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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

Appellate Case No.: 2016-000-963

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

v.

Colony Insurance Company.....Appellant.

RESPONDENT'S FINAL BRIEF

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I. STATEMENT OF THE CASE

Katherine Frost ("Ms. Frost") sued Three Blind Mice, LLC d/b/a The Blind Horse Saloon ("Blind Horse"), alleging in her amended complaint ("Frost Complaint") that she sustained injuries when an unknown patron accidentally struck her in the back when that patron attempted to hit a punching bag that was part of a coin operated arcade game. *See Katherine Frost v. Three Blind Mice, LLC*, et al., Civil Action No. 2012-CP-23-3249. (R. pp. 239-40, ¶¶ 8-17). After receiving a pre-suit settlement demand from Ms. Frost, Blind Horse submitted a claim to Colony Insurance Company ("Colony"). Colony denied the claim. The Frost Complaint was served on Blind Horse on May 15, 2012. (R. p. 173, lines 14-17). Blind Horse submitted it to Colony, and Colony denied the claim again. Due to Colony's multiple denials, Blind Horse was forced to defend itself at its own expense. After months of litigation, the matter was settled at Blind Horse's expense.

On June 19, 2014 Blind Horse filed suit against Colony asserting claims for breach of contract and bad faith seeking reimbursement of defense costs and the settlement payment. (R. p. 21, ¶ 9). Blind Horse filed a motion for summary judgment, which the circuit court granted on November 25, 2016 ("2015 Order"). In challenging this ruling on appeal, Colony argues that the claim falls within the Assault and Battery Exclusion ("A/B Exclusion") and the Athletic or Sports Participant Exclusion ("Athletic Participant Exclusion"), which are both set forth in the insurance policy ("the Policy") that Colony issued to Blind Horse.

On April 8, 2016, the circuit court awarded attorneys' fees and costs to Respondent in the amount of $110,897.07 ("2016 Order") and further found that the award was reasonable. (R. p. 15). The amount was agreed upon by the parties and submitted to the Court for approval. Because Colony agreed that it would not contest on appeal the reasonableness of the fees

reflected in the 2016 Order, Blind Horse agreed to forgo a hearing where it would have built a record supporting the award. (R. p. 266). Colony has failed to honor this agreement and this Court should disregard any argument challenging the reasonableness of the award to Blind Horse.

II. STANDARD OF REVIEW

Rule 56(c) of the South Carolina Rules of Civil Procedure provides that the circuit court may grant summary judgment if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.*, 413 S.C. 630, 634–35, 776 S.E.2d 434, 437 (S.C. Ct. App. 2015), *reh'g denied* (Sept. 14, 2015) (quoting SCRCP 56(c)). "An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56." *Lanham v. Blue Cross & Blue Shield of S. Carolina, Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

An action to ascertain whether coverage exists under an insurance policy is an action at law. *State Farm Mut. Auto. Ins. Co. v. Calcutt*, 340 S.C. 231, 530 S.E.2d 896 (S.C. Ct. App. 2000). In an action at law, the appellate court should not disturb the trial court's findings absent a showing that those findings lacked any reasonable evidentiary support. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

When the circuit court grants summary judgment on a question of law, the appellate court reviews the ruling *de novo*. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). In the present appeal, there is no dispute as to the material facts relevant to the issue of coverage.[1]

[1] Colony admits that "it is undisputed that the claims against [Blind Horse] in the Frost Lawsuit

III. ARGUMENT

Colony argues that the circuit court erred in finding that the injury sustained by Ms. Frost was an "occurrence" under the Policy and that her claim for coverage was not subject an exclusion. *See* App.'s Br. at 4. This argument lacks merit.

