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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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



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Case No. 2014-CP-23-03422

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

v.

Colony Insurance Company . . . . . Appellant

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# APPELLANT'S FINAL REPLY BRIEF

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## ARGUMENT IN REPLY

Appellant Colony Insurance Company, by and through its undersigned counsel, respectfully submits this Reply Brief to address the following arguments raised by Respondent Three Blind Mice, LLC d/b/a The Blind Horse Saloon.

### I. The "Assault and Battery" Exclusion

#### *A. The Manner in Which Some Courts Have Defined the Civil Tort of Battery Is Irrelevant Because the Colony Policy Expressly Defines the Term "Battery" As Used in the "Assault and Battery" Exclusion*

Although this insurance coverage dispute centers on the issue of whether the Colony Policy's definition of the term "battery" (and therefore, the scope of the "Assault and Battery" Exclusion in the Policy) is limited to intentional acts, Three Blind Mice inexplicably disregards the Policy's express definition of "battery" (which is not limited to intentional acts) in arguing that the "Assault and Battery" Exclusion should only apply to intentional acts. Specifically, Three Blind Mice argues in its Brief that the Policy's definition of "battery" should be limited to "intentional" acts because some courts have defined the civil tort of battery to require an element of intent. [Resp.'s Brief, at 6]

However, the manner in which some courts may have defined the civil tort of battery is irrelevant in the present insurance coverage matter because the term "battery" is expressly defined by the Policy itself.[1] As a result, it is the Policy's

[1] In coming to the conclusion that the civil tort of battery requires an element of intent, Three Blind Mice ignores the fact that "more recent cases . . . suggest that intent is not a necessary element of the civil offense of assault and battery." *See USF Ins. Co. v. D&J Enters.*, 2010 U.S. Dist. LEXIS 55123, *11 (D.S.C. June 3, 2010). As such, Colony does not concede that the civil tort of battery requires an element of intent as claimed by Three Blind Mice.

express definition of the term "battery" that must be applied, not the common law definition of the civil tort of battery. *See Spartan Iron & Metal Corp. v. Liberty Ins. Corp.*, 6 Fed. Appx. 176, 178 (4th Cir. 2001) ("To adopt a common law definition here where the policies provide a contractual definition would be at odds with South Carolina law.").

In an effort to support its position that this Court should disregard the Policy's express definition of "battery" and look outside of the terms of the Policy itself to limit the Policy's definition of the term "battery" to intentional acts, Three Blind Mice cites a federal district court decision—*Canopius US Insurance, Inc. v. Middleton*, No. 2:15-cv-3673-DCN, 2016 U.S. Dis. LEXIS 108878 (D.S.C. Aug. 17, 2016). [Resp.'s Brief, pp. 7–8] This reliance on the federal district court's *Canopius* decision is misplaced. *Canopius* was an insurance coverage action which addressed the applicability of an "assault and battery" exclusion that did not contain a definition of the term "battery." Because the "assault and battery" exclusion in *Canopius* did not define the term "battery," the court was forced to look outside of the policy itself (including case law defining the civil tort of battery) in order to define such term.

Unlike the *Canopius* case, the Colony Policy expressly defines the term "battery." Accordingly, this Court need not look to case law defining the civil tort of battery and whether such case law requires or does not require an element of intent. Rather, this Court need only look to the Policy's express definition of the term "battery" in order to determine whether the "Assault and Battery" Exclusion applies to the claims against Three Blind Mice in the Frost Lawsuit.

