THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

James R. Barber III, Circuit Court Judge
Letitia H. Verdin, Circuit Court Judge

Case No. 2014-CP-23-03422

Three Blind Mice, LLC
d/b/a The Blind Horse Saloon . . . . . Respondent

v.

Colony Insurance Company . . . . . Appellant

APPELLANT'S FINAL BRIEF

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3. Did the Circuit Court commit reversible error by holding that Colony acted in bad faith when it denied coverage to Three Blind Mice under the Colony Policy and awarding the attorneys' fees incurred in the present coverage action to Three Blind Mice?

II. STATEMENT OF THE CASE

This is an appeal from a final judgment and order entered by the Circuit Court finding that Respondent Three Blind Mice d/b/a The Blind Horse Saloon is entitled to coverage under Commercial General Liability Insurance Policy No. GL3812749 issued by Appellant Colony Insurance Company to Three Blind Mice for claims asserted against insured bar owner Three Blind Mice by a patron who sustained injuries when she was inadvertently struck by another patron who was using a punching bag boxing machine game. The Circuit Court held that Three Blind Mice was entitled to coverage for such claims under the Colony

Policy despite the existence of the "Assault and Battery" Exclusion as well as an "Athletic or Sport Participants" Exclusion in the Policy.

The incident at issue occurred on October 30, 2011, when an unidentified individual—who was using a punching bag boxing machine game in a bar owned by Three Blind Mice located in Greenville, South Carolina—inadvertently struck another patron, Katherine Frost. [R. pp. 239–40; Frost Complaint, ¶¶ 7–14] On May 15, 2012, Ms. Frost filed a lawsuit against Three Blind Mice captioned *Katherine Frost and Bobby Frost v. Three Blind Mice, LLC,* et al., Civil Action No. 2012-CP-23-3249 (the Frost Lawsuit), in the Court of Common Pleas, Greenville County, South Carolina, asserting claims against Three Blind Mice for injuries sustained by Ms. Frost as a result of the incident. [R. p. 21; Complaint, ¶ 7] In the Frost Lawsuit, it was specifically alleged that Katherine Frost sustained injuries when "an unknown individual who had been using a punching bag boxing machine had missed the punching bag he had been attempting to strike as part of the machine's use, inadvertently striking [Ms. Frost] in the back." [R. pp. 239–40; Frost Complaint, ¶¶ 7–14]

After the Frost Lawsuit was filed, Colony informed Three Blind Mice that coverage was not available for the claims asserted against Three Blind Mice in the lawsuit based upon the allegations in the Complaint and the application of the plain and unambiguous terms of the "Assault and Battery" Exclusion as well as the "Athletic or Sport Participants" Exclusion in the Policy. [R. pp. 32, 62–67; Counterclaim, ¶ 8 and Ex. B] The "Assault and Battery" Exclusion expressly excludes coverage for claims arising out of or resulting from

a "battery"—which is defined by the Colony Policy as "an act which brings about harmful or offensive contact to another or anything connected to another" without any requirement that the act which brings about such harmful or offensive contact be "intentional." [R. pp. 32–61; Counterclaim, ¶¶ 4, 15–16, and Ex. A] The "Athletic or Sports Participants" Exclusion also bars coverage for "bodily injury" to "any person arising out of or resulting from practicing for or participating in any athletic contest, exhibition, activity, game or sport." [R. pp. 32–62; Counterclaim, ¶¶ 4, 17, and Ex. A]

Three Blind Mice subsequently settled the claims against it in the Frost Lawsuit for $10,000 [R. p. 21; Complaint, ¶ 8], and filed this insurance coverage action on June 19, 2014, seeking reimbursement from Colony for the defense costs incurred and the settlement payment made to resolve the claims. [R. p. 21; Complaint, ¶ 9] Colony filed its Answer and Counterclaim for Declaratory Judgment on September 2, 2014, seeking a declaration that the Colony Policy excludes coverage for the claims asserted against Three Blind Mice in the Frost Lawsuit based upon the application of the "Assault and Battery" Exclusion and the "Athletic or Sport Participants" Exclusion in the Policy. [R. p. 33; Counterclaim, ¶ 15–19] Three Blind Mice filed a Reply to Counterclaim on September 4, 2014, asserting that the "Assault and Battery" Exclusion in the Colony Policy was ambiguous as to whether it applied to unintentional acts, and so the exclusion should not bar coverage for the claims in the Frost Lawsuit. [R. pp. 68–71; Reply to Counterclaim, ¶¶ 4 and 12] Three Blind Mice also took the position in its Reply to Counterclaim that the "Athletic or Sport Participants"

