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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable G.D. Morgan, Jr., Circuit Court Judge

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Appellate Case No. 2025-000529

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James Dustin Lucas, ... Appellant,

v.

State Farm Mutual Automobile Insurance Company, ... Respondent.

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PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel submits that, upon information and belief, he has preserved the issues discussed herein for appeal and that he timely filed a petition for rehearing after the Court of Appeals issued an opinion in this case.

STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court erred in granting summary judgment when the Appellant submitted more than a scintilla of evidence in support of his claims.

2. Whether the Circuit Court relied upon inapplicable case law.

3. Whether the Circuit Court's ruling deprives the Appellant of his constitutional right to a jury trial.

4. Whether the Circuit Court erred in ignoring the at-issue doctrine with respect to reserve information that proves State Farm's fraudulent breach of contract.

5. Whether the Circuit Court erred in allowing a fact witness to testify in favor of the Respondent at the summary judgment hearing.

6. Whether the Circuit Court erred in holding that the Appellant's damages were speculative.

7. Whether rule 43(k) is satisfied by an attorney agreement made by email.

STATEMENT OF THE CASE

This Court has never addressed a case where an insurance company intentionally used a lie to get an insured out of default with a promise to mediate within parameters, then intentionally violated our State's mandatory ADR rules at the mediation. Petitioners respectfully submit that this case is cert-worthy for that reason.

Petitioner sued State Farm's insured after he was injured in a bad wreck that hospitalized him and others. Months after default was entered as to State Farm's insured, State Farm asked Petitioner to let its insured out of default. Petitioner responded in writing that he would let Respondent's insured out of default if Respondent would mediate between its reserve and its policy limit. Respondent agreed to this, in writing, through counsel it hired to represent its insured. However, Respondent appears to have never had any intention of keeping its end of the deal.

Once the Respondent had gotten what it made the fraudulent promise over, its insured out of default, Respondent showed up to mediation, without its insured present, in direct violation of SCADR Rule 6, declared it would not pay more than $1,000, and spoiled the mediation. To make matters worse, Respondent refused to provide any information about its reserve, refused to provide an affidavit about its reserve, and refused to offer reserve information for *in camera* review. Respondent State Farm's plain fraud and disrespect for officers of the Court, the Rules of Court, and the Court itself could not be more flagrant.

After Respondent State Farm told the costly lie and intentionally violated our mandatory ADR rules, Petitioner sued Respondent. Respondent's deception and violation of the rules cost Petitioner the price of a non-conforming mediation as well as resolution between the parameters within which Respondent lied about negotiating. Respondent then moved for summary judgment before any depositions were taken. Petitioner rebutted the motion, not only with evidence, but

irrefutable proof of Respondent State Farm's fraudulent statements, followed by its intentional and admitted violation of mandatory ADR rules. Notwithstanding that uncontroverted proof, the Circuit Court granted Respondent's motion. Petitioner filed a SCRCP 59(e) motion and preserved all issues for appeal, and the Circuit Court denied that motion. Lucas thereafter timely filed an appeal, and the Court of Appeals affirmed the Circuit Court's ruling. Petitioner filed a motion for rehearing and *en banc* review, which was denied. Petitioner now seeks review of that decision.

FACTS

On June 17, 2017, Petitioner and two other individuals rode as passengers in Petitioner's car, driven by Petitioner's girlfriend. That car was struck by a Ford F-250 driven by Respondent's insured, weighted down with lawnmowers and landscaping equipment and driving at an excessive speed.[1]

On June 7, 2020, Petitioner filed suit against Respondent's insured. Petitioner served the summons, complaint, and discovery requests on June 23, 2020. Neither Petitioner nor its insured filed an answer or requested an extension of time to file a responsive pleading. Default was entered against Respondent's insured on October 2, 2020, more than three months after service. Petitioner sent letters to Respondent State Farm on March 24, 2021, and April 14, 2021, and even postponed a damages hearing in an effort to allow Respondent to hire defense counsel for its insured and participate in litigation. Nearly 10 months after Respondent's insured was served, on April 20, 2021, Respondent had an insurance defense lawyer contact Petitioner's counsel and ask to be let out of default.

Neither Respondent nor its insured had any good cause or even a reason for the failure to

[1] Four witnesses, including the responding officer, the Petitioner's girlfriend, Petitioner, and Respondent's insured, have acknowledged Respondent's insured was speeding when the collision occurred.

respond to the properly served complaint and discovery requests for the better part of a year. Petitioner communicated to Respondent that Petitioner would agree to cancel the scheduled damages hearing and let Respondent's insured out of default, only if Respondent, State Farm, agreed to mediate the case between the amount of its highest reserve and its policy limit. Petitioner then engaged in what would later be learned was clear and intentional deception, communicating an acceptance of the deal in writing. Petitioner relied on Respondent's deception, and performed to his detriment by allowing cancellation of the damages hearing.