The Colony Policy's express definition of the term "battery" (as found in the Policy's "Assault and Battery" Exclusion) does not impose a requirement that the act which brings about harmful or offensive contact to another be done with intent. Rather, the Policy defines a "battery" as "an act which brings about harmful or offensive contact to another" without any limitation that the act be done with any intent to bring about harmful or offensive contact. Three Blind Mice concedes that the allegation against it in the Frost Lawsuit is that Katherine Frost was injured while patronizing the bar owned by Three Blind Mice when another patron struck Ms. Frost (i.e. brought about harmful contact to Ms. Frost). [Resp.'s Brief, p. 1] Therefore, based upon the allegations in the Frost Lawsuit and the plain terms of the Colony Policy, the claims against Three Blind Mice arose out of a "battery"—as that term is expressly defined by the Policy—and so coverage is excluded under the "Assault and Battery" Exclusion in the Policy.[2]

[2] In a footnote, Three Blind Mice also attempts to support its limited definition of "battery" by referencing the manner in which other policies issued by Colony have defined the term "battery." [Resp.'s Brief, p. 9] Colony has issued various policies to other insureds that define the term "battery" in different ways depending on the nature of the insured business, the premium paid, and a host of other insurance underwriting factors. However, the extraneous policy forms referenced by Three Blind Mice in its Brief—which were not even in existence when the Colony Policy was issued—are irrelevant to the coverage dispute before this Court. This insurance coverage action seeks a legal determination as to whether the plain terms of the Policy at issue (as found in its policy forms) provide coverage for claims against Three Blind Mice in the Frost Lawsuit.

### *B. The Interpretation of the "Assault and Battery" Exclusion Proposed by Three Blind Mice Requires the Improper Insertion of Words into the Policy's Definition of "Battery"*

Next, Three Blind Mice argues that "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." [Resp.'s Brief, p. 9] However, this statement made by Three Blind Mice in its Brief exposes the error in its argument—there is no need to "insert language" in the Policy to expand the Policy's definition of "battery" to include both intentional and unintentional acts because the Policy already includes an expansive definition of "battery" without any limitation or qualification.

As written, the Policy's definition of "battery" includes "an act which brings about harmful or offensive contact to another" without any language that would limit the scope of the term "battery" to an intentional act. Because the express definition of "battery" in the Policy does not contain any limiting language, the term "battery" as expressly defined by the Policy includes any act (including an unintentional act) that brings about harmful contact to another. Therefore, contrary to the argument raised by Three Blind Mice, Colony has included an expansive definition of "battery" in the Policy, which includes any act (whether intentional or unintentional) that brings about harmful or offensive contact to another.

In fact, in order to accept the position taken by Three Blind Mice, this Court would need to insert the word "intentional" into the Policy's definition of "battery" to limit the application of the "Assault and Battery" Exclusion to

"intentional" acts, thereby improperly changing the substantive terms of the Policy itself. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 378, 440 S.E.2d 367, 587 (1994) (holding that 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.'").

It is undisputed that the claims asserted against Three Blind Mice in the Frost Lawsuit arose out of an incident in which an unknown patron struck Ms. Frost. [Resp.'s Brief, p. 1] As a result, the claims against Three Blind Mice arose when a bar patron made harmful or offensive contact with Ms. Frost. The "Assault and Battery" Exclusion in the Colony Policy excludes coverage for claims arising from a "battery" (which is expressly defined by the Colony Policy as "an act which brings about harmful or offensive contact to another" without any limitation or qualification that the act be "intentional"). Therefore, based upon the application of the plain and unambiguous language of the "Assault and Battery" Exclusion in the Policy to the allegations in the Frost Lawsuit, the claims against Three Blind Mice are excluded from coverage under the Policy.

### *C. There is No "Internal Inconsistency" in the Colony Policy*

In its Brief, Three Blind Mice also argues that limiting the Policy's definition of "battery" to intentional acts "allows the ["Assault and Battery"] exclusion to function in concert with the general framework of coverage in the Policy," and that the application of the Policy's express definition of "battery" would create an internal inconsistency in the Policy. [Resp.'s Brief,

pp. 6–9] In essence, Three Blind Mice takes the position because the "Insuring Agreement" in the Policy generally provides coverage for bodily injury caused by an accident (which would be an unintentional act), the Policy's definition of "battery" (and hence, the "Assault and Battery" Exclusion) should be limited intentional acts. *Id.*

