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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

James Dustin Lucas, ...Appellant,

v.

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

Appellate Case No.: 2023-000870

APPELLANT'S FINAL BRIEF

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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

Lucas sued State Farm's insured for damages resulting from a motor vehicle collision that destroyed multiple cars and caused multiple people to be treated at the hospital. Months after default was entered as to State Farm's insured, State Farm contacted Lucas' counsel and asked that its insured be let out of default. State Farm agreed in writing that, if Lucas' counsel would let its insured out of default, it would mediate between its reserve and its policy limit. Once Lucas let State Farm's insured out of default, State Farm showed up to mediation, without its insured present as required by SCADR Rule 6, offered $1,000.00, and made it clear that it would offer no more than that amount. State Farm 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.

Lucas sued State Farm for breach of contract accompanied by fraudulent act, fraud and misrepresentation, and negligence. State Farm moved for summary judgment before any depositions were taken. Lucas rebutted the motion with evidence of the parties' binding agreement and State Farm's fraudulent statements accompanying its breach of the contract. That evidence notwithstanding, the circuit court granted State Farm's motion for summary judgment without requiring State Farm to provide any evidence that it began negotiations at its highest reserve. Lucas filed a SCRCP 59 motion and preserved all issues for appeal. The circuit court denied that motion. Lucas thereafter timely filed this appeal.

FACTS

On June 17, 2017, Lucas and two other individuals rode as passengers in Lucas' car, which was driven by Lucas' girlfriend. That car was struck by a Ford F-250 driven by Knox that was

hauling lawnmowers and landscaping equipment and driving at an excessive speed.[1] The truck was insured by State Farm. On June 7, 2020, Lucas filed suit against Knox. Lucas served Knox with the summons, complaint, and discovery requests on June 23, 2020. Neither Knox nor State Farm filed an answer or requested an extension of time to file a responsive pleading. Default was entered against Knox on October 2, 2020. Lucas sent letters to State Farm on March 24, 2021, and April 14, 2021, and even postponed a damages hearing in an effort to get State Farm to hire defense counsel for Knox and participate in litigation. Nearly 10 months after Knox was served, on April 20, 2021, State Farm had an insurance defense lawyer contact Lucas' counsel and ask to be let out of default.

Neither Knox nor State Farm had any good reason or cause for Knox's failure to respond to the properly served complaint and discovery requests for the better part of a year. Lucas informed Knox's counsel, hired by State Farm, that he would agree to cancel the scheduled damages hearing and let Knox out of default if State Farm would agree to mediate the case between the amount of its highest reserve and its policy limit. State Farm accepted this offer. Lucas performed to his detriment by canceling the damages hearing and allowing State Farm to file an answer for Knox. At mediation, State Farm violated mandatory SCADR Rule 6, which required State Farm to have its insured present at mediation. State Farm then breached the agreement to mediate within clearly established perimeters by offering less than the amount of its highest

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[1] Three witnesses – including the responding officer, the driver of Lucas' car, and Knox himself –stated that Knox was speeding when the collision occurred. Lucas will provide Seely's and Knox's deposition transcripts and the responding officer's collision report upon the Court's request. Although he has not been deposed yet, Lucas has also stated that Knox drove at a high rate of speed at the time of the collision.

reserve.[2]

To avoid filing a second lawsuit, Lucas filed a motion in the underlying wreck case to compel the production of materials in State Farm's claim file. Those materials would have included reserve information, which would have conclusively established whether State Farm breached the terms of its agreement to mediate. The circuit court ruled that State Farm was not required to produce reserve information in part because Lucas had not filed a direct action against State Farm for breach of contract.

