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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-000963

Case No. 2014-CP-23-03422

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

v.

Colony Insurance Company . . . . . Appellant

PETITION FOR REHEARING OF APPELLANT

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Pursuant to Rules 221(a) and 240(i), SCACR, the Appellant Colony Insurance Company ("Colony") respectfully petitions this Court for a rehearing of Opinion No. 2018-UP-402, dated October 31, 2018. Rehearing is warranted when the Court has overlooked or misapprehended an argument or any points of law or fact. Rule 221(a), SCACR; *see also Kennedy v. S.C. Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001).

Specifically, Colony petitions this Court for rehearing on the grounds that, in holding that the "Assault and Battery" Exclusion in the Colony Policy[1] does not apply to exclude coverage for the claims asserted against Respondent Three Blind Mice, LLC d/b/a The Blind Horse Saloon (Three Blind Mice), the October 31, 2018, Opinion overlooked or misapprehended the following:

- The interpretation of the "Assault and Battery" Exclusion in the Colony Policy to provide coverage for the claims against Three Blind Mice in the Frost Lawsuit[2] applied by the lower court and adopted by this Court required the improper insertion of the word "intentional" into the Policy's definition of the term "battery" to limit the exclusion's application to "intentional" acts, thereby improperly changing the substance of the terms of the Policy itself.

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[1] Commercial General Liability Insurance Policy No. GL3812749 issued by Colony to Three Blind Mice.

[2] *Katherine Frost and Bobby Frost v. Three Blind Mice, LLC,* et al., C.A. No. 2012-CP-23-3249, in the Court of Common Pleas, Greenville County, South Carolina.

- The purpose of an exclusion, such as the "Assault and Battery" Exclusion in the Colony Policy, is not to fit within the framework or "function in concert with" the coverage granted by the "Insuring Agreement," but rather, to remove or limit the scope of coverage granted by the "Insuring Agreement" in the Policy. Therefore, the application of the "Assault and Battery" Exclusion to bar coverage for unintentional acts does not create a "contradiction" or internal inconsistency within the Policy. *Precision Walls, Inc. v. Liberty Mut. Fire Ins. Co.*, 410 S.C. 175, 180, 763 S.E.2d 598, 600 (Ct. App. 2014); *Laidlaw Envt'l Servs. (TOC), Inc. v. Aetna Cas. & Sur. Co.*, 338 S.C. 43, 51, 524 S.E.2d 847, 852 (Ct. App. 1999). As such, an "internal inconsistency" is not created by the "Assault and Battery" Exclusion in the Policy, which removes coverage for "bodily injury" arising out of a "battery" regardless of whether such battery was committed intentionally or unintentionally.
- The coverage afforded under the Colony Policy would not be illusory if the "Assault and Battery" Exclusion is applied pursuant to its plain and unambiguous terms because the exclusion does not deprive coverage for *any* harmful act under the Policy.
- The manner in which some courts have defined the civil tort of "battery" is irrelevant because the Colony Policy expressly defines the term "battery" as used in the "Assault and Battery" Exclusion.

The definition is not ambiguous. It is improper to consider other definitions of "battery" in other contexts. The parties are free to define contractual terms as they want. *B.L.G. Enter. v. First Fin. Ins. Co.*, 334 S.C. 529, 535–36, 514 S.E.2d 327, 330 (1999) (internal citations omitted); *see also Spartan Iron & Metal Corp. v. Liberty Ins. Corp.*, 6 Fed. Appx. 176, 178 (4th Cir. S.C. 2001) ("To adopt a common law definition here where the policies provide a contractual definition would be at odds with South Carolina law."); *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 519, 548 S.E.2d 880, 883 (S.C. Ct. App. 2001) (holding that an insurer's obligations are defined by the terms of the policy itself, and policy definitions must be enforced as written). The lower court and this Court improperly relied upon such extrinsic evidence to interpret the "Assault and Battery" Exclusion in order to find that the exclusion only applies to "intentional" acts.

- The Opinion is inconsistent in interpreting the Colony Policy by simultaneously holding that insurance policies must be interpreted according to their plain terms without inserting language under the guise of judicial construction, but then improperly inserting language into the "Assault and Battery" Exclusion in order to find that the exclusion only applies to "intentional" acts.

- The plain and unambiguous language of the "Assault and Battery" Exclusion in the Colony Policy bars coverage for the claims against Three Blind Mice in the Frost Lawsuit.

