THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court Of Common Pleas

The Honorable Michael G. Nettles, Judicial Circuit Court Judge
Trial Court Case No.: 2017-CP-21-341

Appellate Case No. 2018-001675

Allstate Property and Casualty Insurance Company..... Respondent,

v.

Natoshia Hamilton. .....Appellant.

INITIAL BRIEF OF RESPONDENT ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY

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ATTORNEYS FOR RESPONDENT
ALLSTATE PROPERTY & CASUALTY
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INTRODUCTION

The circuit court's grant of summary judgment in favor of Respondent Allstate Property and Casualty Insurance Company ("Allstate") should be affirmed because Appellant Natoshia Hamilton ("Hamilton") has failed to demonstrate any basis upon which the circuit court's determination should be reversed.

This case arises from a claim that was submitted to Allstate related to bodily injuries Hamilton sustained arising from an accident that occurred on January 31, 2015. By letter dated January 15, 2016, and received by Allstate during the afternoon of January 21, 2016, Hamilton made a time-sensitive demand for payment of Allstate's policy limits to resolve her bodily injury claim. The applicable limits of the policy issued to Allstate's insured, Kathryn Broach ("Broach"), was $25,000 for Hamilton's bodily injuries. Allstate had less than 4 whole business days to ascertain what Hamilton was seeking in the ten-page letter, review the submitted information, and respond before the arbitrarily-set deadline of January 26, 2016. On January 26, 2016, Allstate hand delivered the settlement check in the amount of $25,000 representing the bodily injury limits along with the other documentation demanded in the letter, thereby resolving the bodily injury claim.

Despite the fact Allstate performed the material terms outlined in the January 15, 2016 letter and timely tendered the applicable limits of the policy, Hamilton rejected Allstate's acceptance of her demand with no explanation and filed suit against Kenneth Coogler ("Coogler"), the driver who was involved in the accident and Broach's husband. Allstate filed a declaratory judgment action seeking a declaration that Allstate's performance under the demand is valid and enforceable and Allstate fulfilled its

obligations under the policy when the claim was settled. Further, Allstate sought a declaration that it has no further obligation to Hamilton in connection with her claim. The parties filed cross-motions for summary judgment, and the trial court granted Allstate's motion and denied Hamilton's motion.

The trial court correctly determined that Allstate accepted the material terms of the time-sensitive demand such that Allstate's payment of the $25,000.00 bodily injury limits constituted a valid and enforceable settlement. Because Hamilton failed to demonstrate the existence of a genuine issue of material fact, the circuit court properly granted Allstate's motion and denied Hamilton's motion. Therefore, the circuit court's decision should be affirmed.

STATEMENT OF THE CASE

On February 6, 2017, Allstate filed a Summons and Complaint against Hamilton and Coogler seeking a declaration from the court that Allstate's acceptance of Hamilton's time-sensitive demand resulted in a valid and enforceable settlement agreement. Hamilton's counsel accepted service on behalf of Hamilton on February 23, 2017, and thereafter, Hamilton filed her Answer and a Motion to Dismiss contending that the allegations of the Complaint failed to allege an enforceable contract.[1] A hearing was held on the Motion to Dismiss on July 17, 2017, and the Court issued an Order dated July 21, 2017 denying the Motion to Dismiss.

On January 22, 2018, Hamilton filed a Motion for Summary Judgment ("Hamilton's Motion") contending that Allstate did not meet the terms of the settlement offer because Allstate sent a "manual" check rather than a certified or cashier's check for the applicable policy limits and the sending of the check constituted a counter proposal. Hamilton argued that because Allstate did not comply with this term, she was entitled to entry of summary judgment on the declaratory judgment. On February 7, 2018, Allstate filed its Motion for Summary Judgment ("Allstate's Motion") contending that Allstate complied with the material terms of the time-sensitive settlement demand such that Allstate was entitled to entry of summary judgment in its favor and entitled to an order declaring that the settlement agreement was valid and enforceable. On June 7, 2018, Allstate filed its Memorandum of Law in Support of its Motion.[2]

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[1] Coogler was served on February 18, 2017. To date, Coogler has not answered the complaint or otherwise appeared in this action.

