THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2018-CP-04-02003
Appellate Case No.: 2019-000856

Debra O'Connor, as Personal Representative of the Estate of Sandy Lynn Shook — Appellant,

v.

Aaron Collier — Respondent.

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES ON APPEAL

1) DID THE CIRCUIT COURT CORRECTLY GRANT MR. COLLIER'S MOTION TO ENFORCE SETTLEMENT, DETERMINING THAT THERE WAS A MEETING OF THE MINDS AND A VALID ACCEPTANCE OF THE OFFER/DEMAND MADE ON BEHALF OF MS. SHOOK'S ESTATE?

2) DID THE CIRCUIT COURT CORRECTLY HOLD THAT THE MISTAKE WITH REGARD TO THE DELIVERY OF THE SECOND SETTLEMENT CHECK CONSTITUTED A GOOD FAITH ERROR INSUFFICIENT TO TERMINATE OR RESCIND THE AGREEMENT?

II. STATEMENT OF THE CASE

This matter arises out of a motor vehicle accident that occurred on or about July 22, 2017 in which a motorcycle being driven by Respondent Aaron Collier left the roadway and crashed. Sandy Shook was a passenger on Mr. Collier's motorcycle and was fatally wounded in the collision. Debra O'Connor was appointed as Personal Representative of the Estate of Sandy L. Shook. At the time of the accident, Mr. Collier was insured under a motorcycle policy, policy number 28452697-0 (the "Policy"), by Progressive Northern Insurance Company ("Progressive"). The Policy included $25,000.00 in bodily injury coverage and $25,000.00 in coverage for property damage per accident.

The Anastopoulo Law Firm, LLC ("Anastopoulo"), sent a letter of representation dated July 28, 2017 to Progressive stating that the firm was representing the Estate of Ms. Shook in making a claim under the Policy and requesting disclosure of the Policy limits. [R. p. 000016] Jeff Vicary, a Senior Claim Specialist with Progressive, was assigned the claim against Mr. Collier. [R. p. 000012] By letter dated April 18, 2018 sent to the Anastopoulo firm, Progressive, on behalf of Mr. Collier, offered to settle to with the Estate of Sandy Shook for its $25,000 per person bodily injury limit and requested a response from the firm. [R. p. 000019] When the Anastopoulo firm failed to respond, Progressive faxed this letter to the firm on May 24, 2018 and again requested a response. By email dated May 25, 2018, the Anastopoulo firm acknowledged receipt of the April 18, 2018 settlement letter and advised that the firm would be sending an "'Offer of Compromise." [R. p. 000013]

On or about September 26, 2018, Anastopoulo sent a demand letter to Progressive via email. The nine page (exclusive of exhibits) letter demanded the bodily injury and property damage limits of Mr. Collier's policy on or before October 12, 2018 by 5:00 p.m. EDT together with a covenant not to execute that conformed to Anastopoulo's specifications and an affidavit of no

additional coverage provided by Mr. Collier. [R. pp. 000128 - 000140] The demand included over a page of footnotes restricting the content of the proposed covenant not to execute. [R. pp. 000128 - 000140] The demand contained an additional footnote stated that "[s]ettlement funds must be paid by Cashier's Checks, or Certified Bank Checks (not drafts) issued by your insurance company as follows: Debra O'Conner [sic] as PR for the Estate of Sandy Shook and the Anastopoulo Law Firm, LLC." [R. pp. 000128 -000140] Despite the fact that the accident occurred just outside of Greenville County and despite the fact that Mr. Hodge, the Anastopoulo attorney handing the claim is also located in Greenville [R. p. 000022], the demand letter sought payment of the funds at Anastopoulo's office in Charleston. [R. pp. 000128- 000140]