Mediation was scheduled, which of course requires attendance by all parties. Respondent, State Farm, appeared at the mediation, violated mandatory SCADR Rule 6, requiring participation by Respondent's insured, and breached the agreement to mediate within clearly established perimeters by offering less than the amount of its highest reserve. Petitioner offered $1,000.00 in a case where a vehicle rolled over and multiple people were hospitalized. Petitioner removed any doubt that $1,000.00 was below its reserve by 1) refusing to provide an affidavit confirming the reserve amount, 2) refusing to submit the reserve amount for *in camera* review, and 3) by filing an offer of judgment for $2,500.00, which is two and a half times more than the amount offered at the mediation, the mandatory rules of which Respondent intentionally violated.

To avoid filing a second lawsuit, Petitioner filed a motion to compel the production of materials in Petitioner's claim file, which includes reserve information, to conclusively establish Respondent's reserve amount related to its fraud and violation of our ADR rules. The Circuit Court ruled that Respondent was not required to produce reserve information, in part because Petitioner had not filed a direct action against Respondent for breach of contract. So that is what Petitioner did.

Petitioner filed suit against Respondent, and stated in the complaint that, pursuant to *Shores*

v. Weaver, 315 S.C. 347, 433 S.E.2d 913 (Ct. App. 1993), he would not be precluded from recovering minimum financial limits under Respondent's policy, even if Respondent's insured failed to give Respondent notice he was sued as a result of the wreck. This demonstrated that, along with the cost of the mediation, which was worthless because of State Farm's deception and violation of ADR Rules, Petitioner sustained damages as a result of State Farm's conduct.

Petitioner served discovery requests on Respondent, which included requests for the production of the reserve information Respondent put at issue by agreeing to the terms of the proposed mediation. Petitioner also noticed a deposition, and in response, Respondent moved for summary judgment, basically claiming it was allowed to engage in fraud and nefarious conduct. Petitioner seemed to take the position that it is permitted to make agreements with no intention of acting accordingly or in good faith because, 1) SCRCP 43(k) allows as much, and 2) portions of Respondent's breach and dishonesty occurred during the mediation, the governing rules of which the Respondent violated. In response, Petitioner argued that SCRCP 43(k) applies to settlement agreements and not breaches of contract accompanied by a fraudulent act. Besides this, of course, there is the fact that SCRCP 43(k) relates to agreements in the suit being litigated, not a separate suit stemming from fraud and recklessness in violating mandatory rules. Petitioner also argued that tortious conduct is not without a remedy simply because the tortfeasor commits some or all of the tortious conduct during mediation.

All said, Respondent State Farm believes it is above the law and the rules of the Court. Respondent advanced a lie in writing and does not – because it cannot – deny that the proof of that lie is unambiguous and commemorated. Neither can Respondent contest that it knowingly, willfully, and blatantly violated our mandatory Alternative Dispute Resolution rules. Petitioner asks that certiorari be granted, and the law be clarified to mandate insurance carriers' adherence

to requirements and rules that our Legislature has mandated.

ARGUMENT

Insurance companies do not get to do whatever they want or follow rules that are mandatory in this State only when they choose to do so. Insurance companies are required to follow ADR rules, just as any other entity is required to do, and they are not immune from suit stemming from fraud and deception for any reason.

The Court of Appeal's opinion ignores the fact that Respondent intentionally engaged in fraud, knowingly made false statements, and intentionally violated mandatory ADR rules, all of which caused harm to Petitioner. The emails showing Respondent's deception, which are part of the Record on Appeal, show that counsel hired by Respondent immediately contacted the Circuit Court to cancel the damages hearing before anything further—such as wet signatures or other formalities—could solidify the clear and unambiguous agreement. The opinion ignores the fact that attorneys reflected the bargained-for and consideration-supported agreement in writing with signature blocks.

This case deserves Supreme Court review because right now, Respondent's conduct described above, which is uncontested, is essentially endorsed. Without Supreme Court review and correction, the unpublished opinion of the Court of Appeals condones conduct that is forbidden by general legal principles and, perhaps more importantly, our Legislature.

I. SCRCP 43(k) applies to "pending litigation," not a subsequent action for damages.

The Court of Appeals held "[t]he intent of Rule 43(k) is to require all agreements regarding **pending litigation** 'to satisfy the requirements of the rule.'" *Ashfort Corp. v. Palmetto Constr. Grp, Inc.*, 318 S.C. 492, 495, 458 S.E.2d 533, 535 (1995). (Emphasis added.) The dismissed action that is the subject of this appeal is not the "pending litigation." In other words, this case is separate

from the wreck case, where Respondent lied and violated Court rules. Even if the Circuit Court used SCRCP 43(k) to let Respondent off the hook for its fraud in the wreck case, that rule does not preclude Petitioner from filing a lawsuit like this one against Respondent for its fraud and violations that proximately caused Petitioner damages in a separate lawsuit.