Lucas subsequently filed suit against State Farm. He stated in his 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 State Farm's policy, even if Knox failed to comply with the policy's duties of notice and cooperation. With the complaint, Lucas served discovery requests, which included requests for the production of the reserve information that State Farm put at issue by agreeing to the terms of the proposed mediation. Lucas also noticed a deposition. In response, State Farm moved for summary judgment, claiming, in essence, that it could engage in nefarious conduct and make agreements with no intention of acting accordingly or in good faith because, 1) SCRCP 43(k) allows as much, and 2) portions of State Farm's breach and dishonesty occurred during mediation. In response, Lucas argued that SCRCP 43(k) applies to settlement agreements and not breaches of contract accompanied by fraudulent act. Lucas also argued that tortious conduct is not without a remedy simply because the tortfeasor acts during mediation.

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[2] State Farm offered $1,000.00. For the reasons discussed below, it is a near certainty that this amount is less than State Farm's reserve amount, as is underscored by State Farm's refusal to provide an affidavit about the reserve amount or to submit the information for *in camera* review.

ARGUMENT

I. The circuit court erred in granting summary judgment when the appellant submitted more than a scintilla of evidence in support of his claims.

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 cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to defeat a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 673 S.E.2d 801 (2009); *Callawassie Island Members Club, Inc. v. Frey*, Opinion No. 2018-UP-179, *7 (S.C. App. May 2, 2018) (unpublished) (reversible error for trial court to fail to apply "scintilla" standard).

"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).

In response to State Farm's motion for summary judgment, Lucas submitted more than a scintilla of evidence in support of his claims. Specifically, Lucas submitted emails that show Lucas' offer to let Knox out of default if State Farm agreed to mediate between its highest reserve and its

policy limit, as well as Knox's acceptance of that offer. After entering into this binding agreement, State Farm 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.

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

State Farm further breached its agreement by failing to negotiate between the amount of its highest reserve and its policy limit. After mediation, State Farm repeatedly failed to offer proof that the amount it offered at mediation was its highest reserve. The respondent never provided the appellant with an affidavit concerning reserve information, produced reserve information in its discovery responses, submitted reserve information for *in camera* review, or even produced a privilege log identifying the existence of reserve information. As Appellant's counsel repeatedly stated at the summary judgment hearing, verification of the reserve amount would conclusively establish whether State Farm breached its agreement (R. pp. 161:15-19, 183:1-4). ("…if [reserve information] is something that the Court would be more comfortable being offered in camera, then certainly we would be okay with that." (R. p. 183:1-4)); "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, an amount that is 150% higher than its

offer at mediation. This offer is further evidence supporting Lucas' argument that State Farm failed to offer its highest reserve.

Weighing the facts and inferences in favor of the appellant, the parties entered into a binding contract for Lucas to let Knox out of default in exchange for State Farm mediating the case between its highest reserve and the policy limit. State Farm then breached that agreement by failing to have its insured – the defendant and a necessary party to mediation under SCADR 6(b) – present at mediation. State Farm further breached its agreement by failing to mediate between its highest reserve and the policy limit. It is reasonable to infer from State Farm's repeated failure to offer proof of its reserve amount that the amount offered at mediation was not the amount of the highest reserve. Under *Hancock*, the appellant is entitled to that inference. Because the appellant submitted more than a scintilla of evidence in support of his claim, when weighing the facts and inferences in favor of the appellant, the circuit court should have denied the respondent's motion for summary judgment.

It was also improper for the circuit court to grant summary judgment when the parties had not had an 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). The appellant attempted to engage in discovery from the start of this litigation, even serving discovery requests with the complaint. As Appellant's counsel stated during the summary judgment hearing, the limited responses that State Farm produced to these requests consisted mostly of claims of privilege with no privilege log, as is required by SCRCP 26(b)(5). (R. pp. 186:23-187:7). 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 this email from State Farm, Lucas contacted the court for clarification, and the court verified that no discovery was allowed until the hearing on February 17, 2023. This means that Lucas 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 State Farm acted deceptively, mediated according to the terms of the agreement, and breached its agreement with the appellant. As Appellant's counsel argued to the circuit court, State Farm's summary judgment motion was premature (R. pp. 182:12-31:4) and should not have been granted.

In its order, the circuit court acknowledges that, 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). Importantly, none of these cases stand for the proposition that a party waives evidence that makes summary judgment inappropriate or overrules *Hancock*'s scintilla standard. Summary judgment is improper where at least a scintilla of evidence has been presented, 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.