Progressive agreed to the terms of the demand letter and began diligently working to obtain the requested affidavit from Mr. Collier and retain counsel to prepare the requested covenant not to execute. [R. p. 000014] Prior to the October 12, 2018 deadline, Progressive obtained the affidavit of Mr. Collier and had the requested Covenant not to Execute drafted. Id. With regard to the settlement amount being tendered by Progressive on behalf of Mr. Collier, the covenant not to execute stated: "NOW, FOR AND IN CONSIDERATION OF the payment to Covenantor of the total sum of Fifty Thousand Five Hundred ($50,000.00) by Insurer on behalf of Covenantee…". [R. pp. 000039 - 000041] Because the payment to Ms. Shook's estate was for bodily injury and property damage, which are two separate coverages under the split-limits Policy, two checks, each in the amount of $25,000.00, were issued by Progressive. [R. p. 000014] The two $25,000.00 checks (check numbers 210477106 and 210477107) were issued by Progressive on October 10, 2018. [R. pp. 000037 – 000038; R. p. 000014] In order to be sure the October 12, 2018 was met, the covenant not to execute and Mr. Collier's affidavit were emailed to Richard Ozegovich, a claim

representative in Progressive's North Charleston office. [R. p. 000014] The two $25,000.00 settlement checks were also printed in the North Charleston office. Id.

On October 11, 2018, Mr. Ozegovich placed the covenant not to execute, Mr. Collier's affidavit, and one of the $25,000.00 checks in an envelope for delivery to Anastopoulo. [R. p. 000045] Mr. Ozegovich inadvertently left the second $25,000.00 check on the printer and did not include it in the envelope. Id. The same day, Mr. Ozegovich delivered the envelope to the Anastopoulo law firm's office in North Charleston, 24 hours in advance of the October 12, 2018 deadline. Id. Attorney Casey Van Valkenburg with the Anastopoulo firm accepted the envelope, noted what was received, and signed a receipt for the same. Id. At no point did attorney Casey Van Valkenburg inform Mr. Ozegovich that the second check was missing. Id.

On October 16, 2018, Mr. Vicary received a letter from the Anastopoulo firm repudiating the settlement agreement because only one check had been received and informing Mr. Vicary that suit would be filed against Mr. Collier. [R. p. 000015] The mistake with regard to the delivery of the second check was remedied the next day when Mr. Ozegovich hand delivered the check to Anastopoulo's office in North Charleston. [R. p. 000045; R. p. 000015] The second $25,000.00 check was returned to Progressive. [R. p. 000015]

The Summons and Complaint were filed by Anastopoulo on October 17, 2018. An Answer on behalf of Mr. Collier was filed on November 7, 2018. A Motion to Enforce Settlement was filed on behalf of Mr. Collier on February 1, 2019. [R. pp. 000009 - 000053] The motion was heard by the Honorable R. Lawton McIntosh on March 20, 2019 and granted by written Order entered on April 8, 2019. [R. pp. 000001 - 000005] In the order, Judge McIntosh found that the settlement agreement is valid and enforceable as there was a meeting of the minds between the parties and that the mistake in the delivery of the second check constituted a good faith mistake in performance

that caused no prejudice to Plaintiff. [R. pp. 000001 - 000005] The court further held that the instant lawsuit was filed solely as an attempt to manufacture a bad faith claim against Progressive. [R. pp. 000001 - 000005]

A motion to reconsider was filed by Appellant on March 22, 2019, before Judge McIntosh's written order was entered. [R. pp. 000075 – 000076] The motion to reconsider was heard by Judge McIntosh on April 25, 2019. At the hearing, Judge McIntosh reiterated his holding that there was a meeting of the minds between the parties. Judge McIntosh stated:

> THE COURT: Well, you keep referring to a meeting of the minds, and I don't think you're right because you said 25, 25, pay me under a covenant and we'll accept it. And they said, "We'll pay you 25, 25 under a covenant and we'll pay it." But then it came down -- so there's the meeting of the minds.
> Do you not agree?
> MR. HODGE: Well, I would agree that they said ---
> THE COURT: But the performance was a mistake.
> MR HODGE: And then they're asking for specific performance here.

[R. p. 000124, lines 14-25] Judge McIntosh went on to articulate policy concerns and concerns about the direction of the legal profession if such practices were allowed:

> THE COURT: I'm not going to change my mind. I – you know, you can call me a fool. I just think this is not the way we want to practice law in South Carolina. So I'm going to – with all due respect, Mr. Hodge, I'm going to deny your motion.