Ashfort makes it clear that the purpose of SCRCP 43(k) is to "prevent a fraudulent claim." *Id*. at 535. Respondent not only made a fraudulent claim in writing, but the fraudulent statement also caused reliance and a change in position. If the purpose of SCRCP 43(k) is to prevent fraud, it makes no sense that the rule would prevent a damaged party from filing an action against an insurer that caused damage by engaging in fraud and violation of mandatory rules.

It is an outrageous and morally repugnant concept – as the Court of Appeals' opinion stands now, an insurer is permitted to lie, benefit as a result, injure another party as a result, then violate mandatory rules as it wishes, and get away with it without the injured party having any recourse. There is no portion of SCRCP 43(k), *Ashfort*, or any other authority that permits or endorses an insurer engaging in fraud get out of default, then prolonging litigation in violation of mandatory ADR rules.

This is not a case where a party "[m]erely describing an alleged agreement for the purpose of defending against it does not satisfy this condition," as stated in the opinion. It is a case where Respondent made an agreement in writing, for its own benefit, to Petitioner's detriment. Respondent then used the change in position it gained from the lie to willfully violate our ADR rules, without apology to the Court or anyone else.

The opinion cites as support for affirming the Circuit Court's decision that "[t]he parties did not reach a settlement during mediation," but that hurts, not helps, Respondent. *Of course*, the parties did not reach a resolution – because Respondent offered $1,000, an amount less than its

highest reserve, in violation of its agreement, without its insured present to witness the outrageous conduct of his insurance company.

II. The Circuit Court erred in granting summary judgment because Petitioner supported his claims with evidence, and if his allegations were assumed true, he could recover from a jury.

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any fact and the movant is entitled to judgment as a matter of law." *SCRCP* 56(a). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party." *Koester v. Carolina Rental Center, Inc.*, 443 S.E. 392 (1994) citing *Hamilton v. Miller*, 301 S.C. 45, 47, 389 S.E.2d 652, 653 (1990). Circumstantial evidence alone can be sufficient to withstand summary judgment. *Gastineau v. Murphy*, 323 S.C. 168, 473 S.E.2d 819 (Ct. App. 1996), *rev'd on other grounds*, 331 S.C. 565, 503 S.E.2d 712 (1998) ("In totality, the Court comes to the inescapable conclusion that there is sufficient circumstantial evidence in the record to create a factual issue."). "Since it is a drastic remedy, summary judgment 'should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Baughman v. American Tel. and Tel. Co*., 410 S.E.2d 537, 543 (S.C. 1990) quoting *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.SC. 1975).

Petitioner submitted several pieces of evidence to rebut Respondent's motion that, if assumed true, would allow Petitioner to recover. Specifically, Petitioner submitted emails that show his offer to let Respondent's insured out of default on the condition that Respondent agreed to mediate between its highest reserve and its policy limit. Petitioner also submitted proof of Respondent's acceptance of the offer. After entering into this binding agreement, Respondent refused to bring its insured to the mediation, as required by SCADR Rule 6(b)(2):

> The following persons shall physically attend a mediation settlement conference unless otherwise agreed to by the mediator and all parties or as ordered or approved by the Chief Judge for Administrative Purposes of the circuit:
> (1) The mediator;
> (2) All individual parties; or an officer, director or employee having full authority to settle the claim for a corporate party; or in the case of a governmental agency, a representative of that agency with full authority to negotiate on behalf of the agency and recommend a settlement to the appropriate decision-making body of the agency;
> (3) The party's counsel of record, if any; and
> (4) For any insured party against whom a claim is made, a representative of the insurance carrier who is not the carrier's outside counsel and who has full authority to settle the claim.

Respondent breached its agreement to mediate, which necessarily requires a mediation that complies with the South Carolina ADR rules.

As Petitioner repeatedly stated at the summary judgment hearing, verification of the reserve amount would conclusively establish whether Respondent breached its agreement (Hearing Transcript pp. 9:15-19, 31:1-4). ("…if [reserve information] is something that the Court would be more comfortable being offered in camera, then certainly we would be okay with that." (Hearing Transcript p. 31:1-4)); "if we get an affidavit from anybody involved saying that the reserve was [$]1,000, then that's fine." Additionally, State Farm has filed an offer of judgment in the underlying case for $2,500.00, significantly higher than its max offer at mediation. This establishes a virtual certainty that Respondent refused to negotiate in the parameters within which it promised to negotiate to get its insured out of default.

Weighing the facts and inferences in favor of Petitioner, the parties entered into a binding contract for Petitioner to let Respondent's insured out of default in exchange for Respondent mediating the case between its highest reserve and the policy limit. Respondent then breached that agreement by failing to have its insured present at mediation, as required by SCADR 6(b).

Respondent further breached its agreement by failing to mediate between its highest reserve and the policy limit.

