but failed to disclose the moratorium of approximately 5 years preventing development of the property.

50. That during the December 2010 meeting the TLC parties advised Mr. Hutson that BWR had no known debt.

51. That during or after the December 2010 meeting the TLC parties advised Mr. Hutson that BWR had an annual income of approximately \$200,000.00.

52. That during and after the December 2010 meeting, the TLC parties concealed BWR's \$300,000.00 annual losses.

53. That during the December 2010 meeting the TLC parties advised Mr. Hutson that BWR had no accounting records.

54. That during the December 2010 meeting the TLC parties advised Mr. Hutson that the value of BWR was \$500,000 and the value of the land at 5215 Dingle Pond Road, Summerton, SC was \$6 million.

55. That TLC parties and Mr. Hutson negotiated for Mr. Hutson to lease the land with the option to purchase in 12 months for \$6 million or 24 months for \$7 million.

56. That during the December 2010 meeting the TLC parties and Mr. Hutson discussed the length of the Lease Purchase Agreement so that Mr. Hutson would have sufficient time to secure the necessary permits to develop the property.

57. That prior to executing the Lease Purchase Agreement and the Membership Interest Purchase Agreement (hereinafter collectively "the Agreements" attached as Exhibits A and B), Mr. Hutson searched the property title record; no liens or encumbrances were found.

58. That prior to purchase by Mr. Hutson, the TLC parties and Mr. Hutson executed the Membership Interest Purchase Agreement for BWR and a Lease Purchase Agreement for the property at 5215 Dingle Pond Road, Summerton, SC (Hereinafter collectively "The Agreements").

.....(Repetitive sections were skipped for the purposes of meeting page limitations.).....

62. That the Membership Interest Purchase Agreement includes a representation by the TLC parties representing that they had "good and marketable title to all of its properties and assets.

.....(Repetitive sections were skipped for the purposes of meeting page limitations.).....

65. That the Lease Purchase Agreement includes representations by the TLC parties ensuring that they have good and marketable title to their land at 5215 Dingle Pond Road, Summerton, SC.

66. That the TLC parties knowingly and / or negligently failed to disclose and / or concealed information that the Retail Membership Agreements provided that each holder: 1) a right to use campground facilities, and services solely for members recreational and enjoyment, (emphasis supplied), 2) this right to use the facilities ranges from 5 years up to two life times.

.....(Repetitive sections were skipped for the purposes of meeting page limitations.).....

69. That the TLC parties advised Mr. Hutson that the Retail Membership Agreements could be terminated / divested such that he could proceed with development of the property.

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

.....(*Repetitive sections were skipped for the purposes of meeting page limitations.*).....

72. That Mr. Hutson and his attorney performed titles searches with the Clarendon County Register of Deeds prior to purchase and no encumbrances as to the timeshares were found.

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

.....(*Repetitive sections were skipped for the purposes of meeting page limitations.*).....

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

76. That, as a result of such fraudulent and/or negligent misrepresentations, Mr. Hutson has been damaged, and continues to be damaged, and has suffered pecuniary loss as a direct and proximate result of his reliance on the TLC parties representations:

77. That prior to execution of the Agreements, the TLC parties advised Mr. Hutson that the value of BWR was \$500,000 and the value of the land at 5215 Dingle Pond Road, Summerton, SC was \$6 million.

.....(*Repetitive sections were skipped for the purposes of meeting page limitations.*).....

79. That prior to execution of the Agreements, the TLC parties advised Mr. Hutson that BWR had an annual income of approximately \$200,000.00.

80. That prior to execution of the Agreements, the TLC parties did not advise Mr. Hutson that BWR was operating at a substantial loss upward of \$300,000 per year, outstripping its income.

81. That prior to execution of the Agreements, the TLC parties advised Mr. Hutson that BWR had no accounting records.

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

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

.....(Repetitive sections were skipped for the purposes of meeting page limitations.).....

89. That the TLC parties actively, intentionally, willfully, wantonly, recklessly, and / or negligently misrepresented and / or concealed the financial condition, including, but not limited to, the debt owned to Black River Electric, to induce Mr. Hutson to purchase BWR and enter into the Agreements.

90. That as a result of the TLC parties' intentional, active, willful, wonton, and / or reckless and / or negligent misrepresentations and / or concealments, inducing Mr. Hutson to enter into the Agreements, he has suffered irreparable harm including, but not limited to, significant financial harm.

91. Therefore, as a direct and proximate result of the TLC parties' actions, Mr Hutson is entitled to actual, direct, consequential, incidental, special, and punitive damages as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of same or any other waiver or other limitation are null, void,

unenforceable, and subject to rescission as a matter of law. (Defamation / Libel Per Se as to the TLC parties)

92. That on or about April 3, 2014, the TLC parties wrote to the members of the Big Water Resort Campground the letter at Exhibit C.

93. That in their correspondence, the TLC parties included untrue statements impugning Mr. Hutson's performance as one-time owner of Big Water Resort.

94. That the TLC parties' correspondence was made with actual and / or implied malice and intended to degrade and reduce the character and / or reputation of Mr. Hutson to others.

95. That as a direct and proximate result of the TLC parties' actions, including, but now limited to, the malicious publication of libelous materials to the members of the Big Water Resort, Mr. Hutson is entitled to actual, direct, consequential, incidental, special, and punitive damages as aforesaid, all in an amount to be determined by the trier of fact and any attempts in any contractual agreement for the limitation or disclaimer of same or any other waiver or other limitation are null, void, unenforceable, and subject to rescission as a matter of law.

96. That the TLC entities and Defendant Hutson entered into the Agreements as outlined above.

97. That the Agreements contained certain provisions as outlined above including, but not limited to:

- a. Warranties as to good and marketable title to all its properties and assets;
- b. Seller represents, warrants and covenants to Purchaser as follows: ...further, there are no actions, suits, or proceedings either at law or equity . . .or to the knowledge of Sellers, threatened;
- c. Seller represents, warrants and covenants to Purchaser as follows: (e.) In compliance with all laws, regulation and orders applicable to its business"

- 98.** That in breach of the aforementioned Agreements, the TLC entities:
- a. Did not have marketable title and, in fact, such title was encumbered by timeshares;
 - b. That a substantial outstanding debt was owed Black Water Electric which could lead to litigation;
 - c. That the TLC entities failed to record timeshares as required by statute; and
 - d. Other such breaches as may be determined.
- 99.** This constitutes a breach of the Agreements with Mr. Hutson and accompanying this breach was the fraudulent acts:
- a. Knowingly failing to disclose the outstanding debts of BWR, including, but not limited to Black Water Electric;
 - b. Advising Mr. Hutson that no financial records were kept as to BWR to conceal the losses / financial condition of the company;
 - c. Failing to record encumbrances required by statute as outlined above;
 - d. Advising Mr. Hutson that the Retail Memberships could be divested to allow for development of the lakefront land as discussed;
- 100.** The TLC parties and the John Doe Corporations, and each of them, through their acts and omissions including, but not limited to, the following particulars, conducted unfair and deceptive practices within the meaning of S. C. Code Section 39-5-140 (a) and 27-31-430, S. C. Code of Laws and amended:
- a) by failing to disclose the Vacation Time Shares encumbering the property;
 - b) In failing to record the memberships as required pursuant to Sections 27-32-10 through 27-32-250 of the 1976 Code are designated as Article I of Chapter 32, Title 27, and entitled 'Vacation Time Sharing Plans';
 - c) In failing to pay and subsequently hiding the debt owed to Black River Electric;

- d) In failing to provide any additional consideration for subsequent attempts to modify their agreement;
- e) In failing to properly disclose the true conditions of the business and properties at issue in the Agreements and putting them into the stream of commerce;
- f) In making false representation as to the condition of the business and properties at issue in the Agreements an/or representations as to the condition of the business and properties at issue in the Agreements in reckless disregard as to the truth of the representations; and
- g) In failing to analyze and preserve reserves for maintenance and operation of the business and concealing same.

.....(*Repetitive sections were skipped for the purposes of meeting page limitations.*).....

103. The conduct of The TLC parties in their ownership and management of TLC Holdings, BWR, and the John Doe Corporations, as described above, was knowing and willful, and the TLC parties knew or should have known that such conduct was a violation of S. C. Code Section 39-5-20 and 27-31-430.

104. Mr. Hutson is a person within the meaning of S. C. Code Section 39-5-140(a) and has suffered actual, direct, and proximate damages as a direct and proximate result of unfair and deceptive acts of the TLC parties, in an amount to be determined by the trier of fact.

105. The aforesaid acts of the TLC parties impact the public interest in that they constituted unfair and deceptive acts and have the potential for repetition and, in fact, occurred at the execution of the Agreements and may continue to occur as the TLC entities engage in other enterprises related to the Retail Memberships and BWR and, as such, are acts which can have and will affect the public at large by repetition.