[R. p. 000126, lines 5-10] Judge McIntosh's order denying Appellant's motion to reconsider was filed on May 3, 2019. [R. pp. 000006 - 000008]

On May 16, 2019, Appellant served her Notice of Appeal.

III. STANDARD OF REVIEW

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). The interpretation of a contract is an action at law. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 663 S.E.2d 484

(2008). In an action at law, tried without a jury, the trial court's factual findings will not be disturbed on appeal unless found to be without evidence that reasonably supports the court's findings. Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). An appellate court is free to decide questions of law with no particular deference to the trial court." Byrd v. Livingston, 398 S.C. 237, 241, 727 S.E.2d 620, 622 (Ct. App. 2012).

Appellant has alleged Mr. Collier's motion to enforce the settlement is an action for specific performance of the agreement. [R. p. 000124, lines 14-25] An action for specific performance lies in equity. Ingram v. Kasey's Assocs., 340 S.C. 98, 531 S.E.2d 287 (2000). "In equity actions an appellate court can review the record and make findings based on its view of the preponderance of the evidence." Id. at 105, 531 S.E.2d at 290–91. "This broad scope of review does not require this court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses." Clardy v. Bodolosky, 383 S.C. 418, 679 S.E.2d 527 (2009). Whether to grant or deny specific performance rests in the sound discretion of the trial court. Yawkey v. Lowndes, 150 S.C. 493, 148 S.E. 554, 561 (1929).

"There can be no doubt but that the trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court." Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992). A court's exercise of this power is reviewed for an abuse of discretion. Id. ("It may not be said that [the lower court's] ruling involved an abuse of discretion, nor can we say there is no basis in the record for [the lower court's] ruling.").

A respondent may argue any additional reasons why an appellant court should affirm the appealed ruling, "regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

A reviewing court may, in its discretion, review the additional reasons presented by the respondent and "if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." Id. at 420, 526 S.E.2d at 723. See also Rule 220(c) SCACR.

IV. ARGUMENT

Both parties agree that there are no material facts in dispute. The following exchange occurred at the hearing on the Appellant's motion to reconsider:

> MR. COULTER: Yeah, it was -- there were two $25,000 checks that were supposed to be delivered. A covenant for $50,000 separating those, meaning a 25 payment for BI; 25 PD.
> The currier forgot to bring one of those checks and instead brought only one $25,000 check. And -- and although the covenant was clear and it was supposed to be 50 and supposed to be two $25,000 checks, he just forgot it. And when he found out, he brought it the next day.
> THE COURT: Okay.
> MR. HODGE: So those are the undisputed facts.

[R. p. 000120, line 23 - p. 000121, line 9] The lower court held two hearings, considered the arguments of Mr. Hodge (who was a party to the negotiation of the settlement agreement at issue), and considered the affidavits of both Progressive representatives involved in Progressive's agreement to the terms of the demand letter and the performance of the settlement agreement, the demand letter, the covenant, the affidavit of Mr. Collier, and the copies of the settlement checks issued on October 10, 2018. Based on the foregoing evidence, the lower court properly concluded that there was a meeting of the minds as to all of the material terms of the agreement and that the mistake in the delivery of the second check constituted a good faith error in performance, insufficient to rescind the agreement. Therefore, the lower court held there was a valid and enforceable settlement agreement between the parties.

A. The lower court correctly held that there was a meeting of the minds between the parties.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). Settlement agreements are viewed as contracts. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). "It is well settled in South Carolina that in order for there to be a binding contract between parties, there must be a mutual manifestation of assent to the terms." Potomac Leasing Co. v. Otts Mkt., Inc., 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct.App.1987) "The necessary elements of a contract are an offer, acceptance, and valuable consideration." Roberts v. Gaskins, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct.App.1997).