[2] The Memorandum of Law was served on the judge and opposing counsel on May 31, 2018.

On June 1, 2018, the circuit court heard oral argument of the parties. After hearing oral argument and considering the written argument and evidence, the circuit court granted Allstate's Motion and denied Hamilton's Motion by Order dated August 6, 2018. In granting Allstate's Motion, the court determined that Allstate met the essential and material terms of the demand – the payment of the entire $25,000 policy limits for Hamilton's bodily injuries. (Order, p. 6) The trial court noted that Hamilton conceded that the type of check would not change the amount of money demanded and received by her. Further, the court determined that it was a term that was impossible for Allstate to meet because, as an insurance company, Allstate does not issue cashier's or certified checks. (Order, pp. 6-7).

In reaching such a determination regarding the materiality of the type of check, the court noted that the South Carolina Supreme Court has ordered that there is no material difference between an insurance check and a certified or cashier's check per South Carolina Rule of Professional Conduct 1.15, thus, the type of check was not an essential or material term of a settlement agreement. (Order, pp. 7-8) The court also found that Allstate's acceptance of the settlement demand constituted a "textbook example of an accord and satisfaction" and specifically found: 1) that there was a demand to settle Hamilton's claim; 2) Allstate accepted the demand, and 3) Allstate provided the demanded consideration to support the agreement to settle Hamilton's claim. (Order, p. 8) Finally, the court also found that based on its review of the evidence, "demanding a certified or cashier's check and rejecting the check issued by Allstate without attempting to negotiate was done for the purpose of attempting to manufacturer a *Tyger River* bad faith claim." (Order, p. 9) In this vein, the court specifically found that "if the true

reason for requesting payment of the policy proceeds in this manner was to get the client paid quicker, counsel would have deposited the check that was hand delivered by Allstate to Hamilton's counsel on January 26, 2016" such that "Hamilton would have been paid within 2 weeks of the demand and over two years ago." (Order, p. 9)

On August 20, 2018, Hamilton filed a Motion to Reconsider and/or Alter or Amend Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant Hamilton's Motion for Summary Judgment ("Motion to Reconsider"). Before Allstate could file an opposition to the Motion to Reconsider, on August 30, 2018, the circuit court denied the Motion to Reconsider and entered an order that same day. On October 12, 2018, Hamilton filed a Notice of Appeal.

STATEMENT OF FACTS

A. Claim Handling and Time-Sensitive Settlement Demand

Allstate received a letter dated February 5, 2015, from the Anastopoulo Law Firm, LLP ("the Law Firm") stating that the Law Firm would be representing Hamilton "for the bodily injuries she suffered during a motor vehicle accident." (Allstate's Motion, Ex. A., Affidavit of Wayne D. Gaymon ("Gaymon Aff."), p. 1, Ex. B) Hamilton and her husband handled the property damage portion of her claim through her insurance company, and Hamilton testified that she does not know of any outstanding property damages as a result of this accident. (Allstate's Motion, Ex. B, Deposition of Natoshia Hamilton ("Hamilton Depo."), pp. 11-13, 28-29) Consistent therewith, per the Attorney Retainer and Contingent Fee Agreement between Hamilton and the Law Firm, the Law Firm did not have an obligation to negotiate or settle any property damage issues Hamilton may have had. (Allstate's Motion, Ex. C, Hamilton's Supplemental Responses to Plaintiff's First Requests for Production)

On Thursday, January 21, 2016, Allstate received a letter from the Law Firm regarding radiology bills that were to be added to the bills included with the demand. However, because Allstate had not received the demand referenced in that letter, Allstate called the Law Firm and was told that the demand package had been sent. During the afternoon of January 21, 2016, Allstate received the time-sensitive demand that was dated January 15, 2016, which was the Friday before the holiday on January 18, 2016. (Gaymon Aff., pp. 1-2)

Per the terms of the demand, the demanded limits were to be received by "5:00 pm EDT on January 26, 2016." Hamilton was told and knew that Coogler's policy had

