

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Kristi F. Curtis, Circuit Court Judge

Unpublished Opinion No. 2023-UP-011 (S.C. Ct. App. filed Jan. 11, 2023)

Therese Hood,

Petitioner,

v.

United Services Automobile Association,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

POULIN | WILLEY | ANASTOPOULO, LLC

Angeline M. Larrivee (S.C. # 105466)

Angeline.larrivee@akimlawfirm.com

Roy T. Willey, IV (S.C. # 101010)

Roy@akimlawfirm.com

Eric Poulin (S.C. # 100209)

Eric@akimlawfirm.com

32 Ann Street

Charleston, S.C. 29403

(803) 222-2222

ATTORNEYS FOR THE PETITIONER

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The Petitioner, Therese Hood, respectfully submits this Petition for Writ of Certiorari under Rule 242, SCACR.

QUESTIONS PRESENTED FOR REVIEW

- I. Did the trial court err in granting JNOV for Respondent, where the verdict could be reconciled or, if it could not be reconciled, Respondent failed to request the appropriate remedy?**
- II. Does South Carolina law permit a standalone claim for negligence in a first-party insurance action, in addition to a claim for breach of the duty of good faith and fair dealing?**
- III. Did Petitioner waive her right to appeal certain pretrial and mid-trial rulings, and did the trial court err in making those rulings?**
- IV. Did the Court of Appeals err when it affirmed the trial court's decision on the ground that Respondent did not act in bad faith?**

STATEMENT OF THE CASE

I. Before Trial

This case stems from a three-vehicle accident that occurred on November 7, 2014 and severely injured Petitioner Therese Hood. (R. p. 1105, lines 19-22, p. 1779). Petitioner sued Antoine Johnson, one of the other drivers. (R. pp. 23, 103). The Kucks, who were in the final car, sued Petitioner, alleging that she contributed to the accident by failing to properly use her headlights. (R. pp. 1789, 1793).

USAA ("Respondent"), Petitioner's liability insurer, hired attorney Chris Nickels to defend Petitioner in the Kuck suit. (R. p. 1438, lines 8-14). It also hired expert Woodrow Poplin (R. p. 2431), who performed a lamp filament test and reported to Nickels that Petitioner did have headlights on at the time of the collision (R. pp. 1778-82).¹

¹ Respondent's consultant, Tyler Black, later validated Poplin's report. (R. p. 786, line 15-p. 789, line 7).

After Johnson's liability insurer paid \$25,000 to settle Petitioner's case against him (R. p. 1424, lines 8-10), Respondent appeared as Petitioner's UIM carrier to defend in Johnson's name (R. pp. 23, 103). But in defending that suit, Petitioner denied that Petitioner's headlights were on. (R. p. 1448, lines 14-20). Ultimately, Petitioner won the Johnson suit. (R. p. 1108, lines 8-10).

Because Respondent took disparate positions regarding the headlights in the two cases that it defended, even though the tortfeasor had admitted liability, and because in defending the Johnson suit, Respondent browbeat and belittled Petitioner and lied about its settlement authority, ultimately blocking mediation, Petitioner sued. Her first-party action alleged negligence/gross negligence, bad faith, and breach of contract, among other claims. (R. pp. 20-33).

In deposition testimony about Respondent's misconduct, Petitioner testified that Respondent's attorney and agent "accosted" her, "treating [her] like less of a person, like a liar" and accused her of telling "untruth[s]" even though Respondent's experts had already "cleared" her. (*See, e.g.*, R. p. 2475, lines 3-17; R. p. 2570, lines 9-12). Due to the attorney's conduct, Petitioner (as the attorney himself admitted) was "not fit for [the] deposition" he was conducting. (R. p. 2494, lines 16-21). Respondent's conduct in protecting its profits caused Petitioner "mental anguish . . . severe enough that" she required "treatment from a psychiatrist." (R. p. 2492, line 3-p. 2493, line 18; see R. p. 2494, lines 12-15 ("I continued to go see [a doctor] because I was questioning my own being . . . whether I was a liar . . ."). At trial, Petitioner, her husband, and her attorney in the Johnson suit testified to her emotional distress. For example, Petitioner's husband testified that USAA's behavior was "devastating" to his wife and had "been tearing her up since day one," (R. p. 1163, line 22-p. 1164, line 21), and her attorney testified that Respondent's attorney characterized her as "crazy" and "a liar," (R. p. 1459, lines 2-12).

Furthermore, at mediation, Respondent’s attorney lied about his settlement authority. He told Petitioner’s attorney, “I want to put my full authority on the table and it is \$200,000, that’s all I I have got and I just want to put it on the table.” (R. p. 1465, lines 17-20). After speaking with Petitioner, who would have compromised for \$250,000, Petitioner’s attorney asked, “[I]s 200 all you have got?” (R. p. 1465, line 22-p. 1466, line 17). Respondent’s attorney told him, “It is all I have got; it will never be more; I can’t get anymore; I’m putting it all on the table.” (R. p. 1466, lines 17-18). However, the attorney was authorized to offer up to \$250,000—Respondent’s reserve in the case. (R. p. 1288, lines 9-12; p. 1777). That reserve (according to Respondent’s field adjuster and corporate representative (R. p. 958, line 22-p. 959, line 12; R. p. 1232, lines 18-19)) was Respondent’s “reasonable evaluation of the value of the claim.” (R. p. 1260, lines 5-15).

