

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Hon. Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2018-000375

Kenneth A. Davis As Personal Representative
Of The Estate of Kenneth Miles Davis

Respondent

v.

Cole Austin Dunn and John Richard Smith

Appellants

RECEIVED

JUN 21 2018

SC Court of Appeals

INITIAL BRIEF OF APPELLANTS

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PCIC/SCFB, via Claims Representative Rick Lamar, responded by letter dated January 31, 2017, stating that it accepted the (Tyger River) demand and would pay the policy limits for a Covenant Not to Execute and would have local counsel Dwight Hudson's draft a Covenant to protect its insureds. **(Carrier Acceptance of Tyger River Demand Letter)**

Plaintiff's counsel Taylor Powell then began pushing for a quick approval. To achieve this, he emailed attorney Mary Anne Graham at Hudson's office, saying that he would prepare the Petition and Proposed Order and forward them the next week, and for Hudson's office to prepare a Covenant as to Charlotte Smith and Cole Dunn "that carves out the ability for me to pursue any other liability coverage, should I find it." Powell said that he could get a fast hearing because he "clerked for Judge Hyman." **(Emails)** Attorney Hudson's office was still dealing with a backlog of work that began because Mr. Hudson was, understandably, out of the office and dealing with grief for several months after his youngest son's death.. Because of the backlog, this being a Tyger River settlement, Powell being a fellow officer of the Court obligated to act fairly and in good faith, Hudson's office accommodated Powell's urgency for a quick approval by accepting the offer for him to prepare the pleadings and obtain the "quick hearing" he promised that he could get based on having worked for Judge Hyman.

Powell then prepared the Petition and Order and Graham, based on those documents and information supplied by the carrier, prepared the Covenant. After emails back and forth as to changes, a hearing was scheduled. **(Emails)**

That approval hearing was held and an Order was signed by Judge Hyman on March 15, 2017. **(Approval Order)** The named Defendants in the Petition and Order drafted by Plaintiff's counsel were minor Cole Dunn, and his mother, Charlotte Smith. The Order provides that the carrier, its named insured AND the defendants will be given a Covenant Not To Execute,

inclusive of a Policy Release that will "fully and completely" Release the referenced policy from "all claims" arising out of or connected with the death of the decedent, "including claims for wrongful death, conscious pain and suffering, medical expenses and any and all other claims which in any wise relate to the aforesaid accident." The Order further provides that the PR could file a lawsuit but that the carrier would have no obligation to answer or defend the suit, as the carrier would have protected "its insured(s)" with a Covenant. **(Order, p. 2-3)**

After providing that the Court was "mindful" that all available coverage from "the carrier and the policy" was being paid through this settlement, the Court approved the same. **(Order, p. 2-3)** The Court held that the settlement would be full and complete as to the subject policy and that the carrier and its insured would be given a Covenant that also released the policy. **(Order, p. 3)** It only allowed the PR to pursue and collect on any additional liability policies. The Order provided that upon payment by the carrier on behalf of "its named insured and the Defendants" that the PR was authorized to execute and deliver a Covenant Not to Execute, as to the effect of which, the Court Ordered as follows:

"...such Covenant Not to Execute, when so executed and delivered, shall be valid and effectual forever as to South Carolina Farm Bureau Mutual Insurance Company, its stated policy and its named insured and the Defendants - subject to the terms of this Order preserving the Plaintiffs rights to pursue any other available coverage or source of payment." **(Order p. 3)**

The Order then states that the carrier does not have to trace the funds and the settlement is "full, final and complete" as to the carrier "which has no obligation as to any subsequent litigation filed by the petitioner as the carrier's named insured and the Defendants will be protected by the Covenant Not to Execute approved herein." **(Order, p. 3-4)** This language controls the meaning of the Covenant and is an Order of the Court that the Covenant will be

or any action involving Dunn's stepfather, Mr. Smith, who was not Dunn's natural or legal guardian, and did not own the shotgun on the date of the fatal accidental discharge. Mr. Smith was not mentioned in the settlement demand by name, though the demand was made pursuant to Tyger River and the demand letter stated it was made to resolve the claim within policy limits so that the carrier could protect "their insureds and themselves by settling this case." (**Tyger River Demand Letter**) Approval pleadings do not generally name every member of a household. Mr. Smith was not named as a party in the Petition and Order drafted by the Plaintiff's counsel, but this was not unusual, given Mr. Smith's lack of involvement, and he was protected by the Covenant, and, particularly, by the explicit terms of this Court's Order.

After service of this action and notification to the carrier, the undersigned contacted Attorney Powell, asking for an explanation of this filing and seeking to confirm that he had, in fact, located other coverage. Attorney Powell sent a letter of June 7, 2017, admitting that his actions throughout this process were part of a scheme to attempt to extort or coerce the carrier to pay the policy limits a second time. (**Powell letter of 6.07.17**) This letter is an admission of bad faith throughout the process and of a violation of Rule 11 by Attorney Powell's signature of the Summons and Complaint in this action. The letter also demonstrates either Attorney Powell's misunderstanding or disregard of the subject insurance policy and of the Tyger River doctrine generally.

In response to Attorney Powell's letter of June 7, 2017, the undersigned replied in a letter of June 8, 2017, written for the purpose of explaining why Attorney Powell should properly advise his client and dismiss this action. In that reply letter, the undersigned explained how the underlying settlement, from the demand letter through the approval hearing, Order and signature of the Covenant, applied to and was intended to apply to the Smith Dunn household, and to all

insureds and named insureds under the subject Policy. (**Hudson Letter of 6.08.17**) It pointed out Plaintiff's bad faith, Rule 11 violations, and explained that Mr. Smith was an insured under the policy, and was covered for other reasons, including the fact that he is and was an heir or successor of Charlotte Smith. Further, to illustrate and document the fact that Mr. Smith was protected by the policy, was a named insured and was intended to be protected by the Court Order and the Covenant, counsel enclosed a copy of the Policy, inclusive of the following definition:

In this policy, "you" and "your" refer to the "**named insured**" shown in the Declarations and the spouse if a resident of the same household. (**SCFB/PCIC Policy, p. 1**)

Plaintiff's counsel responded by letter of June 13, 2017, focusing on the policy/definition issue, and claiming that either the above language did not define a resident spouse as a named insured or that the policy was ambiguous. (Ex. p. 129) In this letter, counsel exposes the ultimate goal of his scheme by discussing alleged bad faith by the carrier and his intention to seek an assignment of that bad faith claim. Further, the letter notes Farm Bureau's obligation to protect all of its insureds - which is exactly what the carrier did and intended to do by accepting Powell's original Tyger River Demand which the demand letter says was made to afford Farm Bureau Insurance Company the opportunity to protect their **insureds** (emphasis added) and themselves by settling this case." (**Tyger River Demand Letter**) Under the policy, Smith is plainly one of the insureds that the Tyger River Demand purported to protect. (**Policy, policy definitions**)

The exchange between counsel documents that the original Tyger River Demand was made in bad faith, did not deal fairly, and either ignored, disregarded or deliberately used the Tyger River doctrine as the basis for a scheme to defraud the carrier. The carrier was bound by

this Court's prior decisions to accept the original Tyger River Demand, putting its insureds interests ahead of the carrier's own interests. This case is about whether the Tyger River doctrine also binds Plaintiff's attorneys who invoke it by imposing a duty that they act fairly and deal in good faith with a carrier that accepts and meets their Tyger River demand. If the doctrine does not impose a mutual duty of good faith and fair dealing, then how can a carrier ever accept and meet a Tyger River demand? The lower Court sanctioned Plaintiff's scheme and if this Court does the same, then it creates a situation where, due to the possibility of multiple Tyger River demands, the company's interests in trying a case to a single verdict would outweigh those of its insureds who would benefit by one - or multiple - payment of policy limits. If this case stands, then the Tyger River Doctrine cannot.