Exclusion was inapplicable because Ms. Frost "was not making use of the amusement box machine when she was injured." [R. pp. 69–71; Reply to Counterclaim, ¶¶ 5 and 13]

The parties filed cross-motions for summary judgment, and the Circuit Court entered an interlocutory Order on November 18, 2015, granting summary judgment in favor of Three Blind Mice and denying Colony's motion for summary judgment. [R. p. 13; 2015 Order, p. 12] The Circuit Court found that neither the "Assault and Battery" Exclusion nor the "Athletic or Sport Participants" Exclusion in the Colony Policy barred coverage for the claims against Three Blind Mice in the Frost Lawsuit, and that "Colony not only breached its contract of insurance in denying coverage but acted in bad faith in doing so." [R. pp. 2, 6–9; 2015 Order, pp. 1, 5–8] The Circuit Court ordered Three Blind Mice to submit affidavits setting forth the attorneys' fees and litigation costs incurred in the Frost Lawsuit as well as this coverage action. [R. pp. 12–13; 2015 Order, pp. 11–12] On April 8, 2016, the Circuit Court entered a final Order and Judgment against Colony in the amount of $110,897.07—which included not only the settlement payment, attorneys' fees, and litigation costs incurred by Three Blind Mice in the Frost Lawsuit, but also the attorneys' fees incurred by Three Blind Mice in the present coverage action. [R. p. 15; 2016 Order, p. 1]

Colony filed and served a timely Notice of Appeal on May 3, 2016. [R. p. 155; Notice of Appeal] Colony appeals from the Circuit Court's final Order

and Judgment entered on April 8, 2016, and the Circuit Court's interlocutory Order entered on November 18, 2015, and seeks reversal of those Orders below.

III. ARGUMENT

The Circuit Court erred by ignoring the plain and unambiguous language of the "Assault and Battery" Exclusion as well as the "Athletic or Sport Participants" Exclusion in the Colony Policy in order to hold that such exclusions did not bar coverage for the claims asserted against Three Blind Mice in the Frost Lawsuit. Therefore, this Court should reverse the Circuit Court's November 18, 2015 Order and April 8, 2016 Order, and hold that the "Assault and Battery" Exclusion as well as the "Athletic or Sport Participants" Exclusion bar coverage under the Colony Policy for the claims asserted against Three Blind Mice in the Frost Lawsuit, and that Colony did not act in bad faith when it informed Three Blind Mice that coverage was not available for the claims asserted in the Frost Lawsuit based upon the application of such exclusions.

A. The Circuit Court Erred When It Held That the "Assault and Battery" Exclusion in the Colony Policy Does Not Bar Coverage for the Claims Asserted Against Three Blind Mice in the Frost Lawsuit

The core of the dispute between the parties in the present matter as it relates to the "Assault and Battery" Exclusion in the Colony Policy is whether such exclusion applies to claims arising from a "battery" if the individual committing the battery did not act with intent to make harmful or offensive contact with the injured party. Three Blind Mice takes the position that the "Assault and Battery" Exclusion only applies if the individual who committed the battery acted with intent to make the harmful or offensive contact with the

injured party. However, the express definition of a "battery" in the "Assault and Battery" Exclusion in the Colony Policy is not limited to "intentional" acts. Rather, the Policy defines a "battery" as "an act which brings about harmful or offensive contact to another or anything connected to another" without any limitation that requires that the individual act with intent to bring about such harmful or offensive contact to the injured party.

Therefore, based upon the plain and unambiguous language in the Colony Policy, the "Assault and Battery" Exclusion applies to claims arising out of an act (whether intentional or unintentional) that brings about harmful or offensive contact to another. Accordingly, the Circuit Court erred when it held that the "Assault and Battery" Exclusion in the Policy only applies to "intentional" acts and does not bar coverage for the claims asserted against Three Blind Mice in the Frost Lawsuit.

