THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2019-001943
Civil Action No. 2018-CP-10-666

Therese Hood……Appellant

v.

United Services Automobile Association……Respondent

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court err in granting Respondent's pre-trial motions for summary judgment as to breach of contract and outrage?

II. Did the Trial Court err in granting partial directed verdicts limiting the jury to considering Respondent's conduct in taking disparate positions and limiting damages to actual litigation costs?

III. Did the Trial Court err in granting Respondent's Motion for Judgment Notwithstanding the Verdict?

STATEMENT OF THE CASE

On June 25, 2019, this matter was called to trial and on June 28, 2019, the jury returned a verdict in Appellant's favor in the amount of $299,052.20[1]. Verdict Form. (R. p. 15). Following the verdict, Respondent requested ten days to file post-trial motions under Rules 50 and 59, and the Trial Court granted the request. Trial Transcript 855: 6-9. (R. p. 1707, lines 6-9). On July 8, 2019, Respondent filed a series of motions seeking new trial absolute, new trial *nisi remittitur*, new trial pursuant to the thirteenth juror doctrine, and/or judgment notwithstanding the verdict. (R. p. 136 - 145). On November 1, 2019, the Trial Court issued an order granting Respondent's motion for JNOV and entering judgment in Respondent's favor. Order Granting JNOV and Denying Other Post-Trial Motions. (R. p. 6 – 10). On November 18, 2019, Appellant timely filed and served the notice of appeal and the appeal is properly before this Court. Appellant also filed a Motion to Reconsider, which this Court permitted to be heard, and was subsequently denied by the trial court. Motion to Reconsider, Order on Motion to Reconsider. (R. p. 146 – 162; 11 - 13).

[1] This verdict represented the maximum amount of actual damages permitted by the court $49,052.20, and punitive damages of $250,000.00. (R. p. 15).

STATEMENT OF FACTS

This is a first party insurance case arising out of Respondent's handling of Appellant's underinsured motorist claim. Amended Compl. (R. p. 16 - 100). Respondent insured Appellant under an automobile insurance policy, which policy was in full force and effect on November 7, 2014 and included Underinsured motorist coverage. Answer to Amended Compl. ¶ 15. (R. p. 101 - 108).

The Underlying Collision

Appellant was involved in a three-vehicle collision on November 7, 2014 that resulted in Appellant suffering severe injuries. Trial Transcript 580-581. (R. p. 1432 - 1433). As Appellant was traveling straight on a four-lane highway in Beaufort County, a vehicle driven by one Antoine Johnson ("Johnson") entered the highway from a private drive and t-boned Appellant. Id. The force of the collision caused Appellant's vehicle to careen across the median and into the oncoming lane of travel, where Appellant's vehicle collided head on with a vehicle being occupied by William and Mary Kuck ("the Kucks"). Trial Transcript 585. (R. p. 1437). Johnson carried only minimum limits of liability coverage, which was quickly exhausted by the damages suffered. Amended Compl. ¶ 24. (R. p. 23). Answer ¶ 21. (R. p. 103). Trial Transcript 581-83. (R. p. 1433 - 1435).

The Underlying UIM Lawsuit

Appellant made a liability and UIM claim regarding her injuries from the wreck. Respondent failed to make any pre-suit offer, and as a result on March 17, 2015, Appellant filed the lawsuit against Johnson and served Respondent as her UIM carrier. Trial Transcript 582. (R. p. 1434). Respondent retained attorney Jack Daniel to defend against Appellant's UIM action. Trial Transcript 590. (R. p. 1442). During the course of the underlying UIM lawsuit, Respondent,

repeatedly denied liability, despite the fact that Johnson's liability carrier had accepted liability and tendered his full liability limits. P. Trial Exhibits 13 and 14. (R. p. 1800 and 1802); Trial Transcript 600-01: 607. (R. p. 1452 – 1453; 1459). Respondent defended the underlying UIM lawsuit by alleging that Appellant's lights were off at the time of the underlying collision, which prevented Johnson from being able to see her when Johnson pulled out in front of her. Id.