Respondent perpetrated this misconduct although its own core values include “honest[y], integrity, loyalty,” and “standing by our insured” (R. p. 595, lines 3-17), and Respondent’s internal policy is to have “the person handling the claim” “[p]rotect[] the insured to make sure that . . . we’re paying the insured what we owe them.” According to one of Respondent’s adjusters (R. p. 493, lines 20-25), “if an adjuster . . . participated in keeping facts hidden in order to not pay an insured what they are owed, that individual would be violating [Respondent’s] policies and ethics.” (R. p. 537, lines 1-5; p. 538, lines 15-19). Yet this is exactly what Respondent did.

II. At Trial

A. Summary Judgment

On June 19, six days before trial, Respondent filed a motion for summary judgment in which it purported to renew its earlier motion for summary judgment. (R. pp. 114-16).

On the first day of trial, Petitioner vigorously argued that the court could not hear the motion: “Rule 56(C) is quite clear in when a motion for summary judgment must be served. And

it says the motion shall be. Not may be. Shall be served at least ten days before the time fixed for the hearing.” (R. p. 862, lines 14-19). She argued that she would be prejudiced if the trial court heard and granted the motion, because due to the short notice, she had not had enough time to prepare. (R. p. 865, line 21-p. 867, line 15). Her arguments at the first hearing had been drawn from preliminary discovery and did not reference all the pertinent bases; the short notice before the second hearing prevented her from gathering evidence and preparing memoranda specific to that hearing. (R. p. 865, line 21-p. 867, line 15; R. p. 966, lines 15-22). For example, she was unable to prepare a memorandum regarding breach of contract, a cause of action Respondent did not argue in its prior memorandum supporting summary judgment. (R. p. 966, lines 15-22; R. pp. 114-24). Ultimately, though, the court heard the motion. (R. p. 871, lines 1-3).

After doing so, the court restricted Petitioner’s case, granting Respondent’s summary-judgment motion on all causes of action except bad faith and negligence/gross negligence. (R. p. 1008, lines 2-24). It granted summary judgment on the breach of contract claim because “there’s been an award now that has been paid, the insurance now has been tendered”—in other words, because Respondent was no longer breaching the contract. (R. p. 1008, lines 17-19). And it granted summary judgment on the outrage claim because “the conduct has to be so extreme that it shocks the conscience, that no reasonable person can be expected to endure it. . . . I don’t find that the conduct rises to the level of outrage” (R. p. 1008, lines 10-16).

B. Directed Verdict

Throughout the trial, the court continued to circumscribe Petitioner’s case. At the directed-verdict stage, the court decided not to allow the jury to consider the unpaid portion of the verdict below (\$250,000, the difference between the policy limits and the ultimate verdict) as an element of damages. (R. p. 1531, line 24-p. 1534, lines 9-14). The court also granted Respondent’s directed-

verdict motions on the negligence and bad-faith claims “to the extent that” those claims “rel[y] on conduct regarding mediation”—that is, on Respondent’s failure to offer its internal valuation and Respondent’s attorney’s affirmative misrepresentation of his settlement authority—holding that Respondent had no “duty to offer the full amount of their evaluation or their reserve where the parties [were] that far apart in their negotiations.” (R. p. 1545, line 22-p. 1546, line 2). It also decided that the jury could not consider emotional-distress damages, ruling (1) that there was no evidence of emotional-distress damages in the bad-faith claim because not enough evidence tied such damages to Respondent’s bad-faith acts and (2) that the negligence claim could not contain emotional-distress damages because, in a negligence action, “emotional distress damages are not recoverable . . . where there is no accompanying physical injury.” (R. p. 1517, lines 17-22; p. 1546, lines 6-22-p. 1547, line 2).

C. Jury Instructions

While charging the jury, the judge provided separate instructions for each remaining cause of action: bad faith and negligence. (R. pp. 22-25). She also explained that if the jury found Respondent liable on either claim, it could consider punitive damages. (R. p. 1684, lines 1-4).

On the verdict form itself, the first-listed questions were question 1, “Do you find by a preponderance of the evidence that the Defendant USAA breached its duty of good faith and fair dealing to Therese Hood?”, and question 2, “Do you find by a preponderance of the evidence that the USAA individually or through its agents was negligent?” (R. p. 15). Next, the form instructed, “IF YES TO EITHER 1 or 2 or BOTH GO TO QUESTION 3” (regarding actual damages), an instruction the judge repeated when she first went over the form. (R. p. 15, p. 1688, lines 8-13). Then came Question 4: “Did the Plaintiff prove by clear and convincing evidence that USAA’s bad faith was intentional, reckless, willful, wanton, or malicious?” (R. p. 15). Finally, the form

instructed, “If you answer yes, GO TO QUESTION 5” (regarding punitive damages). (R. p. 15 (emphasis omitted)).

During deliberations, the jury asked, “Can verdict one and four be mutually exclusive?” (R. p. 1694, lines 23-24). The judge clarified, “If you find actual damages then you will continue to question number four, did the plaintiff prove by clear and convincing evidence that USAA’s bad faith on either of the bad faith cause of action or the negligence cause of action was intentional, reckless, willful, wanton, or malicious.” (R. p. 1703, lines 18-22).

The jury responded “No” to question 1, and “Yes” to question 2. (R. p. 15). It awarded actual damages on question 3, responded “Yes” to question 4, and awarded \$250,000 (the amount of Respondent’s reserve) in punitive damages on question 5. (R. p. 15). When the judge sought to verify the answer to 4, she did not use the slightly altered language from her earlier explanation, but rather the verdict form’s original language: “Did the plaintiff prove by clear and convincing evidence that USAA’s bad faith was intentional, reckless, willful, wanton, or malicious?” (R. p. 1706, lines 46). The jury members agreed that their answer was yes. (R. p. 1706, lines 6-14).