Such an argument fundamentally misconstrues the relationship between the "Insuring Agreement" and exclusionary provisions in liability insurance policies. The "Insuring Agreement" in a liability policy grants coverage, and the exclusions remove coverage for certain elements of coverage that were originally granted by the "Insuring Agreement." The purpose of an exclusionary provision (i.e. the "Assault and Battery" Exclusion) is not to "function in concert with" the coverage granted by the "Insuring Agreement," but rather, to remove or limit the scope 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 (Ct. App. 2014); *Laidlaw Envt'l Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 51, 524 S.E.2d 847, 852 (Ct. App. 1999). As a result, there is no "internal inconsistency" created by the "Assault and Battery" Exclusion in the Colony Policy, which removes coverage for "bodily injury" arising out of a "battery" regardless of whether such battery was committed intentionally or unintentionally.

In fact, the interpretation of the term "battery" that has been suggested by Three Blind Mice that would limit the application of the "Assault and Battery" Exclusion to "intentional acts," would result in the exclusion being unnecessary

surplusage in the Colony Policy. As Three Blind Mice concedes, the "Insuring Agreement" in the Policy only provides coverage for accidents (i.e. unintentional acts). [Resp.'s Brief, p. 6] If the "Assault and Battery" Exclusion only applied to "intentional" acts, the exclusion would serve no purpose because there is no coverage in the first instance under the "Insuring Agreement" for intentional acts regardless of the application of the "Assault and Battery" Exclusion. *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").

### *D. The Coverage Afforded under the Colony Policy Is Not Illusory*

Three Blind Mice claims that if the "Assault and Battery" Exclusion is applied such that coverage is excluded for any "battery" regardless of intent, then coverage would be excluded "for virtually every type of tort which might cause injury" or at least "all unintended, accidental person-to-person contact." [Resp.'s Brief, pp. 9–10] As a result, Three Blind Mice claims that the coverage afforded by the Colony Policy would be "illusory" if the "Assault and Battery" Exclusion is applied pursuant to its plain and unambiguous terms, and that the "reasonable expectations" doctrine should be applied to create coverage for a claim that would otherwise be excluded under the plain terms of the Policy.

This argument is without merit. Although the plain terms of the "Assault and Battery" Exclusion exclude coverage for the claims asserted against Three Blind Mice in the Frost Lawsuit for the injuries sustained by Ms. Frost

when she was struck by the unknown individual in the bar, such exclusion certainly does not "have the effect of excluding coverage for virtually every type of tort which might cause injury" as claimed by Three Blind Mice. In fact, the scenarios under which the Policy would provide 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, some simple examples include a claim arising out of an incident in which a defective bar stool collapses under the weight of a patron, a claim arising out of injuries sustained by a patron who trips over an uneven pavement in the parking lot, or an incident in which a patron cracks a tooth on a foreign object in a food item served at the bar.

An insurer has the right to limit its liability through the use of exclusionary provisions and defined terms to bar coverage for certain types of risks. In this case, Colony issued the Policy to an entity in the business of operating a bar, on the condition that the Policy include the "Assault and Battery" Exclusion in order to bar coverage for bodily injury 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"). This is not a case in which the plain language of the Policy "undermines the entire reason that [Three Blind Mice] agreed to purchase this contract for insurance" as claimed by Three Blind Mice. [Resp.'s Brief, p. 10] Rather, the "Assault and Battery" Exclusion is a reasonable limitation on the coverage that Colony was willing to provide to Three Blind Mice as the operator of a bar.

An insured has an obligation to read its policy. *See Lewis v. OMNI Indem. Co.*, 970 F. Supp. 2d 437, 449 (D.S.C. 2013) ("It is well settled in South Carolina that an insured has the duty of reading his insurance policy and of acquainting himself with its contents. Failure to do so will prevent him from avoiding the written contract on the grounds that he did not know its terms."). As such, Three Blind Mice had a duty to read the Colony Policy, and therefore, accepted the Policy as issued. Three Blind Mice may not now re-write the terms of the Policy to limit the application of the "Assault and Battery" exclusion to "intentional" acts in order to obtain coverage which Colony did not agree to provide and for which Three Blind Mice did not pay premium. Rather, the provisions of the Policy—including the "Assault and Battery" Exclusion—must be applied pursuant to their plain terms.