As an initial matter, Appellant has argued that delivery of the settlement checks to Anastopoulo's North Charleston office rather than the office in downtown Charleston constitutes a failure of assent to a material term of the agreement. [See Appellant's Statement of Issues on Appeal] However, at the hearing on Mr. Collier's motion to enforce the settlement, Appellant's counsel conceded that the specific delivery location was not a material term. Counsel stated, "If this were a situation where they simply delivered the check to the wrong place or the wrong person, I'd say, Mr. Bickery (sic) at Progressive, just send it to me and we'll be fine." [R. p. 000115, lines 6-9] Therefore, Appellant cannot now argue that delivery of the checks to a specific Charleston location was a material term. Indeed, the reference concerning delivery to "32 Ann Street" is found in one of the many footnotes in the nine-page demand letter. [R. p. 000135, footnote 2] This is the very definition of "fine print". Further, Progressive made substantial efforts to deliver the checks in Charleston, which resulted in a claim representative that was unfamiliar with the claim handling

the delivery of the settlement package and a mistake in the delivery of the checks. Both checks were ultimately delivered to Anastopoulo in Charleston.

In Player v. Chandler, supra. the South Carolina Supreme Court held that the "meeting of the minds" required to form a contract "must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." Id. at 105, 382 S.E.2d at 894. Here, Appellant made an offer to resolve her claims against Mr. Collier in exchange for the payment of the bodily injury and property damage Policy limits, an affidavit of no additional coverage, and a covenant not to execute in a form approved by Anastopoulo. The demand stated a deadline of October 12, 2018. Progressive and Mr. Collier agreed to each and every one of these terms and expressed their agreement in writing. The covenant not to execute, which was admittedly received by Anastopoulo on October 11, 2018, reads: "NOW, FOR AND IN CONSIDERATION OF the payment to Covenantor of the total sum of Fifty Thousand ($50,000.00) by Insurer on behalf of Covenantee...". [R. pp. 000039 - 000041] In the letter purporting to reject Progressive's "counteroffer", Anastopoulo claims to be unaware of Progressive's agreement to pay $50,000.00 in settlement. [R. p. 000042] However, the plain language of the covenant clearly states the payment to be paid on behalf of Mr. Collier to Appellant is $50,000.00.

In interpreting contracts, the court should ascertain and give legal effect to the parties' intentions. Gilbert v. Miller, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct.App.2003). Where the language of the contract is clear and unambiguous, the court must construe the contract according to the terms the parties used as understood in their plain, ordinary, and popular sense. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Thus, where an agreement is clear and capable of legal construction, the courts only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." Patricia Grand Hotel,

LLC v. MacGuire Enterprises, Inc., 372 S.C. 634, 640, 643 S.E.2d 692, 695 (Ct. App. 2007). This is exactly the function the lower court performed in this case. As the lower court stated:

> THE COURT: Well, you keep referring to a meeting of the minds, and I don't think you're right because you said 25, 25, pay me under a covenant and we'll accept it. And they said, "We'll pay you 25, 25 under a covenant and we'll pay it."

[R. p. 000124, lines 14-21] The only intent that can be gleaned from a covenant stating that $50,000.00 is to be paid to Appellant by Progressive on behalf of Mr. Collier is that Progressive intended to pay $50,000.00.

Further, the record is clear that Progressive intended to pay the $50,000.00 on October 11, 2018, one day before the date demanded by Anastopoulo. Because the payment to Ms. Shook's estate was for bodily injury and property damage, which are two separate coverages under the split-limits Policy, two checks, each in the amount of $25,000.00, were issued by Progressive. [See Affidavit of Jeff Vicary, p. 3] The two $25,000.00 checks bear consecutive check numbers (check numbers 210477106 and 210477107). Both checks are dated October 10, 2018, the date they were issued by Progressive. [R. pp. 000037 – 000038; R.p. 000014] Both checks were printed on October 11, 2018, and Mr. Ozegovich, who was acting as a courier because of his proximity to the Anastopoulo's Charleston offices, intended to deliver both checks on October 11, 2018 but inadvertently left the second $25,000.00 check on the printer. [R. p. 000045] Therefore, the intent of Progressive, as expressed in the covenant and the checks themselves was to fully comply with Appellant's demand. Therefore, the lower court correctly held that there was a meeting of the minds and a valid contract between the parties.

