

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Hon. Larry B. Hyman, Circuit Court Judge

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Appellate Case No. 2018-000375

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**RECEIVED**

OCT 12 2018

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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**REPLY BRIEF OF APPELLANTS**

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## REPLY TO RESPONDENT'S STATEMENT OF FACTS

As Respondent's brief states, this case arises from the tragic death of decedent, Kenneth Miles Davis on October 9, 2016. Respondent's brief notes that decedent, Respondent Dunn, and a friend, Seth Sarvis, were "socializing" at the time. It fails to say that Dunn and Sarvis were talking with decedent after they finished working all day at his family's property. Dunn and Sarvis came over to help decedent's family clean up damage left by Hurricane Matthew. Dunn came over to help and did hard physical labor because he and the decedent were such good friends. **(Complaint, Answer, Affidavit of Dunn)**

Despite Respondent's claim, Dunn was not "in possession of a loaded 12-gauge shotgun" and he was not waving it around "in a reckless manner." Dunn's step-father (Smith) had just recently given him a hunting shotgun and the boys walked over to the truck Dunn drove (his aunt's vehicle) so that Dunn could show the hunting shotgun to his friends. Dunn thought the gun was unloaded, but was wrong. It discharged, fatally injuring the decedent. **(Complaint, Answer, Affidavit of Dunn)**

Respondent's brief mentioned that Dunn lived with his mother, but it fails to note that he also lived with Respondent Smith, his step-father, in the same household. Smith gave Dunn the hunting gun only after Dunn completed a gun safety course and had a number of years of safe hunting experience. **(Answer, Affidavits of Smith and Dunn)** The Smith/Dunn household had homeowner's insurance coverage with Palmetto Casualty Insurance Company, a/k/a South Carolina Farm Bureau (SCFB) under Policy Number HO 0412831 providing liability coverage of \$300,000 and medical payments coverage of \$5,000. **(Declarations Page, Palmetto Casualty Policy)** While Charlotte Smith's name appears on the Declaration's page as the named insured, the policy defines the term to include a resident spouse, stating 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. (SCFB/PCIC Policy, p. 1)

The present action is for negligence as to Dunn and negligent entrustment and negligent supervision as to Smith. **(Complaint)** It seeks a recovery for claims that have already been paid and settled. Attorney J. Taylor Powell's demand letter of January 30, 2017, prior to any payment being made, stated as follows: "I am contacting you pursuant to Tyger River v. Maryland Casualty Company, 170 SC 286, 170 SE 346 (1933), and its progeny to inform you that my client, Kenneth A. Davis, as Personal Representative of the Estate of Kenneth Miles Davis, will agree to accept three hundred and five thousand and no/100 (\$305,000) Dollars." The demand letter went on to explain that the demand was for the policy coverage for liability and medical payments. (Ex. p.10-13) ***\*\*That Tyger River letter concluded with the following statement: "We are submitting this demand letter with the hope that we can resolve this matter within your insured' limits of liability coverage by affording Farm Bureau Insurance Company the opportunity to protect their insureds (emphasis added)and themselves by settling this case." (Tyger River Demand Letter)\*\**** PCIC/SCFB, via Claims Representative Rick Lamar, responded by letter dated January 31, 2017, accepting the Tyger River demand. **(Carrier Acceptance of Tyger River Demand Letter)**

On Thursday, February 9, 2017, Respondent's counsel forwarded an email offering to prepare the Petition and Order for the Wrongful Death Approval. **(Memo, Exhibit D, p. 40)** It noted that Appellants' counsel would be preparing the Covenant as to Cole Dunn and Charlotte Smith, carving out the ability for Respondent's counsel to "pursue any other liability coverage, should I find it." Respondent's counsel asked to be advised of the schedule of Appellants' counsel for the "next two weeks" because he "clerked for Judge Hyman and will be able to get him to

work us in anytime in the next two weeks while he is in Conway." (**Memo, Exhibit D, p. 40**)

While this email did not include the words fast or quick and did not expressly say that Respondent was pushing for a quick approval, it clearly was meant to and did leave that impression. Otherwise, Appellants' counsel could have prepared the approval documents and handled the scheduling in a normal fashion.