III. STATEMENT OF THE CASE:

The instant case was initiated on May 9, 2017 with the Respondent/Plaintiff's filing of a Summons and Complaint for Wrongful Death alleging negligence by Dunn and negligent entrustment and negligent supervision by Dunn's stepfather, Smith arising from the accidental discharge or firing of a hunting shotgun by Dunn which caused decedent's death on October 9, 2016. **(Complaint)**

On June 23, 2017, Respondents filed an Answer and Counterclaim, which first alleged a Rule 12(b)(6) motion, and which then pled the defenses of Open & Obvious Danger, Comparative Negligence, Assumption of the Risk/Sole Negligence, Accord and Satisfaction/ Release/ Settlement/ Payment/ Waiver/ Joint Tortfeasors/ Reformation of Agreement, Setoff, Tyger River, Bad Faith, Unclean Hands, Lack of Standing, Equitable Powers of the Court, Res Judicata - claim preclusion, Collateral Estoppel - issue preclusion - or Estoppel by Judgment, Public Policy, Equitable Estoppel, Reservation of Right to Amend, Unconstitutionality of

Punitive damages. Also pled were the following Counterclaims: Breach of Contract, Breach of Contract Accompanied by Fraudulent Acts, Breach of the Covenants of Good Faith and Fair Dealing, Rule 11 Violations and Motions to Dismiss/Strike. **(Answer & Counterclaim)**

On July 24, 2017, Respondent filed a Motion to Dismiss, asking for the dismissal of Appellants' Counterclaims. **(Motion to Dismiss)** And on July 28, 2017 Appellants filed a Motion to Dismiss and/or to Reform, seeking dismissal of or Summary Judgment as to the Plaintiff's Complaint or reformation of the Covenant, all based on the grounds sated in Appellant/Defendants' Answer & Counterclaim, and in the Memorandum filed with the Motion. Specifically, the Appellants/ Motion and Memorandum sought Summary Judgment on the following grounds:

The pending Complaint fails to state grounds for which relief can be granted pursuant to Rule 12(b)(6), SCRCF and/or are Defendants entitled to Summary Judgment on the following grounds:

1. Acting in good faith pursuant to a Tyger River demand by the Plaintiff, and pursuant to and within the terms of the governing Order of this Court approving this settlement, Defendants' carrier paid all available coverage and obtained a Covenant Not To Execute. Therefore, this Court should hold that Defendants and all insureds are relieved of all personal liability and this action should be dismissed; and
2. Defendant Cole Dunn should be dismissed from this case on the grounds that there is no justiciable controversy as to Defendant Dunn who is a sham party and under Rule 12(b)(6), and Defendant Dunn is entitled to be and should be dismissed; and
3. The Covenant and Order released all members of the Smith Household and were intended to do so, but to any extent the Court finds otherwise, the Covenant should be reformed the Covenant to explicitly release and relieve all members of the household, including John Richard Smith;
4. Plaintiff and his counsel acted in bad faith from the beginning of the settlement negotiations through the filing of this Summons and Complaint and to the present time. After making a Tyger River demand and urging the carrier to act to protect its insureds, and after seeking and obtaining this Court's Order approving the settlement made pursuant to that demand, Plaintiff's counsel knew, or should have known, to the best of his knowledge, information and belief, that there was not good grounds to support the present action within the meaning of Rule 11, SCRCF, and therefore Defendants are entitled to an Order of this Court

against counsel awarding sanctions, including attorney's fees, costs, and the dismissal of this action.

(Motion to Dismiss or Reform, Answer & Counterclaim, Memorandum Supporting Motion to Dismiss) On September 7, 2017, Respondent/Plaintiff filed a Memorandum Opposing Defendants/Respondents' Motion to Dismiss. **(Memo In Opposition)** The Court heard the Motions on September 12, 2017. The Court issued a Form 4 Order on September 13, 2017 stating that the Plaintiff's Motion to Dismiss Defendant's Motion for Summary Judgment was granted and that the Defendants' Motion to Dismiss and For Summary Judgment is denied. The Form 4 Order indicated that a formal Order would follow. **(Form 4 Order)** The referenced formal Order was filed on April 9, 2018.

The Appellants served the present Notice of Appeal by US Mail on April 19, 2018 and it was filed by this Court on April 20, 2018.

IV. ARGUMENT:

1. THE ORDER FOUND THE FACTS INCORRECTLY, FAILED TO APPLY THE SUMMARY JUDGMENT STANDARD PROPERLY & ERRONEOUSLY DENIED APPELLANTS' MOTION FOR SUMMARY JUDGMENT & GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT :

The lower court's Order, the comments made at the motion hearing, and the demeanor of the presiding Judge showed the Judge's prejudicial favoritism for his former law clerk. **(See: Transcript)**. The Order found all facts as claimed by the Plaintiff, found none as claimed by the Defendants, and failed to find that disputed facts exist, even though that was plainly the case. In so doing, the lower Court found the facts incorrectly, failed to apply the Summary Judgment Standard properly and erroneously denied Appellants' Motion for Summary Judgment and granted Respondent's Motion.

The standard for Summary Judgment and its review is as follows:

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Young v. South Carolina [***4] Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRPC. See also Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998) (trial court should grant motion for summary judgment when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgment as matter of law). In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998) ; Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997) . If triable issues exist, those issues must go to the jury. [**305] Rothrock v. Copeland, 305 S.C. 402, 409 S.E.2d 366 (1991) ; Young, supra.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997); Moriarty [***5] v. Garden Sanctuary Church of God, 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Young, supra; Truck South, Inc. v. Patel, 332 S.C. 222, 503 S.E.2d 774 (Ct. App. 1998). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Young, supra; Moriarty, supra. However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Young, supra; Pye, supra.

Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 304-305, 1999 S.C. App. LEXIS 94, *3-5, CCH Prod. Liab. Rep. P15,611

In the present case, the Order finds as fact the account of the shooting advanced by the Respondent/Plaintiff, citing as authority allegations from the Complaint, even though that account was not pled in those allegations and is corrected, denied and disputed by the Appellants' Answer. (See: **Order, p. 2; Complaint, #5, #7-12; Answer & Counterclaims, #6-8, p. 3**) The Order claims to quote the decedent and Appellant Dunn, citing as authority allegations from the Complaint. Those allegations do not contain the quotes found by the Court as fact, and the

of his youngest son's death; (3) This was a Tyger River settlement; and (4) Based on all of the foregoing, Appellants' counsel extended the professional courtesy to grant the request of Respondent's counsel that he draft the pleadings with the intent of concluding the Tyger River settlement quickly. **(See: Exhibits to both parties' Memoranda, Exhibits to Answer & Counterclaim)**

The Order includes a brief reference to the approval proceedings and pleadings, and finds that the Covenant signed included the provision that it did not constitute a release. **(See; Order, p. 3)**. This is, of course, a standard provision in a Covenant since a Covenant is signed rather than a Release to allow claimants to file suit to recover from other policies or sources without running afoul of later defenses claiming an earlier Release ended the action. The present Order also did not include a finding that the Approval Order specifically provided that SCFB would be released and that it would have no obligation to answer or defend a second lawsuit as it would have protected its insured(s) interests with this settlement. **(See: Order p. 7-8; Approval Order p. 2-4; Answer & Counterclaims and Memoranda)** Respondent's counsel not only filed a second lawsuit, it sent a demand letter to SCFB referencing an intent to seek a bad faith assignment from Smith. **(See: Powell Letter of June 13, 2017)**. The present Order conflicts with the Court's ruling in the approval Order by holding that despite the Court's Approval Order relieving SCFB of any duty to Answer or defend a second lawsuit, that SCFB had a duty to Answer and defend this second lawsuit. **(See: Approval Order p. 2-4; Order p. 7-8)**

All of the findings noted as not found by the Court's Order were presented to the Court via either argument, pleadings, memoranda and/or exhibits to the same and all of the facts noted as not found by the Order were material. **(See; Transcript, Answer & Counterclaims, Memorandum Supporting Motion To Dismiss)**. The existence of these material facts,

appearing in the record before the Court, mandated denial of Respondent's Motion for Summary Judgment. Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct. App. 1998); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999); Rule 56(c), SCRPC. The Trial Court also had a duty to view all inferences to be drawn from the facts, including disputed facts, in favor of Appellants as to Respondent's Motion. The failure of the Trial Court to fully and properly find the facts and to correctly apply the Summary Judgment standard, along with the Trial Court's erroneous findings as to Appellants' Summary Judgment Motion (which are inextricably linked and will be discussed below) constituted clear error mandating a reversal of the grant of Summary Judgment to the Respondents.