Eventually, the underlying UIM case was mediated. Trial Transcript 606. (R. p. 1458). By the end of the mediation, Appellant was prepared to settle claim for $250,000. Trial Transcript 614: 13-14. (R. p. 1466). However, Respondent's agent and attorney stated in no uncertain terms that his "full authority" to settle the case was $200,000 and that "it will never be more" and "I'm putting it all on the table." Trial Transcript 614-15. (R. p. 1466 - 1467). The claims file later revealed that this representation was false. In fact, prior to the mediation, Respondent had evaluated the case and set its reserve at $250,000. P. Trial Exhibit 6, 7. (R. p. 1776 - 1777). Trial Transcript 425: 19-25. (R. p. 1278, lines 19-25). See also Deposition of Moats. (R. p. 662 - 852). Likewise, Respondent had given its agent, Mr. Daniel, authority to offer up to its evaluation of $250,000 to settle the case. Trial Transcript 439. (R. p. 1291).

Instead, Respondent never offered any amount above $200,000 at any stage of the litigation. Had Respondent offered this amount during mediation, the case would have settled. Trial Transcript 614: 13-14. (R. p. 1466, lines 13-14). Because Respondent did not offer its full evaluation of the case, and in fact misrepresented their evaluation, the underlying case was forced to proceed all the way to trial, which resulted in litigation costs to Appellant in the amount of $49,052.20. Trial Transcript 617. (R. p. 1469).

Ultimately, the jury in the underlying case returned a verdict in favor of Appellant and against Johnson in the amount of $2,500,000 on September 7, 2017. Trial Transcript 617: 14-16.

(R. p. 1469, lines 14-16). The verdict was reduced to $1,275,000 based on the jury's determination that Appellant was 49% comparatively negligent on the basis that Respondent continued to argue that Appellant's lights were off. Trial Transcript 617: 17-24. (R. p. 1469, lines 17-24). However, Respondent's retained experts in another matter, the Kuck lawsuits, had long since determined this to not be true. P. Trial Exhibit 8 - Report of Woodrow M. Poplin, M.S.E., P.E., Aug. 12, 2016. (R. p. 1778). Unbelievably, Respondent itself had taken the opposite position in Kuck lawsuits, to protect its liability policy limits from the Kucks.

The Underlying Kuck Lawsuits

Initially following the wreck, Mr. Kuck, the driver of the third vehicle, gave a statement to USAA saying, "all I seen was headlights coming at me." Trial Transcript 449: 6-8. (R. p. 1301, lines 6-8). Nevertheless, after USAA had taken the opposite position in defense of Appellant's underlying UIM lawsuit – that being that Mrs. Hood's lights were off – on March 29, 2016, the Kucks filed lawsuits[2] against Appellant alleging that she contributed to the collision. P. Trial Exhibit 11 – Complaint Wm. Kuck v. Hood, et al., 2016-CP-27-00124. (R. p. 1789). Specifically, the Kucks alleged that Appellant was traveling without headlights and that her failure to illuminate her headlights contributed to Johnson's not seeing her and pulling out into her resulting in the t-bone collision that propelled her vehicle into the Kucks' head on. Id. at ¶ 7. (R. p. 1793). In response, Respondent, as Appellant's liability insurer, hired attorney Chris Nickels to defend against the Kuck lawsuits. Trial Transcript 586: 8-14. (R. p. 1438, lines 8-14). Respondent and Mr. Nickels denied the Kuck's allegations. P. Trial Exhibit 12 – Answer to Kuck Suit. (R. p. 1796). As part of that defense, Respondent and Mr. Nickels engaged the

[2] In addition, to Mr. Kuck's lawsuit, his wife also filed a lawsuit styled: Mary Elizabeth Kuck v. Therese Hood and Antoine Johnson, Case No. 2016-CP-27-00123 with substantively similar allegations.

services of expert engineer Woodrow Poplin. Court Exhibit 2 – Check Copy to Poplin from USAA. (R. p. 2431).

Mr. Poplin, at Respondent's direction, performed a lamp filament analysis on Appellant's vehicle and issued a report concluding that Appellant's headlights were, in fact, illuminated at the time of the collision. P. Trial Exhibit 8 - Report of Woodrow M. Poplin, M.S.E., P.E., Aug. 12, 2016. (R. p. 1778). Respondent used this report to defend its liability money against the Kuck lawsuits, even as it continued to insist that Appellant's lights were off in the UIM lawsuit.

As discovered in the claims file, Respondent also obtained another expert witness – who they never disclosed – to review Mr. Poplin's work. That expert, Tyler Black, determined that Mr. Poplin completed a scientifically supported lamp filament analysis test in reaching his conclusions. Trial Transcript 588: 24 – 589: 6. (R. p. 1440, line 24 – p. 1441, line 6).