The settlement was approved and the Covenant prepared and signed. It preserved Respondent's right to recover additional funds from "any other" insurance coverage or from "any other" source for the claim. (**Covenant**) The Order approving the Covenant indicated that the Court was mindful that all available coverage from the carrier and the policy was being paid. It authorized and approved a Covenant, finding that it would be "valid and effectual forever" as to the carrier, the policy, the named insured and the Defendants subject only to the Respondent's right to pursue any other available coverage or source of payment. (**Approval Order**) The Order provides that the settlement would be "full, final and complete" as to the carrier, and that the carrier would have no obligation as to any subsequent litigation because the carrier's named insured and the defendants will be protected by the approved Covenant. (**Approval Order**)

Despite the Tyger River Settlement made to protect the carrier **and its "insureds"** (***Tyger River Demand Letter***), **and** despite the approval pleadings, Order and Covenant, the Respondent filed the instant action against Cole Dunn and John Richard Smith. Dunn was a named party, a Defendant in the approval and explicitly protected. Further, as to "any other coverage," Dunn was a teenager who did not even own the vehicle he drove over to decedent's house the day of this incident. As to Smith, at the time of the hunting shotgun discharge, Smith did not own the gun and he was not a biological parent of Dunn. Further, Smith was both an insured and a named insured under the subject policy. Neither Dunn nor Smith was "any other"

available source of payment. While subsequent litigation could have possibly been forthcoming, it was expected that such could only be against other parties - like the gun manufacturer, the ammunition manufacturer, or even against another party present at the event.

Instead, despite the Tyger River demand, the promise or representation in his demand letter that payment would protect the carrier and its insureds, and despite the approval pleadings, Covenant and the Order - the instant action was filed. Respondent's brief quotes the Trial Court at the motion hearing as asking why SCFB/ PCIC was defending this action as it had paid its coverage and had no obligation to defend **(Respondent's Brief, p. )** That gets to the heart of why the filing of this action constituted a fraudulent breach of contract, a breach of the covenant of good faith and fair dealing and a violation of opposing counsel's Rule 11 obligations. Despite everything cited above, including a specific Court Order providing that the carrier had paid all available coverage and had no duty to defend any subsequent action, after filing this action, Respondent's counsel sent a letter dated June 7, 2017 admitting that Smith was an insured under the SCFB/PCIC policy at "all times relevant to the wrongful death of Kenneth Miles Davis." This letter claimed that SCFB/PCIC had a duty to defend and indemnify Ms. Smith for his "separate and independent negligence" and that if SCFB/PCIC does not defend/indemnify Mr. Smith, and the case results in a jury verdict, then Respondent will "likely seek assignment of these claims against Farm Bureau." **(June 7, 2017 letter from Respondent's counsel)**

The June 7, 2017 letter confirmed that the present course of action was "an intentional decision on the part of our client." **(June 7, 2017 letter from Respondent's counsel)** This intentional course of action could not have been conducted had Respondent and his counsel not sent the original "Tyger River Demand" letter representing/promising that payment of the coverage would afford "*Farm Bureau Insurance Company the opportunity to protect their*

***insureds (emphasis added) and themselves by settling this case."* (Tyger River Demand Letter)\*\*** The June 7, 2017 letter confirmed that counsel considered Mr. Smith an insured at all times relevant to this action. Although he knew that Mr. Smith was an insured under the policy, and he had invoked Tyger River, promising to protect Farm Bureau's insureds and Farm Bureau, Respondent's counsel never intended to provide the promised protection. He intended to and did induce a fraudulent settlement by invoking the Tyger River Doctrine in bad faith and then filing the instant action, followed by sending a "bad faith" letter, stating that if SCFB did not defend and indemnify, that he would seek an assignment of claims against Farm Bureau, despite the Approval Order providing that the carrier would have no such obligation. **(June 7, 2017 letter, Tyger River Demand letter, Approval Order)**

The course of conduct by Respondent and his counsel was admittedly intentional and the entire course of conduct is and should be before this Court as it considers this appeal. At the core of this appeal rests the validity and vitality of the Tyger River Doctrine and SCFB protecting its insureds by voluntary settlement of the policy limits.