1. The Circuit Court Improperly Ignored the Plain and Unambiguous Language in the "Assault and Battery" Exclusion in Holding That the Exclusion Does Not Bar Coverage for the Claims Asserted Against Three Blind Mice in the Frost Lawsuit

The Circuit Court went against established precedent in South Carolina by ignoring the plain and unambiguous language of the "Assault and Battery" Exclusion in order to hold that the exclusion only applies to "intentional" acts. Insurance policies are contracts and are to be interpreted according to principles of contract law. *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008). When a policy is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 440 S.E.2d 367 (1994). The court's duty is

"limited to the interpretation of the contract made by the parties themselves 'regardless of its wisdom or folly, apparent unreasonableness, or failure [of the parties] to guard their interests carefully.'" *Goforth*, at 378, 373 S.E.2d at 587; *see also Torrington Co. v. Aetna Cas. & Sur. Co.*, 264 S.C. 636, 216 S.E.2d 547 (1975) (holding that courts are not permitted to torture the meaning of language used by the parties in order to extend coverage expressly excluded by the terms of the policy). Furthermore, "[a]lthough exclusions in an insurance policy are construed against the insurer, insurers have the right to limit their liability and to impose conditions on their obligations provided they are not in contravention of public policy or a statutory prohibition." *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535–36, 514 S.E.2d 327, 330 (1999) (internal citations omitted); *see also Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 377 S.E.2d 569 (1989).

The "Assault and Battery Exclusion" in the Colony Policy provides as follows:

> **Assault, Battery or Assault and Battery**
>
> This insurance does not apply to damages or expenses due to "bodily injury", "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" by any person;
>
> **(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";
>
> * * *
>
> "Battery" means an act which brings about harmful or offensive contact to another or anything connected to another.

[R. p. 203; Colony Policy, p. 17]

As such, the Colony Policy excludes coverage for damages or expenses due to harmful or offensive contact from one person to another. It was alleged in the Frost Lawsuit that Ms. Frost's injuries arose when she was struck by an unknown individual who had attempted to strike the punching bag of a boxing machine, but missed and instead struck Ms. Frost. [R. pp. 3, 240; 2015 Order, p. 2; Frost Complaint, ¶¶ 14 and 17] As a result, it is uncontroverted that the claims asserted against Three Blind Mice in the Frost Lawsuit arose when one bar patron harmfully or offensively made contact with Ms. Frost. Therefore, based upon the application of the plain and unambiguous language of the "Assault and Battery" Exclusion in the Colony Policy, the claims against Three Blind Mice in the Frost Lawsuit are excluded from coverage under the Policy.

2. *The Circuit Court's Interpretation of the "Assault and Battery" Exclusion Would Require the Improper Insertion of Words or Phrases into the Policy's Definition of "Battery"*

The Circuit Court claims that Colony's interpretation of the "Assault and Battery" Exclusion would require the court to "insert the phrase 'intentional or unintentional'" into the Policy's definition of "battery." [R. pp. 8–9; 2015 Order, pp. 7–8] However, the Circuit Court fails to explain why the insertion of this phrase is necessary in order for the exclusion to apply to both intentional and

unintentional acts. Rather, the *absence* itself of any limitation or qualification requiring that the act be done intentionally unambiguously requires a reading of the exclusion that it applies to both intentional and unintentional acts.

In fact, it is the Circuit Court's *interpretation* of the unambiguous exclusion that requires the insertion of the word "intentional" into the Policy's definition of the term "battery" to limit the exclusion's application to "intentional" acts, thereby substantively changing the Policy itself. As written, the Policy defines a "battery" as "an act which brings about harmful or offensive contact to another" without any limitation or qualification that the act be "intentional" or that the person committing the battery act with intent to bring about the harmful or offensive contact with the injured person.

As the Circuit Court recognized, but in reality ignored, it is improper for a court "to rewrite a contract by inserting words or phrases" into the policy provisions. [R. p. 8; 2015 Order, p. 7] Therefore, it was reversible error for the Circuit Court to ignore the plain language of the "Assault and Battery" Exclusion, including the Policy's definition of "battery" as written, and coverage should be excluded under the Colony Policy for the claims asserted against Three Blind Mice in the Frost Lawsuit.

3. Consideration of the Colony Policy as a Whole Supports Colony's Determination That the "Assault and Battery" Exclusion Does Not Only Apply to "Intentional" Acts

The Circuit Court also claims that "[i]f the policy issued by Colony is considered as a whole, it is clear that coverage should . . . have been extended to Three Blind Mice." [R. p. 7; 2015 Order, p. 6] To support its position,

the Circuit Court noted that the "Insuring Agreement" in the Colony Policy provides coverage for "bodily injury caused by an 'occurrence', which would include an accident or unintentional act." [R. pp. 7, 216, 230; 2015 Order, p. 6; Colony Policy, pp. 30 and 44] Therefore, the Circuit Court took the position that its interpretation of the "Assault and Battery" Exclusion as only applying to "intentional" acts "fits within the general framework with coverage for unintentional acts but not for intentional acts." [R. pp. 7; 2015 Order, p. 6]