Respondent did not object before the judge dismissed the jury. (R. p. 1706, line 4-p. 1707, line 3). In fact, when the judge asked, “Anything further from either the plaintiff or the defendant before I release the jury?”, Respondent’s attorney answered, “Not from the defendant, Your Honor.” (R. p. 1706, lines 16-18).

III. And Beyond

Both parties filed multiple post-trial motions. (R. p. 1711, lines 8-11; p. 1734, line 31). On October 30, 2019, the trial court granted Respondent’s motion for JNOV on the grounds that no standalone claim of negligence exists in first-party insurance cases under South Carolina and that “the jury found in [Respondent’s] favor on the only remaining cause of action”—that is, bad faith.

(R. pp. 6-9). The court denied the parties' other motions as moot. (R. pp. 6–9). On November 20, the court denied Petitioner's subsequent motion to alter or amend the judgment. (R. pp. 11-13). Two days later, Petitioner appealed the JNOV and various other orders and rulings, including the orders granting Respondent's summary-judgment and directed-verdict motions.

The Court of Appeals heard oral argument in November 2022, and it affirmed the trial court's decision on January 11, 2023. It did not address the jury verdict, but simply held that JNOV was proper because South Carolina does not recognize a standalone negligence cause of action in first-party insurance cases. Regarding the summary-judgment and directed-verdict motions, it held that Petitioner waived her arguments; as an additional sustaining ground, it held that there was "no way a reasonable jury could find USAA acted in bad faith." It supported this additional sustaining ground with two holdings: (1) an insurer does not act in bad faith by not offering to settle the case for the full amount of its reserve, and (2) in taking disparate positions in the two underlying cases, Respondent did not go beyond "defend[ing] its own interest as allowed by statute."

Petitioner filed a Petition for Rehearing on January 26, 2023, which the Court of Appeals denied on February 26. This Petition for Writ of Certiorari follows.

ARGUMENT

I. Standard of Review

"When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court": it must "view[] the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Garrison v. Target Corp.*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022) (quoting *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012)). The lower court's decision to grant JNOV should be reversed if "the evidence yields more than one inference or its inference is in doubt." See *ibid.* (quoting *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 176,

648 S.E.2d 585, 588 (2007)) (“The motions should be denied when either the evidence yields more than one inference or its inference is in doubt.”).

Regarding summary judgment, it “is a drastic remedy” which “should be cautiously invoked” lest a litigant be “improperly deprived of a trial on disputed factual issues.” *Lord v. D & J Enterprises, Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) (citing *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006)). Therefore, “[i]n determining whether any triable issues of fact exist,” this Court must view “the evidence and all inferences which can be reasonably drawn therefrom . . . in the light most favorable to the nonmoving party.” *Ray v. City of Rock Hill*, 434 S.C. 39, 44–45, 862 S.E.2d 259, 262 (2021) (quoting *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002)). If the non-moving party presents so much as a “scintilla of evidence” of dispute as to evidentiary facts or conclusions to be drawn from those facts, this Court must deny summary judgment. *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011) (citing *Hancock v. Mid–South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

Finally, this Court “must uphold a jury verdict if it is possible to reconcile its various features.” *Sapp v. Wheeler*, 402 S.C. 502, 512, 741 S.E.2d 565, 571 (Ct. App. 2013) (quoting *Camden v. Hilton*, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct. App. 2004)).

II. Did the trial court err in granting JNOV for Respondent, where the verdict could be reconciled or, if it could not be reconciled, Respondent failed to request the appropriate remedy?

A. The Verdict Can Be Reconciled

A court must “sustain a verdict when a logical reason for reconciling the verdict can be found.” *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 344–45, 450 S.E.2d 66, 74 (Ct. App. 1994) (citing *Rhodes v. Winn–Dixie Greenville, Inc.*, 249 S.C. 526, 155 S.E.2d 308

(1967) and *Haskins v. Fairfield Elec. Co-op.*, 283 S.C. 229, 321 S.E.2d 185 (Ct. App.1984), *overruled in part on other grounds*, *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993)). This is especially so if it is “possible to ascertain and give effect to the jury’s intent,” *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 312, 529 S.E.2d 45, 59 (Ct. App. 2000) (citing *Vinson v. Jackson*, 327 S.C. 290, 491 S.E.2d 249 (1997)), because “the guidepost for the court is enforcing the jury’s intent,” *Encore Tech. Grp., LLC v. Trask*, 436 S.C. 289, 302–03, 871 S.E.2d 608, 616 (Ct. App. 2021), *reh’g denied* (Jan. 11, 2022), *cert. granted* (Jan. 12, 2023) (citing *Vinson*, 327 S.C. at 293, 491 S.E.2d at 250).

Here, assuming that South Carolina law does not allow for a standalone negligence claim in a first-party insurance context,² and viewing the evidence and all reasonable inferences in the light most favorable to Petitioner, an individual can find at least one obvious reason for reconciling the verdict in Petitioner’s favor. Specifically, the apparent discrepancies between answers 1 and 3 could mean that rather than finding Respondent liable for bad faith by a mere preponderance of the evidence, the jury found by clear and convincing evidence that Respondent acted in bad faith—and that Respondent’s bad faith was intentional, reckless, willful, wanton, or malicious.³ The amount of punitive damages lends credence to this logical explanation. The jury awarded \$250,000 dollars, equal to Respondent’s reserve in the case—the amount Respondent would have offered had not its attorney (who was also its agent) lied when Petitioner’s attorney asked him about his

² An incorrect assumption. See Section III, *infra*.