106. These unfair and deceptive acts are acts which will affect members of the public, beyond the parties to the above-described transactions, in the form of their consumers who may be injured by purchasing new memberships or other such timeshare that the TLC parties and the John Doe Corporations offer on the land which, upon information and belief, those entities, and / or the amalgamated John Doe Corporations own and operate whereby placing members of the public in danger of harm.

107. Mr. Hutson is entitled to be compensated pursuant to S. C. Code Section 39-5-140(a) for the above-described actual, incidental, consequential, and special damages, as well as costs, interest, and attorney's fees, and to recover three (3) times these damages by reason of the knowing and willful nature of the unfair and deceptive acts by Defendants and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

108. The TLC parties, by and through various instrumentalities and alter-egos and other companies to be named at a later date were the original developers and/or operators of BWR.

109. That the TLC parties, with their John Doe Corporations, combines and joined together through various instrumentalities, alter egos, and amalgamated entities, to facilitate the process of developing BWR, encumbering BWR with various debts, and concealing such debts from Mr. Hutson.

110. The TLC parties created and controlled numerous and various entities (hereinafter the John Doe Corporations) to be expressly named at a later date, for the sole purpose of the activities solely relating to development and sale of memberships related to BWR.

111. The TLC parties and the John Doe Corporations created and controlled these sham entities for the sole purpose of enabling it to transact a portion of its business under an alternate corporate guise and to avoid claims such as those set forth herein. These entities, and each of them, were

merely a façade for the operations of Messrs. Lovell and Clark to achieve their financial goals and to perpetrate the activities more particularly described herein.

112. The subservient entities in fact manifested no separate interest of their own and that there was an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the TLC parties and the John Doe Corporations and the sham corporations, shareholders, officers, agents, partners, employees, assets, and each of them.

113. The TLC parties created entities, which were created to perform single purpose functions, in order to effectuate the sole will of the TLC parties to perpetuate the acts described herein. Despite the creation of these sham entities and despite the sham entities appearing in name only on some contracts, letters, deeds, and/or other documents, the TLC parties and the John Doe Corporations actively and directly in the activities herein, and in fact put BWR in the stream of commerce.

114. The TLC parties and the John Doe Corporation directed and oversaw the fraudulent / negligent actions described herein.

.....(Repetitive sections were skipped for the purposes of meeting page limitations.).....

118. There would exist a broad element of injustice and fundamental unfairness if the acts of the TLC parties, including Messrs. Lovell, Clark, and TLC Holdings, LLC, and the John Doe Corporations, and each of them individually, were not regarded as the acts of one another.

119. At the time BWR and the Lease-Purchase Agreement were offered and placed into the stream of commerce by the TLC parties and the John Doe Corporations, the faulty defects and deficiencies heretofore described were hidden and concealed through the acts and omissions of the TLC parties and the John Doe Corporations.

120. That the TLC parties and the John Doe Corporations, knew or should have known of the existence of the said defects and deficiencies, which were unknown by and / or concealed from Mr. Hutson.

121. These hidden defects, including, but not limited to, defective, un-marketable title and outstanding and oppressive debts, which unbeknownst to Mr. Hutson rendered the business and the Leas-Purchase Agreement undevelopable and worthless.

122. The resulting actual, incidental, consequential and special damages, and continue to do so through the date of this filing.

123. Mr. Hutson suffered damages and injuries when the TLC parties and the John Doe Corporations put BWR and the properties described in the Lease-Purchase Agreement into the stream of commerce and continue to be damaged and injured through the date of this filing.

124. As a direct and proximate result thereof, the TLC parties and the John Doe Corporations are liable to the Plaintiffs for actual incidental, consequential, special and punitive damages, all in an amount to be determined by the trier of fact, and any attempts in any contractual agreement for the limitation or disclaimer of warranties, or any other waiver or other limitation, are null, void, unenforceable, and subject to rescission as a matter of law.

All respondents had access to what Paton prepared, including the fraudulent contracts and other papers reflecting fraud and Extrinsic Fraud. The Penn America Insurance Respondents should have contacted Appellant to inform him that they would not take Appellant's case since (as they have proven by their actions, and more accurately their INACTIONS) they refused to disclose the fraud and extrinsic fraud since the attorneys representing TLC Holdings, LLC never disclosed the fraudulent facts to the Courts nor to the Judges, thus elevating their crime of creating the fraud to extrinsic fraud.

In addition, Respondent / Newton's 16-paragraph letter to Appellant, written prior to the

Jury trial, clearly shows Respondents were aware of fraud / extrinsic fraud. Instead, all respondents acted as if Appellant had a chance to win his cases in order to negotiate restitution.

Respondents fully understood that Appellant was going to be badly damaged financially and destroyed. This case needs to be sent for Jury trial where all attorneys and other witnesses can be sworn to tell the truth. Respondents never have admitted verbally, or in writing, that they were aware that they could not win any of the cases against Appellant because they refused to report the Extrinsic Fraud...which was legally and morally imperative.

Furthermore, by not addressing this in the Appellate Court, additional Extrinsic Fraud upon the Court is being enacted by the Respondents. They knew or should have known, they failed to act when they should have acted. They are guilty of bad faith, fraud, and should be held accountable and forced to fully indemnify this Appellant.

Appellant cannot complete his preparations for trial without discovery nor can Appellant win this case without taking this to a jury. The actions of all Respondents are the very reason that the public does not trust insurance companies and their lawyers. In this case, all Respondents have deceived the Courts and Judges. Respondents should have never settled with TLC Holdings, LLC knowing that fraud and extrinsic fraud was the sole reason TLC and their lawyers always won.

Similar attempts have already been made in South Carolina and across America whereby insurance carriers attempted to circumvent their duty to defend fraud. Presented herein was evidence that the courts have already ruled against bad faith actions all across this country. Rules beyond the State of South Carolina in the America Bar Association already address fraudulent actions by attorneys and damages to victims such as this Appellant has suffered at the hands of Penn America, et. al. This Appellant remains waiting for this Appellate Court to move on his

behalf for indemnification and removal of the judgments wrongly placed upon him. Reverse this case immediately and order the same to a jury. Kick out the Respondents now due to their fraud.

August 6, 2020

A handwritten signature in black ink, appearing to read 'M B Hutson', is written over a horizontal line.

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

PROOF OF SERVICE ON NEXT PAGE:

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant

v.

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

Respondents

PROOF OF SERVICE

I certify that I have served the **RESPONSE TO INITIAL BRIEF OF RESPONDENT, PENN AMERICA**, et. al., with a copy of this Proof of Service on Penn America Insurance Company, Global Indemnity Insurance Company, J. R. Murphy, Esq., and Timothy Newton, Esq. by depositing a copy of it in the United States Mail, postage prepaid, on August 6, 2020, addressed to the insurance companys' attorney of record, Christian Stegmaier, Esq., @ Post Office Box 12487, Columbia, South Carolina 29211-12487, and also to J.R. Murphy, Esq. and Timothy J. Newton, Esq., both of Murphy and Grantland, P.A. (both acting as Pro Se, of record), BOTH at Post Office Box 6648, Columbia SC 29260-6648.

August 6, 2020



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

EXHIBIT 2

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant.

v.

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

Respondents.

APPELLATE'S RESPONSE TO RESPONDENTS PENN AMERICA INSURANCE
COMPANY AND GLOBAL INDEMNITY GROUP, INC'S MOTION FOR AND
MEMORANDUM IN SUPPORT OF IMPOSITION OF SANCTIONS AGAINST
APPELLANT FILED ON JULY 24, 2020

Comes now the Appellant, victim/pro se, who brings the spotlight to the Honorable
Appeals Court of these facts:

I. This Appeals case is due to Respondents' deception, fraud, breach of contract
and Extrinsic Fraud:

A. All materials that Respondents have filed are irrelevant to this complaint and merely an attempt to mislead, distract and ultimately continue to conceal from the courts:

1. their willful, contrived actions to harm and do disservice to the insured, this Appellant, rather than to expose the guilt of Respondents' colleagues (fellow attorneys who structured the underlying Extrinsic Fraud upon the Courts), while
2. masking their own (these Respondents') subsequent guilt in not disclosing that Extrinsic Fraud (which was initially perpetrated by TLC's lawyers on the courts in a real estate scam) against the courts in contrived actions against these Respondents' insured, this Appellant, AND
3. that these Respondents, still attempting to protect their fellow attorneys, chose to co-conspire and conceal that Extrinsic Fraud upon the Court rather than expose that Extrinsic Fraud upon the Courts, which would have exonerated their insured, this Appellant in former actions which Respondents are trying to fabricate those court "losses" as caused by the Appellant—rather than admitting the cause was Respondents' failure to expose their colleague attorneys and inform the courts of the underlying Extrinsic Fraud which would have nullified those actions.
4. Therefore, they have now become participants themselves in the cover-up of that Extrinsic Fraud upon the courts and

the subsequent cover up which they are now playing out
before this honorable Appellate Court.