The Circuit Court's analysis of the application of the "Assault and Battery" Exclusion fundamentally misconstrues the purpose of an exclusion in the context of a liability policy as a whole. It is the "Insuring Agreement" in an insurance policy that grants coverage under the policy, and the exclusions by definition remove coverage for certain elements of coverage originally granted by the "Insuring Agreement." However, the exclusions cannot create coverage that was not originally granted by the "Insuring Agreement," and the purpose of an exclusion is not to "fit within the framework" of the grant of coverage under the "Insuring Agreement," but rather to remove certain aspects of coverage granted by the "Insuring Agreement." *Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co.*, 410 S.C. 175, 180, 763 S.E.2d 598, 600 (S.C. Ct. App. 2014); *Laidlaw Envtl. Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 51, 524 S.E.2d 847, 852 (S.C. Ct. App. 1999).

In fact, if the "Assault and Battery" Exclusion only bars coverage for "intentional acts" (as suggested by the Circuit Court), then there would be no need for such exclusion in the Colony Policy because (as the Circuit Court notes) the

Colony Policy only provides "coverage for unintentional acts." [R. p. 7; 2015 Order, p. 6] As noted by the Circuit Court, the "Insuring Agreement" in the Policy only grants coverage for "occurrences," which are defined by the Policy as "accidents" or unintentional acts. [R. pp. 216, 230; Colony Policy, pp. 30 and 44] If the "Assault and Battery" Exclusion only bars coverage for "intentional acts," there would be no need for such an exclusion in the Policy which only provides coverage for unintentional acts. *Liberty Mut. Ins. Co. v. Scottsdale Ins. Co.*, No. 1:01-2932-22, 2001 U.S. Dist. LEXIS 26853, at *12 (D.S.C. Dec. 13, 2001) (holding that "a policy must be evaluated as a whole, and language construed in harmony with plain and generally accepted meaning of words employed").

Therefore, contrary to the Circuit Court's claim that the application of the "Assault and Battery" Exclusion to bar coverage for unintentional acts would create a "contradiction" in the Colony Policy [R. p. 8; 2015 Order, p. 7], it is only when the exclusion is properly interpreted pursuant to its plain and unambiguous language as applying to both intentional and unintentional acts that such exclusion becomes more than mere surplusage in the context of the Policy overall. Accordingly, consistent with the exclusion's plain and unambiguous language, the interpretation of the "Assault and Battery" Exclusion in the context of the Colony Policy as a whole supports Colony's position that the "Assault and Battery" Exclusion applies to both intentional and unintentional acts.

4. *Colony's Interpretation of the "Assault and Battery" Exclusion Does Not Exclude Coverage for "Virtually Every Type of Tort Which Might Cause Injury"*

The Circuit Court also claims that utilizing the Colony Policy's express definition of the term "battery" without limiting the definition to intentional acts "would have the effect of excluding coverage for virtually every type of tort which might cause injury." [R. p. 8; 2015 Order, p. 7] By way of example, the Circuit Court claims that absent a limitation of the term "battery" to only "intentional" acts, "any accidental injury, including one caused by a customer tripping over the leg of a chair, would not be covered." *Id.*

The Circuit Court's own example belies the error of the court's conclusion that interpreting the "Assault and Battery" Exclusion based upon the exclusion's plain language would exclude "virtually every type of tort which might cause injury." Coverage would not be excluded pursuant to the "Assault and Battery" Exclusion for an accidental injury caused by a customer tripping over a leg of a chair because such claim would not arise out of a "battery" *by any person*—defined by the Policy as "an act which brings about harmful or offensive contact to another or anything connected to another"—because there would not have been any harmful or offensive contact *between the individual alleged to have committed the battery* and the injured party.

Although the plain terms of the "Assault and Battery" Exclusion in the Colony Policy exclude coverage for the claims asserted in the Frost Lawsuit for the injuries sustained by Ms. Frost when she was struck by the unknown individual in the bar, the exclusion does not preclude coverage for "any accidental

injury" as suggested by the Circuit Court. In fact, the scenarios under which the Colony Policy provides coverage for "bodily injury" claims despite the Policy's exclusion of claims arising out of a "battery" (whether intentional or unintentional) are too numerous and varied to provide an exhaustive list. However, in addition to the example provided by the Circuit Court, some simple examples include a claim arising out of injuries sustained by a patron who slips and is injured on a slick spot on the floor, a claim arising out of a food poisoning incident caused by improperly prepared food at the bar, or a claim arising out of injuries sustained by a patron when a loose overhead lamp falls and lands on the patron.