Furthermore, Colony petitions this Court for rehearing on the grounds that, in holding that the "Athletic or Sport Participants" Exclusion in the Colony Policy does not apply to exclude coverage for the claims at issue, the October 31, 2018, Opinion overlooked or misapprehended the following:

- The "Athletic or Sport Participants" Exclusion is not limited to injuries to "any person" who is "practicing for or participating" in the arcade game as found by this court. Rather, the exclusion applies to "any person" for any injuries "arising out of or resulting from practicing for or participating in any athletic contest, exhibition, activity, game or sport" regardless of whether the injured person was one participating in the athletic contest, exhibition, activity, game, or sport.
- The plain and unambiguous language of the "Athletic or Sport Participants" Exclusion in the Colony Policy bars coverage for the claims against Three Blind Mice in the Frost Lawsuit. *See Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 320, 751 S.E.2d 256, 261 (2013) (holding that when a policy's language is unambiguous it must be given its plain and ordinary meaning, and the court may not look to extrinsic evidence to interpret the provisions of the policy).

Finally, Colony petitions this Court for rehearing on the grounds that, in holding that the question of whether Colony acted unreasonably or in bad faith should be submitted to the trier of fact, the October 31, 2018, Opinion overlooked or misapprehended the following:

- Even if it is determined that the Colony Policy should afford coverage for the claims asserted against Three Blind Mice in the Frost Lawsuit, there was no evidence presented to support a determination that Colony acted in bad faith by contesting coverage for such claims. In fact, the Court of Appeals found that the policy language at issue was ambiguous and none of the materials in the record established that Colony unreasonably breached the terms of the Colony Policy. If the language was ambiguous, which Colony does not concede, then Colony did not act in bad faith in interpreting the language based upon a reasonable interpretation of language, especially if that interpretation was based upon its intent in drafting the language. Colony issued the Policy to an entity in the business of operating a bar, on the condition that the Policy include the "Assault and Battery" Exclusion in order to bar coverage for bodily injury claims arising out of a "battery", which is a reasonable limitation on the coverage that Colony was willing to provide to an operator of a bar. More importantly in the context of a summary judgment motion, there was no evidence in the record that Colony

"had no reasonable basis" for contesting coverage for the claims against Three Blind Mice in the Frost Lawsuit (as required to establish a bad faith claim under South Carolina law). *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004); *see also Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992) ("If there is a reasonable ground for contesting a claim, there is no bad faith."). Accordingly, based upon this Court's finding of ambiguity, Colony was entitled to judgment as a matter of law with respect to the bad faith claim asserted by Three Blind Mice against Colony as well as the related claim for attorneys' fees incurred by Three Blind Mice in this action.

WHEREFORE, the Appellant Colony Insurance Company seeks an Order granting Rehearing, and ultimately withdrawing Opinion No. 2018-UP-402, dated October 31, 2018, and entering a new Opinion that reverses the Circuit Court's final Order and Judgment entered on April 8, 2016, and the Circuit Court's interlocutory Order entered on November 18, 2015, which held that the "Assault and Battery" Exclusion and the "Athletic or Sport Participants" Exclusion in the Colony Policy did not bar coverage for the claims against Three Blind Mice in the Frost Lawsuit and that Colony acted in bad faith when it denied coverage to Three Blind Mice for the claims asserted in the Frost Lawsuit.

Respectfully submitted,

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November 30, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-000963

Case No. 2014-CP-23-03422

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

v.

Colony Insurance Company . . . . . Appellant

PROOF OF SERVICE

I certify that on the 29th day of November, 2018, I served a copy of the Petition for Rehearing of Appellant on all parties to the appeal in this action by mailing a copy of the same on the following counsel of record:

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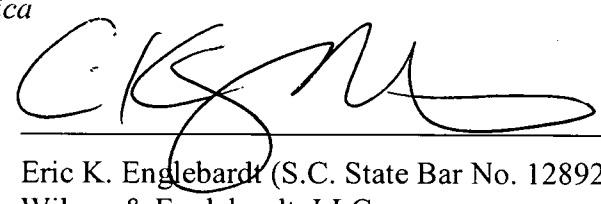

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November 29, 2018.

WILSON & ENGLEBARDT, LLC
LITIGATION • APPEALS • DISPUTE RESOLUTION

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November 29, 2018

Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
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RE: Three Blind Mice, d/b/a The Blind Horse Saloon v. Colony Insurance Company
Appellate Case No.: 2016-000963

Dear Ms. Kitchings:

This firm represents the Appellant in the above-captioned matter pending in the South Carolina Court of Appeals.

Enclosed please find the original and seven (7) copies of Appellant's Petition for Rehearing in the above-referenced case along with the proof of service upon Respondent's counsel.

Enclosed is our firm's check in the amount of $50.00 as the required filing fee for this Petition. Please return a filed copy to me in the enclosed self-addressed stamped envelope.

If you have any questions or concerns, please feel free to contact me.

Thank you for your assistance.

Respectfully yours,

WILSON & ENGLEBARDT, LLC

Eric K. Englebardt

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Enclosures
cc: William W. Wilkins and Andrew A. Mathias, Esquires
Robert Curt Calamari, Daniel Ray McCoy, and Nicholas Andrew Charles, Esquires
David L. Brown and David Grant Harris, Esquires