II. The circuit court relied upon 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 upon *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 the respondent subsequently failed to comply with the terms of the agreement, the appellant filed a motion to enforce settlement. The circuit court denied that motion, finding that the parties' agreement did not satisfy the requirements of Rule 43(k), *SCRCP*, which governs settlement agreements. 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*. In this action, the parties entered into an agreement to mediate within certain parameters, rather than a settlement agreement. Such an issue is not addressed by the *Chen* court, 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 fails to perform. *Chen* does not address causes of action for breach of contract accompanied by fraudulent act, fraud and

misrepresentation, or negligence, and certainly does not overrule *Hancock v Mid-South Mgmt., Co.*, 381 S.C. 326, 673 S.E.2d 801 (2009). 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).

State Farm's offer and acceptance is reduced to written emails, which clearly document offer and acceptance. The emails contained signature blocks for both parties: the undersigned on behalf of Lucas and defense counsel on behalf of State Farm. State Farm 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. State Farm disregards the part of the *Chen* decision that acknowledges that a party – like State Farm – is bound when a condition of 43(k) is satisfied. *Id*. (citing *Farnsworth v. Davis Heating*, 367 S.C. 634, 627 S.E.2d 724 (2006). Rule 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."

State Farm has also acknowledged that it entered into an agreement to negotiate above its reserve if Lucas would let its insured out of default, satisfying the "made in open court" method of binding in the Rule. (R. p. 158:1-10). (Importantly, the Rule does not say the open court statement must precede the breach.) State Farm's counsel referenced emails that dispositively

show that State Farm entered into the contract at issue. The defense lawyer hired by State Farm in the tort action, who should not have been allowed to give testimony, also acknowledged the deal in open court when she agreed that State Farm's counsel stated everything correctly. (R. p. 160:11-12). Counsel for Knox also admitted, in open court, that State Farm's insured did not attend mediation in the underlying wreck case.

According to State Farm's rationale, no email, phone conversation, or exchange of words between counsel can ever be binding. This means that 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). Further, the circuit court's ruling also failed to address the fact that SCRCP 43(k) does not apply because the fraud and breach happened in another case. Lucas has not moved to enforce a settlement in this case, which is what SCRCP 43(k) applies to. Rather than a motion to enforce a settlement, this is a separate suit for different damages caused by a different defendant than the underlying tort action.

b. The circuit court improperly relied upon insurance bad faith law instead of breach of contract law.

This action 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 a breach of contract and breach of company accompanied by a fraudulent act. Because there is a valid and enforceable contract, privity of contract exists between Lucas and State Farm.

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 Lucas and State Farm existed. On April 20, 2021, the respondent's counsel asked if Appellant's counsel would be willing to let the respondent out of default. (R. p. 71). Appellant's counsel then made a valid offer by stating that the appellant would agree to let the respondent out of default "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." (R. p. 72). Respondent's counsel accepted the offer on June 2 by stating, "We can move forward with the early mediation now. Who do you want to use as a mediator?" (R. pp. 73-74). Between the offer on April 20 and the acceptance on June 2, no counteroffers were made by Respondent's counsel. The appellant even reiterated that State Farm's agreement was a condition to the damages hearing being canceled when State Farm's counsel contacted the Clerk of Court. State Farm's counsel again confirmed State Farm's valid acceptance of the offer. Further, although it is not necessary for this Court to delve into the adequacy of consideration, the appellant suffered a detriment by letting the respondent out of default, and the 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 three elements: "(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, State Farm agreed to negotiate between its reserves and the policy limit. It then failed to disclose the amount of its reserves, attempting to hide behind attorney-client privilege and work-product doctrine, contrary to the at-issue doctrine.[3] Likewise, a fraudulent act accompanied this breach of contract. State Farm 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 failing to disclose those terms. Further, this course of dealing, under these circumstances, is patently unfair. State Farm realized the benefit of its bargain when Lucas followed the terms of the contract and then breached the agreement to Lucas' detriment.