It was also improper for the Circuit Court to grant summary judgment when the parties had no adequate opportunity to engage in discovery. Summary judgment is a drastic remedy and "must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112 (1991); see also *Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003). Petitioner attempted to engage in discovery from the start of this litigation, even serving discovery requests with the complaint. As Petitioner's counsel stated during the summary judgment hearing, the limited responses that State Farm produced consisted mostly of claims of privilege with no privilege log, as is required by SCRCP 26(b)(5). (Hearing Transcript pp. 34:23-35:7). When the appellant attempted to schedule a deposition, he received the following response:

> On November 18, Judge Gibbons continued until February 17 all motions, one of which was SF's motion to stay this case while the underlying case is pending. Judge Gibbons issued a form 4 order which referenced the filed motions and which stated "in the interest of efficiency and fairness, these matters are administratively continued until the February term of court for Judge Morgan to hear all motions. **The Court sua sponte orders the case to remain status quo until that time"** (emphasis added) Your deposition notice is in violation of this order. Have you forgotten about the order, or are you intending to violate the order? Either way, there will be no discovery until the motions are adjudicated by Judge Morgan at the hearing February 17.

After receiving the email from State Farm's counsel, Petitioner contacted the Circuit Court for clarification, and the Court verified that no discovery was allowed until the hearing on February 17, 2023. This means Petitioner was not allowed to conduct discovery prior to the February 17, 2023, hearing and, therefore, did not have a "full and fair opportunity to conduct discovery." The deposition of a SCRCP 30(b)(6) representative from State Farm would have determined the issues of whether Respondent acted deceptively, mediated according to the terms of the agreement, and

breached its agreement with Petitioner. As Petitioner argued to the Circuit Court, Respondent's summary judgment motion was premature (Hearing Transcript pp. 30:12-31:4) and should not have been granted. The Court of Appeals did not address this properly raised issue, relying on *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). Petitioner appreciates the ruling in Futch, but respectfully submits that this and other issues preserved in Petitioner's SCRCP 59(e) motion, appellate brief, and motion for rehearing should be ruled on and the Circuit Court's decision reversed.

Where cross motions for summary judgment are filed, the issues are decided as a matter of law. See *USAA v. Pickens*, 862 S.E. 2d 442, 444 (S.C. 2021); *South Carolina Public Interest Foundation v. Calhoun County*, 854 S.E. 2d 836, 827 (S.C. 2021); *Quicken Loans v. Wilson*, 823 S. E. 2d 697, 700 (S.C. Ct. App. 2019); and *Duke Energy v. South Carolina Department of Revenue*, 764 S.E. 2d 712, 715 (S.C. Ct. App. 2014). The Court of Appeals acknowledged this, but none of the related cases stand for the proposition that a party waives evidence that makes summary judgment inappropriate. Summary judgment is improper where fact questions exist for a jury, regardless of whether cross-motions for summary judgment have been filed. It is undisputed that, after Lucas performed to his detriment, State Farm realized the benefit of Lucas' performance and breached its agreement. Indeed, State Farm's position appears to be that it is entitled to hide behind mediation's confidentiality to avoid repercussions for its breach.

III. The Circuit Court's ruling was based on inapplicable case law.

a. *South Carolina Human Affairs Commission v. Chen*, 430 S.C. 509, 846 S.E.2d 861 (2020) does not apply to the facts of this case.

In its order granting summary judgment, the Circuit Court improperly relied on *South Carolina Human Affairs Commission v. Chen*, 430 S.C. 509, 846 S.E.2d 861 (2020). In *Chen*, the parties resolved a dispute concerning the South Carolina Fair Housing Law and entered into a

settlement agreement during a mediation conducted in accordance with the South Carolina Alternative Dispute Resolution (SCADR) Rules. When one of the parties failed to comply with the terms of the agreement, the other filed a motion to enforce settlement, and the court denied that motion, finding that the parties' agreement did not satisfy the requirements of Rule 43(k), *SCRCP*. The South Carolina Supreme Court agreed, holding that "substantial compliance" with Rule 43(k) is not enough to create a binding settlement agreement and that parties instead must comply with all mandatory terms of the rule. *Id*. at 521.

This case is both factually and legally distinct from *Chen*. Here, the parties entered into an agreement to mediate within certain parameters, rather than a settlement agreement. That issue was not addressed in *Chen*, which is why *Chen* refers to "withdraw[ing] assent." (*Id*. at 520). Withdrawal of assent is something that happens before either party acts, not after a party receives and retains the bargained-for benefit and then refuses to perform. *Chen* does not address causes of action for breach of contract accompanied by fraudulent act, fraud and misrepresentation, or negligence. Simply put, *Chen* is off point.

Even if *Chen* was applicable, the parties' agreement to mediate satisfies the requirements of SCRCP 43(k), which states:

> **Agreements of Counsel.** No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless **made in open court** and noted upon the record, or **reduced to writing and signed by the parties and their counsel**. However, where the parties reach a settlement agreement during a mediation governed by the South Carolina Court-Annexed Alternative Dispute Resolution Rules and the settlement agreement involves payment by an insurer, the signature of counsel retained by an insurer on behalf of the Defendant(s) or third-party administrator shall suffice in place of the signature of the insured party. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP. (Emphasis added).