Appellant attempts to liken this case to Ozyagcilar v. Davis, 701 F.2d 306, (4th Cir. 1983) in which the Court of Appeals for the Fourth Circuit reversed the district court's order enforcing a settlement because there was no meeting of the minds. However, in Ozyagcilar, there was a dispute over the meaning of a material term in the settlement agreement. Id. The dispute concerned the

meaning of "a nonexclusive transferrable royalty-free irrevocable license". Id. Plaintiff contended that his understanding was that he would have the right to sublicense the process to numerous companies. Defendants contended that they had understood —and that plaintiff had understood— that plaintiff would only get one indivisible license that he could transfer to one company. Id. at 308. In Ozyagcilar, there were two potential interpretations of a material term and the district court failed to consider the plaintiff's argument that there was no meeting of the minds. Here, there is no confusion over any of the material terms of the agreement, and the lower court specifically analyzed the issue of whether a meeting of the minds was present and held that there was assent to all material terms.

Appellant further argues there was no meeting of the minds because there must be "mirror-image" acceptance. First, the Court of Appeals has called into question the validity of the "so-called mirror-image rule". In Weisz Graphics Div. of Fred B. Johnson Co. v. Peck Indus., Inc., 304 S.C. 101, 106, 403 S.E.2d 146, 149 (Ct. App. 1991), the Court stated: "This so-called 'mirror-image' rule, is well suited to simple, one time transactions, in which the parties contract face to face. However, it fails to accommodate the realities of much modern commercial practice." The Court's observation is exactly the issue here as the negotiations were done via email with both the Greenville and Charleston offices of Anastopoulo and Progressive involved.

Second, there was mirror-image acceptance by Progressive. Progressive agreed to all of the material terms of Appellant's demand and fully intended to timely comply with all of them. As the lower court held, the mistake as to the delivery of the second $25,000.00 check was a mistake in performance of the mutually binding contract between the parties, not a failure to accept Appellant's offer. As will be discussed more fully below, this mistake in performance was not so

substantial as to defeat the purpose of the contract. Therefore, a valid and enforceable contract exists.

B. The lower court correctly held that the mistake with regard to the delivery of the second $25,000.00 check constituted a good faith mistake in performance insufficient to rescind or terminate the agreement.

At the hearing on the motion to enforce the settlement, the court posed the following question to appellant's counsel: "Why are we here fighting over a day? I mean, really? If it's good and it's an honest mistake, which it appears to be, why are we really here?" [R. p. 000109, lines 2-23] This question is pivotal as the issue in this case is not whether there was a meeting of the minds, but rather, whether the failure to deliver the second check on or before October 12, 2019 constitutes a material breach of the agreement warranting termination or rescission. The lower court correctly answered this question in the negative. [R. pp. 000001 - 000005]

"A breach of contract claim warranting rescission of the contract must be so substantial and fundamental as to defeat the purpose of the contract." Brazell v. Windsor, 384 S.C. 512, 516–17, 682 S.E.2d 824, 826 (2009) (citing Rogers v. Salisbury Brick Corp., 299 S.C. 141, 143, 382 S.E.2d 915, 917 (1989)). "[R]escission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties." ZAN, LLC v. Ripley Cove, LLC, 406 S.C. 404, 414, 751 S.E.2d 664, 669 (Ct. App. 2013). In Rogers v. Salisbury Brick Corp., 299 S.C. 141, 382 S.E.2d 915, (1989), the court weighed whether payment shortages on a lease agreement were intentional breaches sufficient to warrant termination of the contract, or whether the shortages were inadvertent mistakes constituting minor breaches. The court ultimately determined that the shortages were not material breaches but "inadvertent" mistakes that did not entitle the appellant to rescind the lease. Id. at 144, 382 S.E.2d at 917.