A. Because Ms. Frost's injury was the result of an accident, it constitutes an "occurrence" under the Policy.

It is undisputed that Ms. Frost's injuries resulted from another bar patron striking, or attempting to strike, a punching bag at Blind Horse. App.'s Br. at 15; (R. p. 162, lines 4-13; R. p. 166, lines 22-25; R. p. 252, ¶¶ 14-16). Pursuant to the Policy, any potential claim against Blind Horse stemming from bodily injury is covered by Colony as long as it constitutes an "occurrence" under the Policy. Further, Colony must provide a defense to any litigation arising from such an "occurrence." Under the Policy, the definition of "occurrence" includes an "accident." (R. p. 7). While the Policy does not define "accident," the Supreme Court of South Carolina has defined the term in the insurance coverage context to mean "[a]n unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." *Green v. United Ins. Co. of Am.*, 254 S.C. 202, 206, 174 S.E.2d 400, 402 (1970).

In this case, Ms. Frost's injuries occurred when she was suddenly and unintentionally struck at Blind Horse by someone using the punching bag game. (R. pp. 3-4). This accident[2] falls within the Policy's definition of an "occurrence." (R. p. 11 (finding that "Colony was

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arose out of or resulted from 'bodily injury' sustained by Ms. Frost when an unknown individual missed a punching bag and struck [Ms.] Frost." *See* App.'s Br. at 15.

[2] There is neither evidence nor any argument from Colony that the unknown bar patron intended to strike Ms. Frost. As such, her injury constitutes an accident. *See Goethe v. N.Y. Life Ins Co.*, 183 S.C. 199 (1937) (an "accident" is an effect which the actor did not intend to produce and cannot be charged with the design of producing).

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.")).

B. The "Assault and Battery" Exclusion in the Policy is not a valid basis for denying coverage.

The Policy contains the following Assault and Battery Exclusion (the "A/B 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."

(R. p. 203).

The circuit court considered the same argument that Colony raises on appeal— whether the A/B Exclusion precludes coverage of the injuries alleged in the Frost Complaint. Because

the circuit court held that this exclusion did not preclude coverage, Colony has "the burden of establishing [the] exclusion's applicability" on appeal. *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 560, 614 S.E.2d 611, 614 (2005) (holding that the insurer bears the burden of establishing that a policy's exclusion precludes coverage). Colony cannot carry this burden.

1. *Colony's characterization of "Battery" does not comport with the Policy language because the Policy language does not include unintentional acts.*

The term "Battery" is defined by the Policy to mean "an act which brings about harmful or offensive contact to another or anything connected to another." (R. p. 203). Colony argues that this definition of "battery" includes both intentional *and unintentional* acts. *See* App.'s Br. at 5 (emphasis added).

The circuit court correctly noted 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." (R. p. 8 (holding that the meaning of a particular word or phrase is not to be considered by the word itself.) (citing *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 225 S.E.2d 344 (1976))). Despite this holding, Colony's argument fails to consider the Policy as a whole. The circuit court held that "[Blind Horse] 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." (R. p. 7). Limiting the A/B Exclusion to intentional acts allows the exclusion to function in concert with the general framework of coverage in the Policy. (R. p. 7); *see also Yarborough*, 266 S.C. at 592, 225 S.E.2d at 349 ("As a rule of construction, the Court must consider the entire contract between the parties to determine the meaning of its provisions. That construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is

reasonable to do so.").

The circuit court disagreed with Colony's argument that the A/B Exclusion applies to unintentional acts, finding that "[t]he definition of battery, as set forth in [the Policy], does not . . . specifically provide that it applies to both 'intentional' and 'unintentional' acts." (R. p. 6). In support of its holding that unintentional acts do not fall within the definition of battery under the Policy, the circuit court correctly applied the ordinary use of the term battery. (R. pp. 6-7 ("Whether the term 'act', as used in the definition of 'battery', includes both 'intentional' and 'unintentional' acts depends upon how 'battery' is used in the ordinary sense. Most authorities view 'battery' as an intentional act." (citing *Longshore v. Saber Security Services, Inc.*, 365 S.C. 554, 619 S.E.2d 5 (S.C. 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))).[3]