Respondent's agreement is reduced to written emails, which clearly document the offer and acceptance. The emails contained signature blocks for both parties, and Petitioner cannot genuinely argue that signatures in electronic mail are insufficient to comply with SCRCP 43(k) when every filing with the court is now submitted with electronic signatures. Respondent disregards *Chen's* acknowledgement that a party – like State Farm – is bound when a condition of SCRCP 43(k) is satisfied. *Id*. (citing *Farnsworth v. Davis Heating*, 367 S.C. 634, 627 S.E.2d 724 (2006)) SCRCP 43(k) specifically states, "the signature counsel retained by **an insurer** on behalf of the Defendant(s)…shall suffice in place of the signature of the insured party."

Respondent acknowledged that it entered into an agreement to negotiate above its reserve if Petitioner would let its insured out of default, satisfying the "made in open court" method of binding in the Rule. (Hearing Transcript p. 6:1-10). Importantly, the Rule does not say the open court statement must precede the breach. Respondent's referenced emails that dispositively show that Respondent entered into the contract at issue. The defense lawyer hired by Respondent, who should not have been allowed to give testimony, also acknowledged the deal in open court when she agreed that Respondent's counsel stated everything correctly. (Hearing Transcript p. 8:11-12). Respondent's insurance defense lawyer also admitted, in open court, that Respondent's insured did not attend mediation in the underlying wreck case.

If the Court of Appeals opinion stands, no email, phone conversation, or exchange of words between counsel can ever be binding. Agreements for extensions of time, conferring under Rule 11 on discovery disputes, and agreeing to show up and mediate cases on certain dates are meaningless. This is simply not how law is practiced and cannot be what the legislature intended with its adoption of SCRCP 43(k).

The Appellate Court's decision did not address the fact that SCRCP 43(k) does not apply because the fraud and breach happened in another case, not the "pending litigation. See *Ashfort Corp. v. Palmetto Constr. Grp, Inc.*, 318 S.C. 492, 495, 458 S.E.2d 533, 535 (1995). Petitioner did not move to enforce a settlement in the "pending litigation," which is what SCRCP 43(k) applies to. Rather, Petitioner filed a separate suit for different damages arising from Respondent's fraud, breach, and SCADR violations instead of filing a motion in the tort action against Respondent's insured. This Court should grant certiorari and rule that such an action is appropriate and not prohibited by SCRCP 43(k).

b. The Circuit Court improperly relied upon insurance bad faith law instead of breach of contract law.

Although the Court of Appeals did not address this issue, the opinion affirmed the Circuit Court's reliance on inapplicable case law. This case does not involve third-party bad faith, unfair claims practices, or any issues in any way related to *Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 526 S.E. 2d 218 (2000); *Gaskins v. Southern Farm Bureau,* 541 S.E. 2d 269 (Ct. App. 2000). Instead, this case arises out of Respondent's breach of contract and breach of company accompanied by a fraudulent act and Respondents violation of mandatory ADR rules.

It is well established in South Carolina that "the necessary elements of a contract are an offer, acceptance, and valuable consideration." *Sauner v. Pub. Serv. Auth. of S.C.* 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). A valid offer "identifies the bargained-for exchange and creates a power of acceptance in the offeree." *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 315 S.C. 215, 437 S.E.2d 122 (Ct. App. 1993). "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." *Electro-Lab of Aiken, Inc. v. Sharp Contr. Co. of Sumter, Inc.* 357 S.C. 363, 369, 593 S.E.2d 170, 173 (Ct. App. 2004) (Quoting RESTATEMENT (SECOND) OF CONTRACTS § 50 cmt. c (1981)). "Valuable

consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship,* 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998).

A valid contract between Petitioner and Respondent existed, and Respondent breached it while intentionally violating the SCADR requirement for its insured to participate in mediation. On April 20, 2021, Respondent asked if Petitioner would let Respondent's insured out of default. Petitioner made a valid offer by stating Petitioner would do that "if yall [sic] agree to mediate the case in the next 30 days and negotiate between the amount of your reserve and the policy limit." Respondent accepted the offer on June 2, 2021, by stating, "We can move forward with the early mediation now. Who do you want to use as a mediator?" Between the offer on April 20 and the acceptance on June 2, no counteroffers were made by Respondent's counsel. Petitioner even reiterated that Respondent's agreement was a condition to the damages hearing being canceled when Respondent contacted the Clerk of Court. Respondent again confirmed its valid acceptance of the offer. Further, although it is not necessary for this Court to delve into the adequacy of consideration, Petitioner suffered a detriment by letting Respondent out of default, and Respondent *agreed* to suffer a detriment by negotiating between the amount of its reserve and the policy limit.