## II. The "Athletic or Sport Participants" Exclusion

### *A. Three Blind Mice Ignores the Plain Terms of the "Athletic or Sport Participants" Exclusion*

Three Blind Mice also ignores the plain terms of the Policy in advancing its argument that the "Athletic or Sport Participants" Exclusion "only applies to [injured individuals] who actually *participate* in the activity." [Resp.'s Brief, p. 11] The 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" without any limitation that the injured individual be participating in the activity. In fact, in order to accept the interpretation of the "Athletic or Sport Participants" Exclusion proposed by

Three Blind Mice, this Court would again need to insert words into the language of the exclusion in order to limit the exclusion to "bodily injury to any person **while participating in an athletic contest, exhibition, activity, game or sport**." (added words bolded and underlined)

In an effort to support its position, Three Blind Mice cites three out-of-state cases without providing the Court with the policy language at issue in those cases. [Resp.'s Brief, p. 12] A review of those cases reveals that the policy language in the exclusions at issue in those cases differed significantly from the language in the "Athletic or Sport Participants" Exclusion in the Colony Policy. In fact, unlike the exclusion at issue in the Colony Policy, the exclusions in the cases cited by Three Blind Mice specifically limit their application to individuals who are participating in an athletic contest or exhibition (similar to the hypothetical exclusion above). *Jefferson Ins. Co. v. Sea World of Fla.*, 586 So. 2d 95, 97 (Fla. Dist. Ct. App. 5th Dist. 1991) (analyzing an exclusion that expressly provided that "the insurance does not apply to bodily injury to any person while performing in any exhibition or diving event sponsored by the named insured"); *Garcia v. St. Bernard Parish Sch. Bd.*, 576 So. 2d 975, 975 (La. 1991) (analyzing an exclusion that provided that "the insurance does not apply to bodily injury to any person while practicing for or participating in any contest or exhibition of an athletic or sports nature sponsored by the named insured"); *Zurich Reinsurance (London) Ltd. v. Westville Riding Club, Inc.*, 82 F.Supp.2d 1254, 1256 (E.D.Okla. 1999) (analyzing an exclusion that provided that "this insurance does not apply to

'bodily injury' to any person while practicing for or participating in any sports or athletic contest or exhibition that you sponsor").

Unlike the exclusions in the cases cited by Three Blind Mice in its Brief, the language in the "Athletic or Sport Participants" Exclusion in the Colony Policy 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." There is no limitation in the language of the exclusion that the injured individual be participating in the activity.

It is undisputed that the claims asserted against Three Blind Mice arose out of or resulted from an unknown individual participating in an athletic activity or game (the punching bag machine). [Resp.'s Brief, p. 1] Accordingly, such claims are excluded by the plain terms of the "Athletic or Sport Participants" Exclusion in the Colony Policy.

## III. The Bad Faith Claim

### *A. Three Blind Mice Failed to Present Any Evidence to Support a Claim for Bad Faith against Colony*

In its Brief, Three Blind Mice advances a single argument for its claim that Colony acted in bad faith—Three Blind Mice argues that Colony denied coverage, and so it must have done so in bad faith. [Resp.'s Brief, pp. 13–15] However, Three Blind Mice provides absolutely no evidence that would support a finding that Colony acted in bad faith.

As an initial matter, for the reasons set forth above, Colony properly denied coverage for the claims against Three Blind Mice in the Frost Lawsuit,

and so Three Blind Mice does not have a valid cause of action for bad faith against Colony. *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 additional insured's claim for coverage because no coverage existed under its policy for such claim). However, even if it is ultimately determined that coverage should be afforded under the Policy for the claims at issue, Three Blind Mice did not present any evidence to the Circuit Court that Colony's denial of coverage was in bad faith.