Here, the lower court held and the Appellant agreed that Progressive's failure to deliver the second check with the settlement package on October 11, 2018 was an inadvertent good faith mistake. [R. pp. 000001 - 000005]; See also [R. p. 000120, line 23 - p. 000121, line 9] Further, the good faith mistake did not defeat the purpose of the settlement agreement. The purpose of the settlement agreement was to pay the Policy limits and provide an affidavit of no additional coverage and a covenant not to execute to resolve Appellant's claims against Mr. Collier. The purpose is not defeated by a five day delay. Appellant suffered no prejudice as a result of the five day delay in receiving the second settlement check. This is especially so as there would have been no delay and, in fact, both settlement checks would have been received one day before the requested deadline had Anastopoulo informed Progressive of the mistake. Further, because this case is a wrongful death action, Ms. Shook's Estate could not have received the checks before the settlement was approved by the court. Therefore, whether both settlement checks were received on October 11 (the date Progressive intended to deliver them), October 12 (the date of the demand), or October 17 (the date both checks were actually received by Anastopoulo) made no practical difference to the Estate.

A contract may be rescinded for mistake, if justice so requires, in the following circumstances: (1) where the mistake is mutual and is in reference to the facts or supposed facts upon which the contract is based; (2) where the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with the true agreement of the parties; (3) where the mistake is unilateral and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission, without negligence on the part of the party claiming rescission; or (4) where the mistake is unilateral and is accompanied by very strong and extraordinary circumstances

which would make it a great wrong to enforce the agreement, sustained by competent evidence of the clearest kind. King v. Oxford, 282 S.C. 307, 313, 318 S.E.2d 125, 128 (Ct. App. 1984). None of the foregoing circumstances are present here.

In addition, the right to rescind or terminate a contract on the ground of failure of performance by the opposite party belongs only to the party who is free from substantial default himself. Smith v. First Provident Corp., 245 S.C. 509, 512, 141 S.E.2d 646, 647 (1965). There exists in every contract an implied covenant of good faith and fair dealing. RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct.App.2004) "[T]he implied covenant of good faith and fair dealing has been viewed as another contract term." See Williams v. Riedman, 339 S.C. 251, 267, 529 S.E.2d 28, 36 (Ct.App.2000).

The lower court held that Appellant has filed suit in an attempt to "hold Progressive in bad faith." [R. p. 000004] Further, had anyone at the Anastopoulo firm mentioned the missing check when they accepted the envelope, noted what was received, and signed a receipt for the same, or mentioned the missing check in the twenty-four hours following their acceptance of the settlement package, Progressive would have completely and timely performed. Instead, Anastopoulo chose to remain silent and instead sent a letter claiming they were unaware of the reason Progressive was seeking a release of claims for property damage even though the plain language of the covenant stated that the consideration to be paid was $50,000,00 ($25,000.00 in property damage and $25,000.00 in bodily injury). [R. p. 000042; R. pp. 000039 - 000041] Remaining silent as to the missing check to allow the deadline to pass in order to manufacture a bad faith claim is not indicative of a party's good faith and fair dealing. Further, "[s]ilence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." S. Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993) (citation

omitted). If, at any time anyone at Anastopoulo had informed Progressive that one of the checks was missing, the mistake would have been immediately remedied. This is evidenced by the fact that the check was delivered the day after the mistake was discovered. [R. p. 000045]

C. Mr. Collier is entitled to specific performance of the settlement agreement.

Appellant has alleged that a motion to enforce a settlement is an action for specific performance of a contract. [See Appellant's Brief, p. 8] Though Appellant makes this assertion with no citation to authority, even if true, Mr. Collier is entitled to specific performance of the settlement agreement.

Specific performance is not a matter of absolute right but rests in the sound discretion of the court and the exercise of that discretion will depend upon the facts and circumstances of each case. Yawkey v. Lowndes, 150 S.C. 493, 148 S.E. 554, 561 (1929). The trial court should only grant specific performance if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties. Ingram v. Kasey's Associates, 340 S.C. 98, 105–06, 531 S.E.2d 287, 291 (2000). The Ingram court stated:

> In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract.

Id. at 106, 531 S.E.2d at 291. Here, no adequate remedy at law exists and the settlement agreement, which constitutes payment of the Policy limits for both bodily injury and property damage is equitable. There is clear evidence in the form of written documents, including the demand, the covenant, the affidavit of no coverage, and the settlement checks, of the valid settlement agreement. The agreement had been partly (arguably fully) executed by Progressive at Appellant's request. Progressive has performed the agreement. It has tendered the Policy limits and has

provided the requested affidavit and covenant not to execute in the form approved by Anastopoulo. Progressive remains ready, willing, and able to consummate the settlement.