To maintain an action for breach of contract accompanied by a fraudulent act, a plaintiff must prove "(1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Conner v. City of Forest Acres,* 348 S.C. 454, 465–66, 560 S.E.2d 606, 612 (2002). "Fraudulent act" is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." *Id.* at 466, 560 S.E.2d at 612. In this case, Respondent agreed to negotiate between its reserves and the policy limit, then

refused to disclose the amount of its reserves, attempting to hide behind attorney-client privilege and work-product doctrine, contrary to the at-issue doctrine. Likewise, a fraudulent act accompanied this breach of contract. Respondent was dishonest in fact when the company, by and through its agents, agreed to the claim reserves as a contract term and then willfully and intentionally breached the contract by refusing to disclose those terms. This course of dealing, under these circumstances, is patently unfair. Respondent got the benefit of its bargain when Petitioner performed under the terms of the contract and then Respondent breached the agreement to Petitioner's detriment. While also violating mandatory ADR rules.

"[T]here exists in every contract an implied covenant of good faith and fair dealing." *Hall v. UBS Fin. Servs. Inc.*, 435 S.C. 75, 86, 866 S.E.2d 337, 342, (2021) (quoting *Adams v. C.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995)). As noted in *RoTec Sen's., Inc. v. Encompass Sen's., Inc.*, "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract." 359 S.C. 467, 473, 597 S.E.2d 881, 884 (S.C. Ct. App. 2004). South Carolina courts have consistently given credence to the underlying purpose of the doctrine of good faith and fair dealing by using it to protect the intentions of the parties to a contract. *Williams v. Riedman,* 339 S.C. 251, 273, 529 S.E.2d 28 (Ct. App. 2000). "[T]erms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly written on its face." *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966). In the absence of an express provision, "the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made." *Ibid*.

Here, it is uncontested that State Farm entered into an agreement to mediate between the policy limits and its reserve amount. However, State Farm never revealed the reserve amount, despite making it a contractual term and an issue in the contract. By failing to reveal a key term of the contract it agreed to, State Farm acted in bad faith. This is exactly the type of behavior and activity that the implied covenant of good faith and fair dealing seeks to prevent.

Further, although this Court declined to address the issue in *Hood v. USAA*, a case also argued by Respondent's counsel, the Court noted in its decision that, "[i]t may be that USAA [the insurer] had a **duty** to answer truthfully if asked whether it was offering the maximum amount of its authority, but that question was not asked here and is not before us." (Appellate Case No. 2019-001942, emphasis added) (unpublished). In this case, State Farm breached its duty when it failed to truthfully answer whether it was offering the maximum amount of its reserve.

IV. The Court of Appeals affirmed the deprivation of Petitioner's constitutional right to a jury trial.

The right to a jury trial is guaranteed by the constitutions of the United States and the State of South Carolina, as well SCRCP 38. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved…" U.S. Const. amend. VII. "The right of trial by jury shall be preserved inviolate…" S.C. Const. art. I, §14.

"Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt*, 293 U. S. 474, 486, (1935). As Alexander Hamilton wrote in 1788, "The friends and adversaries of the plan of the constitutional convention, if they agree in nothing else, concur at least in the value they set upon trial by jury; the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium

of free government." Alexander Hamilton, Federalist No. 81, The Federalist Papers. By affirming the Circuit Court's entry of summary judgment, the Court of Appeals affirmed the deprivation of the right to a jury trial guaranteed by the constitutions of South Carolina and the United States. This Court should grant certiorari so that the deprivation may be corrected.

V. Respondent put its reserve information at issue by breaching an agreement, engaging in fraud, and violating mandatory ADR rules.

The at-issue doctrine or in-issue waiver provides that "a client impliedly waives the privilege when he relies on confidential communications with his attorney to make out a claim or defense." *Davis v. Parkview Apartments*, 409 S.C. 266, 293, 762 S.E.2d 535, 550 (2014) (Pleicones, J. concurring). When Respondent State Farm agreed to negotiate above its reserve as a condition of Petitioner letting its insured out of default, it put its reserve directly at issue. As Petitioner argued during the hearing, reserve information "…became an issue and became a discoverable issue" when Respondent "agreed to mediate within the amount of the reserve and the policy limit" to get its insured out of default. At the time Respondent induced performance by agreeing to the deal at issue, Petitioner was entitled to Respondent's minimum limits policy under *Shores v. Weaver, 315 S.C. 347, 433 S.E.2d 913 (Ct. App. 1993)*. As Petitioner argued, liability was established at that time, and the only remaining proceeding was a trial on the damages. (Hearing Transcript p. 29:5-8). The Court of Appeals described this idea as "patently meritless," but that was the actual legal posture of the parties.