#### **I. REPLY TO RESPONDENT'S ARGUMENT AS TO THE GRANT OF SUMMARY JUDGEMENT RE APPELLANTS' COUNTERCLAIMS**

Respondent incorrectly argues that the trial court's grant of Summary Judgment should be affirmed. The Order erroneously granted Summary Judgment as to all of Appellants' counterclaims, being those for: Breach of Contract, Breach of Contract With Fraudulent Intent, Breach of the Duty of Good Faith and Fair Dealing and Rule 11 Sanctions.

As to the Breach of Contract, Respondent wrongly contends that the only contract between the parties was the Covenant. The Covenant, inclusive of the incorporated Approval,

was one of the contracts involved. The other contract was the Tyger River settlement demand which was accepted by Appellants via SCFB/PCIC. The Tyger River settlement was the basis for the approval which resulted in the incorporated Order that authorized the Covenant, which Respondent contends allows this action and Appellants contend does not allow it.

The elements for Breach of Contract are "the existence of a contract, its breach and damages caused by such breach," Branche Builders, Inc. v. Coggins, 386 SC 43, 686 SE2d 200 (2009). Damages in a Breach of Contract action should place the nonbreaching party in the position he/she/it would have enjoyed if the contract was performed. S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 303 SC 74, 399 SE2d 8 (Ct. App. 1990) Contrary to the lower Court's ruling and Respondent's contention, Appellants' action alleged and meets all elements for a breach of contract action as to both the Tyger River Settlement and the Covenant inclusive of the Approval Order. **(Tyger River Demand Letter, Tyger River Acceptance Letter, Approval Order, Covenant, Summary Judgment Order)**

The Tyger River settlement demand and acceptance and the Covenant, inclusive of the incorporated Approval Order, show that there was a Tyger River settlement contract whereby Respondent, through his counsel, agreed that in exchange for payment of the liability coverage and med pay benefits the carrier's insureds and the carrier would be protected. **(Tyger River demand letter)** The Appellants, through their insurance carrier, agreed to pay the coverage demanded for the protection promised. **(Tyger River acceptance letter)** The Court approved the settlement and the Covenant confirms payment of the coverage demanded in exchange for protection of insureds (Appellants) Dunn, Smith and Charlotte Smith and the carrier, SCFB/PCIC. **(Approval Order, Covenant)**

As to the filing of the instant action, Respondent's brief notes that the Covenant is not a Release and claims that all parties anticipated the filing of this action. While the settlement document at issue is explicitly labeled as a "Covenant," it is one that protects the insureds as per the Tyger River demand and acceptance and the Approval Order. **(Tyger River demand letter, Tyger River Acceptance, Approval Order, Covenant)** All parties understood that a subsequent action could be filed but it was understood and agreed that the action would not seek a recovery from the insureds or the carrier. It might be against the gun or ammunition manufacturer or against another party at the scene. It might have sought recovery from Respondent's homeowner's coverage. .

What was not anticipated was the Respondent's now-admitted intentional plan or scheme. **(June 7, 2017 letter from Respondent's counsel)** Appellants, via their insurance carrier and counsel, accepted, in good faith, a Tyger River demand, met the terms of that demand, and consummated the Tyger River Settlement. Appellants relied upon Respondent and his counsel's good faith intention to uphold their end of the contract by protecting the carrier and its insureds. The Tyger River demand letter specifically referenced the minor insured that owned the hunting shotgun and held it when it accidentally discharged (minor Dunn) and Dunn's mother and natural guardian (Charlotte Smith). but it promised protection to the insureds, without limitation, and to the carrier. **(Tyger River demand letter, Tyger River acceptance letter)** Appellants, via their carrier and counsel, relied on the long established Tyger River doctrine and the good faith of Respondent and his counsel and they had a right to rely, as they had no knowledge or notice of Respondent and his counsel's professed intentional plan or scheme. **(June 7, 2017 letter from Respondent's counsel)**