"Mere inadequacy of consideration is not a ground for refusing the remedy of specific performance; in order to be a defense, the inadequacy must either be accompanied by other inequitable incidents, or must be so gross as to show fraud." Campbell v. Carr, 361 S.C. 258, 264, 603 S.E.2d 625, 628 (Ct.App.2004) (citing Ingram, 340 S.C. at 106, 531 S.E.2d at 291). If the delay in delivering the second check constitutes inadequacy of consideration, there is no evidence (or allegation) of inequitable incidents on the part of Progressive and certainly no evidence of fraud.

Finally, an action for specific performance lies in equity. Ingram, supra. "In equity, strict compliance with time limits contained in a contract will not ordinarily be enforced, except with regard to option contracts." Faulkner v. Millar, 319 S.C. 216, 220, 460 S.E.2d 378, 380 (1995) (citing Dargan v. Page, 222 S.C. 520, 73 S.E.2d 705 (1952)). The settlement agreement is not an option contract. Therefore, in equity, Progressive has fully performed the agreement and is entitled to specific performance. Accordingly, Respondent respectfully requests that the lower court's order granting the motion to enforce the settlement be affirmed.

D. Progressive's performance of the settlement agreement constitutes 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 the Estate's claims, the offer was accepted, and Progressive provided the demanded consideration to support the agreement to settle the Estate's claims. The mistake in

performance was remedied the day after it was discovered and full consideration was received on October 17, 2018.

E. The lower court correctly exercised its inherent power to enforce the settlement and correctly advanced public policy concerns should settlements be abrogated under these circumstances.

A settlement to which all parties agree is valid and binding. "Sound public policy generally requires the enforcement of contracts freely entered into by the parties." Wolf v. Colonial Life & Acc. Ins. Co., 309 S.C. 100, 108, 420 S.E.2d 217, 221 (Ct. App. 1992) South Carolina has a strong public policy of encouraging settlements, and courts will generally uphold contracts that parties entered into freely. West v. Gladney, 341 S.C. 127, 136, 533 S.E.2d 334, 338 (Ct. App. 2000). "There can be no doubt but that the trial court retains inherent jurisdiction and power to enforce agreements entered into in settlement of litigation before that court." Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 93, 419 S.E.2d 841, 842 (Ct. App. 1992).

The parties freely entered into the settlement agreement and agreed to all material terms. The lower court had the inherent authority to enforce the settlement agreement, and the trial judge expressed his public policy concerns as well as his concerns about the direction of the legal profession if settlements were abrogated under these circumstances. The lower court held that Appellant filed suit in an attempt to manufacture a bad faith claim against Progressive. [R. p. 000004] Appellant did not appeal this finding. Further, at the hearing the court stated:

> THE COURT: I'm not going to change my mind. I – you know, you can call me a fool. I just think this is not the way we want to practice law in South Carolina. So I'm going to – with all due respect, Mr. Hodge, I'm going to deny your motion.

[R. p. 000126, lines 5-10] This court should not allow this type of gamesmanship in settlement negotiations. It is against the public policy of this state and diminishes the holdings of Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933) and its successors when an

insurance carrier is charged with bad faith even when it seeks in good faith to settle claims. Accordingly, Respondent respectfully requests that the lower court's order granting the motion to enforce the settlement be affirmed.

V. CONCLUSION

The lower court correctly held that there was a meeting of the minds and mutual assent to the material terms of the settlement agreement. The lower court further correctly held that the mistake with regard to the delivery of the second check constituted a good faith mistake insufficient to terminate or rescind the agreement. Therefore, Respondent respectfully requests that the lower court's order granting Respondent's motion to enforce the settlement be affirmed.

Respectfully Submitted by:

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January 7, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2018-CP-04-02003
Appellate Case No.: 2019-000856

Debra O'Connor, as Personal Representative of the Estate of Sandy Lynn Shook — Appellant,

v.

Aaron Collier — Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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