When Respondent engaged in fraudulent conduct and breached its agreement during mediation, it put the facts related to its tortious conduct directly at issue. Reserve information contains facts directly related to Respondent's fraud and breach, and facts are always discoverable,

even if they are contained in a privileged document. See *Holder v. Lebo* (2011-CP-23-04455) and *Upjohn Co. v. United States*, 449 US 383 (1981).[2]

In cases like this, the "privilege holder asserts a claim or defense and attempts to prove that claim or defense by reference to the otherwise privileged material," many courts have held that the information is relevant and discoverable. *Pennsylvania v. Harris* 612 Pa. 576, 32 A.3d 243 (2011). *See e.g., Savino v. Luciano*, 92 So.2d 817 (Fla. 1957) (holding that "when a party has filed a claim, based upon a matter ordinarily privileged, the proof of which will necessarily require that the privileged matter be offered in evidence, we think that he has waived his right to insist that the matter is privileged."); *Hoechst Celanese Corp. v. National Union Fire Ins. Co. of Pitts. Pa.*, 623 A.2d 1118 (Del. Super. Ct. 1992) (holding that where the facts contained in the otherwise privileged material have been placed in issue, a client may not invoke the attorney-client privilege as a shield for discovery); *Pittston Co. v. Allianz Insurance Co.*, 143 F.R.D 66 (D.N.J. 1992) (noting that "the 'in issue' doctrine is operative when the party has asserted a claim or defense that he intends to prove by use of the privileged materials."); *State v Hydrite Chemical Co.*, 220 Wis.2d 51, 582 N.W.2d 411, 416 (Ct. App. 1998) (adopting the *Pittston* Court's analysis). In this case, it was intentional to agree to negotiate between its reserves and policy limit, just as it was intentional when it knowingly violated the ADR requirement that it produced its insured to participate at mediation. This Court should grant certiorari so these issues may be examined.

[2] See also *Cox v. Combahee* (2021-CP-08-00940), *Franklin v. Russell* (2017-CP-36-00143), *Rice v. Ahearn Rentals* (2014-CP-43-02294), *Pinckney v. Varnadoe* (2008-CP-15-00291), *Brown v. White* (2001-CP-10-04760), and *Henry v. Harris* (2000-CP-23-06494). These Circuit Court orders address discovery issues, including those where claims files are sought.

VI. The Court of Appeals did not address the fact that Respondent offered live testimony from its insurance defense lawyer at the summary judgment hearing, and deprived Petitioner of the right to cross-examine her.

It is axiomatic that when testimony is offered by a party, the other has the right to test that testimony with cross-examination. During the hearing on Respondent's motion for summary judgment, the Circuit Court allowed Jeanmarie Tankersley, Respondent's insurance defense lawyer in the underlying wreck case, to offer testimony to support Respondent's summary judgment motion. Ms. Tankersley was not an attorney of record in the case, and did not represent State Farm at the hearing. The Circuit Court allowing testimony from a fact witness at a summary judgment hearing alone is enough for reversal, and it is certainly grounds for reversal that Petitioner was not allowed to cross-examine the witness. This Court should review this case and reverse the Court of Appeals' affirmance of the entry of summary judgment.

Testimony is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *State v. Stewart*, 435 S.C. 405, 416, 867 S.E.2d 33, 39 (Ct. App. 2021) (citing *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2001)). Oxford Languages defines testimony as "a formal written or spoken statement, especially one given in a court of law, and evidence or proof provided by the existence or appearance of something." Testimony, GOOGLE, http://google.com (search "Testimony").

Using the plain ordinary meaning of the word testimony, well-established law from the South Carolina Supreme Court, and well-established law from the United States Supreme Court, Jeanmarie Tankersley proffered testimony during the hearing. Tankersley is not an attorney of record in this case. Her statements, in open court, on the record, count as declarations or affirmations made for the purpose of establishing or proving a fact. The case law is clear that a

trial court may grant a motion for summary judgment based upon the "pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, if any." *Madison ex rel. Bryant v. Babcock Center, Inc.*, 317 S.C. 123, 638 S.E.2d 650 (2006) (citing *Rule 56(c), SCRCP*); *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997)). Live witness testimony is not included in SCRCP 56. Petitioner did not have any notice of the witness testimony, a chance to cross-examine the witness, or a chance to present his own witness.

Because Petitioner was neither given notice that a witness would testify nor a chance to cross-examine the witness, Petitioner respectfully submits that it was error for the Circuit Court to grant summary judgment based, in part, on Tankersley's testimony. In *South Carolina Dept. of Social Services ex rel. Texas v. Holden*, our state's Supreme Court acknowledged, "[t]he right to confrontation, although historically limited to criminal prosecutions, has been applied in the civil context." 319 S.C. 72, 78 459 S.E.2d 846, 849 (1995). Further, the Supreme Court in *Brown v. South Carolina State Board of Education* held, "[w]here important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990).

Respondent presented a witness who testified at a hearing as to her factual role in the proceedings and contract formation. In this situation, under South Carolina case law, the Circuit Court was required to afforded Petitioner the opportunity to cross-examine the witness. Because Petitioner was not able to cross-examine the fact witness after her testimony, he was denied a meaningful opportunity to be heard as guaranteed by the Due Process Clause of the Constitution, the Supreme Court of the United States, and the South Carolina Supreme Court. The Court of Appeals did not address this issue, and this Court should grant certiorari so that the deprivation of Petitioner's constitutional right to cross-examine Respondent's witness may be corrected.