2. ***THE ORDER EITHER ERRS IN MISAPPLYING SC LAW OR IT REWRITES THE TYGER RIVER DOCTRINE AND IT REWRITES EVERY INSURANCE POLICY ISSUED IN THIS STATE***

The Order states and holds as follows:

Defendants argue that the Tyger River doctrine recognizes that an insurer has one contract and one group of insureds protected by that contract to whom a carrier owes a duty, and that it does not hold that an insurer owes a severable duty to individual insureds and a separate policy limit to each. This argument by Defendants is not supported by South Carolina law

(Order p. 7)

The Respondent/Plaintiff's counsel made a Tyger River demand for settlement that specifically cited Tyger River v. Maryland Casualty Company, 170 SC 286, 170 SE 346 (1933), and its progeny. **(See: Tyger River Demand Letter)** He listed the names of two of the household members in the letter - Dunn, the 17-year-old high school senior who owned the shotgun and had it in his possession at the time that it accidentally discharged, and Dunn's mother, Charlotte Smith who was Dunn's natural and legal guardian. It did not individually list

the names of every member of the Smith/Dunn household, but it concluded by stating that the Tyger River demand afforded SCFB the opportunity to protect "their insureds and themselves." (See: **Tyger River Demand Letter**). SCFB reviewed the demand, considered that the facts involved the tragic death of a 17-year-old young man and as per **Tyger River**, it concluded that paying the coverage was the reasonable thing to do and that it should put the interests of its insureds ahead of its own and meet the demand. SCFB sent a letter back accepting the **Tyger River Demand**. (See: **Tyger River Acceptance Letter from SCFB**)

"There is no duty to settle every claim within policy limits. The seminal case on bad faith in South Carolina is *Tyger River Pine Co. v. Maryland Casualty Co.*" ***Bad Faith Insurance Litigation In The South Carolina Practice Manual***, 13 South Carolina Lawyer 18, July/August 2001. **Tyger River** and its progeny hold that an insurer owes its insureds the duty to compromise a claim within policy limits if settling is the reasonable thing to do. Otherwise, an insurer lacks a financial incentive to pay a reasonable settlement demand near the policy limits because it could try the case and gamble on a lower verdict or a defense verdict. At that point, only the insureds are at risk because only they are exposed to any verdict beyond policy limits.

The foundation of the Tyger River doctrine is the insurance contract. Every contract carries an implied covenant of good faith and fair dealing. Tharpe v. G.E. Moore Co., 254 S.C. 196, 174 S.E.2d 397 (1970) A third party plaintiff has no privity with the insurer so the insurer owes no duty of good faith and fair dealing to a stranger to the contract, and owes no third party a duty to reasonably settle a claim. Carter v. American Mut. Fire Ins. Co., 279 S.C. 367, 307 S.E.2d 225 (1983) For Tyger River liability to attach, there must be two elements in addition to an excess verdict: (1) An insurer must have had an opportunity to settle the case against the insured for an amount within policy limits; and (2) The insurer must have acted unreasonably or

in bad faith in failing to settle. *Bad Faith Insurance Litigation In The South Carolina Practice Manual*, 13 South Carolina Lawyer 18, July/August 2001

Because *Tyger River* litigation is conducted after the jury verdict, the evidence must show that the plaintiff would have settled within the policy limits. This is a relatively easy requirement and is typically established by showing that counsel for the plaintiff offered in writing to settle the case within the policy limits. This offer is what is normally thought of as a *Tyger River letter*. A *Tyger River letter* should clearly explain that the plaintiff is willing to settle the claim against the insured within the policy limits and not seek to obtain, levy, or execute on any excess judgment. A *Tyger River letter* should set a deadline within which the settlement is to be accomplished. It should explain that in the event the insurer refuses to meet the deadline and settle within the policy limits, the plaintiff will thereafter not settle, will proceed to verdict and will seek to levy and execute on any excess judgment obtained

Bad Faith Insurance Litigation In The South Carolina Practice Manual, 13 South Carolina Lawyer 18, July/August 2001

The Tyger River doctrine is based on the policy limits. Although the doctrine is from 1933, the South Carolina Supreme Court has reaffirmed that by saying:

In *Tyger River*, we held an insurer's unreasonable refusal to settle within policy limits subjects the insurer to liability. The application of the Tyger River Doctrine to an insurer's handling of a claim for first-party benefits was a natural extension of the policy behind the doctrine. Additionally, the federal courts had predicted the results of *Nichols* since 1979. See *Robertson v. State Farm Mutual Automobile Ins. Co.*, 464 F. Supp. 876 (D.S.C. 1979); see also *Trimper v. Nationwide Ins. Co.*, 540 F. Supp. 1188 (D.S.C. 1982).

Charleston County Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 8, 437 S.E.2d 6, 10 (1993)

And the Tyger River doctrine is based on the contract. Under Tyger River, the insurance company owes a duty of good faith to defend and indemnify within policy limits. **Tyger River Pine Co. v. Maryland Casualty Co.**, 170 S.C. 286, 170 S.E. 346, 348 (1933) (cause of action recognized for bad faith failure to pay benefits to the insured). Only a policy holder may bring a cause of action for bad faith refusal to pay benefits under an insurance policy. See *Kleckley v.*

Northwestern Nat'l Cas. Co., 338 S.C. 131, 134, 526 S.E.2d 218, 219 (2000) ("A tort action for an insurer's bad faith refusal to pay benefits does not extend to third parties who are not named insureds."); Cock-n-Bull Steak House, Inc. v. General Ins. Co., 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996) ("The elements of an action for bad faith refusal to pay benefits under an insurance contract include (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant . . ."). It follows that payment of the policy limits would similarly be governed by the terms of the contract.

The Policy provides liability coverage of \$300,000 per occurrence and medical payments coverage of \$5,000 per occurrence. (See: **Declarations Page**) As to the available policy limits, the involved PCIC policy states as follows:

SECTION II- CONDITIONS

1. Limit of Liability. Our total liability under Coverage E for all damages resulting from any one **occurrence** will not be more than the limit of liability for Coverage E as shown in the Declarations. This limit is the same regardless of the number of **insureds**, persons or organizations making claims or bringing suits, claims made or persons injured. All **bodily injury** and **property damage** resulting from any one accident or from continuous or repeated exposure to substantially the same general harmful conditions shall be considered to be the result of one **occurrence**.

Our total liability under Coverage F for all medical expense payable for bodily injury as the result of one accident will not be more than the limit of liability for Coverage F as shown in the Declarations. This limit is the same regardless of the number of insureds, persons or organizations making claims or bringing suits, claims made or persons injured.

(PCIC Policy, p. 51)

The policy defines "Occurrence" as follows:

13. "Occurrence" means an accident, a happening or event, or continuous or repeated exposure to conditions, which unexpectedly and unintentionally results in bodily injury or property damage during the policy period. All such injury or damage that is attributable directly or indirectly:

a. to one cause; or

b. to one series of similar causes; or

c. to substantially the same general conditions existing at or emanation from one premises or location shall be deemed one occurrence and shall be treated as one occurrence, irrespective of the period of time during which such injury or damage occurs on the premises or location at which such injury or damage occurs.

(PCIC Policy, p. 74-75)

The prior approval and this lawsuit are for the decedent's alleged Wrongful Death. They involve the same shotgun, the same locations and general conditions existing at or emanating from one location and are injuries or damages attributable directly or indirectly to one cause or one series of similar causes. Insurance policies are subject to the general rules of contract construction. B.L.G. Enters., Inc. v. First Fin. Ins. Co., 334 S.C. 529, 514 S.E.2d 327, 330 (S.C. 1999). "When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used." *Id.* The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.* The Trial Court's Order erred in writing a different contract of insurance rather than in enforcing the one before the Court. **(Order, p. 7)** Under the Policy, there was one coverage limit of \$305,000 available for the Wrongful Death claims arising from decedent's death and it was previously paid as part of the Tyger River settlement. **(See: Policy, Declarations, Approval Pleadings)**

The Order cites American Casualty Co. v. Howard, 187 F2d 322 (4th Cir., 1951) in support of the proposition that the duty to defend is broader than the duty to indemnify and may continue after coverage is exhausted. However, the cited decision holds that pursuant to the policy involved, the carrier was obligated to defend, particularly since the first lawsuit in that matter did not resolve the outstanding claim for property damage, which would be an indivisible

part of the verdict in the second case. *Id.* Appellants note first that it has been defending the second, groundless, lawsuit at issue in this case, but that it should not be required to do so because: (1) The approval Order contemplated that a second lawsuit would be brought (although counsel and the carrier never contemplated that it would be a second Wrongful Death action against insureds protected by the first Tyger River settlement) and that approval Order specifically provided that SCFB, having paid its coverage, would have no obligation to defend or pay in a subsequent matter. (See; **Approval Order**) and (2) The PCIC Policy involved in this case is different than the policy in American Casualty. The SCFB/PCIC policy states that its obligation to defend ends when the amount it pays for the loss equals its limits of liability. (See: **Policy, p. 83**)

American Casualty does not support the Order's holding that a carrier owes a separate policy limit to each insured. In that Wrongful Death case, the carrier declined a Tyger River demand for the policy limits, doing so after careful investigation including valuation by experienced trial counsel. When the liability verdict exceeded the policy limits, the carrier paid its policy limits and the insured paid the excess verdict. The decedent's estate filed a second lawsuit - for Survival, and amended to include unpaid property damages. The insured counterclaimed for bad faith action, seeking payment of the excess verdict. To resolve all of this, the carrier filed a DJ. The Fourth Circuit denied the Tyger River claim, finding no bad faith by the carrier in refusing the policy limits demand and trying the case. It held that the carrier was obligated to defend the second (Survival) action based on its own policy language and based on the inclusion of previously unpaid property damages. As to payment of damages for the Survival Action, the Court held that the carrier would only owe any amount awarded for property damage as that was previously unpaid. *Id.* Thus, American Casualty contradicts the

Order's finding that separate policy limits may be owed to each insured. It found that the policy limits were due once.