³ Evidently, Appellant’s trial counsel believed that the jury found only negligence, not bad faith. See, e.g., R. p. 1726, lines 5-8 (“I think the jury simply found unreasonable action and wasn’t willing to assign the label of bad faith.”). However, “[a]rguments made by counsel are not evidence.” *In re Gonzalez*, 409 S.C. 621, 637 n.3, 763 S.E.2d 210, 218 n.3 (2014) (alteration in original) (quoting *S.C. Dep’t of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003)). If anything, Appellant’s trial counsel’s belief (and Respondent’s trial counsel’s uncertainty: “***I think*** that the plaintiff put the legislature’s system of how we defend UIM insurance carriers on trial, and ***I think*** that was confusing to the jury and ***I think*** that explains the verdict.” (R. p. 1715, lines 1-4) (emphasis added)) emphasizes the parties’ ignorance of the jury’s thought process, underscoring the fundamental need to sustain a verdict if that verdict can be logically explained.

authority. This award suggests that the jury found Respondent liable for bad faith and intended to punish Respondent for mistreating its insured.

Granted, given the jury instructions and the court's explanation of the verdict form, the jury may have found Respondent liable for negligence alone. But that is conjecture. If that is the inference to be drawn from the evidence, it is a doubtful one, and a doubtful inference cannot justify JNOV.

Because the verdict can be logically reconciled in Petitioner's favor and because upholding it would enforce the jury's intent, the verdict should stand.

B. Even if the Verdict is Irreconcilable, Respondent Forfeited Its Remedy by Failing to Object

Trial is the time to address an irreconcilably inconsistent verdict. But the law does not require the trial court to raise the matter sua sponte; the trial court has “no duty . . . to reject an inconsistent verdict in the absence of an objection by either party.” *Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 562–63, 619 S.E.2d 5, 10 (Ct. App. 2005) (citing *Stevens v. Allen*, 342 S.C. 47, 50, 536 S.E.2d 663, 664 (2000)). “[A] party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.” *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002).

Where verdicts “are facially inconsistent under South Carolina law . . . the proper remedy, **when an objection is raised**, is to resubmit the matter to the jury,” *Stevens*, 342 S.C. at 52, 536 S.E.2d at 665 (emphasis added), or perhaps to immediately “grant a new trial absolute,” *Campbell v. Robinson*, 398 S.C. 12, 26, 726 S.E.2d 221, 229 (Ct. App. 2012) (citing *Stevens*, 342 S.C. at 52–53, 536 S.E.2d at 665–66 and *Camden*, 360 S.C. at 173–74, 600 S.E.2d at 92–93)). If “the jury

cannot reach a consistent verdict” on its second try, “the trial court may then order a new trial nisi or a new trial absolute.” *Stevens*, 342 S.C. at 53, 536 S.E.2d at 666.

Here, Respondent witnessed the verdict’s receipt without objection. In fact, when the court asked the parties if they had anything to add before it discharged the jury, Respondent explicitly rejected the opportunity. Respondent thus relinquished the chance to obtain the proper remedy: resubmission to the jury, or perhaps a new trial absolute. It cannot now claim advantage of its error. The verdict should stand.

C. If Respondent Preserved the Alleged Error, its Only Possible Remedy is a New Trial

Even if (1) Respondent preserved the alleged error despite its failure to object, and (2) the verdict was actually inconsistent, the appropriate remedy would be a new trial, not a grant of JNOV. If a verdict is “internally inconsistent and unexplainable,” “the appropriate remedy on appeal is to grant a new trial,” *Vinson*, 327 S.C. at 293, 491 S.E.2d at 250. JNOV is an inappropriate vehicle for correcting an inconsistent verdict; the court cannot decide on its own “whether the jury intended to render a verdict for the plaintiff or defendant.” *Campbell*, 398 S.C. at 25–26, 726 S.E.2d at 228–29; see *Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 657, 869 S.E.2d 819, 846 (Ct. App. 2021), *reh’g denied* (Feb. 25, 2022), *cert. granted* (Jan. 12, 2023) (“[N]o factual or legal determination may be based on speculation.”). Thus, if this Court believes that the verdict is so inconsistent that a logical explanation is beyond hope, it should reverse and remand for a new trial.

Ultimately, the Court of Appeals’ decision turned a factually complex matter involving the verdict’s internal consistency and the jury’s intent into a simple matter of legal theory: whether, under the circumstances presented, South Carolina law provides for a negligence cause of action apart from a bad faith cause of action. However, because of the situation’s factual complexity, this Court should either uphold the verdict or reverse and remand for a new trial.

III. Does South Carolina law permit a standalone claim for negligence in a first-party insurance action, in addition to a claim for breach of the duty of good faith and fair dealing?

But if this Court concludes (1) that the verdict can only be a verdict for the Petitioner on negligence and for the Respondent on bad faith, and (2) that a motion for JNOV was appropriate despite Respondent's failure to request the correct remedy, it should hold that an insurer has a duty to act reasonably toward its insured. As a result, it should uphold the jury's verdict.

In its January 11 decision, the Court of Appeals held that in the first-party insurance context, "there is no tort against an insurance company for negligence that does not also cross the threshold of breaching the duty of good faith and fair dealing." It read *Nichols v. State Farm Mut. Auto. Ins. Co.* ("[I]f an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim . . . he can recover consequential damages in a tort action."), 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983) (*superseded on other grounds by statute*, Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C. § 1144(a), (b)(2)(A)), to "recognize[] a single tort encompassing bad faith and negligence, not separately viable claims for bad faith and negligence." It also pointed out that "unreasonable action" is part of an "element[]" of a cause of action for bad faith refusal to pay first party benefits." See *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 396 (1992).