The United States District Court for the District of South Carolina recently held that "[w]ith respect to battery, *the intentless definition never gets off the ground.*" *See Canopius US Ins., Inc. v. Middleton*, No. 2:15-CV-3673-DCN, 2016 WL 4379538, at *6 (D.S.C. Aug. 17, 2016) (emphasis added). Despite this holding, and similar to the insurer in *Middleton*, Colony cites to *Mellen v. Lane* in support of its argument that "intent, while pertinent and relevant, is not an essential element." *See Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (S.C. Ct. App. 2008); *see also* App.'s Br. at 13. In fact, the *Middleton* court directly addresses and rebuts this argument. Specifically, the *Middleton* court held:

> On its face, this language [in Mellen] appears to suggest that a civil action for battery does not require a showing of intent, but this proposition does not withstand closer scrutiny. The reference to 'an assault and battery' seems to regard the offenses as inseparably linked, rather than two potentially distinct

[3] The Restatement (2d) Torts § 18 (2005) also provides that one commits a battery only if "he acts intending to cause a harmful or offensive contact with the person of the other or a third person."

> claims for either "assault" or "battery," indicating the court's discussion does not apply to battery when considered as an independent tort. The court then goes on to explain that '[t]he rule, supported by the weight of authority, is that the defendant's intention does not enter into the case, for, if reasonable fear of bodily harm has been caused by the conduct of the defendant, this is an assault.' This explanation has nothing to do with battery and further suggests that the preceding reference to 'an assault and battery' did not apply to 'battery' when considered *in isolation.*

Middleton, 2016 WL 4379538, at *6 (internal citations omitted; emphasis added).

Pursuant to the *Middleton* court's analysis, Colony's proposed theory that "battery" can be devoid of intent is erroneous because "[f]or the term 'battery' to have any operative meaning under the Policy, it must be susceptible of some definition that does not require an underlying assault." *Id.* at *7. In fact, "[t]he only recognized definitions of battery that satisfy this condition contain some element of intent." *Id.* Therefore, Colony's argument must fail.

2. *Colony's proposed definition of "Battery" creates at least an ambiguity in the A/B Exclusion that must be resolved in favor of Blind Horse.*

Colony argues that the definition of "battery" includes unintentional acts. As previously stated, this argument must fail. However, if this Court were to adopt Colony's view, then the presence of conflicting precedent regarding the definition of "battery" reveals an ambiguity in the Policy. That ambiguity must be resolved in favor of Blind Horse. *See Greenville County v. Insurance Reserve Fund*, 313 S.C. 546, 548, 443 S.E.2d 552, 553 (1994) (holding "[t]hat different courts construe the language of an insurance policy differently is some indication of ambiguity.").

When an insurance policy is ambiguous, the construction of the policy that is most favorable to the insured will be adopted. *See Garrett v. Pilot Life Ins. Co.*, 241 S.C. 299, 304, 128 S.E.2d 171, 174 (1962). In addition to requiring that ambiguous provisions be construed against the insurer, policy exclusions should be "interpreted narrowly and to the benefit of the

insured." *Horry County v. Insurance Reserve Fund*, 344 S.C. 493, 499 544 S.E.2d 637, 640 (S.C. Ct. App. 2001). In this case, a narrow interpretation requires that the term "battery" be limited to intentional acts. *See Am. Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co.*, 378 S.C. 623, 629, 663 S.E.2d 492, 495 (2008) ("exclusions in an insurance policy are always construed most strongly against the insurer.").

If Colony's intent was to expand the definition of "battery" to include both intentional and unintentional acts, then it could have simply inserted language to that effect in the Policy. This principle was applied in *Brooklyn Bridge, Inc. v. South Carolina Ins. Co.*, 309 S.C. 141 (S.C. Ct. App. 1992). In *Brooklyn Bridge*, this Court held that if an insurer intends to limit an exclusion to a particular circumstance, it can specifically provide for that limitation by adding words that would make the exclusion clear. *Id.* at 144. In this case, Colony chose not to include an expansive definition of "battery" in the A/B Exclusion.[4] If such language had been included in the Policy at issue, then Colony's argument for a broad interpretation of "battery" would be appropriate. However, because Colony failed to use specific language that would broaden the A/B Exclusion, it created at least an ambiguity that must be resolved in favor of Blind Horse. *See S.C. Farm Bureau Mut. Ins. Co. v. Berlin*, No. 2005-UP-062, 2005 WL 7082978, at *2 (S.C. Ct. App. Jan. 25, 2005).