B. Respondents 1) violated the law, 2) violated their Oath, 3) violated Rule 402, and also 4) violated Rule 3.3 (CANDOR TOWARD THE TRIBUNAL)—inserted below.

C. Respondent's Penn America/Global including Christian Stegmaier are requesting the Honorable Appeals Court to Sanction Appellant for disgracing the Respondents due to the Extrinsic Fraud. Appellant notes that any officer of the Court who has taken the required *Oath* (rule 402) and fully understands Rule 3.3: *Candor Towards the Tribunal*, and who intentionally conceals critical evidence for the sole purpose of self preservation at the cost of disgracing, deceiving, plotting and defrauding the Honorable Court, is creating Extrinsic Fraud upon the court. Respondents are intentionally trying to make an innocent Plaintiff/Appellant appear to be a dishonest person who files suits merely to harass! The evidence presented shows otherwise. Respondents like this are chronic liars and need to be removed from the Honorable Court.

D. This case is primarily about Extrinsic Fraud Upon the Court and Deception on the Court for the purpose of a major attorney 'cover-up.' It includes the insurance company's Breach of Contract to their insured (Appellant), Negligence, and Failure to Perform Duties (namely their obligation "TO DEFEND"). All other papers filed by Respondents that do not address why Respondents did not report the Extrinsic Fraud are simply to confuse and distract the courts while they protect fellow lawyers who schemed illegally.

1. Refer to the Respondent Tim Newton's voluntarily (16) paragraph letter where he states:

(15) "I can see how you could argue that the Consent Order is 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 undevelopable because it was already obligated to double lifetime memberships as a private club. It appears that could easily have averted the entire fiasco. Since attorneys were involved, and it resulted in your inability to present your case in court and possibly led to the sanctions order and judgment against you, there might possibly be extrinsic fraud on the court to support setting aside the Consent Order. See *Chewning v. Ford Motor Co.*, 354 S.C. 72, 579 S.E. 2d 605 (2003)".*

2. All Respondents were aware, including Christian Stegmaier who is sponsored by Penn America and paid by Penn America and Global, of the Extrinsic Fraud intentionally created by TLC's lawyers in the underlying cases. Appellant will again list some of the intentional fraud upon the lower courts and Federal courts by TLC's lawyers to show that extrinsic fraud continues in the Appeals Court.

- a. Intentionally hid the fact that the Option to Purchase Agreement was fraudulent due to the fact that TLC and their attorneys fully understood that TLC could never sell the 108 acres due to an unrecorded 740 right to use memberships for 70 years.

b. Hid the fact to Defendant/Appellant that it would cost Defendant/Appellant \$22 million dollars to honor the 740 memberships caused by the continuous lost each year of \$350.00 dollars.

c. Hid the fact that TLC would never agree to enter into an agreement whereby Big Water Resorts could legally use the TLC's property in order to continue honoring the 70 year memberships. Each of the 740 Retail Membership Agreements (RMAs) provided the sole use of the very 108 acres that TLC and their attorneys prepared contracts that Defendant / Appellant executed to buy for clearly stated development purposes. The TLC attorneys prepared the contracts to sell the property while fully understanding that it was impossible to ever sell the property to Defendant/Appellant for development. The sole purpose of pretending that TLC could enter into that sales agreement was to defraud the Defendant/Appellant to buy Big Water Resort's failing business as a campground and becoming responsible for the hidden \$22 Million dollar liability over 70 years.

d. TLC prepared a financial statement showing a worth of \$1.7 million for the Big Water Resort when in fact the business was worth less than \$30,000.00 and was carrying a hidden \$22 Million dollar obligation.

e. TLC's attorneys prepared all contracts and were fully aware of all hidden situations and fraudulent facts. Each and every time TLC appeared in court it was with four to six of their lawyers. All fraudulent facts were hidden from the unsuspecting Defendant/Appellant as well as from the State and Federal Courts. TLC's lawyers committed fraud upon

both the S.C. State and the Federal Courts and Judges (by intentionally not disclosing the fraud their clients had committed against the unsuspecting Appellant. Rule 3.3 Candor Toward The Tribunal.

3. All the Respondents in this case had all the paperwork, all contracts, filings and depositions which provided them with full access to the truth, that fraud existed. Because Extrinsic Fraud upon the Courts was underlying all actions against this Appellant, it was extrinsic fraud on the part of these Respondents to not report that underlying Extrinsic Fraud to the courts and stop the proceedings.

a) NOTE: At the first mediation hearing of which Appellant was invited, Appellant revealed most of the fraud committed by TLC and their attorneys. Respondent Tim Newton and Kim Jackson for Torus Insurance (Umbrella Carrier) were present. They both fully understood the Extrinsic Fraud. *All* Respondents fully understood that the lawyers for TLC had willfully plotted and concealed the fraud against this Appellant. They took NO ACTION TO DISCLOSE IT.

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

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

c. All of the Respondents were fully aware of the extrinsic fraud carried out by TLC's lawyers yet no Respondent ever brought it to the court(s) attention: not then, and not since!

d. Had the Respondents disclosed this prior to the Lower Court hearing under Judge Nettles, Nettles would have thrown out and dismissed any defense in behalf of the Respondent's and ruled totally for the Plaintiff / Appellant, and this case would have all ready been sent to a jury, Appellant would no longer be indigent, and would have not suffered the resultant health issues and great Depression.

NOTE: At this point, Appellant is fighting for his life while the Respondent's still continue to refuse to admit they intentionally did not report the extrinsic fraud although they fully understood it. *These actions make Respondents guilty and co-conspirators of the extrinsic fraud.*

Merrimack-Webster's Dictionary of Law: "a fellow conspirator-Under Federal law, a statement made by a co-conspirator during and to further the conspiracy is admissible as evidence, but there must be other evidence establishing both the conspiracy and the defendant's participation".

The term "defendant's participation" is abundantly clear. All Respondents participated in not disclosing the extrinsic fraud upon the courts to the courts. This includes not exposing it to this Honorable Appellate Court. More than being honorable, Respondents prioritize protecting themselves and their fellow attorneys (as stated to Appellant by Respondent Tim Newton). All Respondents were fully aware

of all the related fraud perpetrated by TLC's officers of the Court and Respondents who willfully chose to hide the extrinsic fraud and protect their fellow attorneys/colleagues ~~in order to reach~~ and conclude by way of making an approx.. \$2 Million dollar settlement with TLC knowing full well that Appellant would be doomed forever.

The Annotated South Carolina Rules of Professional Conduct (2016 Edition) states: "Rules 3.3 (a)(3) prohibits a lawyer from offering evidence that the lawyer knows to be false. If the lawyer learns that material evidence offered by the lawyer, the lawyer's client, or a witness called for the client is false, the lawyer must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal."

Appellant reminds the Honorable Appeals Court that the Respondents had full knowledge that their filing(s) were false due to their intentional former concealments from the Courts that damaged this Appellant and caused this Appellant not to have his case fully heard. They further understood that tilting the scales totally in favor of the Respondents would once again, leave this Appellant without Justice.

All Respondents, representing the Insurance Companies had an exclusive duty to defend and protect this Appellant (since Appellant was the insured) from TLC's lawsuits which involved underlying Extrinsic Fraud and prevented this Appellant from ever having his case heard in the lower courts.

All Respondents were aware of the Extrinsic Fraud and that they had a duty to disclose to all the courts, including this Honorable Appeals Court (See RULE 3.3: CANDOR TOWARDS THE TRIBUNAL –cited below).

All Respondents fully understood that:

- the underlying Extrinsic Fraud would cause this Appellant, the insured, to lose in each court ruling, and
- *each* attorney had a legal duty to report the underlying Extrinsic Fraud to the court (including Christian Stegmaier, Esq in this case), BUT

All Respondents elected not to report such fraud, and chose rather to become co-conspirators with TLC attorneys' Extrinsic Fraud, knowing that such actions would destroy the future of this Appellant.

The Court of Appeals is the very Court that requires each attorney to take his professional oath (Rule 402) to become "officers of the court." Appellant asks this Honorable Appeals Court to have an emergency hearing: nothing prevents the Appeals Court from investigating the truth, clearing the court and stopping this cancerous Extrinsic Fraud spreading from lawyer to lawyer. Extrinsic Fraud destroys the credibility of the court.

Respondents, continuing to be evasive and deceitful, cannot produce any law that prevents the Honorable Appeals Court from investigating Extrinsic Fraud being perpetrated in their own court. In fact, case law is already established compelling the Appellate Court Judges thru "inherent authority" to act.

The requisite fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering

the presentation of the opposing party's claim or defense." *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) . . . The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court orders. *Kornblum v. Schneider*, 609 So. 2d 138, 139 (Fla. 4th DCA 1992). (Emphasis, mine.)