Beyond this indirect support, the Court of Appeals sought support primarily from non-binding authority. In *Skinner v. Horace Mann Ins. Co.*, the District Court held that where "[t]he negligence/gross negligence claim is duplicative of the bad faith claim," "a freestanding claim of negligence is improper." 369 F. Supp. 3d 649, 654 (D.S.C. 2019). Similarly, in *Kraemer v. Massachusetts Mut. Life Ins. Co.*, the District Court held that where "the crux of [the plaintiff's] negligence claim is that [the insurance company] breached the policies in bad faith when it refused

to pay benefits,” the plaintiff’s “negligence claim is better suited as a bad faith claim.” No. CV 2:15-04571-CWH, 2017 WL 5635469, at *6 (D.S.C. Apr. 28, 2017), *aff’d*, 701 F. App’x 268 (4th Cir. 2017). But two South Carolina cases on point, *Tyger River Pine Co. v. Maryland Cas. Co.* and *Orangeburg Sausage Co.*, gainsay this argument. In *Tyger River*, this Court rejected the defendant’s “contention . . . that plaintiff [was] not entitled to recover for negligence unaccompanied by fraud or bad faith on the part of defendant in the negotiations relating to compromise and settlement.” 170 S.C. 286, 170 S.E. 346, 348 (1933). And in *Orangeburg*, handed down after *Nichols* and *Crossley*, the Court of Appeals found the verdict consistent where “the jury found for [the plaintiff] on its negligence, breach of contract, and bad faith claims,” and “awarded different amounts under each theory,” 316 S.C. at 345, 450 S.E.2d at 74; “[d]ifferent damages [were] recoverable under each claim.” *Ibid.* Thus, the decision in this case conflicts with two prior decisions, including a Supreme Court decision.

However, if this Court concludes that *Tyger River* and *Orangeburg Sausage Co.* do not permit a standalone negligence claim, this is a novel question of law and demands review. The decision whether to allow a standalone negligence claim in the first-party context is one with profound public impact. *See* 14 C.J.S. Certiorari § 7 (“The writ of certiorari will be granted only when necessary to prevent substantial wrong or injustice, or to do substantial justice, especially where the matters in controversy are of a public nature.”) (internal citations omitted). This Court has held that an insurance applicant has a cause of action in negligence against an insurer which negligently mishandles his or her application, *Hinds v. United Ins. Co. of Am.*, 248 S.C. 285, 289–91, 149 S.E.2d 771, 774–75 (1966), but if it affirms the Court of Appeals’ decision in this case, this Court will ratify an upside-down regime in which a mere applicant has more rights than an insured. This contradicts South Carolina’s insurance regime, which is constructed for the benefit

of the insured, not the insurer. *See State Farm Mut. Auto. Ins. Co. v. Windham*, 432 S.C. 134, 144, 850 S.E.2d 633, 638 (Ct. App. 2020) (cleaned up) (“The UIM and uninsured motorist statutes are remedial in nature and enacted for the benefit of injured persons and should be construed liberally to effect the purpose intended by the Legislature.”), *aff’d as modified*, 438 S.C. 156, 882 S.E.2d 754 (2022). Therefore, this Court must reverse the Court of Appeals’ decision, acknowledge a standalone negligence claim in first-party cases, and uphold the jury’s verdict.

IV. Did Petitioner waive her right to appeal certain pretrial and mid-trial rulings, and did the trial court err in making those rulings?

A. Waiver

The Court of Appeals held that Petitioner “waived her right” to appeal “various rulings . . . at the summary judgment and directed verdict stages” because she “did not present any of these arguments to the circuit court in her posttrial motions or in her motion for the court to reconsider its JNOV ruling.” For this proposition, it relies on *Gordon v. Rothberg*, 213 S.C. 492, 505, 50 S.E.2d 202, 208 (1948) (refusing to consider “matters complained of [that] were not included in the appellants’ ground on motion for new trial” because the circuit court “ha[d] not been given an opportunity of passing on same”). However, this interpretation misconstrues *Gordon*. “Issues and arguments are preserved for appellate review . . . when they are raised to and ruled on by the lower court,” and a party is not required to file a Rule 59(e) motion in order to preserve an issue or argument for appellate review unless that “issue or argument *has been raised, but not ruled on.*” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–80 (2004). Clearly, then, waiver occurred in *Gordon* not just because the waived matters “were not included in the . . . motion for new trial,” but because the trial court had not had a chance to rule on them.

Here, Petitioner did not waive her right to appeal the trial court’s decision to hear Respondent’s untimely motion for summary judgment; its rulings that granted Respondent

summary judgment on numerous causes of action; and its rulings that the jury could not consider mediation conduct, emotional-distress damages, or excess-verdict damages. All these issues were either raised in Petitioner’s post-trial motions or her motion to reconsider, or were previously raised and ruled upon by the trial court.

Petitioner raised the emotional-distress damages in her post-trial motions.⁴ In her motion to reconsider, she argued the breach of contract claim and stated that based on the trial court’s ruling that Respondent owed her only the duty of good faith and fair dealing, “the breach of contract cause of action should have” reached the jury.⁵ She also complained that the court failed to consider “the full basis of [her] claims as laid out in her complaint and in argument.” These, she reminded the court, included claims against Respondent for bad faith, negligence, and breach of contract; “for not offering its full valuation of what she was owed”; “for not following its own policies and procedures”; “for negligently evaluating, investigating and/or adjusting the claim”; and “for intentional infliction of emotional distress.” Furthermore, although Petitioner did not raise the issues of excess-verdict damages or of defendant’s untimely summary-judgment motion in her post-trial motions or her motion to reconsider, she raised them to the trial court, which ruled on them. Therefore, this Court should reverse the Court of Appeals’ ruling on waiver and consider the merits of Petitioner’s arguments.