$25,000 limits for bodily injury. (Hamilton Depo., pp. 19-20) The demand stated that "[s]ettlement funds must be paid by Cashier's Checks, or Certified Bank Checks (not drafts) issued by your insurance company" and be made payable to Hamilton and the Law Firm. (Gaymon Aff., p. 2, Ex. C) However, Hamilton conceded the $25,000 would have been the same amount of money whether it was issued via a regular check or a certified check. (Hamilton Depo., p. 44) Hamilton also admitted that she did not have any concerns that a check from Allstate would bounce. (Hamilton Depo., pp. 45-46)

In addition, the letter also demanded that Coogler "provide sworn and notarized statements that there is no other insurance coverage available to her [sic] that could pertain to this loss." Further, the demand requested that a proposed release be provided. The letter specifically directed that Allstate "[i]nstead of acting in bad faith and trying to trick us, please just send a reasonable Release that does not include indemnification or the release of property damage claims." In addition, the letter stated "[p]art of the performance required to accept this offer is for you to deliver a proposed Release with the settlement check" and "the proposed Release that is delivered with the settlement check must comply with the terms of this offer." (Gaymon Aff., p.2)

On January 26, 2016, the settlement check in the amount of $25,000.00, covenant not to execute, and affidavits of the named insured Broach, and her husband, Coogler, were delivered to the Law Firm (and signed for by attorney Evan Williams) to satisfy the requirements of the time-sensitive demand. (Gaymon Aff., p. 3)

B. Attempted Rejection of Allstate's Acceptance of Settlement

Despite Allstate's acceptance of the time-sensitive demand by performance, Hamilton rejected Allstate's acceptance. Hamilton explained that she rejected Allstate's

acceptance of the demand because the check was not a certified check and "because of [her] pain and suffering." (Hamilton Depo. 41) She explained that the check "didn't meet our demand." (Hamilton Depo., pp. 30-35). However, she could not explain any difference between the types of checks, acknowledged there is no material difference and specifically testified:

> Q: ...So this check that's attached here was in the amount of 25,000 dollars, correct?
>
> A: Yes, sir.
>
> Q: Okay. And the amount of money, the 25,000 dollars, you would agree that would have been the same amount of money whether it was a regular check or a certified check. Do you agree with that? The amount wouldn't change. It would still be 25,000 dollars.
>
> A: You're – you're right. I'm – yes, sir, you're right.
>
> Q: Okay. So it's the same amount of money.
>
> A: Yes, sir.

(Hamilton Depo., p. 44)

ARGUMENT

I. Standard of Review

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Rife v. Hitachi Const. Machinery Co., Ltd.*, 363 S.C. 209, 213, 609 S.E.2d 565, 568 (Ct. App. 2005) (citing *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 602 S.E.2d 389 (2004) *and* Rule 56, SCRCP). The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder. *Rife*, 363

S.C. at 215, 609 S.E.2d at 568 (citing *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 443 (2003)). "Further, summary judgment depends upon the existence of plain, undisputed facts on which reasonable minds cannot differ." *Allen v. Long Mfg. NC, Inc.*, 332 S.C. 422, 426, 505 S.E.2d 354, 356 (Ct. App. 1998) (citing *Priest v. Brown*, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990)). "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493-494, 567 S.E.2d 857, 860 (2002) (citing *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1990)).

Here, Allstate demonstrated that it was entitled to entry of judgment in its favor as a matter of law with regard to the validity and enforcement of the settlement agreement that was formed upon its acceptance of Hamilton's time-sensitive demand. Hamilton has failed to present any basis upon which the circuit court's grant of summary judgment in Allstate's favor should be reversed. Allstate interpreted the demand to require payment of the $25,000 bodily injury limits be paid by a certain time. Allstate's interpretation of the requirements of the demand was correct as evidenced by Hamilton's testimony where she acknowledges that she was seeking payment of the $25,000 bodily injury policy limits. The evidence clearly shows that Allstate complied with the terms of the demand. Allstate issued a check for the $25,000.00 bodily injury limits of the policy in a form that was immediately available to her before the arbitrary deadline included in the demand. The circuit court properly granted Allstate's Motion on these undisputed facts and the grant of summary judgment should be affirmed.