Once this Appeals Court identifies that all Respondents are in violation of such rules, no rule or law prevents the Appeals Court from bringing action against the Respondents, and even from making an immediate ruling to reverse this case and send it to a jury. Appellant nor the Courts deserves the torture of more time wasted. Once put on notice of Extrinsic Fraud, the Honorable Court *is obligated* to seek satisfaction for the Appellate. Any actions filed by its perpetrators, dishonest officers of the Court, should be suspended until the court achieves satisfaction and responds accordingly and in favor of the truth and this Appellant.

Appellant challenges this court to immediately investigate the allegation(s) of Extrinsic Fraud and upon satisfaction that the Extrinsic Fraud exists, exonerate this Appellant without further delay. Respondents are betraying the Honorable Court's trust as officers of the court.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) apply when the lawyer is representing a client before a tribunal as well as in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. These duties continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(q) for the definition of "tribunal." It also

applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation

prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires, that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. Counsel, however, may allow the accused to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. See also Comment [9]. When a narrative statement is offered under these circumstances, the lawyer may not examine the witness or use the false testimony in the closing argument.

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(h). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be

surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make disclosure to the tribunal. It is for the tribunal then to determine what should be done making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of The Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

(14) Ordinarily an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material

facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Last amended by Order dated April 15, 2015.

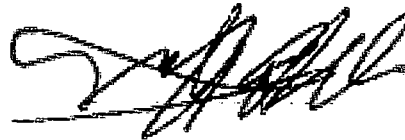
Therefore, this victim/Appellate prays that this honorable court:

1. investigate, reverse, and remand this case to a jury.
2. refuse to allow Respondents further involvement in this case due to their extraordinary Extrinsic Fraud upon the Court (no court should associate with officers of the court committing pre-planned and intentional fraud), and
3. Deny Respondent's motion for sanctions against Appellant as Respondents' actions are intentionally illegal before the Honorable Court.

“Requisite fraud on the court occurs where “it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party’s claim or defense.” *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989). . . . The trial court has the inherent authority, within the exercise of sound judicial discretion, to dismiss an action when a plaintiff has perpetrated a fraud on the court, or where a party refuses to comply with court orders. *Kornblum v. Schneider*, 609 So. 2d 138, 139 (Fla. 4th DCA 1992). (Emphasis, mine.)”

This Appellant cries and prays for this Court to rectify what Respondents have and are committing against this Appellant and the Court. Appellant, now 76 years old, has become indigent from this long-term extrinsic fraud. Give this Appellant, who is fighting for his life, justice!

Filed on this 27th day of July, 2020.



M B Hutson, Pro Se
Post Office Box 2755
Orangeburg, South Carolina 29116-2755
(803) 308-2714
hutson4444@gmail.com

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2018-CP-400-6344

Appellate Case # 2019-001488

MB Hutson/ MB Hudson

Appellant.

v.

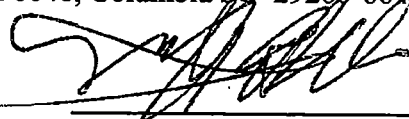
Penn America Insurance
Company, Global Indemnity
Group, Inc., Timothy J.
Newton, Esq., J.R. Murphy,
Esq., John Doe #1 and John
Doe #2,

Respondents,

PROOF OF SERVICE

I certify that I have served the APPELLATE'S RESPONSE TO PENN AMERICA'S RETURNS TO APPELLANT'S EMERGENCY MOTION FOR HEARING with a copy of this Proof of Service on Penn America Insurance Company, Global Indemnity Insurance Company, J. R. Murphy, Esq., and Timothy Newton, Esq. by depositing a copy of it in the United States Mail, postage prepaid, on July 27, 2020, addressed to the insurance companies' attorney of record, Christian Stegmaier, Esq., @ Post Office Box 12487, Columbia, South Carolina 29211-12487, and also to J.R. Murphy, Esq. and Timothy J. Newton, Esq., both of Murphy and Grantland, P.A. (both acting as Pro Se, of record), at Post Office Box 6648, Columbia SC 29260-6648.

July 27, 2020



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

EXHIBIT 3

Fwd: Setting aside the Judgement

Mr. H <hmr226621@gmail.com>

Mon 8/13, 12:52 PM

ods06535cpc ✕

👤 ⚙️ Reply all ▼

Inbox

This item will expire in 24 days. To keep this item longer, apply a different label.

Label: 30 days Delete CPC mailbox (1 month) Expires: 9/12/2018 12:52 PM

Begin forwarded message:

From: "Tim J. Newton" <tnewton@murphygrantland.com>

Date: August 13, 2018 at 10:49:58 AM EDT

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

Subject: RE: Setting aside the Judgement

Mr. Hutson,

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

1. Renee Roark testified at trial in the defamation action that you contacted her in October 2010 looking for waterfront property to develop.
2. Susan Stroman admitted at trial sending you an e-mail dated November 11, 2010 in which she indicated the campground could possibly be moved or the members bought out. However, she denied having said that on behalf of TLC.
3. The alleged lease between Big Water Resort, LLC and TLC Holdings, LLC, if it existed, was never recorded, although it was for a term of more than a year.
4. The membership agreements between the campground members and Big Water Resort, LLC were never recorded. Possibly they should have been, since they granted campground members a rights to use Big Water Resort, LLC's facilities for life plus the lifetime of a survivor. See S.C. Code s 27-33-30 (requiring "any . . . agreement for the use . . . of real estate" to be recorded).
5. There is some case law indicating lifetime memberships are for the duration of the club member, and can only be terminated for cause. Paul Gabrillis, Inc. v. Dahl, 154 Or. App. 388, 961 P.2d 865 (Or. Ct. App. 1998); Martin v. Town & Country Dev., Inc., 230 Cal. App. 422, 41 Cal. Rptr. 47 (Cal. Ct. App. 1964).



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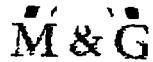
7. The Lease-Purchase Agreement pertains to all of TLC's property at the Big Water Resort site.
8. The Membership Interest Purchase Agreement in Big Water Resort, LLC does not specify what property is subject to the campground membership agreements.
9. The Settlement Agreement dated March 30, 2012 is between TLC Holdings, LLC (and its principals) and Hutson only. TLC is represented as the landlord, and Hutson is represented as the tenant. Big Water Resort, LLC and the campground members are not parties.
10. The Settlement Agreement, in para. 5, obligates Hutson to submit a Qualified Plat for a proposed subdivision "as shown on Exhibit 'A' attached hereto." There are provisions for an acreage release, and it appears the payments owed to TLC may be paid from the proceeds of the subdivision and sale of parcels of the property.
11. The copy of this Settlement Agreement that was made an exhibit at Hutson's bankruptcy deposition had two hand drawings immediately after the last page, which reads "Exhibit A." These drawings depict the approximate location of the proposed development as being on the campground parcel.
12. Despite the language in the Lease-Purchase Agreement and the Settlement Agreement that the subdivision and sale pertained to unimproved portions of the property, the letter that TLC's attorney Tom Harper submitted to the Clarendon County Planning Commission with TLC's approval depicts a development on the campground property.
13. The Consent Order filed April 13, 2012 incorporates the Settlement Agreement but does not otherwise mention Big Water Resort, LLC or the campground members. It reads as if it pertains to a mere landlord-tenant dispute.
14. Bonnie Youmans testified at trial (by way of her deposition) that she thought all of TLC's property was part of the Big Water Resort campground and she would have considered it a violation of the campground memberships to have developed condominiums on the campground property. This testimony was unopposed.
15. I can see how you could argue that the Consent Order is 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 undevelopable because it was already obligated to double lifetime memberships as a private club. It appears that could easily have averted the entire fiasco. Since attorneys were involved, and it resulted in your inability to present your case in court, and possibly led to the sanctions order and judgment against you, there might possibly be extrinsic fraud on the court to support setting aside the Consent Order. See Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003).

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

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.

Tim N.





Murphy & Grantland, P.A.

Tim J. Newton, Esquire

tnewton@murphygrantland.com

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Columbia, South Carolina 29260

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803-454-1242 dd

803-782-4140 fax

www.murphygrantland.com

Please be advised that this e-mail and any files transmitted with it are confidential attorney client communications or may otherwise be privileged or confidential and are intended solely for the individual or entity to whom they are addressed. If you are not the intended recipient, please do not read, copy or retransmit this communication but destroy it immediately. Any unauthorized dissemination, distribution or copying of this communication is strictly prohibited.

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

Sent: Saturday, August 11, 2018 9:04 PM

To: Tim J. Newton <tnewton@murphygrantland.com>

Subject: Setting aside the Judgement

EXHIBIT 4

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
)
)
)
)
_____)

AFFIDAVIT OF MARK W. HARDEE

Qualifications

- a. I graduated from the University of South Carolina School of Law in 1986 and began working as an Assistant Public Defender in Richland County.