In fact, Respondent was using the Tyger River doctrine to create a "Catch 22" situation. Respondent intended to obtain a double recovery of coverage and to pursue a bad faith claim against the carrier, via the original demand or via the second demand. It is of note that Respondent's counsel provided no warning of his intentions at the time of the original Tyger River demand. Counsel could have said that acceptance of the demand would protect only insureds Dunn and Charlotte Smith, but he did not do so because that wasn't the plan. The admitted existence of Respondent's plan or scheme, coupled with the failure to disclose and to properly advise Appellants via their carrier and counsel, was false and fraudulent. This more than met the standards for upholding or allowing the improperly dismissed counterclaims for Breach of Contract and Breach with Fraudulent Intent or Act. The requisite elements; to wit: (1) a breach of contract; (2) fraudulent intent as to the breaching of the contract rather than just as to its making; and (3) a fraudulent act accompanying the breach. "Fraudulent act is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." Rotec Servs. v. Encompass Servs., 359 SC 467; 597 S.E.2d 881 (Ct App 2004), citing Connor v. City of Forest Acres, 348 SC 454, 560 SE2d 606 (2002) Again, as stated, the conduct here met the requisite standards.

Further, Appellants pled a separate counterclaim for Breach of the Implied Covenant of Good Faith and Fair Dealing. Respondent contends that this Court should uphold the Trial Court's Order dismissing this counterclaim. The Order found that there is no independent cause of action for this claim, and dismissed it. The Trial Court erred 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, *supra*.

Respondent also contends that Appellant Smith cannot assert any contract counterclaims as he is not a party to the contract. That contention is in direct contradiction to Respondent's post

filing letter to counsel which states that SCFB has a duty "under the policy" to defend and indemnity and that if the claim is not resolved, and a verdict is rendered against Mr. Smith, that Respondent is "likely" to seek an assignment of Mr. Smith's claims against SCFB. **(June 7, 2017 letter from Respondent's counsel)** Either Mr. Smith is or is not an insured party to the contract. The "catch 22" Respondent built using the Tyger River doctrine traps Respondent when it comes to coverage. If Appellant Smith is an insured in this action covered under the policy, then he was an insured at the time of the original Tyger River demand and later approval, and Respondent's counsel promised to protect SCFB and its insureds if coverage was paid and the Tyger River demand met - which it was. **(June 7, 2017 letter from Respondent's counsel, Tyger River demand letter, Tyger River acceptance letter, Approval Order and Covenant)**

The post-filing letter from Respondent's counsel 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, of the Tyger River doctrine and of the ethical requirements of good faith. **(June 7, 2017 letter from Respondent's counsel)** 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)** Rule 11 provides carriers a shield against the improper use of Tyger River and Appellants' counterclaim as to the same should be upheld.

**II. REPLY TO RESPONDENT'S ARGUMENT INCORRECTLY  
CONTENDING THAT UNDER THE PRESENT CIRCUMSTANCES,  
THE DENIAL OF SUMMARY JUDGMENT IS NOT APPEALABLE**

While the denial of Summary Judgment is interlocutory and generally not appealable, South Carolina appellate courts may review such rulings when they are companion to appealable issues. **Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.**, 368 SC 342, 628 SE2d 902 (Ct. App. 2006) For an issue to be properly preserved for appeal, it must have been raised to and ruled on by the trial court. **Elam v. SCDOT**, 361 SC 9, 602 SE2d (2004) Error preservation principals empower a trial court to rule after considering relevant facts, law and arguments. Until the trial court has considered and ruled an appellate court cannot find error. **Ellie, Inc. v. Miccicchi**, 358 SC 78, 594 SE2d 485 (Ct. App. 2004) The purpose of preservation rules is to give the trial court a fair opportunity to rule on the issues and provide appellate courts with a basis for meaningful review. **Queen's Grant II**, *supra*

