STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

CASE NO. 2014-CP-23-3422

THREE BLIND MICE, LLC, d/b/a
THE BLIND HORSE SALOON,

Plaintiff,

vs.

COLONY INSURANCE COMPANY,

Defendant.

ORDER

This matter comes before the Court on cross motions for summary judgment. At issue is whether a comprehensive general liability policy issued by Colony Insurance Company (Colony) to Three Blind Mice, LLC doing business as The Blind Horse Saloon (Three Blind Mice) provides coverage for an incident involving Katherine Frost on the premises of The Blind Horse Saloon. It is the determination of this Court that coverage was available under that policy and that Colony not only breached its contract of insurance in denying coverage but acted in bad faith in doing so.

GENERAL PRINCIPLES OF CONSTRUCTION

When called upon to determine whether coverage is afforded under a policy, a Court is required to compare the allegations of the underlying Complaint with the policy language. Shelby Mut. Ins. Co. v. Askins, 307 S.C. 81, 41 S.E.2d 855 (Ct. Apps. 1992). If the alleged facts of the underlying Complaint fall within the coverage provisions of the policy, the insurer must not only indemnify for any settlement of a loss, but under most liability policies must provide a defense to the insured.

Most insurance policies begin with a broad proposition of coverage and then narrow that broad statement of coverage through specific exclusions. While these exclusions are to be interpreted according to their plain, ordinary and popular meanings, they are to be narrowly construed in favor of coverage. Horry County v. Insurance Reserve Fund, 344 S.C. 493, 544 S.E.2d 637 (Ct. Apps. 2001), Diamond State Ins. Co. v. Homestead Industries, Inc., 318 S.C. 231, 456 S.E.2d 912 (1995). If the intention of the parties is clear, then a court may not torture the meaning of the policy language to extend or defeat coverage. Torrington Co. v. Aetna Casualty and Sur. Co., 264 S.C. 636, 216 S.E.2d 547 (1975). On the other hand, where the language of a policy is ambiguous, a court is to construe the policy in favor of coverage for the insured. BLG Enterprises, Inc. v. First Financial Ins. Co., 328 S.C. 374, 491 S.E.2d 695 (Ct. Apps. 1997).

With these general rules of construction in mind, a consideration of the specific underlying facts and the provisions of the Colony policy will be undertaken.

UNDERLYING FACTS

According to the Complaint, Katherine Frost and her husband Bobby Frost, were attending a Halloween party on October 29, 2011 at The Blind Horse Saloon. Katherine Frost was engaged in conversation with several friends who were standing near a boxing machine. She was inadvertently struck by an unknown individual who had attempted to strike the punching bag of the boxing machine, missed and instead hit Katherine Frost in the lower back. As a result, Katherine Frost sustained serious bodily injuries, requiring hospitalization. In their Complaint, Katherine Frost and Bobby Frost alleged that Three Blind Mice was negligent in maintaining an unreasonably dangerous product on its premises, failing to guard against

permitting invitees into the zone of danger surrounding the boxing machine, and in failing to warn of the danger associated with the use of the boxing machine.

COLONY POLICY PROVISIONS

Pursuant to the terms of the policy issued by Colony to Three Blind Mice, Colony agreed to

> 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. [Colony] will have the right and duty to defend the insured against any "suit" seeking those damages. However, [Colony] 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.

The policy goes on to provide that

> [t]his insurance applies to "bodily injury" or "property damage" only if:
>
> > (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory".

The term "occurrence" is defined to mean

> an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The policy also provides that coverage does not apply to certain matters set forth as exclusions. Colony contends that coverage is precluded by the following exclusion:

> Assault, Battery or Assault and Battery

This insurance does not apply to damages or expenses due to "bodily injury" or "property damage" or "personal and advertising injury" arising out of or resulting from:

(1) "Assault", "Battery" or "Assault and Battery" committed by any person;

(2) The failure to suppress or prevent "Assault", "Battery" or "Assault and Battery";

(3) The failure to provide an environment safe from "Assault", "Battery" or "Assault and Battery";

(4) The failure to warn of the dangers of the environment which could contribute to "Assault", "Battery" or "Assault and Battery";

(5) "Assault", "Battery" or "Assault and Battery" arising out of the negligent hiring, supervision, or training of any person;

(6) The use of force to protect persons or property whether or not the "bodily injury" or "property damage" or "personal and advertising injury" was intended from the standpoint of the insured or committed by or at the direction of the insured.