⁴ Petitioner had no reason to raise any other issues in the post-trial motions. At trial, she won on a tort cause of action; thus, she could not claim a remedy for breach of contract, or any other alternative remedy, for the same wrong. See *Brown v. Felkel*, 320 S.C. 292, 294–95, 465 S.E.2d 93, 95 (Ct. App. 1995) (citing *Save Charleston Foundation v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985)) (“When one set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both.”). Only after the trial court granted JNOV did Petitioner have reason to raise other issues. To the extent that *Gordon* may seem to suggest otherwise, it is procedurally inapposite. *Gordon* dealt with the **losing** party’s post-trial motions. See *Gordon*, 213 S.C. at 495, 50 S.E.2d at 204.

⁵ She also raised the breach-of-contract issue in her earlier email memorandum opposing the court’s proposed order.

B. Error

1. Timeliness

The trial court should not have heard Respondent's motion for summary judgment, which was filed six days before trial rather than the required ten. *See* Rule 56(c), SCRPC (a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing").

Respondent, relying on another judge's denial of its similar summary judgment "without prejudice, with leave to renew at a later time" (R. p. 5) a year before, asserts that ten days were not required here. For additional support, Respondent cites *Brown v. Pearson*, which states that "[t]he decision whether to reconsider a motion for summary judgment is within the trial judge's discretion." 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997) (citing *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988)).

However, although the earlier order and *Brown* refer to "renew[al]" and "reconsider[ation]," respectively, neither Rule 56 nor *Brown* establish a shorter time frame for a "renewed" motion. Rule 56(c)'s ten-day period applies when, as here, no motion is pending. And *Brown* discusses the court's discretion *whether*, not *when*, to hear a renewed motion. True, in *Brown*, the Court of Appeals held that the appellants failed to show prejudice where the trial court permitted the respondents to reargue an issue even though the "motion failed to provide notice that the . . . issue would be reargued." *Brown*, 326 S.C. at 417, 483 S.E.2d at 481. However (as Respondent acknowledges), after the appellants protested, the trial court allowed them an additional four days to submit supporting authority. *Ibid.* The Court of Appeals found that the appellants failed to show prejudice not only because they received the additional four days but also, crucially, because they "did not complain the time would be insufficient." *Ibid.*

But here, when Petitioner protested, the court did not grant her extra time. This was error, and was especially significant because although Respondent argued against the breach-of-contract claim during the untimely hearing, it did not do so in its previous memorandum. (R. pp. 117-24).

Respondent’s reliance on Rule 6(d), SCRCP is equally unavailing. In *Loftis v. S.C. Elec. & Gas Co.*, the appellants used 6(d) (which reads, “A written motion . . . and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by” rule or court order) to argue that “the trial court erred in hearing [the] motion for summary judgment on the day trial was scheduled to begin.” 361 S.C. 434, 438, 604 S.E.2d 714, 716 (Ct. App. 2004), *overruled on other grounds by Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 797 S.E.2d 387 (2016). The Court of Appeals held that the appellants were not prejudiced—because the “motion was filed and served twenty-seven days before the hearing” and because, “[i]n response to objections to the timing of the motion hearing, the trial court granted [the appellants] ten additional days to submit” responsive materials.” *Ibid.* (citing *Dedes v. Strickland*, 307 S.C. 152, 155, 414 S.E.2d 132, 134 (1992) (holding that failure to give written notice of a summary-judgment motion hearing is reversible error when it prejudices the opposing party by “wrongfully den[ying] the opportunity to submit affidavits, documents or testimony opposing . . . the motion.”). Here, as Petitioner explained, she suffered prejudice.

2. Summary Judgment

Assuming *arguendo* that the trial court correctly heard Respondent’s motion for summary judgment, it erred in granting summary judgment on Petitioner’s breach of contract claim.⁶

⁶ It also erred in granting summary judgment on the outrage claim. Outrage occurs when “(1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct; (2) the conduct was so ‘extreme and outrageous’ so as to exceed ‘all possible bounds of decency’ and must be regarded as ‘atrocious, and utterly intolerable in a civilized community;’ (3) the actions of the defendant caused plaintiff’s emotional distress; and (4) the emotional distress suffered by the plaintiff

“The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach.” *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). Generally, a party who breaches a contract “is liable for whatever damages follow as a natural consequence.” *Ibid.* (citing *Fuller*, 240 S.C. At 89, 124 S.E.2d at 610).

Here, the trial court did not perform the appropriate factual analysis. It did not rely on a lack of breach or a lack of damages to grant summary judgment. Rather, it granted summary judgment on the basis that Respondent eventually paid the required moneys, impliedly holding that if Respondent breached the insurance contract by failing to pay promptly, the eventual payment nullified any damages. But South Carolina law does not require that a breach continue through trial; it only requires that a breach occur and that damages result. Because the trial court disregarded that aspect of the analysis, it committed reversible error.

was ‘severe’ such that ‘no reasonable man could be expected to endure it.’ *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 70–71 (2007) (quoting *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981)).

The court effectively found that Petitioner did not present a scintilla of evidence as to elements two and four. But in doing so, the court ignored the insured-insurer relationship. As the South Carolina Bar’s Elements of Civil Causes of Action Fourth Edition states: “Conduct which might ordinarily be found forgivable may be deemed severe when there is some special relationship between the plaintiff and the defendant establishing a higher than usual duty for defendant toward plaintiff. For example, in the vast majority of cases where liability has been found, the common thread has been the existence of three factors. First, a pre-existing relationship between the parties has existed, typically a debtor-creditor, **insured-insurer**... Furthermore, the defendant’s conduct has involved excessive self-help in asserting a legal right or avoiding a legal obligation flowing out of the relationship... Finally, the conduct will be adjudged actionable if the evidence has clearly shown that the defendant calculatedly inflicted suffering or heedlessly and contemptuously disregarding the plaintiff’s present emotional suffering either to force plaintiff to accede to the defendant’s wishes or to punish the plaintiff for prior failure to comply.”