The Order is specific in condoning Respondent/Plaintiff's admittedly planned scheme to try to extort the policy limits twice or by creating an illusory bad faith situation. (See; Order, p. 8, Powell Letter of June 7, 2017) It finds that Respondent's counsel sent a Tyger River letter but concludes that the letter restricted the demand to payment for the policy limits on behalf of Dunn and Charlotte Smith. It does not find that the original Tyger River letter stated that the settlement would protect Farm Bureau and its insureds (plural). (See; Order, p. 8, Tyger River Demand letter)

The Court's Order ignores the troubling course of conduct of Respondent's counsel in this matter. Though it is clear that from the initial Tyger River Demand throughout the matter, Respondent and his attorney intended to file and attempt to collect at least twice from the same carrier and the same insured's for the same Wrongful Death claim, it is equally clear that this intention was never disclosed to the carrier or counsel. In fact, these intentions were deliberately hidden. The Tyger River letter does not state that a second action against another member of the household was planned. It listed as "targets" the owner of the hunting shotgun who was holding it at the time and his mother and natural guardian, Dunn and Smith. These same parties were part of the approval action and named in the Covenant. These matters do not individually list every member of a household, and in a Tyger River settlement, that is not and should not be necessary, because the basis of the doctrine, since 1933, has been that coverage limits would be paid in an appropriate case as the reasonable thing to do to protect a carriers insureds (plural, like in the Tyger River letter involved here). (See; Tyger River Letter)

During the preparation of the approval pleadings drafted by Respondent's counsel, he raised an issue at one point about language in the covenant, saying he wanted it changed to carve out the ability for him to pursue any other liability coverage, should he "find it". (See: **Email of February 9, 2017**) The statement was false, as Respondent's attorney wanted the change in wording to assist in creating a bad faith situation against the carrier and to further his aim of obtaining the present ruling that a carrier owes a separate policy limit to each insured. Other states have faced situations where attorneys were attempting to create bad faith traps for carriers.

In an extensive opinion, a Kansas Court considered a case where vehicle owner Kelly gave into an alcohol-induced tantrum by Hudgens, her boyfriend and gave him the keys, allowing him to drive her car. Hudgens collided with the Kemp vehicle, killing the Kemp daughter instantly and causing the driver/mother's death a few days later. Insurer Dairyland initially agreed to pay its 25/50 coverage to settle as to Hudgens, but refused to proceed after *opposing counsel advised of his intent to file a later negligent entrustment claim* as to the owner, Kelly. Subsequent settlement negotiations involved a range of demands, including some demands in the millions, far exceeding the minimum limits coverage. The Court concluded that Dairyland was not liable for bad faith, finding that the motive was to create a bad faith situation. It held that even if Dairyland had accepted the prior settlement offer to pay the coverage to protect Hudgens that Plaintiff Kemp would have pursued a bad faith claim against Dairyland as to the excess verdict against Kelly. Kemp v. Hudgens, 133 F. Supp 3d 1271 (2015)

The Kansas Court in Kemp cited to a decision by the 10th Circuit in another bad faith situation. In that case, the Court rejected a bad faith claim against a carrier after a motor vehicle accident, a stop light case, in which witnesses disagreed over which of the seriously injured parties had the green light. Counsel sent and withdrew a couple of policy limit demands sent

with very short triggers, and then he associated co-counsel whose primary expertise was bad faith litigation. At his deposition, trial counsel admitted that the litigation plan was to reject the settlement offer and then to negotiate directly with the opposing party/insured to get an assignment of a bad faith claim. Wade v. Emasco Ins. Co., 483 F.3d 657 (10th Cir. 2007)

In discussing such strategies to craft bad faith situations, the Wade Court said as follows:

The doctrinal impetus for insurance bad faith claims derives from the idea that the insured must be treated fairly and his legitimate interests protected. . . . In other words, the justification for bad faith jurisprudence is as a shield for insureds--not as a sword for claimants. Courts should not permit bad faith in the insurance milieu to become a game of cat-and-mouse between claimants and insurer, letting claimants induce damages that they then seek to recover, whilst relegating the insured to the sidelines as if only a mildly curious spectator.

Wade v. Emcasco Ins. Co., 483 F.3d 657, 669-670, 2007 U.S. App. LEXIS 8227, *31-32

The Wade Court concluded that in considering bad faith situation, Courts should consider any responsibility the Plaintiff might have for the insurer's lack of information. *Id*

The reverse side of the issue was considered by a Texas Court after an insurer paid all of its coverage to settle on behalf of one of its insureds, leaving, Pride, another insured, exposed. In that case, the settlement demand expressly noted that Pride was intentionally omitted from the demand. After exhausting the coverage, the carrier advised Pride that it was withdrawing its defense. The Court noted that an insurer cannot be liable for failing to settle remaining claims "unless there is evidence that either (1) [the insurer] negligently rejected a demand from the [claimant] within policy limits; or (2) the [initial settlement demand] was itself unreasonable." The Court held that the carrier acted properly. Pride Transp. v. Cont'l Cas. Co., 511 Fed. Appx. 347 (5th Cir. 2013)

It is of note that in the above decisions, the Kansas and Texas cases involved attorneys who advised carriers of their intention to pursue action against another insured. Only in the Wade case out of the 10th Circuit, was a carrier not advised of such intended litigation against an insured following a settlement. And Wade was the case where the Court held that bad faith claims were created to be a shield for insureds and not a sword for claimants. This case is similar to Wade and the Court should so hold.

3. ***THE ORDER ERRS IN HOLDING THAT THIS SECOND WRONGFUL DEATH ACTION IS NOT BARRED BY ESTOPPEL BY JUDGMENT & PUBLIC POLICY***

As to the present - SECOND - action: (a) Like the first claim, this is an action for Wrongful Death; (b) The claim in the second action is one which is based on the same factual transaction that was at issue in the first; (c) the plaintiff seeks a remedy additional or alternative to the one sought earlier; and (d) the claim is of such a nature as could have been joined in the first action.

Because of the interests of justice, society, and the Defendants, every individual is entitled to only one day in Court and the Respondent/Plaintiff has had his day. It was the Respondent who chose to make that day in Court a settlement of a matter that could have been litigated. The settlement was made pursuant to the petition drafted by Respondent, and that pleading was his opportunity to present all claims he had arising from these facts. The Respondent chose to invoke Tyger River and to demand settlement from the insured household by the carrier with a policy covering that household. The carrier accepted that demand according to its terms, and this Court issued an Order approving the settlement according to those terms. In this action, the Plaintiff seeks to change the terms.

South Carolina has held that "... the true ground upon which a former judgment, in a case like this, should be allowed to operate as a bar to a second action is not res judicata, or technical

estoppel, because the parties are not the same, and there is no such privity between them as is necessary for the application of that doctrine; but that in such cases, on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment, persons who are not, strictly speaking, either parties or privies. It is rested upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity." Jenkins, 89 S.C. at 421, 71 S.E. 1010.

In Watson, *supra*, South Carolina applied judgment by estoppel to prevent a plaintiff from bringing a second action arising out of the same fire loss against a second insurance company that was not a party to the first action, nor a privy of the first insurance company. The Court stated in Watson: "This matter having been fully and fairly adjudicated, the appellant is collaterally estopped by prior judgment from bringing this action to adjudicate the same issue, notwithstanding a lack of privity between the insurance companies." Watson, *supra*.