The policy goes on to define the terms "assault", "battery" and "assault and battery" as follows:

"Assault" means:

a. an act creating an apprehension in another of immediate harmful or offensive contact, or

b. an attempt to commit a "Battery".

"Battery" means an act which brings about harmful or offensive contact to another or anything connected to another.

"Assault and Battery" means the combination of an "Assault" and a "Battery".

Colony also relies upon the following exclusion:

ATHLETIC OR SPORT PARTICIPANTS EXCLUSION

This insurance does not apply to "bodily injury" to any person arising out of or resulting from practicing for or participating in any athletic contest, exhibition, activity, game or sport.

APPLICATION OF EXCLUSION FOR BATTERY

Colony argues that its exclusion of coverage for bodily injury caused by a battery is unambiguous, clear and explicit and acts to preclude coverage for the claims asserted by Katherine and Bobby Frost. In making this assertion, Colony argues that the definition of a battery applies to both "intentional" and "unintentional" acts. The definition of battery, as set forth in the Colony policy, does not, however, specifically provide that it applies to both "intentional" and "unintentional" acts. In fact, the word "act", as used in the exclusion is left undefined. Where a policy does not specifically define a term, the term is to be defined according to the usual understanding of the term's significance to an ordinary person. State Farm Fire and Cas. Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132 (Ct. App. 2000) (the term "accident" which was used in the definition of an "occurrence" was defined according to its usual meaning, based upon outside sources). Whether the term "act", as used in the definition of "battery", includes both "intentional" and "unintentional" acts depends upon how the term

"battery" is used in the ordinary sense. Most authorities view a "battery" as an intentional act. See, e.g., Longshore v. Saber Security Services, Inc., 365 S.C. 554, 619 S.E.2d 5 (Ct. App. 2005); Hendricks v. Southern Bell Tel. & Tel. Co., 193 Ga. App. 264, 387 S.E.2d 593 (1989); Brett v. Hayes, 142 N.C. App. 190, 541 S.E.2d 761 (2001); Restatement (2d) Torts §18; W. Prosser, Law of Torts §9 (4th ed. 1971).

Colony nonetheless argues that it is inappropriate to utilize common law definitions where a contractual definition has been utilized. See Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 225 S.E.2d 344 (1976). Colony is correct in that a court should read a policy as a whole, considering the context and subject matter of the policy in an effort to discern the parties' intention before declaring a term to be ambiguous. Id. This does not, however, avail Colony. If the policy issued by Colony is considered as a whole, it is clear that coverage should nonetheless have been extended to Three Blind Mice. Three Blind Mice purchased a policy which was to provide coverage to it for bodily injury caused by an "occurrence", which would include an accident or unintentional act. (Pursuant to her Complaint, Katherine Frost sustained bodily injury at the Blind Horse Saloon and alleged that it was caused by an inadvertent act.) This broad proposition of coverage is then limited by listed exclusions. One exclusion utilized by Colony is for intentionally caused injuries or damages. This exclusion fits with the general coverage for unintentional acts. However, it is limited to the standpoint of the insured. The "assault and battery" exclusion relied upon by Colony expands on the exclusion for intentional acts since it is not limited to being from the standpoint of the insured. When construed to apply only to intentional acts, the "assault and battery" exclusion also fits within the general framework with coverage for unintentional acts but not for intentional acts.

The definition proposed by Colony, however, not only expands the exclusion for "assault and battery" beyond the standpoint of the insured, it also precludes coverage for "unintentional" acts. Since coverage for "unintentional" acts is the essence of what was to be covered by the policy, Colony's interpretation expanding its exclusion to "unintentional" acts would create a contradiction. This contradiction must be resolved in favor of coverage and therefore the "assault and battery" exclusion must be limited to intentional acts.

In fact, if Colony's expansive definition were to be utilized it would have the effect of excluding coverage for virtually every type of tort which might cause injury. Pursuant to its argument, any accidental injury, including one caused by a customer tripping over the leg of a chair, would not be covered. Where an insurance policy contains an internal inconsistency created by an exclusion which purports to ban coverage for claims arising out of the very operation sought to be insured, the policy is rendered ambiguous, requiring that it be construed in favor of coverage. BLG Enterprises, Inc. v. First Financial Inc. Co., 328 S.C. 374, 491 S.E.2d 695 (Ct. App. 1997).

