THE STATE OF SOUTH CAROLINA
In The Court of Appeals

22879

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

Case No. 2016-000963

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

v.

Colony Insurance Company,..... Appellant.

Amicus Curiae Brief of Property Casualty Insurers Association of America

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Introduction

Pursuant to Rule 213 of the South Carolina Appellate Court Rules, the Property Casualty Insurers Association of America ("the Association") submits this brief in support of Colony Insurance Company's ("Colony") request that this court reverse the circuit court's granting of summary judgment in favor of Three Blind Mice, LLC. The Association has filed a motion for leave to file an *amicus curiae* brief contemporaneously with this brief. This court should reverse the circuit court's decision because Colony had a reasonable ground for denying Three Blind Mice's requests for a defense and indemnity and the circuit court erred in interpreting the policy exclusions at issue in this litigation.

Statement of Interest

The Association is a trade association for the property casualty industry and represents nearly 1,000 member companies. The Association's purpose is to advocate for its members' public policy positions in all fifty states and to keep its members current on the information that is critical to their businesses. The Association's members write $202 billion in annual premiums, which accounts for thirty-five percent of the nation's property casualty insurance. The Association has substantial experience with the issues presented in this appeal, and its members have issued policies with the same language contained in the policy at issue in this case. Given the Association's familiarity and experience with advocating for similar issues throughout the country, it possesses unique insight and familiarity with the circumstances and background of the issues in this case. As a result, the Association respectfully submits that this experience and insight would assist this court in reaching the correct resolution on the issues presented in this litigation.

Law and Analysis

Insurance policies are contracts and must 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). Therefore, insurance policies—like all contracts—must be interpreted according to their plain meaning. *Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co.*, 410 S.C. 175, 183, 763 S.E.2d 598, 602 (Ct. App. 2014). In determining whether coverage is afforded under an insurance policy, a court must compare the allegations in the complaint with the language of the policy. *Shelby Mut. Ins. Co. v. Askins*, 307 S.C. 81, 88, 41 S.E.2d 855, 859 (Ct. App. 1992). If the facts alleged in the complaint fall within the coverage provisions of the policy, the insurer must provide a defense to its insured and indemnify the insured for any settlement or loss. *Id.* If the language of a policy is ambiguous, a court must construe the policy in favor of coverage. *Precision Walls*, 410 S.C. at 183, 763 S.E.2d at 602. However, if the intention of the parties is clear, a court may not torture the meaning of the policy language to extend or exclude coverage. *Id.* Similarly, exclusions must be construed narrowly in favor of coverage, but "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. Enters., Inc. v. First Fin. Ins. Co.*, 334 S.C. 529, 535, 514 S.E.2d 327, 330 (1999).

When a policy specifically defines a term as it is used in the policy, a court must apply the specified definition to that term. *See Canal Ins. Co. v. Nat'l House Movers, LLC*, 414 S.C. 255, 262, 777 S.E.2d 418, 422 (Ct. App. 2015) (looking to extrinsic evidence to define a term in an insurance contract only because the contract did not define the term at issue); *see also Spartan Iron & Metal Corp. v. Liberty Ins. Corp.*, 6 F. App'x 176, 178 (4th Cir. 2001) (applying South Carolina law and holding, "To adopt a common law definition here where the policies provide a

contractual definition would be at odds with South Carolina law"). A court may not look to extrinsic evidence to interpret the unambiguous provisions of a policy. *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 320, 751 S.E.2d 256, 261 (2013). If a term is not defined in the policy, the court must define the term according to the usual understanding of the term's significance to an ordinary person. *See Canal Ins.*, 414 S.C. at 262, 777 S.E.2d at 422; *Spartan Iron*, 6 F. App'x at 178.

In reviewing summary judgment, an appellate court must apply the same standard as the circuit court under Rule 56(c) of the South Carolina Rules of Civil Procedure. *Pres. Capital*, 406 S.C. at 315, 751 S.E.2d at 259. Pursuant to Rule 56(c), a court shall 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." Rule 56(c), SCRCP. "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). Moreover, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

I. The circuit court erred in finding Colony acted in bad faith in denying that the underlying plaintiff's injuries were covered by the insurance policy

The circuit court erred in finding Colony liable for bad faith as a matter of law. Under South Carolina law, a party seeking damages for bad-faith refusal to pay insurance benefits must establish four elements: (1) the existence of a mutually-binding contract of insurance between the insurer and the insured; (2) a refusal by the insurer to pay benefits due under the contract; (3) the refusal resulted from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing; and (4) the insured suffered damages. *BMW of N. Am.,*

LLC v. Complete Auto Recon Servs., Inc., 399 S.C. 444, 453, 731 S.E.2d 902, 907 (Ct. App. 2012). An insurer acts in bad faith in denying a claim "when there is no reasonable basis to support the insurer's decision." *Id.*; *see also Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004). However, South Carolina law provides an insurer is not liable for bad faith if it has a "reasonable ground" for contesting a claim. *Complete Auto*, 399 S.C. at 453, 731 S.E.2d at 907; *Helena Chem.*, 357 S.C. at 645, 594 S.E.2d at 462. Whether an insurer denied a claim in bad faith must be judged by the evidence before the insurer 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).