South Carolina gives every litigant the opportunity to try his case on the merits, but it limits him to one opportunity. In the present case, the Plaintiff sent a Tyger River demand, settled within the policy limits for the provided coverage, and agreed in exchange to dismiss the insureds (Dunn) and the named insureds (Smith and Smith). This Court heard that approval and granted the Plaintiff's request that the Wrongful Death settlement be approved. John Richard Smith was not a named party to the action, because he did not own the shotgun nor was he the parent of Dunn, but he is a named insured under the policy and the Plaintiff knew, or should have been fully advised by his attorney, that he had one opportunity to litigate this case against this household based on issues arising from Dunn's use and possession of the shotgun, or its supervision or entrustment. The Plaintiff chose to send a Tyger River demand and accept the policy limits of the Defendants' household Homeowner's policy, and to go to Court and have this

Court issue an Order approving that settlement. He had his opportunity then to decline to accept the policy, and to litigate this case to a jury verdict, and chose not to do so.

Judicial Estoppel and Public Policy preclude the Respondent/Plaintiff from using one set of facts and one policy covering one insured household to make a Tyger River demand, induce a settlement under false intentions, and then attempt to use the same set of facts and the same policy to litigate this case a second time.

4. *THE ORDER ERRS IN NOT APPLYING EQUITABLE ESTOPPEL CONSIDERING THE COURT'S PRIOR RULING AND THE COVENANT*

The Order incorrectly finds that the existence of the Covenant as a written agreement prevented the application of Equitable Estoppel. (Order, p. 10-13) Equitable Estoppel is founded on right conduct and fair dealing. As the Court stated in Kelly v. McCray, 278 S.C. 88, 292 S.E. (2d) 587 (1982), these principles "consider and weigh the conduct of men in their dealings with each other and give that effect and meaning to their actions which common sense and justice dictate." Premium Inv. Corp. v. Green, 283 S.C. 464, 473, 324 S.E.2d 72, 77 (S.C. Ct. App. Nov. 8, 1984)

The elements of an equitable estoppel are (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon such character as to change his position prejudicially. South Carolina State Highway Department v. Metts, 270 SC 73, 240 SE2d 816 (1978)

Here, the Respondent/Plaintiff made a Tyger River Demand, stating that the carrier had a duty to settle the same loss at issue in this case as to the same insured household involved in this case. The Plaintiff's demand insisted that the carrier should settle to protect its insured(s) and the carrier accepted the demand and settled. Respondent's attorney wanted a quick settlement, said

he could get one because he clerked for Judge Hyman, and offered to prepare the paperwork. He prepared settlement paperwork listing as named parties Cole Dunn, the minor who held the hunting shotgun that fired and killed the decedent, and Charlotte Smith, the parent of the minor. The approval paperwork did not name Mr. Smith, who did not own the hunting shotgun and who was not the minor's father, but the carrier and its counsel had the demand letter and the acceptance which advised that pursuant to Tyger River, the parties intended that settlement protect the policy's insured(s), which included Mr. Smith. Relying on that demand and the carrier's acceptance of it as the basis of the agreement, the carrier acted in good faith, fulfilled all of its obligations relative to the settlement and concluded the settlement. **(See: Tyger River letter, SCFB Acceptance of Tyger River Demand, Emails exchanged prior to approval, Approval Petition and Order, Covenant)**

Respondent's attorney could have prevented this claim by stating his intention to exclude Mr. Smith from the settlement. He did not do so. The carrier did not know and could not have known that the Respondent's counsel falsely invoked Tyger River, and promised that the settlement would protect the carrier's insured(s) without ever intending that it protect Cole Dunn or Mr. Smith, and then Respondent furthered this scheme by pushing for a quick hearing. The carrier and counsel trusted that the insured(s) - all of them - would be protected, based upon the terms of the Tyger River demand and the carrier's acceptance, and did not protest the omission of Mr. Smith as a named party - because all household members are not generally named, Mr. Smith didn't own the hunting shotgun, wasn't present at the time of the accidental discharge, wasn't the minor's father and would be protected as an insured, named insured, and member of the insured household. The carrier, on behalf of all of its insureds, including Cole Dunn and Mr. Smith, changed its position to accept and conclude this settlement, which it would not have done

had the Respondent and his Attorney made honest representations of their intentions, instead of falsely invoking Tyger River.

The Order and the Covenant include language that shows the parties protected include Charlotte Smith and Cole Dunn, but were not limited to those parties. The language documents that the heirs and successors of Charlotte Smith were and were intended to be protected. **(See: Covenant)** Mr. Smith, as Charlotte Smith's husband was also, according to the terms of the law, the definitions of the terms, and the intestate statutes of South Carolina, the heir and successor of Charlotte Smith. Under the terms of the policy, as also stated above and incorporated herein, Mr. Smith was also a named insured, and the Order and Covenant specifically protect the named insureds. **(See: Order, Covenant)**

The approval documents and Covenant, as is standard, left the Respondent/Plaintiff free to pursue any other coverage or potentially responsible party. For example, had there been umbrella coverage - the Respondent as free after the approval to seek it. Or, if the Plaintiff located evidence that the manufacturer of the hunting rifle failed to include important safety features - the Respondent was free to pursue the manufacturer. Had the Respondent located evidence that a third party maliciously loaded buckshot into the shotgun without advising Dunn, who thought it unloaded - the Plaintiff was free to pursue that third party.

During preparation of the Covenant, Respondent's counsel asked that language be included carving out the ability for him to pursue any other liability coverage "should he find it." **(Email of 2.09.17)** Respondent did not find any "other" liability coverage, and only ever intended to sue another insured, Mr. Smith, despite his employing the Tyger River doctrine. In that regard, the Respondent's counsel requested a change to the Covenant. **(Powell letter, June 7, 2017)** Paragraph 12 originally read as follows:

This Covenant Not To Execute is not intended to and DOES NOT diminish, impair or limit Payees' rights, if any, to recover additional funds from other insurance coverage or from any other source for the Claim.

Respondent's counsel asked that it be changed to read as follows:

This Covenant Not To Execute is not intended to and DOES NOT diminish, impair or limit Payees' rights, if any, to recover additional funds from other insurance coverage available to Cole Austin Dunn or Charlotte Smith. Further, this Covenant Not To Execute is not intended to and DOES NOT diminish Payees' ability to recover against any other potentially responsible party that is not a party to this Covenant. This Covenant Not To Execute does not constitute a release of any claim or of any party.

The language inserted into the Covenant by Respondent's counsel creates an ambiguity, particularly in light of the filing of this lawsuit. Specifically, the Covenant protects Payor Charlotte Smith's spouse, Mr. Smith, because he is one of his wife's heirs and statutory heirs, and is included and protected as a Payor because he is one of her "heirs, successors, legal representatives and assigns" and he is one of the other persons "benefitting from this Covenant" within the meaning of Paragraph 6. If Mrs. Smith is also a potentially responsible party within the meaning of the version of Paragraph 12 drafted by Respondent's counsel, then that is an ambiguity such that the contract is capable of more than one interpretation within the meaning of the case cited by the Order (Carolina Ceramics, Inc., 251 SC at 155- 156, 161 SE2d at 181).

Further, this case meets the requisite elements of Equitable Estoppel and this Court should invoke those principles to "consider and weigh the conduct of men in their dealings with each other and give that effect and meaning to their actions which common sense and justice dictate." Premium Inv. Corp. v. Green, 283 S.C. 464, 473, 324 S.E.2d 72, 77 (S.C. Ct. App. Nov. 8, 1984) In sending the original Tyger River letter, Respondent's counsel invoked the doctrine and to Farm Bureau and counsel, acting on behalf of all of the insureds, relied upon the term "Tyger River" as meaning what this Court has always said it means - that settling for policy

limits would protect all insureds. The fact that Respondent's counsel named two members of the household as those to be involved in the settlement only meant that those were the two members that Respondent's counsel considered liable for the decedent's death is why SCFB paid the policy limits; it is why Powell's request to prepare the settlement documents was granted by counsel; and it is why Powell's requested change to the Covenant was granted. All of these were changes in position by SCFB and counsel on behalf of all insureds made because Powell declared that payment of the coverage would be a Tyger River settlement. Further, allowing Powell to prepare the approval pleadings was a professional accommodation granted due to his professed rush to have the settlement completed, which speed would not have been possible given the backlog at counsel's office following Hudson's return after an extended absence due to grieving the tragic death of his youngest son. In addition, Powell's requested change to the standard Covenant was an additional accommodation, because he might have been planning to pursue another party like the gun manufacturer. Common sense and justice in this case dictate that the Respondent should be equitably estopped from bringing this action, which contradicts his representation that the prior Wrongful Death settlement was a Tyger River settlement. This case should be dismissed.