Instead of complying with the general rule that a court is to consider the entire contract between the parties to determine the meaning of that contract's provisions, Colony has focused solely upon the language set forth in the definition of "battery". Yet the meaning of a particular word or phrase is not to be determined by considering the word by itself. Yarborough v. Phoenix Mut. Life Ins. Co., supra; 13 Appleman Insurance Law and Practice §7383 (1976). Instead the meaning of a particular word or phrase is to be determined by reading the policy as a whole and considering the context and subject matter of that insurance policy. Nor is a court to rewrite a contract by inserting words or phrases to make complete a particular idea that is otherwise lacking. Colony's approach would have this Court insert the phrase "intentional or

unintentional". If Colony had wished to include such a phrase, it could have done so as it apparently has done with other policies issued by it. See Brooklyn Bridge, Inc. v. South Carolina Ins. Co., 309 S.C. 141, 420 S.E.2d 511 (Ct. App. 1992). The failure to include this additional language in the policy itself creates an ambiguity, which must be construed in favor of Three Blind Mice.

Because the "assault and battery" exclusion, if construed as argued by Colony, tends to create an ambiguity, and because the exclusion itself is to be narrowly construed, it is the determination of this Court that the exclusion does not act to preclude coverage for Three Blind Mice.

APPLICATION FOR EXCLUSION FOR ATHLETIC OR SPORTS PARTICIPANTS

Colony also seeks to preclude coverage under the exclusion for athletic participants. It argues that any person who is injured as a result of a sport or athletic event cannot recover under the policy issued to Three Blind Mice, even if the injured person did not actually participate in the event leading to their injury. However, the policy clearly provides that the exclusion is applicable to sports participants. Colony's approach would once again require the insertion of words or phrase which would expand the exclusion to not only sports participants but also bystanders who are inadvertently injured as a result of the athletic activity. Since this Court is precluded from rewriting the policy for Colony, the exclusion is at best ambiguous. Since exclusions are to be narrowly construed in favor of cover and since all ambiguities are likewise construed in favor of coverage, Colony's position simply cannot be adopted. Instead, the exclusion is clearly inapplicable on its face.

ASSESSMENT OF LIABILITY

Three Blind Mice instituted the present litigation against Colony, asserting actions for breach of contract and bad faith denial of coverage.

As noted previously, it is the determination of this Court that Colony's denial of coverage based upon the application of exclusions for Assault and Battery and Damages Arising Out of Participation in an Athletic Event was inappropriate. Because the policy issued by Colony to Three Blind Mice required Colony to provide a defense in case of litigation and indemnification in case of settlement of judgment and because Colony failed to provide either a defense or indemnification, it has clearly breached its contract with Three Blind Mice.

The action for bad faith is based in tort. When an insured enters into an insurance contract, he does not do see seeking profit, but instead seeks security and peace of mind against a calamity. Because this bargained-for peace of mind and security are the principle benefits for the insured, courts have imposed special obligations upon an insurer in the investigation and resolution of claims and litigation. A.D. Windt, Insurance Claims and Disputes §9.26 (5th ed). These special obligations include the good faith processing of claims with due regard for the insured who has imposed a confidence in the insurer, thereby creating a quasi-fiduciary relationship. See Pitts v. Jackson Nat. Life Ins. Co., 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002). This gives rise to an implied covenant of good faith and fair dealing existent in every policy of insurance. See Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608 (Ct. App. 1999). A cause of action for the bad faith refusal to pay benefits under a policy of insurance exists upon proof of

1) a mutually binding contract of insurance;

2) a refusal by the insurer to pay benefits due under the contract;

3) a refusal to pay based upon the insurer's bad faith or unreasonable action in breach of the implied covenant of good faith;

4) damages to the insured.

Hansen ex rel. Hansen v. United Services Automobile Association, 350 S.C. 62, 565 S.E.2d 114 (Ct. App. 2002). Based upon the undisputed facts submitted to this Court, it is clear that there was a mutually binding contract of insurance, that Colony refused to make payment on the claim submitted by Three Blind Mice and that Three Blind Mice was damaged when it was required to retain its attorneys at its expense and to pay its portion of the settlement of the underlying action.

Colony asserts that is should not be held in bad faith for its refusal to pay since its actions were not unreasonable. Generally, an insurer acts in bad faith when there is no reasonable basis to support its decision. BMW of North America, LLC v. Complete Auto Recon Services, Inc., 399 S.C. 444, 731 S.E.2d 902 (Ct. App. 2012). In this case, Colony was presented with a Complaint which asserted that the personal injury was the result of an inadvertent act. This assertion clearly fell within coverage for an occurrence which caused bodily injury, unless there was an applicable exclusion. Colony attempted to assert that its assault and battery exclusion precluded coverage for inadvertent acts which caused injury even though the exclusion did not specifically state that it was applicable to inadvertent acts and even though exclusions are to be narrowly construed in favor of coverage. Under the circumstance, there was no reasonable basis for application of this exclusion.