Here, Petitioner was Respondent’s insured. Despite this special relationship, Respondent used excessive self-help (that is, unjustifiable legal tactics) to avoid its legal obligation. In order to make Petitioner accede to its wishes, Respondent gaslit Petitioner at her deposition, and then (despite knowing about her emotional sensitivity from the deposition) dragged the case on by lying at mediation. These were calculated, callous means of inflicting suffering. Respondent’s behavior caused Petitioner such mental anguish that she had to seek medical attention. Under these circumstances—especially given the parties’ special relationship—there can be no blanket privilege for litigation conduct. Thus, the trial court committed reversible error in finding that Petitioner failed to present the required scintilla of evidence.

3. Directed Verdict

The trial court also committed reversible errors at the directed-verdict stage in granting Respondent's motions regarding the bad-faith or negligence claims "to the extent that" those claims "rel[y] on conduct during mediation"; refusing to let Petitioner submit emotional-distress damages to the jury; and refusing to let Petitioner submit excess-verdict damages to the jury.

i. Mediation Conduct

Respondent acted unreasonably and in bad faith by refusing to offer, let alone tender, the undisputed value of Petitioner's case and by lying about the amount of its settlement authority.

The Court of Appeals "reject[ed] the suggestion that [Respondent's] internal valuation of the case constitutes an 'undisputed' sum owed to" Petitioner. This may seem reasonable, based on Respondent's citations to non-binding authority on the nature of reserves. But, in general, "there are many kinds of reserves serving different purposes and which are differently defined." 1 Casualty Insurance Claims § 16:19 (4th ed.), Admissibility of Reserves in Evidence. According to the United States Supreme Court, "reserve" generally "means a sum of money, variously computed or estimated, which . . . is set aside—'reserved'—as a fund with which to mature or liquidate, either by payment or reinsurance with other companies, future unaccrued and contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment." *Maryland Cas. Co. v. United States*, 251 U.S. 342, 349, 40 S. Ct. 155, 158, 64 L. Ed. 297 (1920).

According to this particular Respondent, a reserve is the "value of a claim at any given time based on the information [Respondent] ha[s] in the file." In other words, in this case, the "reserve" in Petitioner's case, \$250,000, was what Respondent believed Petitioner's claim was worth. Viewing the evidence and all reasonable inferences in Petitioner's favor, a reserve is what Petitioner believes it owes its insured. Yet Respondent never fulfilled its duty by offering Petitioner

this undisputed amount. *See Orangeburg Sausage Co.*, 316 S.C. at 342–44, 450 S.E.2d at 72–74 (affirming trial court’s holding that “there was clear and convincing evidence that [the insurer] acted recklessly or in conscious disregard of [the insured’s] rights by . . . refusing to pay . . . even the undisputed portions of [the insured’s] claim for eight months, despite repeated requests for payment”). This is especially unreasonable given Respondent’s core values of honesty, integrity, loyalty, and standing by its insured, and its internal policy to protect the insured and pay them what they are owed. *See Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006) (“The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant’s own policies and guidelines.”)

Even if the trial court correctly granted a directed verdict regarding Respondent’s failure to offer its full reserve, it erred in granting a directed verdict regarding Respondent’s lie about its settlement authority. As the Court of Appeals noted, “It may be that [Respondent] had a duty to answer truthfully if asked whether it was offering the maximum amount of its authority.” Here, as described above, Respondent’s attorney and agent lied about his settlement authority, claiming that he had settlement authority of \$200,000, rather than \$250,000. \$250,000 would have settled the case. Viewing the evidence and all reasonable inferences in Petitioner’s favor, Respondent’s lie—a clear sign of bad faith—caused the mediation to fall through. Thus, Respondent’s mediation-related misconduct should have reached the jury.

ii. Emotional-Distress Damages

The trial court also erred in failing to submit Petitioner’s emotional-distress damages to the jury.

Regarding the negligence action, emotional-distress damages may be available if “there is some physical manifestation of the emotional distress.” *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013). Petitioner’s distress caused her to visit a doctor; therefore, Respondent’s conduct physically affected her. But even if this Court disputes that conclusion, the insurer-insured relationship obviates the need for physical proof of emotional damage. As the Colorado Supreme Court has pointed out, “Given that insureds purchase insurance policies to obtain financial security and peace of mind, emotional distress is a likely and foreseeable consequence of a bad faith denial of the benefits afforded under the contract”; “an unreasonable denial of insurance benefits . . . can cause anxiety, fear, stress, and uncertainty, even when the benefits are eventually paid.” *Goodson v. Am. Standard Ins. Co. of Wisconsin*, 89 P.3d 409, 417 (Colo. 2004). *See also Ingalls v. Paul Revere Life Ins. Grp.*, 561 N.W.2d 273 (1997) (“Because a primary consideration in purchasing insurance is the peace of mind and security it will provide, an insured may recover for any emotional distress resulting from an insurer's bad faith.”)

As to both causes of action, Petitioner presented enough testimony for the jury to consider emotional distress in actual damages. Petitioner, her husband, and her attorney testified that Respondent’s attorney bullied and gaslit her at her deposition. That same attorney, aware of her emotional vulnerability, then misrepresented his settlement authority in mediation—an act which would make settlement less likely in any action, and ultimately blocked settlement in this case.