Three Blind Mice concedes that in order to establish a bad faith claim under South Carolina law, the insured must prove that the insurer's denial of coverage "result[ed] from the insurer's bad faith or unreasonable action." *Howard v. State Farm Mut. Auto Ins. Co.*, 316 S.C. 445, 448, 450 S.E.2d 582, 584 (1994); *see also Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359, 415 S.E.2d 393, 396–97 (1992) (holding that one of the necessary elements of a bad faith claim is the insurer's bad faith or unreasonable action in handling the claim). [Resp.'s Brief, pp. 13–14] In this matter, there is no evidence that Colony's denial of coverage resulted from bad faith or unreasonable action. Rather, Colony's coverage position was well-grounded and timely communicated to Three Blind Mice. *Crossley*, 307 S.C. at 360, 415 S.E.2d at 397 (holding that "[i]f there is a reasonable ground for contesting a claim, there is no bad faith"); *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) (holding that "an insurance company should be able to

litigate novel issues without fear of being accused of acting in bad faith"). 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, even if this Court were to find that coverage should be afforded under the Colony Policy for the claims asserted against Three Blind Mice, there is no evidence in the record that Colony "had no reasonable basis" for contesting Three Blind Mice's claim for coverage—under either the "Assault and Battery" Exclusion or the "Athletic of Sport Participants" Exclusion. As such, the Circuit Court erred when it held that Colony acted in bad faith.

Because Three Blind Mice did not seek punitive damages in relation to its bad faith claim against Colony, the significance of the Circuit Court's error in holding that Colony acted in bad faith relates to the Circuit Court's award of attorneys' fees and costs. [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] Specifically, in addition to breach of contract damages (i.e. the settlement payment made by Three Blind Mice and the attorneys' fees and costs incurred by Three Blind Mice in the Frost Lawsuit when Colony denied coverage), the Circuit Court also awarded to Three Blind Mice the attorneys' fees incurred by Three Blind Mice in the present insurance coverage action on the theory that Colony acted in bad faith. [R. pp. 12–13; 2015 Order, pp. 11–12]

However, there is no evidence that Colony acted in bad faith. Therefore, even if this Court were to find that Colony breached its insurance contract with Three Blind Mice by denying coverage for the claims in the Frost Lawsuit, the most that the Circuit Court should have awarded to Three Blind Mice would have been breach of contract damages—the settlement paid by Three Blind Mice in the Frost Lawsuit ($10,000.00) and the attorneys' fees and costs incurred by Three Blind Mice in the Frost Lawsuit ($46,375.34)—plus interest ($7,300.61) and costs ($556.70)—for a total judgment of $64,232.65.[3] Because Colony did not engage in bad faith conduct, the Circuit Court should not have awarded to Three Blind Mice the $46,664.42 in attorneys' fees incurred by Three Blind Mice in the present insurance coverage action.

[3] The Order entered against Colony—which awarded a total of $110,897.07 to Three Blind Mice—did not specify the portion of the award that was made to reimburse Three Blind Mice for the settlement payment that it made in the Frost Lawsuit, the attorneys' fees and costs incurred by Three Blind Mice in the Frost Lawsuit, the attorneys' fees and costs incurred by Three Blind Mice in the present coverage action, or the interest awarded to Three Blind Mice. [R. p. 15; 2016 Order, p. 1] However, correspondence from counsel for Three Blind Mice prior to entry of the Order indicates that amount awarded to Three Blind Mice is comprised of the following amounts: $10,000.00 for the settlement payment made by Three Blind Mice in the Frost Lawsuit; $46,375.34 for the attorneys' fees and costs incurred by Three Blind Mice in the Frost Lawsuit; $7,300.61 for statutory interest on the settlement payment and defense costs incurred by Three Blind Mice in the Frost Lawsuit; and $46,664.42 for the attorneys' fees and $556.70 in costs incurred by Three Blind Mice in the present insurance coverage action. [R. pp. 264 and 270; Letter from David L. Moore to David L. Brown and Eric K. Englebardt, dated December 2, 2015; E-Mail from Andrew Q. Mathias to David L. Brown dated March 31, 2016]