3. *Colony's view of the A/B Exclusion results in an internal inconsistency within the Policy that must be resolved in favor of Blind Horse.*

Under South Carolina law, "where an insurance policy contains an internal inconsistency created by an exclusion which purports to bar coverage for claims arising out of the very

[4] In other Colony insurance policies, the term "battery" was specifically defined to include both intentional and unintentional acts. (R. p. 9 ("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."); *and* (R. pp. 90-113 (providing evidence of other Colony policies)).

operation sought to be insured, the policy is rendered ambiguous, and the court must resolve that ambiguity in favor of coverage." *B.L.G. Enterprises, Inc. v. First Fin. Ins. Co.*, 328 S.C. 374, 377, 491 S.E.2d 695, 697 (S.C. Ct. App. 1997), *aff'd*, 334 S.C. 529, 514 S.E.2d 327 (1999). As the circuit court correctly recognized, Colony's position would "have the effect of excluding coverage for virtually every type of tort which might cause injury." (R. p. 8).

Moreover, the reasonable expectations doctrine allows a court to look at the "reasonable expectations of the insured at the time when he entered into the contract if the terms thereof are ambiguous or conflicting, or if the policy contains a hidden trap or pitfall, or if the fine print takes away that which has been given by the large print." *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 580, 757 S.E.2d 399, 407 (2014), *reh'g denied* (May 7, 2014). In this case, Colony's interpretation "lead[s] to unreasonable results and the definitions as written would be so narrow as to make coverage merely 'illusory.'" *Middleton*, 2016 WL 4379538, at *8 (quoting *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 615, 730 S.E.2d 862, 867 (2012)).

If the Court were to accept Colony's argument, the A/B Exclusion would exclude all unintended, accidental person-to-person contact. *See Middleton*, 2016 WL 4379538, at *8-9 (rejecting a similar argument seeking to remove intent from assault in an assault and battery exclusion and holding that removing accidental contact resulting in an injury would result in a "bizarre" result, leaving the insured with coverage that "would be exceedingly narrow when compared to the Policy's coverage language."). Colony's argument circumvents the purpose of the Policy and undermines the entire reason that Blind Horse agreed to purchase this contract for insurance. As a result, Colony's argument also fails under the reasonable expectations doctrine. *See Bell*, 407 S.C. at 580.

C. The "Athletic or Sports Participation" exclusion in the Policy is not a valid basis for denying coverage.

Colony argues that the Athletic Participant Exclusion provides it with a basis to deny Blind Horse coverage. App.'s Br. at 15. This argument is also meritless. The Policy provides, in pertinent part:

> ATHLETIC OR SPORT *PARTICIPANTS* EXCLUSION
>
> This endorsement modifies insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART SECTION I – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY,
>
> 2. Exclusions is amended and the following added:
>
> 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) (emphasis added).

The circuit court correctly recognized that the plain language of Athletic Participant Exclusion shows that it only applies to those persons who actually *participate* in the activity. (R. p. 9). A simple review of the section header of the exclusion bolsters this position, as that header is clearly labelled "Athletic or Sport *Participants* Exclusion." (emphasis added). Under South Carolina law, "rules of construction require clauses of exclusion to be narrowly interpreted, and clauses of inclusion to be broadly construed." *McPherson By & Through McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 319, 426 S.E.2d 770, 771 (1993).