The circuit court erred in granting summary judgment in favor of Three Blind Mice. First, as explained below in Part II, the injury to the plaintiff in the underlying litigation is clearly and unambiguously excluded from coverage based on the plain language of the "Assault, Battery or Assault and Battery Exclusion" ("the Assault and Battery exclusion") and the "Athletic or Sport Participants Exclusion" ("the Athletic exclusion"). Where there is no coverage, an insurer cannot be liable for bad faith. *Complete Auto*, 399 S.C. at 453, 731 S.E.2d at 907 (providing a party asserting a bad-faith claim must show "a refusal by the insurer to pay benefits *due under the contract*" (emphasis added)). Therefore, the circuit court erred in finding Colony liable for bad faith as a matter of law.

Second, the circuit court's bad-faith holding turns South Carolina law on its head. The language of the Assault and Battery exclusion and the Athletic exclusion is clear, or at worst, ambiguous. The requirements for a finding of bad faith are not simply a denial of coverage followed by a judicial finding of coverage, as the circuit court found in this case. Rather, the requirements for a finding of bad faith include a finding that the insurer had no reasonable basis

for denying coverage. *Complete Auto*, 399 S.C. at 453, 731 S.E.2d at 907. Thus, the fact that a court ultimately construes a policy against an insurer or finds coverage existed does not transform the insurer's denial of coverage into bad faith.

Three Blind Mice's summary judgment argument and the court's analysis demonstrates Colony had a reasonable basis to deny coverage. The court engaged in a lengthy, multi-step analysis interpreting the terms of the Assault and Battery exclusion and the policy as a whole before finding a contradiction in the policy that rendered the exclusion ambiguous. (R. 5-8). Three Blind Mice argued in its memorandum in support of summary judgment that the Athletic exclusion was "ambiguous as to whether it applies only to an athletic injury or damage [to] the athletic participant or more broadly to any bystander who might be injured by one participating in the sports event." (R. 84). Consequently, Three Blind Mice encouraged the circuit court to adopt "the narrower interpretation of the exclusion language." (R. 84). The court agreed with Three Blind Mice and construed the policy against Colony and in favor of coverage. (R. 8).

Moreover, Merriam-Webster's dictionary defines "ambiguous" as "capable of being understood in two or more possible senses or ways." *Ambiguous*, MERRIAM-WEBSTER.COM (2017), *available at* https://www.merriam-webster.com/dictionary/ambiguous. Thus, *by definition*, the meaning of an ambiguous term in a contract is debatable. Accordingly, Colony had a reasonable basis to deny coverage: it reasonably interpreted the policy to exclude coverage for the underlying plaintiff's injury. The circuit court therefore erred in finding Colony had no reasonable basis to deny coverage.

The circuit court essentially applied a strict liability standard—if an insurer denies coverage and coverage is later found by a court to exist, the insurer is liable for bad faith. Should this court affirm the circuit court's finding, it would create a rule that an insurer may deny coverage

only if the policy clearly and unambiguously excludes coverage. The effect of that ruling would be that where coverage is debatable, an insurer must conclude its own policy is ambiguous, construe the policy against itself, and provide a defense and coverage or it will be subject to liability for bad faith. Such a rule has no basis in South Carolina law. South Carolina precedent does not require an insurer to construe a policy term against itself; the analysis of a disputed policy term is left to the courts. *See, e.g.*, *Precision Walls*, 410 S.C. at 183, 763 S.E.2d at 602. Therefore, the circuit court erred in finding Colony had no reasonable basis to contest coverage and Three Blind Mice was entitled to judgment as a matter of law on its bad faith claim.