Approxmently November 1988, I went to work as an Associate with the law firm of Lewis Babcock Plescones and Hawkins (later Lewis, Babcock and Hawkins). Within several years I became a partner. My practice at Lewis Babcock and Hawkins concentrated on Business Litigation, Legal Malpractice and Attorney and Judicial Ethical matters. During that time I handled many legal malpractice matters and represented lawyers and Judges in disciplinary actions. I also acted as special prosecutor on an Office of Disciplinary Counsel matter. I left the firm in 2003 to start my own practice, the Hardee Law Firm, and continued to concentrate on business litigation, legal malpractice and legal ethics matters.
- b. I have spoken at several CLE's on ethics matters, and I have been retained as an expert witnesses in matters regarding legal ethics, and the standard of care for practicing attorneys.
- c. I was admitted to the South Carolina Bar in 1986, US District Court 1988, I was admitted to the US Court of Appeals for the Fourth Circuit in 1995, US Court of Appeals for the Fifth Circuit in 2000, US Court of Appeals for the Tenth Circuit

2002, US Court of Federal Claims in 1999 and the US Court of Appeals Federal Circuit in 2001.

- d. I have appeared in court in several jurisdictions throughout the United States.

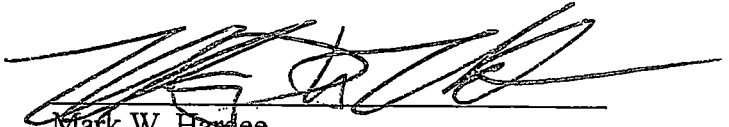
Based on my background, practicing and studying law as it relates to legal ethics as it pertains to both legal malpractice issues, as well as disciplinary issues, and the fact that I have also represented small local businesses in South Carolina for over 25 years.

- e. I am qualified to issue an opinion as to whether or not attorney Paul Weissenstein committed malpractice in his representation of M. B. Hutson in the TLC Holding Inc. litigation involving Big Water Resort.
- f. I have reviewed numerous documents including pleadings and court orders and I have extensively interviewed M. B. Hutson.

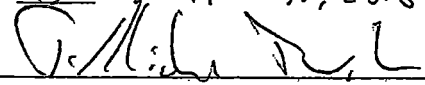
Opinion

- g. It is my opinion that M. B. Hutson retained Paul Weissenstein to represent him in litigation involving TLC Holdings LLC and Big Water Resort.
- h. M. B. Hutson intended to purchase and develop property on lake Marion through a lease purchase agreement which also included an on going business.
- i. Unknown to Mr. Hutson was that a title defect existed on the property due to hundreds of 70 year right to sole use agreements which had been sold by TLC Holdings LLC and Big Water Resort.
- j. Mr. Hutson was unaware that these agreements constituted a title defect on the property which would keep him from developing the property as planned.

- k. The project was doomed from the start due to the title defects and other misrepresentations made by TLC Holding LLC.
- l. When TLC Holdings LLC brought an eviction action against M. B. Hutson, he retained Paul Weissenstein to defend him and prosecute valuable counterclaims against TLC Holdings LLC.
- m. Mr. Weissenstein advised Mr. Hutson that he had no defenses to the eviction or knew of no facts supporting his counter claims. This was even though there was ample evidence that TLC Holdings LLC had made numerous misrepresentations and concealed relevant and material statements of fact regarding the usefulness and ability to develop the property.
- n. Mr. Hutson was not properly advised of the application and effect of the release Mr. Hutson was offered to end the litigation. Therefore, he settled the case and signed the release.
- o. Mr. Weissenstein fell below the standard of care expected of attorneys in similar situations at the time, by failing to advise Mr. Hutson that the existence and effect of the long term leases would prevent him from ever developing the property as he intended, and that his default of the settlement agreement was inevitable, and that he would forever be barred from prosecuting and using as a defense the fraud perpetrated on him by TLC Holding LLC.
- p. It is my opinion to a reasonable degree of certainty that Paul Weissenstein committed malpractice in his advice to, and representation of, M. B. Hutson in the above described matter.


Mark W. Hardee

SWORN TO before me
this 2 day of August, 2018


NOTARY PUBLIC FOR SC

My Commission Expires: 3-11-21

J. MICHAEL TAYLOR

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CIVIL ACTION NO: 2020-CP-40-03810

Penn America Insurance Company and Global
Indemnity Group, LLC,

Plaintiffs,

v.

Morris Beach Hutson a/k/ M.B. Hutson,

Defendant.

**THIRD-PARTY DEFENDANTS
TIMOTHY J. NEWTON AND
MURPHY & GRANTLAND, P.A.'S
MOTION TO DISMISS,
OR, IN THE ALTERNATIVE,
MOTION FOR SUMMARY JUDGMENT**

Morris Beach Hutson a/k/a M.B. Hutson,

Defendant / Third-party Plaintiff

v.

Timothy J. Newton, Esq., Murphy &
Grantland, P.A., and Christian Stegmaier, Esq.,
Collins & Lacy P.C.,

Third-party Defendants.

TO: MORRIS BEACH HUTSON a/k/a M.B. HUTSON, DEFENDANT / THIRD-PARTY PLAINTIFF PRO SE AND TO THE ABOVE-NAMED DEFENDANT / THIRD-PARTY PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Third-party Defendants, Timothy N. Newton and Murphy & Grantland, P.A. (hereinafter collectively "Newton") will move before the Presiding Judge of the Richland County Court of Common Pleas at the Richland County Courthouse at 10:00 a.m. on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard for an Order dismissing the Defendant / Third-Party Plaintiff Hutson's Complaint against them pursuant to South Carolina Rules of Civil Procedure 12(b)(1), (6) and (8) and 56. The grounds for this Motion are as follows.

Rule 12(b)(8), SCRCP. Hutson has previously asserted the same claims in a prior action, M.B. Hutson / M.B. Hudson v. Penn America Ins. Co., Civ. Action No. 2018-CP-40-06344

(Richland County Comm Pl.) (the Bad Faith Action”). On July 18, 2019, The Honorable Michael G. Nettles granted summary judgment against Hutson and in favor of Third-party Defendants Newton and J.R. Murphy. (See Complaint, Exh. I: Order granting MSJ.) Hutson’s appeal from that judgment is currently pending before the South Carolina Court of Appeals, as exhibited by documents Hutson attached to his Third-Party Complaint. Opposing briefs and motions filed in the Court of Appeals confirm that the issues Hutson raised against Third-Party Defendants Newton and his firm, Murphy & Grantland, P.A., involve the same claims. (See Exh. 1: Respondents’ Brief; Exh. 2: Mem. Opposing Emergency Motion; Exh. 3: Reply Memorandum in support of Motion to Strike.) Accordingly, Hutson’s third-party claims in this action are barred by Rule 12(b)(8) of the South Carolina Rules of Civil Procedure.

Res Judicata. The Order granting summary judgment has preclusive effect unless and until it is reversed on appeal. RFT Mgmt. Co., LLC v. Gilbert, Civ. Action No. 8:10-02503-HFF, 2011 WL 13142633 at *4 (D.S.C. signed May 24, 2011); Dawson v. State Law Enforcement Div., Civ. Action No. 3:91-1403-17, 1992 WL 208967 (D.S.C. Apr. 6, 1992); Northern Va. Law Sch. v. Jones, No. 88-1781, 883 F.2d 69 (4th Cir. 1989); Restatement (Second) of Judgments § 13 (June 2020 Update). Courts do not allow a plaintiff to split claims. Plum Creek Dev. Co., Inc. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). Because Hutson’s third-party claims in this action are based upon the same facts and subject matter as the Bad Faith Action, this action is barred. Id. at 36, 512 S.E.2d at 109. Hutson cannot bring successive claims based upon the same alleged wrongful act. 1A C.J.S. Actions § 208 (June 2020 Update). Hutson’s third-party claims are barred by *res judicata*.

Rule 12(b)(6). Furthermore, Hutson’s third-party claims against Newton should be dismissed based upon Rule 12(b)(6), SCRCF. Hutson fails to allege facts to support a claim.

The essential facts, established in numerous judicial orders, are that Hutson contracted to lease / purchase certain property some of which he hoped to develop. On a portion of the property was a campground to which lifetime memberships had been sold. Hutson fell behind on lease payments and the sellers, TLC Holdings, LLC and its principals (hereinafter collectively “TLC”), sued to evict him. Hutson settled that claim through counsel by agreeing to an automatic release of TLC if Hutson breached the terms of the settlement. Hutson breached the lease and was ordered to vacate the premises. (Complaint, Exh. A.) The release was upheld in three orders based upon *res judicata*. (Exhs. B, C, and E.)

After receiving TLC’s eviction notice, Hutson sent out a postcard to the campground members accusing TLC of engaging in a scam. The campground members sued TLC, and TLC sued Hutson for equitable indemnity and (in a separate action) defamation. Penn-America was notified of TLC’s claims, and it undertook Hutson’s defense in early 2016. Penn-America settled both suits without any contribution from Hutson.

Penn-America Insurance Company, an affiliate of Global Indemnity Group, LLC (hereinafter collectively “Penn-America”) retained Newton’s firm as coverage counsel with respect to liability coverage for TLC’s claims against Hutson. The Coverage Action was dismissed after TLC’s claims against Hutson were settled.