In **Queen's Grant II**, the Court of Appeals declined review of a Summary Judgment denial as to a defendant/Respondent's developer's counterclaims, even though they were before the Court on the plaintiff/Appellant HOA's appeal of the grant of Summary Judgment as to one of the HOA's causes of action. *Id* The Court of Appeals declined to hear the developer's appeal as to the denial of its Summary Judgment motion because the record (1) contained no transcript of any proceeding before the trial court; (2) the record was incomplete and contained nothing showing the location of a road that was the subject of the action; and (3) the basis for the trial court's denial was not a ruling on the merits, but was a ruling that judicial economy would be best served by a trial based on the submission of record . *Id* In declining to hear the appeal of the Summary Judgment denial, the Court of Appeals held that the developer was asking it to act as a trial court in making rulings based on a submitted record and that it would not do. *Id*

Here, the grant of Summary Judgment as to Appellants' counterclaims is properly appealable and none of the error preservation principals supports declining a review of the denial of Summary Judgment. The present record contains a transcript, is complete and the basis for the trial court's denial was a ruling on the merits. This action is based upon the prior approval, beginning with the insurance policy or contract, and continuing with the Tyger River demand through the approval hearing, Order and Covenant and concluding with the filing of this action and the second attempt to wield the bad faith doctrine as a weapon. The trial court had the complete record, heard arguments and made a ruling on the merits. The record as to this appeal is similarly complete, inclusive of the underlying transcript and Order. Appellants do not seek to have this Court act as the trial court, but rather seek consideration, ruling and reversal of the trial court's erroneous Order.

Additional appellate jurisdiction over this case exists by statute providing as follows:

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

S.C. Code Ann. § 14-3-330

Jurisdiction exists under this statute, particularly as to the "substantial right" provision. This Court's Tyger River doctrine gives Appellants, on their own behalf and on behalf of their carrier, important and substantial rights to protection upon receiving, accepting and completing a Tyger River settlement. The Tyger River doctrine gives claimants and plaintiffs a potent weapon that is now frequently misused and abused. Unless this Court accepts this appeal and considers all the issues, it is also giving plaintiffs the power to cost a carrier the full expense of trial and defense without giving the carrier the timely ability to respond.

Finally, appellate jurisdiction exists because the trial court's construction of the Tyger River doctrine is the fundamental basis underlying its grant and denial of Summary Judgment. At a minimum, this Court should give the trial court guidance as to how the Tyger River doctrine applies to a case involving an allegedly partial settlement. The grant and denial of Summary Judgment in this case are parts of a whole, and justice cannot be done if this Court reviews only one piece of an intertwined whole.

Respondents also claim that even if appellate jurisdiction does exist, that the denial of Summary Judgment was proper as to Smith and Dunn. As to Smith, Respondent claims he was not a "named insured" under the policy and therefore the prior settlement does not apply to him. This argument overlooks the plain language of the policy that makes a resident spouse an insured and the original Tyger River letter where Respondent's counsel promised protection to the carrier and its insureds. (SCFB/PCIC Policy, p. 1; Tyger River Demand letter) As to Dunn, the Covenant allows him to be named as a party to a subsequent action only to support recovery from a different policy or source. **(Covenant p. 3)** Respondent claims that the counterclaim for Reformation was properly denied and this is also incorrect. A unilateral mistake in not including Mr. Smith as a named party to the Covenant induced by the fraud, deceit and misrepresentation of the Plaintiff and his counsel supports Reformation, to any extent such would be necessary.. Shaw v. Aetna Casualty & Surety Ins. Co., 274 S.C. 281, 262 S.E.2d 903, 1980 S.C. LEXIS 297 (S.C. 1980)

The foregoing paragraph replying to Respondent's erroneous arguments attempting to support the trial court's wrongful grant of Summary Judgment as to the Counterclaims provides support for this Court having jurisdiction. It shows how entwined the issues are, and that one cannot be fully considered without also examining the other.