Respondent's counsel, contrary to the Order, was never once honest with Farm Bureau or opposing counsel. He could have met his duty of good faith and fair dealing by inserting language into the Tyger River demand letter stating that it was a partial demand and that he intended to file this action. Without that honest disclosure, the carrier and counsel had the right to understand that a Tyger River demand was a Tyger River demand and that a Tyger River settlement was a Tyger River settlement.

5. THE ORDER ERRS IN NOT CORRECTLY OR PROPERLY INTERPRETING AND APPLYING POLICY DEFINITIONS, THE APPROVAL ORDER AND THE COVENANT

The Order and Covenant, by their terms, protect the "named insured" but they also contain language protecting other persons. As to the "named insured" the subject policy states as follows:

In this policy, "**you**" and "**your**" refer to the "**named insured**" shown in the Declarations and the spouse if a resident of the same household. (**Policy, p. 1**)

This is a Homeowner's Policy and the liability coverage protects the family residing in the covered home. The cited provision makes the spouse of a person named in the declarations so equivalent to the named insured that the terms "you" and "your" refer to the person whose name appears on the declarations AND to their resident spouse. The only way to construe this provision is that it means that where the policy says "you," "your," or "named insured," it means the person whose name appears in the declarations and their resident spouse.

A policy definition can have the effect of making the "named insured" under a policy two people instead of one. Baxley v. State Farm Mut. Auto. Liability Ins. Co., 241 S.C. 332, 128 S.E.2d 165, 1962 S.C. LEXIS 44 (S.C. 1962)

The purpose of a policy provision, like the one in the Farm Bureau policy, is to extend the protection of a policy to a resident spouse. See:

The first ground of appeal is that the exclusionary clause applies only to an automobile furnished for the regular use of the "named insured," and "the 'named insured' were two persons under the terms of the policy and the vehicle was furnished only to one person." We do not understand that Mavis W. Fulbright was actually named as an insured in the policy issued to her husband. Instead, this ground of appeal rests upon the policy definition of "named insured" as including the spouse of the contracting party designated in the policy, if living in the same household. We think it obvious that the sole purpose of this policy provision was to extend its protection to the spouse of the person named as the insured, and not for the purpose of enlarging, limiting or modifying the contractual rights of such person in the event of a covered loss. Fulbright's spouse was not involved in an accident, and this policy definition, which was adopted to provide coverage for her in such event, is simply irrelevant to the issues arising on the claim of his administrators to indemnity for funeral expenses. For the purposes of this claim, Fulbright is the insured, and recovery is barred by the explicit terms of the

exclusionary clause. Fulbright v. Fidelity & Casualty Co., 247 S.C. 226, 146 S.E.2d 618, 1966 S.C. LEXIS 245 (S.C. 1966)

The facts, as stated above and incorporated herein by reference, show that the Approval Order and the Covenant are intended to protect the named insured. **(See: Approval Order, Covenant)** The Order finds that the only named insured under the policy is Charlotte Smith. **(See Order, p. 2, 5)** However, the Approval Order provides that the carrier, its named insured AND the defendants will be given a Covenant Not To Execute, inclusive of a Policy Release that will "fully and completely" Release the referenced policy from "all claims" arising out of or connected with the death of the decedent, "including claims for wrongful death, conscious pain and suffering, medical expenses and any and all other claims which in any wise relate to the aforesaid accident." **(See: Approval Order p. 2, 3, 4)** The Approval Order provided that upon payment by the carrier on behalf of "its named insured and the Defendants" that the PR was authorized to execute and deliver a Covenant Not to Execute, as to the effect of which, the Court Ordered as follows:

"...such Covenant Not to Execute, when so executed and delivered, shall be valid and effectual forever as to South Carolina Farm Bureau Mutual Insurance Company, its stated policy and its named insured and the Defendants - subject to the terms of this Order preserving the Plaintiff's rights to pursue any other available coverage or source of payment." **(Approval Order p. 3-4)**

The Order then states that the carrier does not have to trace the funds and the settlement is "full, final and complete" as to the carrier "which has no obligation as to any subsequent litigation filed by the petitioner as the carrier's named insured and the Defendants will be protected by the Covenant Not to Execute approved herein." **(Approval Order p. 3-4)**

If the Policy does not define Mr. Smith as a named insured, then the cited provisions of the Approval Order make no sense. Mrs. Smith's is the name listed in the declarations, but, like her son, Cole Dunn, she was a Defendant in the approval. In repeatedly providing that the

Order's protection extended to the "named insured and the Defendants," the Approval Order was not saying that Charlotte Smith, Charlotte Smith and Cole Dunn were protected. The Approval Order was saying that resident spouse Mr. Smith, Charlotte Smith and Cole Dunn were protected. (See: Approval Order p. 2, 3, 4)

The language of the Covenant also shows that it was intended to protect persons other than named individuals Charlotte Smith and Cole Dunn. It protects their heirs and successors, which includes Mrs. Smith as Charlotte Smith's husband. (**Covenant, p. 1-3**) It provides that it is not to be construed as an admission of liability on the part of Payors or of any other person hereby benefitting from this Covenant." (**Covenant, p. 1-3**) Again, the Payors were Charlotte Smith and Cole Dunn. Who then was the other person benefitted from the Covenant? Clearly, it was named insured Mr. Smith.

The Policy, the Approval Order, and the Covenant include Mr. Smith as a protected party and the lower Court's Order erred in holding otherwise.

6. THE ORDER ERRS IN NOT DISMISSING COLE DUNN AS A PARTY:

The Order holds that whether or not Dunn is protected by the Covenant, and whether or not there is insurance which could be collected has no bearing on Dunn being a named Defendant in this case. (**Order, p. 13**)

There is no dispute that Cole Dunn was protected by the Approval Order and Covenant. (**Approval Order, Covenant**) He could be named to a subsequent lawsuit if it sought other coverage. (**Covenant p. 3, 4**) Cole Dunn was a minor at the time of this loss. He did not own the Smith's house and he did not own the truck he drove over to help the decedent's family with hurricane clean-up the day of this tragedy. The only thing he owned was the hunting shotgun. The Plaintiff's attorney has located no insurance covering the hunting shotgun owned by Cole Dunn, and there is none, which Dunn so swore in his Affidavit. (**See: Affidavit of Dunn**)

Mr. Dunn is a sham Defendant against whom the Plaintiff has no cause of action. The Respondent cannot recover from him personally, based on the terms of the Order and the Covenant, and there is no coverage from which the Respondent could conceivably collect.

7. THE ORDER ERRS IN NOT REFORMING THE COVENANT:

Appellants' insurance carrier received a Tyger River demand from the Plaintiff, and pursuant to that demand, they settled this claim with the Plaintiff and it was approved by this Court. The Approval Order and Covenant fully and completely settles this case as to the subject Policy and as to any personal liability of the insureds/named insureds, including Dunn and Mr. Smith. In the alternative, Defendants allege that the intention of the settlement was to protect all members of the Smith household and Appellants believe that it did protect all members of the household, but to any extent the Court held that it did not, Appellants asked that the Covenant be reformed to include Defendant John Richard Smith as a named Party being Released or relieved.

Appellants moved, in the alternative, that the Covenant be reformed on the grounds that they made a unilateral mistake in not including Mr. Smith as a named party to the Covenant, and that such mistake was induced by the fraud, deceit and misrepresentation of the Plaintiff and his counsel. Reformation may be had upon such grounds. Shaw v. Aetna Casualty & Surety Ins. Co., 274 S.C. 281, 262 S.E.2d 903, 1980 S.C. LEXIS 297 (S.C. 1980)

Respondent's counsel has admitted that it was his and his client's intention, throughout this process, to enact this scheme to attempt to extort or coerce the carrier to pay the policy limits a second time. (**Powell letter of 6.7.17**) This letter and Powell's actions throughout, from the Tyger River Settlement demand he never intended to honor through the requested change to the Covenant language so that he could pursue other coverage if he found any, and continuing with the filing of the present lawsuit which violates his Tyger River Settlement demand, and including making a second demand discussing bad faith and Farm Bureau having a duty to pay a second

coverage limit in addition to defending this action which was expressly not required by the Approval Order and Covenant - all of it constitutes fraud and bad faith throughout the process and a violation of Rule 11 by Attorney Powell's signature of the Summons and Complaint in this action. Powell's letter tracks the acts committed in furtherance of this scheme, and shows that he never intended to comply with the terms of the Tyger River settlement demand and acceptance by the carrier upon which this settlement was based. **(Powell letter of 6.7.17, Counsel Correspondence, Transcript of Hearing, Approval Order and Covenant)**

Under the circumstances of this case, and given the deliberately deceitful scheme enacted by the Respondent and his attorney, the trial Court erred in not reforming the Covenant, to the extent it needed to be reformed.