Hutson’s claims in this case, which were previously raised and dismissed in the Bad Faith Action, relate to Hutson’s demand that Penn-America provide counsel to prosecute his counterclaims against TLC. Hutson alleges that Newton and Penn-America somehow committed fraud by failing to disclose certain information to a court that could support an (as yet unfiled) claim by Hutson to set aside his settlement with TLC based upon fraud upon the court. Hutson believes that this would allow him to re-open and prosecute his counterclaims against TLC. The

court ruled that South Carolina does not recognize such a duty and dismissed Hutson's claim against Newton. (Complaint, Exh. I.)

Undaunted, Hutson re-asserted the same claims against Newton in this action. He has merely changed the labels. Accordingly, Hutson's third-party claims should be dismissed.

Hutson is a vexatious litigant. This action was filed seeking an order requiring Hutson to cease and desist from harassing and slandering Plaintiffs and its attorneys. Courts have the inherent authority and the duty to protect themselves and other litigants from vexatious and harassing litigation. 1A C.J.S. Actions § 72 (June 2020 Update). Parties are not allowed to maintain vexatious, frivolous, and malicious claims. Id.

As recounted in the Complaint, Hutson is a vexatious litigant who frequently disregards court orders. He has been sanctioned by a federal court for frivolous claims against TLC. (See Complaint, Exh. C.) Hutson has used the Bad Faith Action and now this action as a mechanism for repeatedly harassing Newton and Penn-America without cause. Hutson has also used these actions as a forum for publishing false and defamatory statements, hiding behind the judicial privilege, without any supporting evidence whatsoever. Hutson's repetitious filing of false and slanderous claims requires time and expense in rebuttal.

Hutson's false and defamatory statements. A false representation to the court that is supported by no evidence in an intentional attempt to mislead the court constitutes fraud upon the court. Sanders v. Smith, Op. No. 5770 (S.C. Ct. App. filed Aug. 26, 2020) (Shearouse Adv. Sh. No. 33 at 19, 25, 2020 WL 5033076 at *4. Hutson's allegations are full of falsehoods. Hutson has thereby forfeited any claim that Newton and his firm committed fraud upon the court. See Anderson v. Marion, 274 S.C. 40, 43, 260 S.E.2d 715, 716 (1979) (holding that he who seeks equity must do equity).

Hutson's fraud claims against TLC have been raised numerous times

Hutson's allegation that fraud committed against him by TLC was never raised to a court is materially false. Hutson has alleged material misrepresentation and/or fraud by TLC and its principals with respect to the Land Deal (see Complaint, p. 2) in three prior cases. (See attached Exh. 4 (counterclaims filed in the Ejectment Action on December 29, 2011); Exh. 5 (counterclaims filed in the Federal Class Action through counsel, Matthew D. Hamrick, on December 16, 2014); Exh. 6 (counterclaims filed in the Defamation Action *pro se* on March 29, 2016).)

Courts ruled against Hutson for several reasons. First, he was deemed to have automatically released TLC and its principals by breaching a settlement agreement. (Complaint, Exh. A). Second, Hutson knew the property was at least partially undevelopable before he entered into The Land Deal. (Complaint, Exh. B). Third, Hutson's claims have repeatedly been dismissed based upon *res judicata* (Complaint, Exhs. C and E.) Courts specifically held that Hutson could not set aside the release in the Ejectment Action because Hutson failed to produce any evidence of fraud in the inducement—all alleged fraud related to the original Land Deal. (Id.) Hutson has been sanctioned for continuing to raise fraud claims in the Federal Class Action after his counterclaims were dismissed and were found to have been made without any supporting evidence. (Complaint, Exh. D.)

Hutson's claims against TLC were lost due to his own conduct prior to any involvement by Penn-America and Newton.

Hutson's claim that all of his claims against TLC were lost due to misconduct by Penn-America and its attorneys is materially false. Penn-America was not even notified of the TLC-Hutson litigation until early 2016—four (4) years after Hutson's settlement with TLC and two (2) years after he was ruled to have breached the settlement. Moreover, Newton served as Penn-

America's coverage counsel in a declaratory judgment action in which Hutson's claims against TLC were not relevant.

Evidence supporting a possible fraud claim was disclosed to Hutson

Furthermore, Hutson's allegation that Newton wrongfully withheld evidence is diametrically opposed to the facts. The very e-mail Hutson relies upon demonstrates that the evidence potentially corroborating his fraud claim against TLC was *not* concealed.

While the judgment against Hutson in the Defamation Action was pending on appeal, Hutson misrepresented to Newton (who represented Penn-America in The Coverage Action, see Complaint, pp. 7-10) that he had recently uncovered evidence of fraud in the inducement in that TLC wrongfully withheld from him that none of the property in the Land Deal could be developed. (Complaint, Exh. I: Order, pp. 19-20.) In attempting to settle certain claims by Hutson against Penn-America, Newton provided corroborating evidence from trial and alerted Hutson that *if* he had been ordered to develop land in which third parties had lifetime rights, that probably should have been brought to the court's attention. (E-mail dated Aug. 13, 2018 attached to Hutson's third-party complaint, ¶ 15.) Newton further notified Hutson that he *might* have a claim for fraud upon the court. (Id. at ¶ 16.)

Hutson never filed suit against TLC for fraud upon the court. Instead, he filed suit against Newton and Penn-America claiming they knew TLC defrauded Hutson and failed to report it to a court. (See Complaint, Exh. I: Order, pp. 2-4.) Newton had no such duty.

All of the property in the Land Deal was not undevelopable

Hutson's allegation that all property in the Land Deal was undevelopable proved inaccurate. During the Bad Faith Action, Newton obtained and filed the e-mail proving Hutson knew the property was at least partly undevelopable before entering into the Land Deal. (See Exh.

7: E-mail dated Nov. 11, 2010 (cited in Magistrate Baker's Report and Recommendation, Complaint, Exh. B, n.5).) Newton also found and filed a deposition from the Class Action in which Hutson personally cross-examined TLC's realtor and she testified Hutson could have developed some of the property. (Exh. 8: Dep. of Susan Stroman excerpts, pp. 32-33, 86.) In order for Hutson to prove fraud, he would have to first prove that TLC's principal perjured himself when he testified under oath that all of the property was *not* part of the campground. (See Exh. 9: excerpts from TLC Rule 30(b)(6) deposition.)

Hutson has never even attempted to refute this evidence. Nevertheless, Hutson continues to allege he was defrauded because all of the property was undevelopable without any supporting evidence. Moreover, Hutson audaciously claims that Newton knew Hutson was defrauded in the face of evidence that *Hutson* knew his fraud claim was, at best, doubtful and disputed.

Newton and his firm have never represented Hutson in any matter

Hutson's allegations that Newton represented him and prepared papers for him are materially false. Newton represented Penn-America, as evidence by the e-mail Hutson attached to his pleading. Neither Newton nor his firm have ever represented Hutson.

Hutson has not been denied a hearing

After a hearing, Judge Nettles found that for various reasons, Hutson's allegation that none of the property could be developed was unproven and undermined by contravening evidence. (Complaint, Exh. I at pp. 21-23.) The court also found that Hutson's claims against Newton and Murphy were barred for numerous other reasons.

Hutson is on notice that liability insurers have no duty to file actions separate from the suit they are defending on behalf of insureds. Post v. St. Paul Travelers Ins. Co., 691 F.3d 500, 521-

22 (3rd Cir. 2012). Moreover, Hutson's claims in this action and the prior action he filed are in breach of a release. (See Complaint, pp. 9-10, and Exh. I: Nettles Order, pp. 23-24.)

Hutson is aware of all of the above—he has been confronted with this evidence on numerous occasions. He has been sanctioned by a federal judge for this course of misconduct. Nevertheless, he continues to repeat the same false allegations over and over.

The authorities Hutson cited are not relevant. Hutson's entire third-party claim in this action is based upon a false premise. None of the rules Hutson cited require an attorney to report *to a court* mere unproven *allegations* of fraud committed against an opposing party by a third party. Hutson has never produced any evidence proving fraud in the inducement with regard to his settlement with TLC, despite having raised that issue in several prior cases. Moreover, even if such evidence exists (and even if Newton withheld it from him), nothing prevents Hutson from retaining counsel and prosecuting claims for fraud upon the court against TLC.

Furthermore, none of the authorities Hutson cites imposes a duty upon lawyers to report misconduct in proceedings in which the lawyer is not involved. Neither Newton nor Murphy & Grantland, P.A. have ever represented Hutson in any matter. In the only action in which Newton, Hutson, and TLC were involved, Hutson's disputes with TLC were not before the court. The only issue adjudicated in the Coverage Action was Penn-America's liability coverage. (See Complaint, ¶ 53.) Rule 3.3 of the South Carolina Rules of Professional Conduct requires candor toward "the Tribunal." Nothing in Rule 3.3 requires lawyers to somehow seek to intervene in actions to which their clients are not parties merely for the purpose of notifying that court of an alleged fraud in that proceeding.