Accordingly, this is not a case in which the plain language of the Policy creates "an internal inconsistency created by an exclusion which purports to ban coverage for claims arising out of the very operation sought to be insured" as suggested by the Circuit Court. [R. p. 8; 2015 Order, p. 7] Rather, an insurer has the right to limit its liability through the use of exclusions and defined terms to bar coverage for certain types of risks. In the present matter, Colony issued a policy to an entity in the business of operating a bar on condition that the policy include the "Assault and Battery" Exclusion to exclude coverage for claims arising out of a "battery" (expressly defined as "an act which brings out harmful or offensive contact to another" without any limitation that the act be "intentional"). The claims asserted against Three Blind Mice in the Frost Lawsuit arose out of or resulted from a "battery" as that term is expressly defined by

the Colony Policy. As a result, such claims are expressly excluded from coverage pursuant to the plain terms of the "Assault and Battery" Exclusion in the Policy.

5. *The Circuit Court Improperly Relied Upon Extrinsic Evidence in Holding That the "Assault and Battery" Exclusion Does Not Bar Coverage for the Claims Asserted Against Three Blind Mice in the Frost Lawsuit*

Finally, the Circuit Court improperly relied upon extrinsic evidence to interpret the "Assault and Battery" Exclusion in order to find that the exclusion only applies to "intentional" acts. *See Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 320, 751 S.E.2d 256, 261 (2013) (holding that when a policy's language is unambiguous it must be given its plain and ordinary meaning, and the court may not look to extrinsic evidence to interpret the provisions of the policy); *see also Employers Reinsurance Corp. v. Teague*, No. 91-2299, 1992 U.S. App. LEXIS 19294, at *7 (4th Cir. Aug. 14, 1992) (holding that "unambiguous policy language is to be construed without resort to extrinsic evidence to 'aid' in its interpretation"). Specifically, despite the fact that the application of the plain and unambiguous language of the "Assault and Battery" Exclusion bars coverage for the claims asserted against Three Blind Mice in the Frost Lawsuit, the Circuit Court held that the exclusion should not apply in this case because "[m]ost authorities view a 'battery' as an intentional act." [R. p. 7; 2015 Order, p. 6]

The Circuit Court was wrong when it determined that "most authorities" view a civil claim for battery as an "intentional" act. In fact, recent South Carolina cases have held that intent is not an element of a civil claim for battery. *See Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (S.C. Ct. App. 2008) ("There is

a well recognized distinction between criminal assault and a civil action for an assault and battery. In civil actions, the intent, while pertinent and relevant, is not an essential element."); *USF Ins. Co. v. D&J Enters.*, 2010 U.S. Dist. LEXIS 55123, *11, 2010 WL 2232211 (D.S.C. June 3, 2010) ("More recent cases, however, suggest that intent is not a necessary element of the civil offense of assault and battery.") However, as the Circuit Court recognized, the "comparison test" is utilized by South Carolina courts to determine whether an insurer has an obligation to defend its insured against a particular claim. [R. p. 2; 2015 Order, p. 1] The "comparison test" requires that the court compare the allegations in the underlying suit with the plain terms of the policy itself in order to determine whether a claim is covered under a policy. *See Holmes v. McKay*, 334 S.C. 433, 438, 513 S.E.2d 851, 853 (S.C. Ct. App. 1999); *see also St. Paul Reinsurance Co. v. Ollie's Seafood Grille & Bar, LLC*, 242 F.R.D. 348, 352 (D.S.C. 2007) ("An insurer's obligation under a policy of insurance is defined by the terms of the policy itself and cannot be enlarged by judicial construction.") Therefore, while the debate as to whether South Carolina law currently recognizes intent as an essential element of a civil claim for battery may be interesting, such debate is irrelevant to the question that was before the Circuit Court—whether the plain language of the "Assault and Battery" Exclusion as found in the Colony Policy (including the Policy's express definition of the term "battery") excluded coverage for the claims against Three Blind Mice in the Frost Lawsuit.

Answering that question, the Colony Policy expressly defines a "battery" as "an act which brings about harmful or offensive contact to another."