Regarding bad faith, Respondent argues (as the trial court incorrectly found) that Petitioner’s stress was merely attributable to litigation. However, Petitioner has pointed to specific bad acts that occurred during litigation but exceeded the proper scope of litigation conduct. *State Farm Fire & Cas. Co. v. Barton*, a Fourth Circuit case applying South Carolina law, is not to the contrary. In *State Farm*, the Court reversed the jury’s award for emotional distress because

“[n]either the existence, causation nor amount of damages can be left to conjecture, guess or speculation.” 897 F.2d 729, 732–33 (4th Cir. 1990) (quoting *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438, 444 (1971)). But, unlike this case, there was no evidence that the appellee’s emotional distress related to specific bad acts. *Ibid.* Rather, the evidence demonstrated solely that the appellee’s emotional distress related to the fire which destroyed his home. *Ibid.*

iii. Excess-Verdict Damages

Finally, the trial court erred when it prevented the jury from considering excess-verdict damages. According to our Supreme Court’s decision in *Nichols* (a first-party insurance case), “if an insured can demonstrate bad faith or unreasonable action by the insurer,” the insured “can recover consequential damages,” which “are not limited by the contract,” in a tort action. 279 S.C. at 340, 306 S.E.2d at 619.

Nichols relied on *Tyger River*, in which the Court determined that an insurer who had an opportunity to settle within policy limits but failed to do so must cover the excess verdict against its insured. 170 S.C. 286, 170 S.E. 346. This reasoning is particularly applicable in first-party insurance cases, where the insurer gambles with the money the insured paid “to protect [her]self against the spectre of accidental [or unavoidable] loss.” *See Nichols*, 279 S.C. at 340, 306 S.E.2d at 619 (quoting *Trimper v. Nationwide Ins. Co.*, 540 F.Supp. 1188, 1193 (D.C.S.C. 1982)). In such cases, the insured is forced to wait, likely while unable to pay ever-mounting bills, while “the insurance company has the benefit of profiting on the use of the insured’s money.” *Ibid.* Therefore, “consequential damages” include an excess verdict, even in a first-party case.

If the Court concludes that the cited authorities do not clarify the availability of excess-verdict damages, this is yet another novel question of law which demands review, given the public importance of insurance and South Carolina’s intent to favor the insured.

V. Did the Court of Appeals err when it affirmed the trial court’s decision on the alternative ground that Respondent did not act in bad faith?

Finally, the Court of Appeals erred when it affirmed the trial court’s decision on the alternative ground that Respondent did not act in bad faith.

As noted above, the Court supported this ground by holding that (1) an insurer does not act in bad faith by not offering to settle the case for the full amount of its reserve and (2) in taking disparate positions in the two underlying cases, Respondent did not go beyond “defend[ing] its own interest as allowed by statute.”⁷

First of all, sub-holding (1) relies on the proposition that Respondent was never asked whether it was offering its entire authority, and thus, any duty to respond truthfully to such a question is inapplicable. However, Petitioner did ask. Respondent, in turn, lied. Based on this factual error alone, sub-holding (1) cannot stand. And, as discussed above, Respondent’s failure to offer its full reserve—not to mention its lie in so doing—was bad faith, as a reasonable jury could well conclude. At the very least, such behavior was unreasonable, in direct contravention of Respondent’s own policies and of the South Carolina’s Legislature’s intent to protect insureds.

As to sub-holding (2), a reasonable jury could find that Respondent acted in bad faith (or at least unreasonably) in taking disparate positions regarding Petitioner’s lights. In this case, the trial court knew “that there was a liability issue . . . that [Petitioner] could be found comparatively negligent.” (R. p. 999 lines 10-12). Yet it also found a jury question as to whether Respondent’s choice to take disparate positions was bad faith. (R. p. 1545 lines 18-21). Given that the judge found that there was a jury question, a reasonable jury could certainly have taken Petitioner’s side of that question. A UIM carrier may indeed defend a case “for its own benefit,” S.C. Code Ann. §

⁷ Both of these holdings rely on the erroneous assumption that South Carolina law does not allow a standalone negligence claim in the first-party insurance context. *See* Section III, *infra*.

38-77-160, but there is a difference between using fair legal tactics and taking contradictory positions in court. “For the law to countenance [an] abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers [and parties] will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for the truth.” *Skipper v. ACE Prop. & Cas. Ins. Co.*, 413 S.C. 33, 38, 775 S.E.2d 37, 39 (2015) (quoting *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App. 1994)). Insurance law is intended to protect the insured, not to be a revenue source for insurance companies. In doubt, the legal system—and a reasonable insurance company—should act in the insured’s favor.

CONCLUSION

Because the jury’s verdict was internally consistent or, if it was inconsistent, because Respondent failed to preserve the issue, this Court must reverse the trial court’s order granting JNOV; reinstate the original verdict; and remand the case for further findings on Petitioner’s post-trial motions. But if this Court finds that the jury’s verdict cannot stand, it should remand the case for a new trial absolute. That trial should proceed consistent with the this Court’s recognition of a standalone negligence cause of action, and consistent with findings that the trial court erred in granting summary judgment as to claims other than negligence and bad faith; in granting directed verdicts limiting submission of claims based on mediation conduct; and in limiting damages to actual litigation costs.

CERTIFICATION

The undersigned hereby certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

POULIN | WILLEY | ANASTOPOULOU, LLC

s/ Angeline M. Larrivee

Angeline M. Larrivee (S.C. # 105466)

Angeline.larrivee@akimlawfirm.com

Roy T. Willey, IV (S.C. # 101010)

Roy@akimlawfirm.com

Eric Poulin (S.C. # 100209)

Eric@akimlawfirm.com

32 Ann Street

Charleston, S.C. 29403

(803) 222-2222

ATTORNEYS FOR THE PETITIONER