## IV. The Award of Attorneys' Fees

### *A. Colony Preserved Its Right to Challenge the Award of Attorneys' Fees*

Three Blind Mice appears to take the position that Colony is not permitted to challenge the award of attorneys' fees made by the Circuit Court. In support of its position, Three Blind Mice relies upon an e-mail from counsel for Colony indicating that Colony would not contest on appeal the "reasonableness" of the fees reflected in a proposed Order prepared by counsel for Three Blind Mice. However, in that same e-mail, counsel for Colony expressly reserved the right to "**contest the issues of coverage, bad faith, and whether any amount at all is owed to the plaintiff**." [R. p. 266; March 31, 2016 E-Mail from David L. Brown to William W. Wilkins and Andrew A. Mathias, RE: Three Blind Mice v. Colony (emphasis added)] Therefore, although Colony did not contest the reasonableness of the attorneys' fees (i.e. the time spent or rates charged) that were incurred by Three Blind Mice, Colony did reserve the right to challenge the award of attorneys' fees made by the Circuit Court.

As outlined above, the Circuit Court awarded two categories of damages against Colony in this matter—$46,375.34 for the attorneys' fees and costs incurred by Three Blind Mice in defense of the Frost Lawsuit; and $46,664.42 for the attorneys' fees incurred by Three Blind Mice in litigating the present insurance coverage action. The first category of attorneys' fees awarded by Circuit Court to Three Blind Mice for those attorneys' fees incurred in the defense of the Frost Lawsuit were awarded by the Circuit Court to Three Blind Mice on the theory that Colony breached its duty to defend Three Blind Mice

in the Frost Lawsuit under the Colony Policy, and so Three Blind Mice should be entitled to recover the attorneys' fees incurred in the defense of the Frost Lawsuit as a matter of contract law. Colony clearly preserved its right to contest the award of such attorneys' fees on the ground that Three Blind Mice was not entitled to coverage under the Colony Policy for the claims in the Frost Lawsuit, and so Three Blind Mice was not entitled to recover the attorneys' fees incurred by Three Blind Mice in the defense of the Frost Lawsuit.

The second category of attorneys' fees awarded by the Circuit Court to Three Blind Mice for those attorneys' fees incurred in the present coverage action were awarded based upon the Circuit Court's holding that Colony had acted in bad faith when it denied coverage for the claims in the Frost Lawsuit.[4] [R. pp. 12–15; 2015 Order, pp. 11–12; 2016 Order, p. 1] Colony clearly contested the bad faith claim asserted by Three Blind Mice, and reserved the right to contest the award of attorneys' fees based upon the Circuit Court's finding that Colony acted in bad faith. [R. pp. ; 124–26; Mem. of Law in Supp. of Def. Colony Ins. Co.'s Mot. for Summ. J., pp. 11–13] As set forth above, there is no evidence that Colony acted in bad faith, and so the Circuit Court erred when it awarded to Three Blind Mice the attorneys' fees incurred by Three Blind Mice in the present coverage action on the theory that Colony acted in bad faith

[4] Recognizing that a successful litigant is not generally entitled to recover attorneys' fees in the absence of a contract or statute, the Circuit Court awarded to Three Blind Mice the attorneys' fees that were incurred by Three Blind Mice in conjunction with this coverage action based upon the finding that Colony had acted in bad faith. [R. pp. 12–13; 2015 Order, pp. 11–12] *See* S.C. Code § 38-59-40 (limiting 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).