II. The Circuit Court Properly Granted Allstate's Motion for Summary Judgment.

The circuit court's determination that the settlement agreement was viable and enforceable was correct under the terms of the demand and South Carolina law and should be affirmed.

A. Hamilton Cannot Rely Upon Arguments That Were Not Properly Preserved.

As an initial matter, the arguments presented in Hamilton's Opening Brief regarding its criticisms of the circuit court's Order were not raised in Hamilton's Motion or in response to Allstate's Motion. Rather, the arguments were raised for the first time in Hamilton's Motion to Reconsider. The South Carolina Supreme Court has explained that "[a]n issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) (citing *Commercial Credit Loans, Inc. v. Riddle*, 334 S.C. 276, 186, 512 S.E.2d 123, 129 (Ct. App. 1999)). Therefore, these arguments are not properly before this Court.

In her Opening Brief, Hamilton includes an argument regarding South Carolina contract formation, interpretation, and the application of unambiguous policy language. Notably, this discussion is missing from Hamilton's Motion and she did not submit an opposition in response to Allstate's Motion. Hamilton appears to be contending that the circuit court improperly modified the terms of the settlement demand and/or there was not a meeting of the mind regarding essential and material terms in the settlement agreement. These specific arguments regarding the alleged unambiguity of the settlement language was not presented to the circuit court on either Hamilton's Motion or Allstate's Motion. Therefore, because these arguments were raised for the first time on Hamilton's

Motion to Reconsider, this issue should not be considered on appeal.

Notwithstanding the fact these arguments are not properly before this Court, even if the Court were to consider these arguments, they fail. There is no question that there was a meeting of the minds in this case. Hamilton, by her own testimony, explained that she expected to receive the $25,000 bodily injury limits in issuing the demand to Allstate. She could not articulate any material difference between a certified, cashiers, or insurance company check. While Allstate could not "issue" a cashier's or certified check, the check Allstate could issue was sent and operated such that the funds were available in the same way the funds would be for a cashier's or certified check. There is no question that the circuit court properly considered the evidence in this case and determined that the evidence – including Hamilton's testimony – demonstrated that there was a meeting of the minds and that Allstate's performance of the material, essential terms of the settlement demand operated such that the claim was settled.

B. Allstate's Acceptance and Performance of the Material Terms of the Settlement Demand Constitute a Valid Acceptance.

1. The Circuit Court Correctly Determined Allstate's Acceptance of the Settlement Demand Was Not a Counteroffer.

In her Motion, Hamilton contends that "Allstate failed to comply with the clear, explicit requirements to tender a cashier's or certified check." (*See* Hamilton's Motion, p. 4) During her deposition, Hamilton testified that her only issue with Allstate's acceptance of the demand was the form of the check. (*See* Hamilton's Depo. 30-35) Further, Hamilton contends that Allstate's acceptance of the demand "was not a mirror image or in compliance with the terms of Defendant's offer" and "under the long-standing dictates of contract law....Allstate's tender in response to Defendant's offer was

nothing more than a counter proposal." (*See* Hamilton's Motion, p. 5) Hamilton's contentions are not supported by South Carolina law. Rather, the principles of South Carolina contract law mandate affirming the trial court's entry of summary judgment in favor of Allstate.

Under South Carolina law, "'[i]n construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). Further, under South Carolina law, for there to be a valid contract, there must be an offer, an acceptance, and valuable consideration. *See Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 328, 721 S.E.2d 447, 450 (Ct. App. 2011) (determining a valid contract existed because there was evidence of a meeting of the minds as to the terms and conditions of the agreement) (citing *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) ("The necessary elements for a contract are an offer, acceptance, and valuable consideration.")). In addition, under South Carolina law, a valid and enforceable contract is created when there is "a meeting of the minds between the parties with regard to all ***essential*** and ***material*** terms of the agreement." *Nutt Corp.*, 396 S.C. at 328, 721 S.E.2d at 450 (citing *Player v. Chandler*, 299 S.C. 101, 106, 382 S.E.2d 891, 893 (1989)) (emphasis added). *See also Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014) (explaining that "[a] valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement.") (emphasis in original).