### III. REPLY TO RESPONDENT'S ARGUMENT AS TO THE JUSTICIABLE CONTROVERSY ERRONEOUSLY ALLEGING SCFB'S NONEXISTENT BAD FAITH

Respondent claims that Appellants argument about Respondent's "Catch 22" Bad Faith scheme are presently theoretical, void of a present case or controversy and that SCFB is not a party to this action. Appellants disagree. It was the Respondent who chose to threaten SCFB with a bad faith claim as to the present action, following an unlikely jury verdict against Smith. Mr. Smith gave Dunn the hunting shotgun only after Dunn completed a gun safety course and only after Dunn had experience in hunting. **(June 7, 2017 letter from Respondent's counsel, Affidavits of Smith and Dunn)** At a minimum, the bad faith threat documents Respondent's intentions and willingness to use the two judicially created shields to protect insureds (a bad faith claim and/or the Tyger River doctrine) as weapons to extort either a double recovery or a bad faith verdict.

Additionally, Respondent states that SCFB is not a party to this action and that no bad faith claim is presently pending as to Farm Bureau. Therefore, Respondent says, Appellants request for judicial intervention as to the bad faith scenario is hypothetical and should be denied. As Respondent well knows, SCFB is a very important part of this action, participating by, through and on behalf of its insureds. After all, it was Respondent's counsel who approached SCFB with a Tyger River demand which was accepted, paid, approved and settled, all in the interest of Farm Bureau giving its insureds and itself the protection promised by counsel. **(Tyger River demand letter, Acceptance letter, Approval Pleadings, Covenant)** And, as noted above, it was Respondent's counsel who threatened bad faith litigation against SCFB if it did not defend this lawsuit and pay any verdict or settlement to protect Mr. Smith. **(June 7, 2017 letter**

**from Respondent's counsel)** This is despite the Approval Order finding that Farm Bureau had no duty under the policy to defend or pay a subsequent verdict. **(Approval Order)**

Respondent's argument provides potent support for Appellant's call for judicial intervention in the Tyger River/Bad Faith area. Respondent carved one claim up into a number of pieces, and attempts to convince this Court that neither piece relates to the other. Piecemeal justice can be most unjust. Saying this piece doesn't relate to the other allows Tyger River and Bad Faith abuse to flourish and prosper.

Appellants ask the Court to consider all issues in this case and renew their call for judicial intervention, interpretation and assistance in the Tyger River/Bad Faith areas.

#### **IV. REPLY TO RESPONDENT'S ARGUMENT AS TO ESTOPPEL AND FINALITY OF JUDGMENTS**

The Respondent contends that the first action was a settlement approval which is not entitled to judicial protections for finality or estoppel. While the first action was a settlement, it was one induced by a Tyger River demand promising protection to SCFB and its insureds - which would include Charlotte Smith, her son, Respondent Dunn, and her husband, Respondent Smith. **(Tyger River demand and acceptance letters)** Respondent broke the original agreement, which he never intended to honor, and filed this action, followed by a sending a bad faith letter. **(June 7, 2017 letter, Complaint)**

Mr. Smith did not own the hunting shotgun at the time of the tragic discharge and he was not then-minor Dunn's natural parent or guardian, but he was Mrs. Smith's resident spouse, making him both a named insured and an insured. **(Complaint, Answer, Affidavits of Dunn and Smith, June 17, 2017 letter from Respondent's counsel, Policy)** Mr. Smith's status as a

named insured and an insured made him part of the original settlement which should have concluded the matter. The Respondent's intention not to honor the original settlement explains his filing of the present action, and explains why he chose to send a false and fraudulent Tyger River Demand to induce the settlement he never intended to honor. Proceeding in this piecemeal fashion allows the Respondent to claim the protection of finality - in addition to wielding the weapons of Tyger River and Bad Faith.