Count One of Hutson's "Ammended Cross-Complaint" fails to state a claim upon which relief can be granted. In paragraph 7, Hutson claims he attached documents proving Newton and

his firm were engaged in fraud. The attached documents are simply motions containing allegations made by Hutson himself. The only evidence submitted is Newton's e-mail, which evidences full disclosure and is the subject of the pending appeal. (See Complaint, Exh. I.)

Rule 402(h)(3), SCACR, which contains the Lawyer's Oath, does not require a lawyer to (a) seek to intervene, (b) on behalf of a non-client who is an opposing party, (c) to re-open a judgment, (d) to disclose to a tribunal before whom the lawyer never appeared, (e) an alleged but unproven fraud, (f) committed against the non-client by a third-party. Hutson has not alleged a violation of the Lawyer's Oath.

Count Two alleges Document Fraud under a federal immigration statute, 8 U.S.C. § 1324c. Hutson has not alleged that Newton prepared false papers to allow Hutson (or anyone else) to emigrate into this country. This statute has no relevance whatsoever.

Count Three asserts "Defamation by Extrinsic Fraud." This purported cause of action is not recognized in South Carolina. Because it relies upon an irrelevant immigration fraud statute in support of an alleged duty, this claim should be rejected. Moreover, Hutson has not alleged any facts supporting any breach of any such duty.

Count Four does not allege any new facts. It is therefore subject to dismissal for the same reasons as the other claims.

Paragraph 16 of Hutson's "Ammended Cross-Complaint" makes false claims. The allegations Hutson attributes to Laura Paton's authorship were raised to the court and ruled upon. (See Exh. 6: Answer and Counterclaim; Complaint, Exh. E: Order.) Hutson lacks any basis for claiming that knowledge of these allegations equates to knowledge of fraud. Moreover, Newton never told Hutson the alleged fraud was not disclosed because someone could go to jail. That is merely a fabrication that Hutson has repeated numerous times in bad faith.

Obstruction of Justice and Conspiracy in violation of 18 U.S.C. § 371 are crimes that do not pertain to this civil matter. Moreover, nothing Hutson has presented even comes close to constituting criminal misconduct.

Incorporation by Reference. Newton and Murphy & Grantland, P.A. incorporate by reference Penn-America's arguments to the extent they are not inconsistent with the above.

Prayer for Dismissal

Accordingly, Third-Party Defendants Newton and Murphy & Grantland, P.A. are entitled to judgment in their favor and dismissal from this action based upon failure to state a claim, the existence of a prior pending action involving the same subject matter and the same parties, and *res judicata*.

Prayer for Sanctions

Third-Party Defendants also pray that this Court award the costs of this action and appropriate sanctions pursuant to Rule 11, SCRPC and the Frivolous Civil Proceedings Act. Hutson's claims against Newton and Murphy & Grantland, P.A. are made in bad faith, are knowingly false, and serve no purpose other than to defame and harass.

Respectfully submitted,

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September 15, 2020
Columbia, SC

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

RECEIVED

APR 02 2020

Case No. 2018-CP-40-06344

SC Court of Appeals

Appellate Case No. 2019-001488

M.B. Hutson / M.B. Hudson, ... Appellant,

v.

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

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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. (Penn-Am. Exh. A, p. PAIC-001.) 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. (Newton Exh. I.)

Penn-America retained Laura Paton, Esq. to defend Hutson in two lawsuits in which Hutson was a defendant. (Newton Exh. H.) Frank Gordon, Esq. was subsequently substituted as counsel for Hutson. (Newton Exhs. AA and L.)

Penn-America retained Murphy & Grantland, P.A. as coverage counsel for a declaratory judgment Penn-America filed against Hutson. (See Hutson Exh. 11.0.) Murphy's sole involvement was to sign off on the Complaint in the declaratory judgment action. (Tr. pp. 7, 54.) 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. (Hutson Exh. 12.0 and 7.0; Newton Exh. V.)

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. (Tr. p. 31.) This assertion is false. Neither Murphy nor Newton have ever represented Hutson in any matter.

Penn-America settled the claims against Hutson in both lawsuits filed against him. (Newton Exhs. L and P.) After learning all claims against him were resolved, Hutson brought this action against Penn-America, Newton, and Murphy.

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. (Am. Complaint, ¶ 9.)

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. (Am. Complaint, ¶ 9.)

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. (Am. Complaint, ¶ 11.) Hutson alleged that when he performed a title search, he did not find the Campground Memberships because they were not recorded. (Am. Complaint, ¶ 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. (Am. Complaint, ¶ 22.)

Exhibits establish that Hutson entered into the Lease Purchase Agreement with TLC in December of 2010. (Hutson Exh. 5.0.) Hutson also entered into a Membership Interest Purchase Agreement at the same time. (Hutson Exh. 6.0.) Through the

Membership Interest Purchase Agreement, Hutson became the sole principal in Big Water Resort, LLC. (Hutson Exh. 13.0, ¶ 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. (Am. Complaint, ¶ 23.)

Hutson alleged that an e-mail establishes Newton's knowledge of the fraud perpetrated on him by TLC. (Am. Complaint, ¶ 24; Hutson Exh. 4.0.) 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.

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. (Hutson Exh. 4.0.) In the e-mail, Newton stated that "If you were ordered to develop property that was subject to lifetime use rights, that probably should have been brought to the court's attention." Newton stated that he did not represent Hutson, and that if Hutson wanted to pursue litigation against TLC, he should hire an attorney. (Id.)

Hutson asserted several purported causes of action in his Amended Complaint. However, the gist of Hutson's claim appears to be that Newton's admitted knowledge of the above facts, coupled with certain statements about the law regarding these facts, 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. (Am. Complaint.) Hutson made no allegations specific to Murphy. (Id.)

Evidence submitted by Respondents

Newton denied Hutson's allegations. In response, Newton pointed to a letter Hutson attached to his Amended Complaint. (Hutson Exh. 7.0.) That letter recounts that the e-mail Hutson quoted in his Amended Complaint was part of ongoing settlement negotiations. (Id. at p. 3.)

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. (Hutson Exh. 7.0, p. 3.) The e-mail Hutson quoted was in response to several e-mails from Hutson under the subject heading, "Setting Aside the Judgment," in which Hutson represented to Newton that Hutson was not aware at the time he purchased the property that *all* of the

Property he purchased was subject to the lifetime Campground Memberships. (Newton Exh. V, pp. EXH_V_000004-5, -17, -22.)

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. (Hutson Exhs. 9.0 and 10.0.)

In the Ejectment Action, TLC alleged that Hutson breached the Lease Purchase Agreement and failed to make lease payments. (Newton Exh. D.) Hutson answered and asserted counterclaims against TLC. (Newton Exh. E.) Among the issues Hutson raised in his counterclaims were the alleged undisclosed sewer moratorium and outstanding debt owed to Black River Electric Cooperative. (Id. at pp. 7, 14.)

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

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

9, pp. 2-3, ¶ 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. (Newton Aff., Exh. 1, pp. EJECT_000197, 000206-08.) The campground site was one of several parcels that were part of the Lease Purchase Agreement. (Newton Exh. CC, pp. 27-40 and exhs.)

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. (Hutson Exh. 9.0 p. 2, ¶ 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. (*Id.* at pp. 6-7, ¶ 23.) The Settlement Agreement was incorporated into a Consent Order that was also filed on April 13, 2012. (Hutson Exh. 10.0; Newton Aff., Exh. 1, pp. EJECT_000188 to 000208.)

TLC subsequently filed an Affidavit of Default in December of 2013. (Newton Aff. Exh. 1, pp. EJECT_000184 to 000187.) Hutson sought a temporary restraining order and moved to set aside the affidavit of default. On the date set for the hearing, Hutson filed bankruptcy. The bankruptcy court lifted the stay for a determination whether Hutson had an equitable interest in the Property. (Newton Exh. G (James Order), pp. 1-2.)

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. (Newton Exh. G, p. 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. (*Id.* at pp. 9-10.) Pursuant to this Order, Hutson vacated the Big Water Resort property in approximately April 2013.

Hutson's attorneys during the Ejectment Action

Hutson was represented in negotiating the Settlement Agreement and Consent Order by Paul Weissenstein. (Hutson Exh. 10.0, p.5.) Hutson sued Weissenstein for malpractice related to this matter. (Newton Exh. F.) Judge Kristi F. Curtis granted Weissenstein's motion for summary judgment. (Newton Exh. Q.) 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. (Newton Exh. R.) Hutson's action against Burn has been dismissed. (Newton Exh. S.)

A third attorney, H. Freeman Belser, represented Hutson at the hearing before Judge James. (Newton Exh. G, p. 2.) Belser was substituted for Burn shortly before the hearing. (Newton Aff., Exh. 1, pp. EJECT_000031 to 000033.)