Hamilton testified that her intention in sending the January 15, 2016 letter to Allstate for the limits of the policy was to actually receive the full, $25,000 bodily injury

limits to resolve her bodily injury claim under the policy. *See Ecclesiastes Prod. Ministries*, 374 S.C. at 498, 649 S.E.2d at 502 ("In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes at the time the contract was entered."); (Hamilton Depo., p. 28). There is no question that Allstate's acceptance of the settlement demand is valid and enforceable. There was an offer from Hamilton that was accepted by Allstate, which provided valuable consideration to Hamilton. Further, there is no question that Allstate met the essential and material terms of Hamilton's demand – the payment of the entire $25,000 policy limits for Hamilton's alleged bodily injuries. Therefore, the trial court properly determined that Allstate was entitled to entry of summary judgment in its favor.

Hamilton's contention seems to suggest that because Allstate's acceptance of the settlement demand was not a so-called "mirror image" in that the type of check issued was not a cashier's check or certified check there was no valid settlement. Contrary to Hamilton's assertion, the type of check is not a material term of the settlement demand, and further, it was a term that was impossible for Allstate to meet.

While Hamilton was unable to articulate why she wanted a certified or cashier's check in this form, during the hearing, her counsel explained that this was done because "We want to get our clients paid quicker." (*See* Motion Hearing Transcript, p. 16) It should go without saying that insurance companies such as Allstate do not issue cashier's checks or certified checks. (*See* Gaymon Aff., p. 2) Moreover, Hamilton has not demonstrated that issuing such checks in this manner is an accepted practice for insurance companies.

Notwithstanding this fact, at least one South Carolina court has questioned the

continued vitality of the so-called "mirror-image" rule and has noted that it is outdated in that it was "well suited to simple, one time transactions, in which the parties contract face to face" and that "it fails to accommodate the realities of much modern commercial practice." *Weisz Graphics Div. of Fred B. Johnson Co. v. Peck Indus.*, 304 S.C. 101, 106, 403 S.E.2d 146, 149 (Ct. App. 1991).

In addition, Hamilton has pointed to no South Carolina case stating that such a rule would apply to determine that Allstate's performance of the actual essential and material terms of the time-sensitive demand constitutes a counteroffer. Further, as has been demonstrated by counsel's statement, the reason for the inclusion of this specific term was to get the client paid quicker. Because there is no material difference between how the manual check issued by Allstate in this case and a certified or cashier's check issued by a bank would be treated in South Carolina, Allstate's issuance of the manual check (the kind of check that it can actually issue), does not constitute a counteroffer. Accordingly, the circuit court's determination should be affirmed.

2. *The Circuit Court Correctly Determined Rule 1.15 Demonstrates that the South Carolina Supreme Court Does Not Consider the Form of the Check to Be a Material Term of the Settlement Demand.*

Hamilton contends that the comments to Rule 1.15 demonstrate that there are material differences between cashier's checks, certified checks, and checks issued by insurance companies. Further, she contends that lawyers take on risks in disbursing funds from their trust accounts because of the difference between available funds and collected funds. Hamilton's arguments lack merit. As an initial matter, these concerns were raised for the first time in Hamilton's Motion to Reconsider and should not be

considered by this Court. *See Johnson*, 381 S.C. at 177, 672 S.E.2d at 570. Even if this Court were to consider these arguments, Hamilton's arguments fail.

Despite Hamilton's contentions to the contrary, our Supreme Court has already determined that payment in the form of a cashier's or certified check is not an essential or material term of a settlement agreement.[3] South Carolina Rule of Professional Conduct 1.15 states as such. Specifically, the rule provides in pertinent part:

> (f)(1) A lawyer shall not disburse funds from an account containing the funds of more than one client or third person ("trust account") unless the funds to be disbursed have been deposited in the account and are collected funds.
>
> (2) Notwithstanding Subsection (f)(1) above, a lawyer may disburse funds from a trust account at the lawyer's risk in reliance on the following deposits when the deposit is made:
>
> ****
>
> (iv) by a certified check, cashier's check, or other check drawn by a depository institution or an insurance company, provided the insurance company check does not exceed $50,000.