Additionally, "there 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.

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[3] For a discussion of the at-issue doctrine, *see, supra,* Section V.

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.

III. The circuit court's ruling deprives the appellant of his 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 granting summary judgment, the circuit court prevented the appellant from exercising his constitutionally protected right to a jury trial.

IV. The circuit court erred in ignoring the at-issue doctrine with respect to reserve information that proves State Farm's fraudulent breach of contract.

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 State Farm agreed to negotiate above its reserve as a condition of Lucas letting its insured out of default, it put its reserve directly at issue. As Lucas' counsel argued during the hearing, reserve information "…became an issue and became a discoverable issue when State Farm agreed to mediate within the amount of the reserve and the policy limit in order to be let out of default. If we had not reached that agreement, then under *Shores*, we would have been entitled to minimum limits. We already had an entry of default. We wouldn't have needed -- there wouldn't have been a trial on the damages." (R. p. 181:5-8). Likewise, when State Farm 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 State Farm'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).[4]

In cases such as this, where 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, State Farm directly put its reserves at issue when it agreed to negotiate between its reserves and policy limit.

V. The circuit court improperly allowed a fact witness to testify at the summary judgment hearing.

[4] 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.

During the hearing on the respondent's motion for summary judgment, the circuit court heard from Jeanmarie Tankersley, the attorney for Knox in the underlying wreck case. Ms. Tankersley is not an attorney of record in this case and does not represent State Farm in this action. Because the circuit court allowed testimony from a fact witness at a summary judgment hearing, the appellant respectfully submits that the circuit court's grant of summary judgment should be reversed.

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. Lucas' counsel did not have any notice of the witness testimony, a chance to cross-examine the witness, or a chance to present witnesses himself.

Because Lucas was neither given notice that a witness would testify at the hearing nor was he given a chance to cross-examine the witness, he 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).

State Farm 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, Lucas should have been afforded the opportunity to cross-examine the witness. Because Lucas 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.

VI. The circuit court erred in holding that the appellant's damages were speculative.

In its order, the circuit court ruled that Lucas' damages were speculative because "it is impossible to state with certainty what the underlying case would have settled for." This ruling ignores the applicability of *Shores v. Weaver*, 433 S.E2d 913 (Ct. App. 1993). In *Shores*, this 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.

In reaching its decision, 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*, the appellant 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 the respondent was in default, the appellant was entitled to have the court determine and award damages at a hearing. The appellant gave up his right to have a judgment of up to $25,000.00 awarded in his favor when he agreed to let the respondent out of default if the respondent negotiated within certain parameters.

As Appellant's counsel argued during the hearing on the respondent's motion for summary judgment, the appellant sustained several distinct and articulable damages as a result of the respondent's breach, including attorney's fees and consequential damages. (R. p. 165:17-24). Such

damages include the continued costs of litigation, the cost of engaging in a mediation that does satisfy the ADR requirements, and the cost of motion hearings. More simply, however, the appellant has been damaged in the amount that he paid for a mediation that violated the terms of the agreement. 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 does matter is that the appellant incurred the cost of what he believed would be a mediation that complied with the ADR rules. By failing to have its insured present, State Farm prevented the parties from having an ADR-compliant mediation and caused the appellant to incur unnecessary expenses.

VII. The circuit court erred in weighing the evidence and invading 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 completing witnesses.").

In its order, the circuit court improperly weighed the 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, State Farm 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.'" (R. p. 6). Because the circuit court improperly weighed the evidence, the appellant respectfully submits that the order granting summary judgment be reversed.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that this Court reverse the circuit court's order of summary judgment in favor of the respondent and remand this case for trial.

Respectfully submitted,

s/ Joshua T. Hawkins ________

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

James Dustin Lucas, ...Appellant,

v.

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

Appellate Case No.: 2023-000870

CERTIFICATE OF COUNSEL

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

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I certify that I have served this Appellant's Final Brief on counsel for the Respondent by e-mail to the addresses indicated below, on December 12, 2023.

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