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. (Hutson Exh. 13.0, ¶¶ 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) (Newton Exh. A.). 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). Judge Norton adopted Magistrate Judge Baker's factual findings as to Hutson's claims of alleged fraud. *Id.* at *7. He also found that all of Hutson's allegations of fraud related to the original transaction and not the procurement of the release. *Id.* at *7-*8.

The Defamation Action

In 2015, TLC filed suit against Hutson for defamation. TLC alleged that the defamatory statements he made in the Postcard he mailed to the campground members instigated the Class Action against TLC. TLC Holdings, LLC v. M.B. Hutson a/k/a M.B. Hudson, Civil Action No. 2015-CP-14-00615. (Hutson Exh. 13.0, pp. 3-4.) 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. (Newton Exh. AA.)

Hutson also asserted counterclaims against TLC in the Defamation Action. (Newton Exh. H.) Hutson prosecuted his counterclaims acting *pro se*. (*Id.* at p. 25; Hutson Exh. 3.0, p. 25 (unfiled draft).)

On March 17, 2017, Judge R. Ferrell Cothran, Jr. granted TLC's motion for summary judgment as to TLC's counterclaims. (Newton Exh. C.) After reviewing the three above-referenced orders, Judge Cothran concluded that Hutson's counterclaims were barred by *res judicata*. (*Id.* at p. 10.) 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*." (*Id.* at pp. 10-11.)

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. (Newton Exh. K.) Judge Norton found that "Hutson appears to have continued his pattern of frivolous filings and conduct designed to harass or burden [TLC], and there is no indication that he intends to cease." Judge Norton noted that Hutson "again makes reference to the alleged fraud by [TLC] in obtaining the settlement agreement and the order signed by Judge James in the prior state court litigation. Hutson has made these allegations throughout the course of this litigation. He has never, however, specified what the fraud is or submitted evidence of it." Judge Norton concluded that:

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

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

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

The trial and appeal in the Defamation Action

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

The e-mail Hutson attached to his pleading (Hutson Exh. 4.0) 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. (Newton Exh. P.) After receiving notice of the settlement, Hutson filed this lawsuit.

The Coverage Action

One other prior lawsuit is pertinent to this case. Penn-America filed a declaratory judgment action in federal court on June 14, 2016. Penn-America Ins. Co. v. BWR, Inc., et al., Civil Action No. 2:16-cv-01943-DCN (D.S.C.) (Hutson Exh. 11.0.). Hutson was named as a defendant in the Declaratory Judgment Action. Respondents Murphy and Newton signed the Complaint. In the Declaratory Judgment Action, Penn-America contested its coverage for Hutson as to TLC's claims against him in the Class Action and the Defamation Action. Among other things, Penn-America contended that Hutson was not an insured for purposes of the actions for which TLC sued him. Penn-America also contended that the claims were excluded because Hutson knowingly violated TLC's rights and/or knowingly published false information.

The Release

In conjunction with Hutson's dismissal from the Coverage Action, Hutson entered into a settlement agreement with Penn-America. (Newton Exh. I.) 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. (Am. Complaint, ¶¶ 3, 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. (Tr. p. 23.) When he contracted for the Property, he also acquired the Campground Memberships. (*Id.* at pp. 24-25.) A title search did not reveal any title defects. (*Id.* at 25.) After taking possession of the Property, Hutson realized Big Water Resort was losing \$300,000 per year. (*Id.* at p. 26.) Hutson believes he was duped into taking the loss from TLC. (*Id.* at p. 27.)

Judge Nettles asked Hutson why these claims were not resolved by the settlements. (Tr. pp. 28-29.) Hutson argued that extrinsic fraud supersedes the settlement. (*Id.* at 29.) Hutson argued that it was impossible for him to comply with the court order requiring him to develop property that had defective title. (*Id.* at p. 31.)

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. (Tr. at pp. 35-36.) As evidence of fraud, Hutson quoted from an unfiled pleading from the Defamation Action. (Tr. at pp. 33-36; Hutson Exh. 3.0.) 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. (Id. at p. 37.) Hutson argued that if these things had been reported, the results of all the prior cases would have been reversed. (Id. at 38.)

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. (Tr. at pp. 40-41.) 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. (Tr. at pp. 44-45; Hutson Exh. 7.0, p. 3.) Hutson admitted Penn-America had a common interest with Hutson in defeating TLC's claims against Hutson. (Tr. at p. 45.)

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 (Hutson Exh. 4.0), but the cited evidence is not sufficient to demonstrate fraud upon the court.

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. (Am. Complaint, ¶¶ 7-22; Hutson Exh. 3.0; Newton Exh. C.) 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 Hutson Exh. 7.0, p. 2.) 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. (Hutson Exh. 4.0.) 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 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 (Am. Complaint, ¶ 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. (Newton Exhs. G (James Order), A (Baker R&R), B (Norton Order), and C (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. (Newton Exh. K at p. 5.)

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 Newton Exh. Z.)

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. (Newton Aff., Exh. 1, pp. EJECT_000197 and 000206 to 000208.) 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. (Hutson Exh. 4.0, ¶ 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 Hutson Exhs. 1.0., 6.0.)

Fourth, Hutson's representation to Newton (and to this Court (Appellant's 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. (Newton Exh. FF, p. 3, 65.) Under Hutson's cross-examination, Stroman testified that all of the Property Hutson purchased from TLC was *not* subject to the Campground Memberships. (Id. at 32-33, 86.) 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. (Newton Exh. GG at pp. 3-4.) Judge Norton granted TLC's motion. (Newton Exh. B.) This corroborated TLC's Rule 30(b)(6) testimony in a deposition taken in the Coverage Action. (Newton Exh. CC at pp. 39-40.) 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) (Newton Exhs. B and K). 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 (Newton Aff., Exh. 1, pp. EJECT_000042 to 000045) 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.

(Id. at p. EJECT_000042.) 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 a declaratory judgment proceeding 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.3d 470, 474 (Mich. Ct. App. 2006). Every state that has considered the issue has held that the absolute judicial privilege from suit applies to statements made by attorneys during settlement negotiations. Id. at 266, 725 N.W.2d at 475-76.

The only exception to the rule that attorneys are immune from liability to third parties while representing party opponents is when misrepresentation or fraud is committed by the attorney. 7A C.J.S. Attorney & Client § 228 (Mar. 2020 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. (Am. Complaint, ¶¶ 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. (Hutson Exh. 7.0.)

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. (Newton Exh. W at p. 2.) He argued the Settlement Agreement should be set aside due to fraud. (Newton Exh. X.) Hutson also argued that the release and *res judicata* should not apply due to fraud upon the court. (Newton Exh. Y at pp. 2-3.) All of this occurred before Hutson raised this issue to Newton. (See Newton Exh. V.)

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. (Tr. pp. 37-38.) 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. (Newton Exh. I.)

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 was involved. Because Hutson alleged Murphy and Newton acted as Penn-America's agents, Hutson's claims against them in this action are barred by the release.

CONCLUSION

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.

Respectfully submitted,

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Columbia, South Carolina
April 2, 2020

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

RECEIVED

APR 02 2020

Case No. 2018-CP-40-06344

SC Court of Appeals

Appellate Case No. 2019-001488

M.B. Hutson / M.B. Hudson, ... Appellant,

v.

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

PROOF OF SERVICE

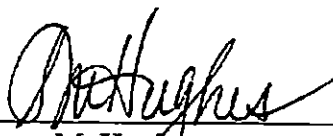
I, the undersigned, for Defendant, Timothy J. Newton, do hereby certify that on April 2, 2020, I have served a copy of Respondents J.R. Murphy and Timothy J. Newton's Initial Brief and Designation of Matter to be Included in the Record on Appeal in the above-referenced case by electronic mail and/or by placing same in the U.S. mail, postage pre-paid to:

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April 2, 2020



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April 2, 2020

RECEIVED

APR 02 2020

SC Court of Appeals

VIA FACSIMILE 803.734.1839 & U.S.MAIL

Jenny Abbott Kitchings, Clerk of Court
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Re: **MB Hutson/MB Hudson v. Penn America Insurance Company, Global Indemnity Group, Inc., Timothy N. Newton, Esquire, JR Murphy, Esquire, John Doe #1 and John Doe #2**

Civil Action No.: 2018-CP-40-06344
Appellate Case No.: 2019-001488
Our File No.: 1565-0050

Dear Ms. Kitchings:

Please find attached Respondents J.R. Murphy and Timothy J. Newton's Initial Brief and Designation of Matter to be included in the Record on Appeal together with Proof of Service for filing in the above-referenced matter. A hard copy of same has been placed in the U.S. Mail to the South Carolina Court of Appeals pursuant to Rule 262(a)(2), SCACR.

With kind regards, I am

Sincerely yours,

s/Timothy J. Newton

Timothy J. Newton

TJN/smh
Attachments

cc: All Counsel of Record