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[3] Without citation to any authority, Hamilton makes the sweeping statement that "[a]s a threshold matter, the Court is not the arbiter of what is a material term of a settlement offer or contract." The failure to include any citation of legal authority in support of her erroneous statement is fatal to her argument. *See State v. Jones*, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) ("Additionally, 'short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.... [and '[a]n issue is deemed abandoned if the argument in the brief is merely conclusory.'") (quoting *Glasscock, Inc. v. U.S. Fid. & Gaur. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); *State v. Colf*, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998); *aff'd as modified*, 337 S.C. 622, 525 S.E.2d 246 (2000)).

Further, South Carolina courts have considered and issued rulings regarding the materiality of terms in contracts. *See, e.g, Hooters of Am. v. Phillips*, 39 F. Supp.2d 582, 606-607 (D.S.C. 1998) (finding that the plaintiff's rules were essential and material terms of the arbitration agreement); *cf. Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978) (determining that "[s]ome terms are considered indispensable to a binding contract").

Rules of Professional Conduct: Rule 1.15, RPC, Rule 407, SCACR. Therefore, per the mandate of the South Carolina Supreme Court, a check issued by an insurance company that does not exceed $50,000 is treated the same as a certified check, cashier's check, or other check drawn by a depository institution – i.e., the money would be immediately available, which addresses counsel's concern. (*See* Motion Hearing Transcript, p. 16)

Hamilton's contention that the Comments to Rule 1.15 support her arguments is illogical. Specifically, Comment 7 to Rule 1.15 states:

> Subsections (i) through (vi) of rule 1.15(f)(2) represent categories of trust account deposits ***which carry a limited risk of failure so that disbursements may be made in reliance on such deposits without violating the fundamental rule of disbursing only on collected funds.*** In any of those circumstances, however, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. The lawyer's risk includes deposited instruments that are forged, stolen, or counterfeit. It any of the deposits fail for any reason, the lawyer, upon receipt of notice or actual knowledge, must promptly act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such items personally pays the amount of any failed deposit within five (5) business days of receipt of notice that the deposit has failed, the lawyer will not be considered to have committed professional misconduct based upon the disbursement of uncollected funds.

Rule 1.15, 407, SCACR, Comment 7. Contrary to Hamilton's assertions, Comment 7 demonstrates that there is no difference between these types of checks because the Supreme Court has determined that all of these trust account deposits carry the ***same*** limited risk of failure. Furthermore, as Allstate argued during the Motion Hearing, another South Carolina circuit court judge considered a case involving a lawyer who received a certified check that was fraudulent and the lawyer disbursed the money before the check cleared. Judge Burch raised this issue to demonstrate (as does comment 7) that

a certified or cashier's check does not necessarily obviate the issues raised by Hamilton. (*See* Motion Hearing Transcript, pp. 13-14) Therefore, Hamilton's arguments lack merit.

Further, there is no valid reason for demanding a cashier's or certified check from an insurance company to resolve an insurance claim. Hamilton contends that Allstate does not argue that the settlement demand was invalid on the grounds of being illegal, unconscionable, or against public interest. This statement is not true. As the circuit court correctly found, the only reason to send a ten-page demand letter with multiple footnotes, containing multiple requirements that the insurance company must meet, including payment by way of a certified or cashier's check "issued" by the insurance company, all within a short period of time, is to attempt to manufacture a future so-called *Tyger River* claim. (*See* Motion Hearing Transcript, pp. 17-18: "I think it's clearly based on the – on the facts of this case. It's an attempt to get bad faith refusal to pay and *Tyger River* in trying to get excess coverage. I think that's clearly what this is all about...."; Order, p. 9) Hamilton has not sought to appeal from the circuit court's finding of fact in this regard. *See Jones v. Leagan*, 384 S.C. 1, 17, 681 S.E.2d 6, 15 (Ct. App. 2009) (noting that the appellant did not dispute the special referee's findings and explaining that "[a]n issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal.") (citing Rule 208(b)(1)(D), SCACR, *Jinks v. Richland County*, 355 S.C. 341, 344, 585 S.E.2d 281, 283, n. 3 (2003)). Allowing this type of gamesmanship in settlement negotiations is unconscionable and against the public policy of South Carolina. *See Smith v. Tiffany*, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017) (recognizing South Carolina's public policy favoring settlements) (citing *Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 830 (2015); *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343,

346, 698 S.E. 559, 560 (2010)).