See Spartan Iron & Metal Corp. v. Liberty Ins. Corp., 6 Fed. Appx. 176, 178 (4th Cir. S.C. 2001) ("To adopt a common law definition here where the policies provide a contractual definition would be at odds with South Carolina law."). The Policy's express definition of the term "battery" does not impose a requirement that the individual committing the battery act with intent to bring about the harmful or offensive contact to another regardless of whether some courts have interpreted a civil claim for "battery" to require an element of intent. *See e.g. S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 519, 548 S.E.2d 880, 883 (S.C. Ct. App. 2001) (holding that an insurer's obligations are defined by the terms of the policy itself, and policy definitions must be enforced as written); *MGC Mgmt. of Charleston, Inc. v. Kinghorn Ins. Agency*, 336 S.C. 542, 548, 520 S.E.2d 820, 823 (S.C. Ct. App. 1999).

In the present matter, it is undisputed that the claims against Three Blind Mice in the Frost Lawsuit arose out of or resulted from "bodily injury" sustained by Ms. Frost when an unknown individual missed a punching bag and struck Katherine Frost. [R. p. 240; Frost Complaint, ¶¶ 14 and 17] Accordingly, the claims against Three Blind Mice in the Frost Lawsuit arose out of or resulted from an act on the part of the unknown patron which brought about harmful or offensive contact with Ms. Frost. Therefore, based upon the application of the plain and unambiguous language of the "Assault and Battery" Exclusion in the Colony Policy"—including the express definition of the term "battery" in the Policy—the claims against Three Blind Mice in the Frost Lawsuit are excluded from coverage under the Policy.

B. The Circuit Court Erred When It Held That the "Athletic or Sport Participants" Exclusion in the Colony Policy Does Not Bar Coverage for the Claims Asserted Against Three Blind Mice in the Frost Lawsuit

The Circuit Court also erred by ignoring the plain and unambiguous language in the "Athletic or Sport Participants" Exclusion in order to hold that such exclusion does not bar coverage for the claims asserted against Three Blind Mice in the Frost Lawsuit. The "Athletic or Sport Participants" Exclusion in the Policy provides as follows:

> **Athletic or Sport Participants**
>
> 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.

[R. p. 205; Colony Policy, p. 19]

Based upon the plain language in the "Athletic or Sport Participants" Exclusion, the Policy "does not apply to 'bodily injury' to **any person** arising out of or resulting from practicing for or participating in any athletic contest, . . . activity, [or] game." (emphasis added) It is undisputed that the claims asserted against Three Blind Mice in the Frost Lawsuit arose or resulted from the unknown individual participating in an athletic activity or game (the punching bag boxing machine). [R. p. 240; Frost Complaint, ¶¶ 14 and 17] Accordingly, such claims are excluded by the plain terms of the "Athletic or Sport Participants" Exclusion.

Despite the fact that the plain and unambiguous language of the "Athletic or Sport Participants" Exclusion bar coverage for the claims at issue, the Circuit Court held that "the policy clearly provides that the exclusion is applicable to sports participants" and that "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 athletic activity." [R. p. 9; 2015 Order, p. 8] However, the Circuit Court fails to explain what words or phrase it believes would need to be added to the "Athletic or Sport Participants" Exclusion in order for the exclusion to apply to bystanders.

Contrary to the Circuit Court's assertion, the existing language in the "Athletic or Sport Participants" Exclusion specifically provides that coverage is not afforded for "bodily injury to **any person** arising out of or resulting from practicing for or participating in any athletic contest, exhibition, activity, game or sport." (emphasis added) [R. p. 205; Colony Policy, p. 19] Again, it would be the Circuit Court's proposed interpretation of the exclusion that would require the insertion of words into the language of the exclusion in order to limit the exclusion to "bodily injury to any person *participating in an athletic, exhibition, activity, game or sport*" in order to prevent the application of the exclusion to bystanders. (added words in italics) However, the plain and unambiguous language of the "Athletic or Sport Participants" Exclusion as written does not contain such limitation. Therefore, pursuant to its plain language, the exclusion applies to "bodily injury to any person" (including bystanders), and so the exclusion applies to bar coverage for the claims asserted against Three Blind Mice in the Frost Lawsuit related to the injury to Ms. Frost arising out of the unknown individual's participation in an athletic activity or game (the punching bag machine).