8. *THE ORDER ERRS IN GRANTING SUMMARY JUDGMENT AS TO APPELLANTS' COUNTERCLAIMS:*

A. Breach of Contract and Breach of Contract Accompanied by Fraudulent Acts:

Appellants pled the following Counterclaims: Breach of Contract, Breach of Contract Accompanied by Fraudulent Acts, Breach of the Covenants of Good Faith and Fair Dealing, Rule 11 Violations and Motions to Dismiss/Strike. **(Answer & Counterclaims)** The lower Court erred in granted Respondent's Motion for Summary Judgment as to all counterclaims pled.

As to the contract-based counterclaims, the Order finds that Smith was not a party to the Covenant, could not assert any contract claims on the basis of the Covenant, and dismissed his claims on those grounds. **(Order p. 15)** This finding is in error. The Covenant protects Mr. Smith, who is, by intestacy statutes a legal heir of his wife, Charlotte Smith. **(Covenant, p. 1-3)** It references and releases the subject insurance policy, pursuant to which Smith is an insured and a named insured by virtue of the policy provisions, references the policy's named insured and references other parties benefitting from the Covenant. **(Covenant, p. 1-3)** Again, the Payors

were Charlotte Smith and Cole Dunn. Who then was the other person intended to benefit from the Covenant? Clearly, it was named insured Mr. Smith.

The Order finds that Appellants failed to identify a specific provision of the Covenant breached by the Respondent. **(Order, p. 15-17)** This is clear error. The Counterclaims for breach state that the filing of this lawsuit is an act of breach as to the entire Covenant Not to Execute, meaning the document, its provisions, its intent, and its purpose. **(Answer & Counterclaims, p. 15-16)**

To maintain an action for Breach of Contract, a party must prove the existence of a contract, its breach, and damages caused by the breach. Consignment Sales, LLP v. Tucker Oil Co., 391 SC 266, 705 SE2d 73 (2010) Appellants contend that the filing of this action constituted a breach of the Covenant. The Order finds that this filing could not be a breach because it was contemplated by the Covenant. **(Order, p. 17)** This finding invades the province of a jury, as does much of the Order. Here, Appellants contend that a subsequent lawsuit was anticipated - that is, after all, the reason that the settlement culminated in a Covenant rather than a Release. However, the lawsuit the Covenant references was one not involving the SCFB Policy or its insureds. The lawsuit that was filed is the one the Covenant and the entire settlement was entered into to avoid, protection of its insureds being the purpose of the carrier's acceptance of the Tyger River demand, compliance with which was a condition precedent to the contract. Zinn v. CFI Sles & Mktg, 415 SC 93, 780 SE2d 611 (Ct. App. 2015) This is, at a minimum, a genuine issue of material fact.

The meaning of the provisions relative to anticipating a subsequent lawsuit is also a genuine issue of material fact as to the Breach of Contract With Fraudulent intent counterclaim as to which the Order also erroneously grants Summary Judgment. **(Order, p. 17-18)** In that

regard, the Order erroneously finds that the claim fails as a matter of law because doing what the contract allows cannot be an act of breach. (**Order, p. 18**)

As to this cause of action, the SC Court of Appeals has held as follows:

In order to maintain a claim for **breach of contract** accompanied by a **fraudulent** act, a plaintiff must prove three elements: (1) a **breach of contract**; (2) "[f]raudulent **intent** relating to the **breaching of the contract** and not merely to its making;" and (3) "[a] **fraudulent** act accompanying the **breach**." *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (Ct. App. 1985) (citations omitted). "The **fraudulent** act is any act characterized by dishonesty in fact or unfair dealing." *Conner v. City of Forest Acres*, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002).

"Fraud," in this sense, "assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence."

Id. (quoting *Sullivan v. Calhoun*, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921)). "**Breach of contract** accompanied by a **fraudulent** act . . . requires proof of **fraudulent intent** relating to the **breaching of the contract** and not merely to its making. Such proof may or may not involve false representations." *Ball v. Canadian Am. Express Co.*, 314 S.C. 272, 276, 442 S.E.2d 620, 623 (Ct. App. 1994) (citation omitted). "**Fraudulent intent** is normally proved by circumstances surrounding the **breach**." *Floyd*, 287 S.C. at 54, 336 S.E.2d at 503-04. "The **fraudulent** act may be prior to, contemporaneous with, or subsequent to the **breach of contract**, but it must be connected with the **breach** itself and cannot be too remote in either time or character." *Id.* at 54, 336 S.E.2d at 504.

Zinn v. CFI Sales & Mktg., 415 S.C. 93, 111, 780 S.E.2d 611, 620-621, 2015 S.C. App. LEXIS 244, *25-26, 25 Wage & Hour Cas. 2d (BNA) 1447

The Order also erroneously finds that there are no competent allegations of fraudulent intent or fraudulent acts. The Appellants' Counterclaim alleged as follows:

70. The aforementioned breaches of the binding contract between the parties and the Defendants' insurer were committed with expressed fraudulent intent relating to the breaching of the contract and/or were committed with constructive fraud, as documented by the enclosed correspondence which is incorporated herein by reference, including, but not limited to, the following false representations:

- (a) That the settlement would be governed by Tyger River, meaning that it would constitute a full personal release of the carrier's insureds, named insureds and policy;
 - (b) That, within the meaning of Tyger River, paying the coverage would be the reasonable thing to do, because it would fulfill the carrier's duty to its insureds and named insureds;
 - (c) That the settlement would resolve all claims relative to the decedent's death;
 - (d) That not paying the claims would constitute an act of bad faith;
 - (e) That the settlement would release any future claims against the carrier's policy;
 - (f) That the settlement would release any future claims against the insureds and named insureds covered by the policy;
 - (g) That it was the intention of the Plaintiff and his counsel to act in good faith and comply with the terms of the settlement;
 - (h) That the settlement would end the matter as to the carrier and its policy and would personally protect all members of the insured household; and
 - (i) As expressed in the post-lawsuit filing correspondence, all of which is incorporated herein as additional false/fraudulent representations.
- (See: Answer & Counterclaims p. 16-17)**

Based on the above-referenced allegations of Appellants' Counterclaim, the Court's dismissal of the same based on the absence of competent or well-pled allegations is clearly erroneous. Further, the error is compounded by the existence of material facts relative to the Tyger River demand, the timing of the decision not to comply with it, the circumstances surrounding the approval process and exchanges between counsel both before and after the approval, and the filing of this action.

B. Breach of The Implied Covenant of Good Faith & Fair Dealing, Rule 11 & the Need for Judicial Recognition of a New Tort Action:

The Order finds that there is no independent cause of action for Breach of the Implied Covenant of Good Faith & Fair Dealing under South Carolina law but it errs in failing to find that such a cause of action is part of a claim for breach of contract since such a Covenant exists in every contract.. RoTec Services Inc. v. Encompass Services, Inc., 359 SC 467, 597 SE2d 881 (2004)

Appellants also contend that either the Trial Court erred in holding that there is no independent cause of action for Breach of the Implied Covenant of Good Faith & Fair Dealing in the insurance area of Tyger River issues, or that this Court should recognize that a tort claim for Breach of the Implied Covenant of Good Faith and Fair Dealing exists within the insurance arena of Tyger River demands and settlements. The Tyger River case itself was judicial recognition of a tort cause of action for an insurer's unreasonable refusal to accept a settlement demand within policy limits and the doctrine was expanded to include a bad faith cause of action for an insurer's refusal to pay an insured's first party claim. Williams v. Riedman, 339 SC 251, 529 SE2d 28 (Ct. App. 2000) In recognizing a first party bad faith claim, the SC Supreme Court said, "The cause of action we consider today and that which is commonly known as the Tyger River Doctrine are merely two aspects of the same duty." Nichols v. State Farm Mut. Auto. Ins. Co., 279 SC 336, 339-340.