Furthermore, even if this Court determines that Colony acted in bad faith, and therefore, Three Blind Mice is entitled to recover attorneys' fees incurred in the present coverage action, this Court must reduce the amount of the award of attorneys' fees awarded to Three Blind Mice for such attorneys' fees to one-third (1/3) of the amount awarded to Three Blind Mice for Colony's alleged breach of contract pursuant to South Carolina Code § 38-59-40. *See* S.C. Code § 38-59-40 ("The amount of the attorneys' fees [awarded to an insured based upon the insurers bad faith denial of coverage] may not exceed one-third of the amount of the judgment."). The total amount awarded to Three Blind Mice in relation to its breach of contract claim was $63,675.95—the $10,000 settlement paid by Three Blind Mice plus $53,675.95 in defense costs incurred by Three Blind Mice in the Frost Lawsuit. Therefore, even if this Court determines that Three Blind Mice should be entitled to recover the attorneys' fees incurred in this insurance coverage action, the amount of the award of such attorneys' fees must be reduced to one-third (1/3) of $63,675.95 (or $21,225.32). This reduction in the amount of attorneys' fees awarded to Three Blind Mice is required by the statutory cap on attorneys' fees recoverable under S.C. Code § 38-59-40, not the reasonableness of the fees incurred by Three Blind Mice.

## CONCLUSION

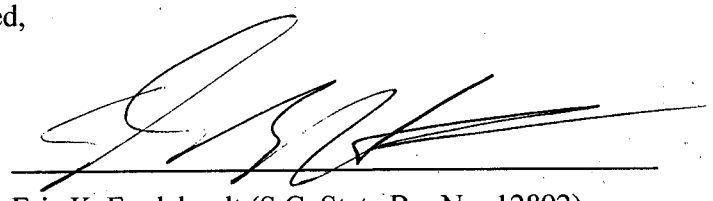
Based upon the foregoing, Colony respectfully requests that the Court reverse the November 18, 2015, Order and the April 8, 2016, Order of the Circuit Court, and hold that the "Assault and Battery" Exclusion and/or the "Athletic or Sport Participant" Exclusion in the Policy bar coverage for the claims asserted

against Three Blind Mice in the Frost Lawsuit and that Colony did not act in bad faith by denying coverage for such claims.

In the alternative, if this Court determines that coverage should have been afforded under the Colony Policy for the claims against Three Blind Mice in the Frost Lawsuit, Colony requests that this Court find that there is no evidence to support the Circuit Court's holding that Colony acted in bad faith in this matter, and reduce the award of damages in favor of Three Blind Mice in this action to the breach of contract damages of $64,232.65—including the settlement paid by Three Blind Mice in the Frost Lawsuit ($10,000.00), defense costs incurred by Three Blind Mice in the Frost Lawsuit ($53,675.95), and the costs in this action ($556.70).

Further, in the alternative, if this Court determines that coverage should be afforded under the Colony Policy for the claims in the Frost Lawsuit and that Colony acted in bad faith in denying coverage for such claims, Colony requests that this Court reduce the amount of attorneys' fees awarded to Three Blind Mice for attorneys' fees incurred in the present coverage action to one-third (1/3) of the judgment entered against Colony in relation to its alleged breach of contract pursuant to South Carolina Code § 38-59-40, such that the total judgment against Colony in this matter would be $85,457.97—including the settlement paid by Three Blind Mice in the Frost Lawsuit ($10,000.00), defense costs incurred by Three Blind Mice in the Frost Lawsuit ($53,675.95), the costs in this action ($556.70), and the attorneys' fees incurred by Three Blind Mice in this coverage action reduced by the statutory cap under South Carolina law ($21,225.32).

Respectfully submitted,



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November 4, 2016

## CERTIFICATE OF COMPLIANCE

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

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November 4, 2016.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

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SC Court of Appeals

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Case No. 2014-CP-23-03422

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

v.

Colony Insurance Company ..... Appellant

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**PROOF OF SERVICE**

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I certify that on the 11 day of November, 2016, I served a copy of the Appellant's Final Reply Brief on all parties to the appeal in this action by hand-delivering a copy of the same on the following counsel of record:

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November 11, 2016.