C. The Circuit Court Erred When It Held That Colony Acted in Bad Faith By Denying Coverage to Three Blind Mice

For the reasons set forth above, the Circuit Court erred when it held that Colony acted in bad faith when it denied coverage to Three Blind Mice in the Frost Lawsuit because Colony properly denied coverage for the claims against Three Blind Mice in the Frost Lawsuit based upon the application of the plain and unambiguous terms of the "Assault and Battery" Exclusion as well as the "Athletic or Sport Participants" Exclusion. It is axiomatic that if coverage is not afforded under a policy, there can be no bad faith in denying coverage for a claim under the policy. *BMW of N. Am., LLC v. Complete Auto Recon Servs.*, 399 S.C. 444, 453, 731 S.E.2d 902, 907 (S.C. Ct. App. 2012) (holding that the insurer could not have acted in bad faith in denying the purported insured's claim for coverage because no coverage existed under its policy for such claim).

Furthermore, even if it is determined that the Colony Policy should afford coverage for the claims asserted against Three Blind Mice in the Frost Lawsuit, there was no evidence presented to the Circuit Court to support its determination that Colony acted in bad faith by contesting coverage for such claims. Under South Carolina law, an insurer only acts in bad faith when there is "no reasonable basis" to support the insurer's decision. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004). However, "[i]f there is a reasonable ground for contesting a claim, there is no bad faith." *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992); *see also Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 158, 345 S.E.2d 711, 713–14 (1986) (affirming jury instructions that "the Plaintiff

must prove that there was no reasonable basis to support the decision of the insurance company to deny certain insurance benefits" and that "[i]f there is any reasonable ground for contesting the claim, there is no bad faith"). The South Carolina Supreme Court has ruled that "an insurance company should be able to litigate novel issues without fear of being accused of acting in bad faith." *See Mixson, Inc. v. Am. Loyalty Ins. Co.*, 349 S.C. 394, 398–99, 562 S.E.2d 659, 661–62 (S.C. Ct. App. 2002) (citing *Nelson v. United Fire Ins. Co.*, 275 S.C. 92, 267 S.E.2d 604 (1980); *Myers v. Gov't Employees Ins. Co.*, 279 S.C. 70, 302 S.E.2d 331 (1983); *Smothers v. U.S. Fid. & Guar. Co.*, 322 S.C. 207, 470 S.E.2d 858 (S.C. Ct. App. 1996).

In the present matter, Colony has an honest disagreement with Three Blind Mice as to whether coverage is available under the Colony Policy for the claims asserted against Three Blind Mice in the Frost Lawsuit. There is no evidence in the record that Colony "had no reasonable basis" for contesting Three Blind Mice's claim for coverage. In fact, the Circuit Court only found coverage for the claims in the Frost Lawsuit based upon its determination that the policy language at issue was ambiguous and then narrowly construed such language in favor of Three Blind Mice. [R. p. 9; 2015 Order, p. 8] Accordingly, the Circuit Court erred when it held that Colony acted in bad faith when it denied coverage to Three Blind Mice under the Colony Policy for the claims asserted against Three Blind Mice in the Frost Lawsuit.

Given that Three Blind Mice has already conceded that it is not seeking punitive damages in relation to its bad faith claim against Colony, and the Circuit

Court did not award punitive damages to Three Blind Mice in this matter [R. p. 263, 164, lines 20–23; Letter from David L. Moore, Jr. to the Honorable James R. Barber, III dated October 1, 2015; *see also* Transcript p. 8], the significance of the Circuit Court's holding that Colony acted in bad faith when it denied coverage to Three Blind Mice relates to the Circuit Court's award of attorneys' fees to Three Blind Mice. [R. p. ; 15; 2016 Order, p. 1] In addition to awarding the attorneys' fees and litigation costs incurred by Three Blind Mice in the defense of the Frost Lawsuit (which the Circuit Court held were awardable as damages in relation to the breach of contract claim asserted by Three Blind Mice against Colony), the Circuit Court also awarded the attorneys' fees incurred by Three Blind Mice in conjunction with this coverage action. [R. pp. 12–13; 2015 Order, pp. 11–12]

Recognizing that a successful litigant is not generally entitled to recover its attorneys' fees in the absence of a contract or statute, the Circuit Court found that South Carolina courts have recognized an exception to this general rule in declaratory judgment actions relating to insurance coverage disputes under which attorneys' fees are recoverable as an element of damages "in fairness to an insured who has been wrongfully denied coverage by an insurer." [R. pp. 12–13; 2015 Order, pp. 11–12] Specifically, the Circuit Court held that "where an insurer, by virtue of a declination of coverage . . . **unreasonably** forces an insured to defend himself in the underlying liability action or a declaratory action, or to institute a declaratory action to enforce its rights under a policy, there is a right to recover attorney fees." [R. p. 13; 2015 Order, p. 12 (citing *Hegler v.*

Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978) and *Gordon Gallup Realtors, Inc. v. The Cincinnati Ins. Co.*, 274 S.C. 468, 265 S.E.2d 38 (1980))]

Of course, South Carolina statutory law specifically limits an award of attorneys' fees in insurance coverage actions to cases in which it has been determined that the insurer has acted in bad faith. S.C. CODE § 38-59-40 ("In the event of a claim, loss or damage which is covered by a policy of insurance . . . and the refusal of the insurer . . . to pay the claim within ninety days after a demand has been made by the holder of the policy or contract and a finding on suit of the contract made by the trial judge that the refusal was without reasonable cause or in bad faith, the insurer . . . is liable to pay the holder, in addition to any sum or amount otherwise recoverable, all reasonable attorneys' fees for the prosecution of the case against the insurer.").

Because the Circuit Court held that Colony committed bad faith by unreasonably denying coverage to Three Blind Mice, the Circuit Court held that Colony was subject to damages for bad faith, including the attorneys' fees incurred in the present coverage action. [R. pp. 12–13; 2015 Order, pp. 11–12] However, as outlined above, there is no evidence in the record that Colony acted in bad faith. Rather, even if this Court determines that coverage should have been afforded to Three Blind Mice under the Colony Policy for the claims asserted in the Frost Lawsuit, Colony had a reasonable basis for contesting coverage based upon the plain language of the "Assault and Battery" Exclusion and/or the "Athletic or Sport Participants" Exclusion.

Accordingly, the Circuit Court erred when it held that Colony acted in bad faith when it denied coverage to Three Blind Mice under the Colony Policy for the claims asserted against Three Blind Mice in the Frost Lawsuit, and awarded the attorneys' fees incurred by Three Blind Mice in this insurance coverage action. Even if this Court determines that Three Blind Mice was entitled to coverage under the Colony Policy for the claims asserted in the Frost Lawsuit, this Court should still reverse and vacate that portion of the Order that awards attorneys' fees in favor of Three Blind Mice for attorneys' fees incurred in the present action.[1] In the alternative, if this Court determines that Colony acted in bad faith when it denied coverage to Three Blind Mice, this Court must reduce the amount of the award of attorneys' fees to one-third (1/3) of the total judgment or $36,965.69 pursuant to the terms of South Carolina Code § 38-59-40 ("The amount of the attorneys' fees may not exceed one-third of the amount of the judgment.").

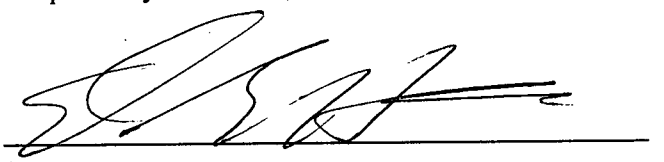
IV. CONCLUSION

The Circuit Court erred when it chose to ignore the plain and unambiguous language of the "Assault and Battery" Exclusion as well as the "Athletic or Sport Participants" Exclusion in the Colony Policy in order to hold that the Colony Policy provides coverage for the claims asserted against

[1] Although the Order entered against Colony in the present action does not separate the attorneys' fees incurred by Three Blind Mice in the underlying Frost Lawsuit from the attorneys' fees incurred by Three Blind Mice in the present action [R. p. 15; 2016 Order, p. 1], correspondence from counsel for Three Blind Mice prior to entry of the Order indicates that of the total judgment entered against Colony, $43,069.50 relates to attorneys' fees incurred in this action. [R. p. 264; Letter from David L. Moore to David L. Brown and Eric K. Englebardt, dated December 2, 2015]

Three Blind Mice in the Frost Lawsuit arising out of the incident in which Ms. Frost was struck by another patron. Furthermore, the Circuit Court erred when it held that Colony acted in bad faith when it contested Three Blind Mice's claim for coverage under the Colony Policy, and awarded the attorneys' fees incurred in the present action to Three Blind Mice. Therefore, Colony respectfully requests that this Court reverse the November 18, 2015, Order and the April 8, 2016, Order of the Circuit Court, and hold that the "Assault and Battery" Exclusion and the "Athletic or Sport Participant" Exclusion in the Policy bar coverage for the claims asserted against Three Blind Mice in the Frost Lawsuit and that Colony did not act in bad faith in denying coverage for such claims.

Respectfully submitted,



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November 4, 2016

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellant's Final Brief complies with Rule 211(b), SCACR.[1]

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[1] Counsel for Appellant has included a margin on the left of an inch and a half on the Appellant's Final Brief in compliance with Rule 267(d), SCACR.