The original settlement should have been final. Alternatively, Appellants are entitled to the protections of estoppel - equitable estoppel, estoppel by judgment and public policy. The latter rests "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 v. Atlantic C.L. R. Co.*, 89 S.C. at 421, 71 S.E. 1010 (1911) Equitable Estoppel considers and weighs "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) As discussed in Appellants' Initial brief in detail, this case meets the elements of equitable estoppel. Therefore, this Court should evaluate the parties' dealings by giving them the effect dictated by common sense and justice.

Respondent's counsel could have and should have specified his intentions in his Tyger River demand letter. 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. The principals of finality, estoppel and public policy should be applied to give the Tyger River Settlement the finality that this Court's prior decisions indicate it was intended to have.

## V. CONCLUSION

Carving up one set of facts and one right of action into small pieces creates artificial barriers that impede rather than promote justice. In this case the Respondent says that the Tyger River demand, acceptance and agreement doesn't apply to the Wrongful Death Approval. Then Respondent says that the Wrongful Death Approval doesn't apply to the filing of this lawsuit. Then Respondent says that the post-filing bad faith threat doesn't apply to anything before the Court in this appeal.

This case stems from the tragic and accidental discharge of a hunting shotgun. Dunn was showing his stepfather's gift to a couple of friends, after they all voluntarily spent a day cleaning decedent's family property of Hurricane Matthew damage. Dunn was an experienced hunter who had completed a gun safety course and thought the hunting shotgun was unloaded. He was wrong and it discharged, killing his good friend, the decedent. **(Answer, Affidavit of Dunn, Affidavit of Smith)**

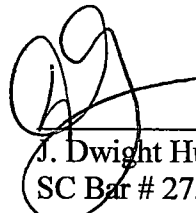
After the accident, the attorney for decedent's father sent a Tyger River demand to SCFB, promising that in exchange for payment of the full coverage he would protect SCFB's insureds and the company. SCFB met the demand and paid the coverage to settle the case and protect its insureds. But Respondent never intended to honor the terms of the Tyger River Settlement, and he did not honor it, setting in motion the events that culminated in this appeal.

The Tyger River doctrine was created to protect insureds' whose best interests might otherwise be disregarded in favor of their insurer's financial considerations. It obligates a carrier to deal honestly and honorably by fully evaluating a claim and paying it if that would be in the insureds' best interests. Carriers have a similar obligation to act honorably and deal in good faith as to settlement demands throughout the process, and an adverse verdict may be followed by a

bad faith claim. To date, there have been no penalties for Plaintiffs or Plaintiff's attorneys who abuse the process to chase a higher verdict or higher recovery.

No amount of money can compensate for the loss of a child, but insureds' ability to respond personally have limits, contracts have limits and it is time for this Court to hold that the conduct of Plaintiffs and their attorneys have limits as well. Appellants ask that this Court reverse the denial of Summary Judgment as to their claims, and reverse the grant of Summary Judgment as to their Counterclaims.

Respectfully submitted,



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Dated: 12/11/18

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

The Hon. Larry B. Hyman, Circuit Court Judge

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OCT 12 2018  
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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**PROOF OF SERVICE**

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I certify that on October 11, 2018 I have served the Appellants' **REPLY BRIEF AND REPLY 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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Dated:

10/11/18

*s/ J. Dwight Hudson, Esquire*



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J. Dwight Hudson, Esquire  
SC Bar # 2753

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J. DWIGHT HUDSON\*  
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ADMITTED IN S.C. and N.C.\*  
United States Supreme Court\*  
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\*  
S.C. Court of Appeals\*\*  
N.C. Court of Appeals\*

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October 11, 2018

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

**RECEIVED**  
OCT 12 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 the following on behalf of Respondent South Carolina Farm Bureau Mutual Insurance Company:

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

By copy of this letter the same are served upon counsel of record.

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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OCT 12 2018

SC Court of Appeals

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**SHIP TO:** The Hon. Jenny Abbott Kitchings  
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SC Court of Appeals  
PO Box 11629  
Columbia SC 29211-1629