Colony also attempted to rely upon its exclusion for damages arising out of an athletic event. Again, there is no reasonable basis for application of this exclusion since it clearly applies only to athletic or sports participants who are injured. Katherine Frost was neither participating in the game which was the source of her injury nor observing those who were using it. Colony's

best argument only raises an ambiguity with regard to this exclusion, which would require this Court to construe the ambiguity in favor of coverage.

In light of the fact that Colony had no reasonable basis for asserting the exclusions it relied upon to deny coverage, it is clear that it has violated the covenant of good faith and fair dealing and is subject to damages for bad faith.

DAMAGES

Under its policy with Three Blind Mice, Colony was required to not only indemnify its insured for losses incurred in payment of a judgment or settlement, but also to pay defense costs and fees associated with any litigation. In this instance, because Colony wrongfully refused to provide coverage, Three Blind Mice was forced to retain an attorney and to pay its portion of the settlement reached in the underlying matter. Moreover, Colony forced Three Blind Mice to undertake the present action in order to enforce its rights under the Colony policy, causing Three Blind Mice to incur further attorney fees and costs.

In the case of a breach of contract, a plaintiff is entitled to recover the equivalent of the performance of the contract. The plaintiff would be entitled to recover all damages as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. Hutson v. Continental Assurance Co., 269 S.C. 322, 237 S.E.2d 375 (1977). Clearly the attorney fees incurred in the defense of the underlying action and the settlement payment made to resolve that action are recoverable. Each of these items of damage are subject to interest at the legal rate of interest set forth in section 34-31-20, S.C. Code (1976, as amended).

Normally, attorney fees are not recoverable in the absence of a contract or statute. While the attorney fees incurred in defense of the underlying action are the subject of a contractual duty, the attorney fees incurred in pursuit of declaratory actions are controlled by case law. In

the case of insurance disputes, South Carolina has recognized that in fairness to an insured who has been wrongfully denied coverage by an insurer, attorney fees are recoverable as an element of damages. See Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978). As a result, where an insurer, by virtue of a declination of coverage or defense under a reservation of rights, unreasonably forces an insured to defend himself in the underlying liability action or a declaratory action, or to institute a declaratory action to enforce his rights under a policy, there is a right to recover attorney fees. Id.; Gordon Gallup Realtors, Inc. v. The Cincinnati Ins. Co., 274 S.C. 468, 265 S.E.2d 38 (1980). Three Blind Mice is therefore entitled to recover attorney fees and costs incurred in conjunction with this litigation. However, these fees and costs shall not be subject to the assessment of interest inasmuch as payment was not demandable at the time the claims which are the subject of this litigation arose. Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (1993).

It is therefore the decision of this Court that the motion for summary judgment on the part of Three Blind Mice shall be granted and the motion for summary judgment submitted by Colony denied. Counsel for Three Blind Mice shall submit to the Court affidavits setting forth the attorney fees and litigation costs incurred on behalf of Three Blind Mice. Counsel for Colony shall have the right to review the submitted attorney fees and costs and to register any objections to any fee or charge they feel are unreasonable or unwarranted. If the parties cannot agree as to the amount of attorney fees and costs, the plaintiff will move before the Court for a hearing for approval of such fees and costs. Once attorney fees and costs are established, the Court will also determine what amount, if any, of interest chargeable on those fees and costs incurred with regard to the defense and resolution of the underlying action by Katherine and Bobby Frost. It shall thereafter render a final judgment.

Judge James B. Barber III
Thirteenth Judicial Circuit

November 18, 2015
Columbia, SC

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 2014CP2303422

PLAINTIFF(S)	DEFENDANT(S)
Three Blind Mice LLC Blind Horse Saloon	Colony Insurance Company
Submitted by:	**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ 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: _____

☐ **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:

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.**

Circuit Court Judge	2110 Judge Code	11/18/2015 Date

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on 11/24/15, and a copy mailed first class or placed in the appropriate attorney's box on 11/24/15, to attorneys of record or to parties (when appearing pro se) as follows:

David L. Moore Jr. Post Office Drawer 10648 Greenville, SC 29601

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ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

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.