The form of the payment is not a material term of the agreement – the amount is the material term. It would be no different than if Hamilton had demanded payment of the $25,000 in pennies rather than a certified check. Settlement of claims should not be reduced to a game of cat and mouse. While Allstate is entitled to prevail on this issue as a matter of law, Allstate is also entitled to prevail on this issue as a matter of civility, common sense, and public policy, all of which are important components to the process of settling insurance claims.

Therefore, the circuit court correctly granted Allstate's Motion as a matter of law and the grant should be affirmed.

C. Allstate's Performance of the Settlement Demand Constitutes an Accord and Satisfaction.

The circuit court correctly determined that Allstate's performance of the settlement demand constituted an accord and satisfaction. Under South Carolina law, "[t]he essential elements of an accord and satisfaction are an agreement to settle a dispute and consideration which supports the agreement." *Wilson v. Builders Transp., Inc.*, 330 S.C. 287, 297, 498 S.E.2d 674, 680 (Ct. App. 1998). Here, as previously stated, there was an offer to settle Hamilton's claim, Allstate accepted the offer, and provided the demanded consideration to support the agreement to settle Hamilton's claim. As the circuit court correctly found, this is a textbook example of an accord and satisfaction.

Allstate sought to comply with the arbitrary deadline imposed by the January 15, 2016 letter, and based on prior experience with Hamilton's counsel, it understood that it would not receive an extension of the deadline by which to tender the

$25,000 policy limits. Given the time restraints, Allstate issued a manual check and hand delivered the check with the other requested items to counsel in order to comply with the arbitrary deadline. And, as stated above, a check issued by an insurance company that does not exceed $50,000.00 is treated the same as a certified check or a cashier's check for purposes of disbursement of the funds to Hamilton. Therefore, Allstate's manual check was sufficient to meet the terms of the agreement and the payment thereof constitutes an accord and satisfaction.

CONCLUSION

The circuit court properly granted Allstate's Motion and properly declared that Allstate's acceptance of the time-sensitive demand was valid and enforceable such that Allstate has no further obligation regarding Hamilton's claim. Allstate accepted and performed the material, essential terms of the time-sensitive demand and such performance created a valid and enforceable agreement and an accord and satisfaction under South Carolina law. Therefore, Allstate respectfully requests this Court affirm the circuit court's grant of its Motion for Summary Judgment.

December 28, 2018 By: _____

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ATTORNEYS FOR RESPONDENT
ALLSTATE PROPERTY & CASUALTY
INSURANCE COMPANY

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court Of Common Pleas

The Honorable Michael G. Nettles, Judicial Circuit Court Judge
Trial Court Case No.: 2017-CP-21-341

Appellate Case No. 2018-001675

Allstate Property and Casualty Insurance Company .....Respondent,

v.

Natoshia Hamilton.....Appellant.

PROOF OF SERVICE

I certify that I served copies of the Initial Brief of Respondent Allstate Fire & Casualty Insurance Company by United States mail, postage prepaid, addressed to:

J. Camden Hodge, Esq. Eric M. Poulin, Esq., and Roy T. Willey, IV, Esq.
Anastopoulo Law Firm, LLC
32 Ann Street
Charleston, S.C. 29403

December 28, 2018

By: _____

A. Johnston Cox (S.C. Bar No. 09081)
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GALLIVAN WHITE BOYD
Complex experience for complex matters

JANICE HOLMES
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December 28, 2018

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Allstate Property and Casualty Insurance Company v. Natoshia Hamilton
Appellate Case No.: 2018-001675
GWB File No.: 8300-323

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find the original and two (2) copies of Respondent's Initial Brief, Designation of Matter to be Included in Record on Appeal, and Proof of Service.

We would appreciate you filing these documents with the Court of Appeals and returning two (2) clocked copies to me by the awaiting individual from my office. By copy of this letter, we are serving counsel of record with copies of these documents.

With kind regards, I am

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.

Janice Holmes

JH:amm
Enclosures
Cc: All Counsel of Record