In interpreting similar clauses, courts of other jurisdictions have held that the insurer must prove that the injured person was practicing for or participating in the contest or exhibition at the time of the injury. *See Jefferson Ins. Co. of New York v. Sea World of Florida, Inc.*, 586 So.2d

95, 98 (Fla. 1991) (holding that the insurer bears the "burden of demonstrating that (1) that the event in which the person was injured was a contest or exhibition; (2) that the contest or exhibition was of an athletic or sports nature; (3) that the contest or exhibition was sponsored by the named insured; and (4) that the injured person was practicing for or participating in the contest or exhibition at the time of the injury") (*citing Garcia v. St. Bernard Parish School Bd.*, 576 So.2d 975, 976-77 (La. 1991) (holding that a non-participant could not be subject to a sports or athletics participant exclusion as "[n]one of the cases reviewed from other jurisdictions involved an injury in an exhibition ancillary to the principal contest sponsored by the insured.")).

Just like the plaintiff in *Garcia*, Ms. Frost was a non-participant. She was doing nothing more than standing in the vicinity of the punching bag game when she was struck in the back by another patron attempting to hit the punching bag. *Compare Garcia*, 576 So.2d at 976-77 (finding that a cheerleader at a school football game was not a participant, only ancillary, and not subject to the sport participant exclusion), *with Zurich Reinsurance (London) Ltd. v. Westville Riding Club, Inc.*, 82 F. Supp. 2d 1254, 1256 (E.D.Okla. 1999), *aff'd sub nom. Zurich Reinsurance (London) Ltd. v. Remaley*, 203 F.3d 837 (10th Cir. 2000) (finding that a rodeo attendee who chose to participate in an in-arena contest and subsequently was injured fell within athletic or sports participant exclusion under the applicable policy) (citing the *Sea World of Florida* and *Garcia* four factor test *supra*).

In this case, Ms. Frost was not "practicing for or participating in any athletic contest, exhibition, activity, game or sport." (R. p. 205). She was nothing more than an innocent bystander standing with her back to the punching bag machine. As such, Blind Horse's claim does not fall under the Athletic Participant Exclusion. (R. p. 9).

D. The circuit court correctly determined that Colony acted in bad faith.

The circuit court correctly held that Colony acted in bad faith when it breached its contract of insurance with Blind Horse. Colony advances one argument disputing this finding. Specifically, Colony claims that this is nothing more than an "honest disagreement" regarding coverage between Blind Horse and Colony.

In this case, the Policy obligated Colony to sacrifice its interests in favor of its insured with regard to the investigation, evaluation, and resolution of claims against its insured in the Frost litigation. *See Tyger River Pine Co. v. Maryland Cas. Co.*, 170 SC 286, 170 S.E. 346, 348 (1933). Despite this obligation, Colony acted in bad faith and in pursuit of its own interests when it denied Blind Horse's claim not once, but twice. Colony did not file a declaratory judgment action to resolve the issues of coverage it created or even defend Blind Horse under a reservation of rights. Instead, Colony elected to deny coverage on two separate occasions. (R. p. 173, lines 14-17).

The circuit court correctly determined that Colony's actions constituted a breach of contract, and that Colony acted in bad faith in breaching that contract. "Whether an insurance company is liable for bad faith must be judged by the evidence before it at the time it denied the claim." *Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994). Under South Carolina law, "[b]ad faith refusal to pay . . . benefits under a contract of insurance includes: (1) the existence of a mutually binding contract of insurance between the plaintiff and defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured." *Id.* at 451. Colony only disputes the third element. *See* App.'s Br. at 18-19.

"Generally, if there is a reasonable ground for contesting a claim, there is no bad faith in the denial of it," and this allows an insurer to litigate "novel issues without fear of being accused of acting in bad faith." *Mixson, Inc. v. Am. Loyalty Ins. Co.*, 349 S.C. 394, 398, 562 S.E.2d 659, 661-62 (S.C. Ct. App. 2002). Despite Colony's contention, this case does not present a novel issue. (R. pp. 11-12).