After receiving Mr. Poplin's report in the Kuck lawsuit, Respondent changed its evaluation and reserves in the UIM lawsuit to $250,000.00, but never officially changed its position on the headlights issue.[3] In fact, even after this point, Respondent unconditionally denied in the underlying UIM lawsuit that Appellant was operating her vehicle with her headlamps illuminated at the time of the November 7, 2014, collision as their own experts had conclusively established. P. Trial Exhibit 14 – USAA Responses to Requests for Admission, January 11, 2017. (R. p. 1802).

The First Party Lawsuit Against USAA

Given that Respondent had taken disparate positions on the headlight issue, had failed to offer their own internal evaluation towards settlement of the claim (an amount that would have settled the claim and prevented the cost of trial), and had blatantly misrepresented their internal

[3] Transcript 453:7-11. USAA Corporate Representative Kathy Moats: "Q. Okay. And you disregarded that too, in your evaluation? A. I - - I took it into account. Obviously, I took everything into account or we wouldn't have raised the reserve to $250,000." (R. p. 1305, lines 7-11).

evaluation of the claim, Appellant filed the present first party action, alleging bad faith, breach of contract, negligence/gross negligence, barratry, outrage, and negligence *per se*. Amended Compl. (R. p. 16 - 100).

The case was called to trial on June 25, 2019. Trial Transcript 7: 2. (R. p. 1859). Prior to the start of the trial, Respondent made an oral motion for summary judgment. Trial Transcript 10. (R. p. 862). The Trial Court granted summary judgment as to Appellant's causes of action for breach of contract, barratry, and outrage. Trial Transcript 156: 6-19. (R. p. 1008, lines 6-19). The Trial Court allowed to case to proceed on the causes of action for bad faith and negligence/gross negligence. Trial Transcript 156: 23-24. (R. p. 1008, lines 23-24).

Following the close of the Plaintiff's case, and again at the conclusion of trial, Respondent made a number of motions for directed verdict. Trial Transcript 665, 753-754. (R. p. 1517; 1605 - 1606). Important to this appeal, the Trial Court granted two of these motions, which severely limited the case with respect to the arguments that were ultimately presented to the jury for consideration. First, the Trial Court held that the jury could only consider Respondent's conduct with respect to Respondent having taken disparate positions on the headlights in the underlying UIM and Kuck lawsuits. Trial Transcript 693: 22 – 694: 2. (R. p. 1545, line 22 – p. 1546, line 2). In so ruling, the Trial Court decided that the jury could not consider the fact that Respondent had failed to offer their internal evaluation of the value of the case (an amount that would have caused the case to settle) or that Respondent affirmatively misrepresented the value of the case to Appellant. Id. The Trial Court also held that the jury could consider as actual damages only Appellant's actual costs incurred in her prosecution of the underlying UIM lawsuit, and not any consequential damages or emotional distress. Trial Transcript 694: 6-11. (R. p. 1546, lines 6-11).

Upon the close of the case, the Trial Court finalized a verdict form. Verdict Form. (R. p. 15). The first two questions on the verdict form pertained to liability. Question one stated, "Do you find by a preponderance of the evidence that Defendant USAA breached its duty of good faith and fair dealing to Therese Hood?" Question two stated "Do you find by a preponderance of the evidence that Defendant USAA individually or through its agents was negligent?" Next, the verdict form stated, "IF YES TO **EITHER** 1 or 2 or BOTH GO TO QUESTION 3." (emphasis added). Questions three through five pertained to damages.

In presenting the charge on the law, the Trial Court explained that the causes of action for bad faith and negligence were separate causes of action, a positive finding under each or either of which would entitle Appellant to actual damages. Trial Transcript 827: 22 – 831: 19. (R. p. 1679, line 22 – 1683, line 19). Again, when explaining the verdict form at the end of the charge, the trial court instructed the jury that a positive finding on either the bad faith or negligence cause of action would entitle Appellant to actual damages. Trial Transcript 835: 19 - 836: 22. (R. p. 1687, line 19 – 1688, line 22).

During deliberations, the jury presented a question. Trial Transcript 843: 23-25. (R. p. 1695, lines 23-25). The question was: "Can verdict one and four be mutually exclusive?" Id. After conversation with counsel, the trial judge decided to do the following:

> So let's bring the jury in. I am going to give them -- I am going to walk through the verdict form with them again and just I am going to give them that caveat that if you can answer yes to either one or two then go to number three. If you find that an award of actual damages proper under either cause of action then you will go to question number four. Did you find the plaintiff proved by clear and convincing evidence that USAA'S bad faith or negligence was intentional, reckless, willful, wanton ---
>
> Trial Transcript 849: 11-19. (R. p. 1701, lines 11-19).