II. The circuit court erred in its interpretation of the policy exclusions

The circuit court also erred in finding the Assault and Battery and Athletic exclusions do not apply to the underlying plaintiff's injury. Courts must interpret the terms of an insurance policy according to their plain meaning and may not "torture the meaning of policy language to extend or defeat coverage that was never intended by the parties." *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 369 (1994). Thus, although courts must construe ambiguous terms in an insurance policy liberally in favor of the insured and strictly against the insurer, where there is no ambiguity, "contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense." *Precision Walls, Inc.*, 410 S.C. at 183, 763 S.E.2d at 602. A court also must apply terms as they are defined in the policy. *See Canal Ins.*, 414 S.C. at 262, 777 S.E.2d at 422; *Spartan Iron*, 6 F. App'x at 178.

Standard commercial general liability insurance policies grant the insured "broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions." *Precision Walls*, 410 S.C. at 180, 763 S.E.2d at 600. Those exclusions must be

independently read and applied. *Id.* Although exclusions in an insurance policy are construed narrowly against the insurer, insurers have a 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. Enters.*, 334 S.C. at 535-36, 514 S.E.2d at 330.

The Assault and Battery exclusion provides that the policy does not cover bodily injury arising out of or resulting from the following events:

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

(R. 203). The exclusion defines "Battery" as "an act which brings about harmful or offensive contact to another or anything connected to another." (R. 203).

The circuit court found that because the word "act" as it is used in the definition of "Battery" is not defined, the entire Assault and Battery exclusion was ambiguous. (R. 6-7). The circuit court then used extrinsic evidence—the common law tort definition of "battery"—to circumvent the policy's definition and define "battery" as including only intentional acts. (R. 7). The court noted in its analysis that it could not rewrite the policy to define a battery as an "intentional or unintentional act," rather than simply "an act" without limiting language. (R. 8-9). However, in the same sentence, the court rewrote the contract to define battery as only "an intentional act." (R. 8-9). The court need not add any language to the exclusion to determine its meaning. The exclusion does not include language limiting its application to only intentional or

only unintentional acts. (R. 203). The exclusion clearly and unambiguously applies to *any* act that brings about a harmful or offensive contact, regardless of a person's intent. The circuit court therefore exceeded its authority under South Carolina law by using extrinsic evidence to alter the definition included in the insurance policy and extend coverage not intended by the parties. *See Precision Walls*, 410 S.C. at 183-84, 763 S.E.2d at 602 (providing in cases where there is no ambiguity, insurance contracts "must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense," and a court "cannot torture the meaning of policy language to extend coverage not intended by the parties").

Moreover, the circuit court erred in finding the Assault and Battery exclusion would exclude from coverage "any accidental injuries" including, for example, an injury suffered by a person when he tripped over a chair leg. *See* (R. 8). Contrary to the circuit court's finding, the Assault and Battery exclusion by its plain definition does not exclude all accidental injuries. *See* (R. 8). Rather, it excludes only a person's "harmful or offensive contact" with another person, with no requirement that the contact be intentional. (R. 203). As our supreme court has explained, insurers have a 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. Enters.*, 334 S.C. at 535-36, 514 S.E.2d at 330. Colony generally provided insurance coverage to Three Blind Mice for accidental injuries but chose to limit its liability by excluding a battery—as that term is defined in the policy—from coverage, as it is permitted to do under South Carolina law. No South Carolina precedent supports the circuit court's analysis that the exclusion is a "contradiction" to the rest of the policy, and the court cited no authority in support of that analysis. Further, the enforcement of the Assault and Battery exclusion comports with the public policy of allowing parties to freely

enter into contracts and allowing insurers to impose conditions on what they sell to an insured. *See id.*

In a similar fashion, the circuit court wrote additional words into the Athletic exclusion. The exclusion provides, "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. 205) (emphasis added). Contrary to the circuit court's analysis, Colony did not advocate for the "insertion of words or phrase[s] which would expand the exclusion" to include bystanders injured by participants in a game. (R. 8). Colony sought only an application of the plain language of the exclusion and a finding that the policy does not cover any injury arising out of any person's participation in a game. (R. 123-24). Rather than applying the plain meaning, the court effectively added language to the exclusion that rendered it applicable only to injuries *suffered by* people participating in an athletic event, rather than injuries *caused by* people participating in an athletic event. (R. 8). Thus, the circuit court erred in failing to interpret the policy according to its plain meaning.

Conclusion

This court should reverse the circuit court's bad-faith ruling and hold that an insurer cannot be held liable for bad faith solely because it interpreted the debatable terms of a policy to exclude coverage and a court later interpreted the policy to afford coverage. This court should also reverse the circuit court's finding that Colony breached the terms of the policy and reaffirm the well-established law in South Carolina that a court must construe an insurance policy in accordance with its plain meaning.

(signature on following page)

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Property Casualty Insurers Association of America do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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