First, with respect to the A/B Exclusion, Colony does not present a novel issue because the injury was not the result of a "battery" that would implicate the A/B Exclusion. The circuit court correctly found that the event at issue, which resulted in Ms. Frost's injury, was within coverage as an "occurrence which caused bodily injury." (R. p. 11). The A/B Exclusion does not expressly encompass inadvertent acts, and Colony cannot avail itself of impermissible broadening of that exclusion in order to avoid a bad faith claim. Such tactics do not reflect an "honest disagreement," but instead represent Colony's underlying objective, which is to expand the A/B Exclusion to the point that it defies logic and common sense. Colony's proposed definition of "battery" "renders the term meaningless" because under it, all unintended, accidental person-to-person contact would be excluded. This would, in effect, delete the word "accident" from the Policy. This position is illogical and is not a reasonable basis to deny coverage. *See Middleton*, 2016 WL 4379538, at *7.

Second, with regard to the Athletic Participant Exclusion, Colony likewise cannot claim that this is a novel legal issue that needs to be litigated. As previously discussed, these issues have been roundly litigated and only cover participants as opposed to bystanders like Ms. Frost. *See Garcia*, 576 So.2d at 976-77; *see also Sea World of Florida*, 586 So.2d at 98. It is certainly reasonable to expect that a sophisticated insurance company such as Colony would be aware of relevant precedent that dates back to the early 1990s. Simply put, this is not an "honest

disagreement." This is bad faith.

Finally, this Court has held that "[a]n insurer is not insulated from liability for bad faith merely because there is no clear precedent resolving a coverage issue raised under the particular facts of the case." *Mixson*, 349 S.C. at 400. Furthermore, it is well settled that all ambiguities must be resolved in favor of the insured. *Id.* at 399-400. "[T]he covenant of good faith and fair dealing extends not just to the payment of a legitimate claim, but also to the manner in which it is processed." Here, the circuit court correctly concluded that "[u]nder the circumstance, there was no reasonable basis for application of this exclusion." *See Mixson*, 349 S.C. at 400; *also* R. p. 11).

E. Colony consented to the reasonable attorneys' fees that were approved by the circuit court.

Blind Horse was awarded reasonable attorneys' fees pursuant to S.C. Code § 38-59-40. (R. p. 12). "A claim for statutory attorneys' fees is an action at law resting within the sound discretion of the trial court and may not be disturbed on appeal absent an abuse of discretion." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 436, 673 S.E.2d 448, 458 (2009).

In the 2015 Order, the circuit court ordered counsel for Blind Horse to submit its documented attorneys' fees and costs to counsel for Colony so that Colony's counsel could review them and determine if they were reasonable. (R. p. 13). The circuit court instructed that if the parties could agree on the fees and costs, then a hearing on the reasonableness of those fees and costs would not be necessary. (R. p. 13). Pursuant to the 2015 Order, counsel for Blind Horse and Colony engaged in the required discussions. However, because Colony continuously failed to communicate about the proposed order, Blind Horse was compelled to file a Motion for Hearing. (R. p. 153). This intentional avoidance by Colony resulted in additional attorneys' fees. (R. p. 153). Eventually, a hearing was set for April 6, 2016.

On March 31, 2016, Colony's counsel, David L. Brown, stated in an e-mail:

> Counsel:
> This will confirm that Colony is amenable to the entry of Judgment in this matter, consistent with the attached Order,[5] and *that Colony will not contest on appeal the reasonableness of the fees reflected in this Order*. Of course, Colony will contest the issues of coverage, bad faith, and whether any amount at all is owed to the plaintiff. However, *Colony will not appeal the reasonableness of the fees as reflected on the attached.* Furthermore, Colony reserves the right to contest the reasonableness of any additional fees the plaintiff may seek (e.g. those fees associated with the appeal), but we can address those fees when, and if, that issue becomes ripe. I trust this meets your concerns, but please let me know if that is not the case.

(R. p. 266) (emphasis added).