Within the first party cause of action context, emphasis is placed on the special relationship between an insured and an insurer. However, the Supreme Court noted that irrespective of the insurance contract, certain duties arise by operation of law. Tadlock Painting Co. v. Maryland Cas. Co., 322 SC 498, 473 SE2d 52 (1996) The Tyger River Doctrine, the course of dealings, and the statutes and rules governing the insurance industry and the practice of law create a special relationship between insurers and attorneys, such that an action in tort is warranted.

In Nichols, the SC Supreme Court found that public policy reasons for recognizing a first party bad faith action for breach of the Implied Covenant of Good Faith and Fair Dealing were abundant. The Court noted the relative difference in bargaining power between an insured and an insurance company and found that without recognizing a tort claim carriers could deny claims

and profit from the use of the insured's money during litigation without facing more risk than the delayed payment of a claim and limited attorney's fees. Nichols, at 340, 619 Tyger River was created in 1933 to give insureds similar protection.

In the years since Tyger River, the doctrine has strayed far from its original impetus of protecting insureds by requiring them to be treated fairly and that their interests be protected. Eager attorneys have seized the shield of Tyger River and turned it into a sword, much as the 10th Circuit observed. Wade v. Emcasco Ins. Co., 483 F.3d 657, 669-670 (10th Cir. 2007) Bad faith has indeed become a game, but perhaps more a gladiator in nature than cat-and-mouse. Plaintiff's attorneys now use the doctrine to cause damages that they seek to recover, and in the process, the insured has become a mildly interested spectator. *Id.*

Recognition of a tort claim for Breach of Good Faith and Fair Dealing in the Tyger River context would give carrier's the ability to defend against overzealous advocates who cloak themselves with the doctrine in bad faith, with the intention of not dealing fairly. It would give this Court a venue to regulate practices such as attorney's who use the doctrine dishonestly, unfairly or without full disclosure or those who set unreasonably short deadlines that don't account for an adjuster possibly being ill, on vacation, or involved in a deposition or trial, and those that set deadlines that appear deceptively reasonable in a case with large damages but questionable liability, and those who set deadlines but don't get the carriers information needed to analyze the claim and meet the deadline.

If ever an area required recognition of a duty of good faith and fair dealing, it is the Tyger River Doctrine in today's circumstances. Appellants believe that if such a tort claim for breach exists, then the Trial Court erred in granting Summary Judgment on this ground and that if such a duty and claim do not yet exist, then time for recognition has come, and Appellants ask that this

Court do so and give guidance as to the standards for dealing fairly and in good faith, and as to acts which might breach such a duty.

Similarly, Rule 11, SCRCF Sanctions should be available in the context of Tyger River violations, inclusive of a claim for breach. The Rule requires a good faith belief by counsel that he has reasonable grounds for the filing of a lawsuit. *Rule 11, SCRCF* Here, the Respondent/Plaintiff's counsel's has admitted that this entire chain of events was part of a plot and a scheme. Counsel admits that his actions were all intentional in furtherance of the scheme and in so doing, he made himself a part and party to the scheme. **(See: Powell letter of June 7, 2017)**

The carrier, on behalf of its insured(s), has acted fairly and in good faith throughout this matter, and it expected that Respondent/Plaintiff's counsel, on behalf of his client, would do the same. Both parties owed that duty in connection with the underlying settlement, initiated by the Tyger River demand, continuing with its duties to the Court in approving this settlement and culminating in the Covenant governed by the Court's Order. Respondents contends that this case, from the Tyger River Demand through the Covenant and the filing of this lawsuit presents a case study in bad faith, deceit and the open breach of the duty of good faith and fair dealing and that the trial Court erred in not so finding.

Respondents contend that the Court erred in granting Summary Judgment as to their Counterclaims. There are numerous genuine issues of disputed material facts and additional issues where examination of the facts is necessary to clarify the law. *Rule 56, SCRCF* Therefore, the grant of Summary Judgment should be reversed

V. CONCLUSION:

The South Carolina Supreme Court recognized the Tyger River Doctrine to compel insurance carriers to act reasonably to settle claims within policy limits and protect their insured(s) financial interest over the carriers' interests. The Doctrine does not compel a carrier to settle once as to part of its insureds and then to pay policy limits a second time to protect the rest of its insured(s) and nothing requires a carrier to pay a second policy limit for the same loss.

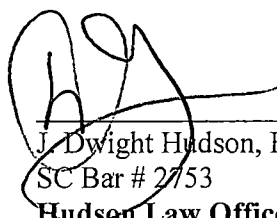
Inherent in the doctrine is a duty of good faith, because that is the very foundation of the doctrine. This Plaintiff and his attorney availed themselves of the doctrine to induce this settlement, and did so with no intention of honoring their promise to accept the coverage in exchange for an agreement protecting the insured(s).

The terms of negotiation and settlement, of Court Approvals and Covenants are all two way streets. In South Carolina our Courts have made it clear that those streets are built upon the foundation of professional responsibility, courtesy, fairness, and good faith expected in all dealings between attorneys, clients, insurers, insureds and insurers and, particularly, in all dealings between attorneys and the Court. The failure of this Court to reverse the lower Court's denial of Summary Judgment to Appellants and grant of it to Respondents will erode and eventually destroy the Tyger River doctrine, crowding the Court's calendars with lawsuits proceeding to trial - because defense attorneys and carriers will be unable to risk paying their coverage in exchange for a worthless Covenant or to risk paying it multiple times. Further, Respondent's actions breached the Covenant with false, fraudulent and deceptive intent, constitute bad faith and unfair dealing and justify Rule 11 sanctions.

The time has come to recognize a tort claim for breach of the implied covenant of good faith and fair dealing in the Tyger River arena. This Court gave insured's a shield. Plaintiff's

attorneys stole it and turned it into a sword, a weapon they wield recklessly and unreasonably. The Court has not yet held that carriers deserve a way to defend themselves, and this case presents an opportunity for the Court to intervene and steer the Tyger River Doctrine towards fairness and justice.

Respectfully submitted

A handwritten signature in black ink, appearing to read "JDH", is written over a horizontal line. The signature is stylized and somewhat cursive.

J. Dwight Hudson, Esquire
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Attorney For: Appellants

Dated: June 20, 2018

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Hon. Larry B. Hyman, Circuit Court Judge

Appellate Case No. 2018-000375

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SC Court of Appeals

Kenneth A. Davis As Personal Representative
Of The Estate of Kenneth Miles Davis Respondent

v.

Cole Austin Dunn and John Richard Smith Appellants

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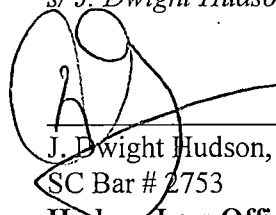
I certify that on June 20, 2018 I have served the Appellants' **INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** on Respondent's counsel by depositing the same in US Mail, sufficient postage prepaid, at the address noted below:

(SEE NEXT PAGE)

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Phone: (843) 724-5155
Email: jtp@lalawsc.com

Dated: June 20, 2018

s/ J. Dwight Hudson, Esquire



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ADMITTED IN S.C. and N.C.*
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U.S. Court of Appeals 4th Circuit*^
U.S. District Court – South Carolina*^
U.S. District Court – North Carolina*
(Eastern, Middle and Western Districts)
S.C. Supreme Court*^
N.C. Supreme Court*
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June 20, 2018

The Hon. Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
PO Box 11629
Columbia, SC 29211

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JUN 21 2018

SC Court of Appeals

Re: Kenneth A. Davis as Personal Representative of Estate of Kenneth Miles Davis,
Respondent vs. Cole Austin Dunn and John Richard Smith, Appellants
Appellate Case No. 2018-000375

Dear Ms. Kitchings:

Enclosed for filing are an original and a copy of the following on behalf of Respondent South Carolina Farm Bureau Mutual Insurance Company:

- Initial Brief
- Designation of Matter to Be Included In the Record On Appeal
- Rule 209(c) Certification for Designation
- Proof of Service of the Initial Brief & Designation

Please return a clocked copy to me via the enclosed stamped, self-addressed, return envelope.

If more is needed, I ask that you please advise.

Thanking the Court for its consideration, and with best regards, I remain

J. Dwight Hudson, Esq.

J. Dwight Hudson, Esq.

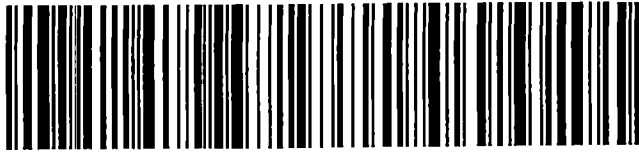
JDH: mag

Enclosure(s): as stated

cc: **J. Taylor Powell, Esq.**

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