VII. Petitioner's damages were not speculative.

The Court of Appeals upheld a Circuit Court order holding Petitioner's damages were speculative because "it is impossible to state with certainty what the underlying case would have settled for." This conflates the fact that the exact amount of damages was unknown at the time with the fact that Petitioner was, in fact, entitled to a monetary recovery at the time. The two are not the same. The ruling ignores the applicability of *Shores v. Weaver*, 433 S.E2d 913 (Ct. App. 1993). In *Shores*, the Court considered whether an insured's failure to notify its insurer of a lawsuit prevents an injured third party from recovering minimum limits. This Court held that "as a matter of public policy, the minimum limits automobile insurance policy involved in this case was not defeated or voided by Weaver's failure to comply with policy notice provisions […] because the coverage was mandated by the legislature to protect innocent third parties […]" *Id*. at 916.

The *Shores* court reasoned that "the purpose of the Motor Vehicle Responsibility Act and the Automobile Reparation Act of 1974 is to afford greater protection to those injured through the negligent operation of automobiles in the State." *Ibid* citing *Pennsylvania National Mut. Casualty Ins. Co. v. Parker*, 282 S.C. 546, 320 S.E.2d 458 (Ct. App. 1984). As a result, the Court found that "public policy insurance not only affords protection to insured motorists but also serves the public policy of affording protection to innocent victims of motor vehicle accidents." *Id*. at 915 citing *Factory Mutual Liab. Ins. Co. v. Kennedy; Evans v. American Home Assurance Co.*, 256 S.C. 417, 166 S.E.2d 727 (1971). The *Shores* court also gave credence to legislative intent, finding that "[t]he legislature has expressed an intent to prohibit an insured's violation of the policy provisions from defeating or voiding coverage for third parties where the legislature has deemed the coverage necessary to protect those third parties." *Ibid* citing S.C. Code Ann. § 56-9-20(7)(b).

Under *Shores v. Weaver, 315 S.C. 347, 433 S.E.2d 913 (Ct. App. 1993)*, Petitioner would not have been precluded from collecting minimum financial responsibility limits from the respondent, even though the respondent failed to notify his insurer of pending litigation. Because Respondent was in default, Petitioner was entitled to have the court determine and award damages at a hearing. Petitioner gave up his right to have a judgment of up to $25,000.00 awarded in his favor when he agreed to let Respondent out of default on the condition that Respondent kept its promise to negotiate within certain parameters.

As Petitioner argued during the hearing on Respondent's motion for summary judgment, Petitioner sustained several distinct and articulable damages as a result of Respondent's breach, including attorney's fees and consequential damages. (Hearing Transcript p. 13:17-24). Such damages include the continued costs of litigation, the cost of engaging in a mediation that does not satisfy the ADR requirements, and the cost of motion hearings.

Petitioner has been damaged in the amount that he paid for a mediation that was worthless because Respondent violated the governing ADR rules and violated the terms of the agreement it made to get its insured out of default. For purposes of determining damages, it does not matter whether the mediation would have been successful and resulted in the settlement of the case. What matters is that Petitioner incurred the cost of a mediation that required Respondent's compliance with the ADR rules. By refusing to have its insured present, Respondent prevented the parties from having an ADR-compliant mediation and caused Petitioner to incur unnecessary expenses.

VIII. The Circuit Court erred in weighing conflicting evidence and invaded the province of the jury.

As John Jay, the first Chief Justice of the United States Supreme Court, wrote: "It may not be amiss here, gentlemen, to remind you of the good old rule, that on questions of fact it is province

of the jury, on questions of law it is the province of the court to decide […] for as, on the one hand, it is presumed that juries are the best judges of facts it is, on the other hand, presumable that the courts are the best judges of law." *Sparf v. United States*, 156 U.S. 51 (1895) quoting *Georgia v. Brailsford*, 3 Dall. 1, 4 (1794). This principle remains a critical component of the American legal system to this day. See *Perry v. New Hampshire*, 132 S.Ct. 716, 723, 565 U.S. 228 (2012) quoting *Kansas v. Ventris*, 556 U.S. 586, 584, 129 S.Ct. 1841, 173 LE.2d 801 (2009) ("Our legal system…is built on the premise that it is the province of the jury to weigh the credibility of competing witnesses.").

From the Circuit Court order affirmed by the Court of Appeals, it is clear that the Circuit improperly weighed evidence and made factual determinations when it found that a valid contract did not exist between the parties and that, if a valid contract did exist, Respondent did not breach that contract: "Even if the emails exchanged between counsel for Lucas and State Farm did constitute a contract, the emails reveal that '[State Farm] did negotiate between the reserves and the limit, as we agreed to.'" Because the Circuit Court improperly weighed the evidence, Petitioner respectfully submits that the order granting summary judgment be reversed.

CONCLUSION

Respondent State Farm advanced a lie to the Court and its officers, from which it unjustly benefited. To make matters worse, it intentionally violated mandatory ADR rules. Petitioner respectfully requests that this Court grant certiorari, review this case, and remand this case back to the Circuit Court for trial.

Respectfully submitted,

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