In a subsequent e-mail to counsel for Blind Horse, Mr. Brown further expressed Colony's consent to the reasonableness of the attorneys' fees that Blind Horse's counsel presented.[6] (R. p. 279). This e-mail from Mr. Brown came in response to an e-mail from Blind Horse's counsel regarding an accounting error in the prior correspondence affecting the total attorneys' fees. (R. p. 270). As a result of Mr. Brown's e-mail, the hearing scheduled before the circuit court was

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[5] This "draft order" would eventually become the April 2016 Order, filed on April 8, 2016. (R. p. 15).

[6] "It is a long-standing and well-settled rule that an attorney may settle litigation on behalf of his client and that the client is bound by his attorney's settlement actions." *Motley v. Williams*, 374 S.C. 107, 111, 647 S.E.2d 244, 246 (S.C. Ct. App. 2007). "Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement." *Shelton v. Bressant*, 312 S.C. 183, 208, 439 S.E.2d 833, 834 (1993). As a basic matter of appellate procedure in this State, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). In this case, Colony acted with authority when it consented to the attorneys' fees in preparation for the April 2016 Order. Further, no allegations of fraud or mistake have been made. Colony elected not to contest the reasonableness of the award at the scheduled hearing, and expressly consented in writing to the fees that were presented to the circuit court. Additionally, this issue was not raised to the circuit court, nor was it ruled upon. Therefore, it is improper for Colony to raise this issue for the first time in the present appeal. *See Wilder Corp.*, 330 S.C. at 76; (R. p. 15 (noting parties' agreement in award)).

cancelled.[7] After the hearing was cancelled, the parties submitted a proposed order granting attorneys' fees and costs to the circuit court. The circuit court found those fees to be reasonable and executed the order.[8] (R. p. 15). Because the circuit court acted within its discretion in approving these fees and costs, its finding should not be disturbed. *See Historic Charleston Holdings*, 381 S.C. at 436.

IV. CONCLUSION

For the reasons stated above, the circuit court's holding that the A/B Exclusion and the Athletic Participant Exclusion do not provide a reasonable basis for Colony to deny Blind Horse's claim should be upheld. Furthermore, Colony breached its contract of insurance with Blind Horse and acted in bad faith. Blind Horse also remains entitled to the reasonable fees and costs awarded by the circuit court, and should likewise be awarded reasonable fees and costs associated with the present appeal.

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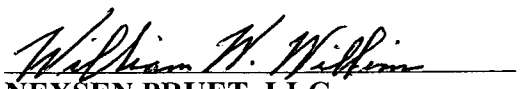
[7] If this hearing was held as initially planned, Blind Horse would have built a record supporting the reasonableness of its requested fees and costs.

[8] "The Court now enters judgment in favor of Three Blind Mice, LLC, in the amount of $110,897.07 against Colony Insurance Company. The Court finds that the amount of this award is *reasonable*." (R. p. 15) (emphasis added).

Respectfully submitted,



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Dated: November 14, 2016

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

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

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v.

Colony Insurance Company.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Final Brief complies with Rule 211(b) SCACR.

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(5)

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PROOF OF SERVICE

The undersigned certifies that on this 14th day of November, a copy of the ***Respondent's Final Brief*** along with the ***Certificate of Counsel*** has been served via U.S. mail upon the following counsel of record:

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Dated: November 14, 2016

Columbia, South Carolina

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The Honorable Jenny Abbott Kitchings
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(b)

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November 14, 2016

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Re: ***Three Blind Mice, LLC d/b/a The Blind Horse Saloon v. Colony Insurance Company***
Appellate Case No.: 2016-000-963

Dear Ms. Kitchings:

Enclosed for filing please find the unbound original and sixteen (16) copies of **Respondent's Final Brief, Certificate of Counsel** and **Proof of Service** in the above referenced matter. Please file the original and return a clocked-in copy to me via our courier.

By copy of this letter and as indicated on Proof of Service, I am serving counsel of record with the same.

Very truly yours,

D. Gregory Placone

Enclosures
cc: (w/enclosures)
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