This reiterated the prior jury instruction during the charge on the law, that being the difference between number one pertaining to the bad faith cause of action and number two pertaining to the negligence cause of action – and that is exactly what she did:

> THE COURT: Okay. Ladies and gentlemen, I am just going to go over the verdict form with you one more time. I hope this will answer your question.
>
> Number one on the verdict form is asking you do you find by a preponderance of the evidence that the defendant breached its duty of good faith and fair dealing to Therese Hood. And of course you are going to answer that either yes or no.
>
> Number two pertains to the second cause of action for negligence. And it states do you find by a preponderance of the evidence that the defendant USAA individually or through its agent was negligent. To which you will answer yes or no.
>
> **If you answered yes to either of these things, either number one or two, then you will proceed to number three which is the question about actual damages**. So if the answer to number one or two is yes, the amount of actual damages, if any, caused by the defendant's conduct.
>
> **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 <u>either of the bad faith cause of action or the negligence cause of action</u> was intentional, reckless, willful, wanton, or malicious.**
>
> If the answer is yes you will continue to question five. If the answer is no you will stop and deliberate no further.
>
> Does that answer your question?
>
> (WHEREUPON, jury foreperson nods in the affirmative.)

Trial Transcript 850: 25- 852: 2. (emphasis added). (R. p. 1702, line 25 – 1704, line 2).

Ultimately, the jury returned a verdict in favor of Appellant for actual damages in the amount of $49,052.20 (the exact amount of Appellant's costs from the underlying UIM lawsuit and the *only* actual damages they were permitted by the Trial Court to consider) and $250,000 in punitive damages. Verdict Form. (R. p. 15). In so doing, the jury followed the Court's instructions and the instructions on the verdict form. Specifically, the jury answered "No" to

question one (Do you find by a preponderance of the evidence that Defendant USAA breached its duty of good faith and fair dealing to Therese Hood? "the bad faith cause of action") and "Yes" to question two (Do you find by a preponderance of the evidence that Defendant USAA individually or through its agents was negligent? "the negligence cause of action"). Id. The jury then went on, as instructed, to answer the remaining questions regarding damages. Id.

Respondent made no objection to the verdict at the time it was published or at any time prior to the jurors being excused. Trial Transcript 854: 16 – 855: 3. (R. p. 1706, line 16 – 1707, line 3). Respondent did request ten days for post-trial motions, which was granted and, eventually Respondent did file a plethora of post-trial motions. Trial Transcript 855: 6-9. (R. p. 1707, lines 6-9). Ultimately, the Trial Court ruled that the jury's verdict was inconsistent and granted Respondent's motion for JNOV. Order Granting JNOV and Denying Other Post-Trial Motions. (R. p. 6 - 10). This appeal followed.

STANDARD OF REVIEW

"In South Carolina, an appellate court must uphold a jury verdict if it is possible to reconcile its various features." Camden v. Hilton, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct.App.2004). "Furthermore, 'a jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention.'" Id. (quoting Johnson v. Parker, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983)). Sapp v. Wheeler, 402 S.C. 502, 512, 741 S.E.2d 565, 571 (Ct. App. 2013). In ruling on directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999). The trial court must deny the motions when the evidence yields more than one inference, or its inference is in doubt. Id.

"When a jury renders an inconsistent verdict, the only remedies available at that moment are to resubmit the case to the jury or grant a new trial absolute. See Stevens v. Allen, 342 S.C. 47, 52–53, 536 S.E.2d 663, 665–66 (2000); Camden v. Hilton, 360 S.C. 164, 173–74, 600 S.E.2d 88, 92–93 (Ct.App.2004). The remedies to correct an inconsistent verdict are limited because a court cannot determine whether the jury intended to render a verdict for the plaintiff or defendant. Stevens v. Allen, 336 S.C. 439, 450–51, 520 S.E.2d 625, 630–31 (Ct.App.1999). Campbell v. Robinson, 398 S.C. 12, 26, 726 S.E.2d 221, 229 (Ct. App. 2012).

"Verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge 'should not be required to guess as to what a jury sought to render.'" Prego v. Hobart, 287 S.C. 116, 118, 336 S.E.2d 725, 726 (Ct.App.1985). "However, '[i]t is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found.'" Rhodes v. Winn–Dixie Greenville, Inc., 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967). Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 49–50, 691 S.E.2d 135, 149 (2010).

ARGUMENT

I. The Trial Court erred in granting Respondent's pre-trial motions for summary judgment as to the breach of contract and outrage claims.

A. The Motions were untimely and not properly noticed.

South Carolina Rule of Civil Procedure 56 on Summary Judgment requires: "Motions and Proceedings Thereon: The motion **shall** be served at least 10 days before the time fixed for the hearing." SCRCP 56(c), emphasis added.

In the present case the motions were filed and served on June 19, 2019, according to the certificate of service. Defs. Motion for Summ. Judg. (R. p. 117 - 124). The motions were argued on June 25, 2019, just before trial. Trial Transcript 7, 107, 149. (R. p. 859, 959, 1001). Plaintiff

raised the timing issue as an objection to the motions moving forward at that time. Trial Transcript 10. ("Rule 56(c) is quite clear in when a motion or 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). The Court heard – and granted – the motions notwithstanding the clear language of Rule 56. It was error to do so.

B. Appellant's breach of contract claim was properly supported by the law and the evidence.

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Turner v. Milliman, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). "Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Id. at 122, 708 S.E.2d at 769. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Id. (citation omitted). Bluestein v. Town of Sullivan's Island, 429 S.C. 458, 839 S.E.2d 879 (2020).

Here, the contract in question provides as follows:

PART C – Uninsured Motorists Coverage (UM) and Underinsured Motorist Coverage (UIM)

Part C Uninsured Motorists Coverage (UM) and Underinsured Motorist Coverage (UIM)

> "B. UNDERINSURED MOTORISTS COVERAGE
> We will pay the following damages which a covered person is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of an auto accident:
>
> 1. BI sustained by a covered person…"

Policy Page 14 of 26, Hood_USAA_412. (R. p. 2402).

CONFORMITY TO STATUTE

> This Part is intended to be in full conformity with the South Carolina Insurance Laws. If any provision of this Part conflicts with that law, it is changed to comply with the law."
>
> Policy Page 18 of 26. Hood_USAA_0418. (R. p. 2408).

The other two elements required to maintain a breach of contract claim are (2) breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)**. "**The general rule is that for a breach of contract the defendant is liable for **whatever damages follow** as a natural consequence and a proximate result of such breach." Id. citing National Tire & Rubber Co. v. Hoover, 128 S.C. 344, 122 S.E. 858; and Smyth v. Fleischmann, 214 S.C. 263, 52 S.E.2d 199 (1949)(emphasis added).

Here, the Court did not find that there was no contract, nor that the contract had not been breached, resulting in damages. Instead, the Court found that the contract was no longer being breached i.e. that since the lawsuit was brought there had been payment under the insurance policy. However, in so finding, the Court disregarded the damages that were suffered as a result of the Respondent's unreasonable refusal to promptly pay the reasonable amount owed in the first place. The ruling from the bench granting summary judgment as to the breach of contract claim was specifically: "The breach of contract action, that is granted. My understanding is they -- there's been an award now that has been paid, the insurance now has been tendered." Trial Transcript 156: 17-19. (R. p. 1008, lines 17-19).

However, there is no requirement in South Carolina that the breach continue through trial, only that the breach occur in the first instance with resultant damages. Then, "whatever damages follow" are recoverable. Here, the Court disregarded that aspect of the analysis and, as a result, committed reversible error.

C. Appellant's outrage claim was properly supported by the law and the evidence.

In order to establish a cause of action for outrage, Plaintiff "must establish that:

> (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 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).

In the present case, the Court found that the claim failed as there was no scintilla of evidence as to elements 2 and 4. The Court's entire holding on this cause of action is as follows:

> As to the cause of action for outrage, the motion for summary judgment is granted. Of course, the conduct has to be so extreme that it shocks the conscience, that no reasonable person can be expected to endure it. The Court is the gatekeeper for that cause of action. I don't find that the conduct rises to the level of outrage, and so that motion is granted."
>
> Trial Transcript 156. (R. p. 1008).

With respect to the finding on these elements, the Court failed to consider the effect of the special relationship between insurer and insured, and the conduct itself fully. As the South Carolina Bar's Elements of Civil Causes of Action Fourth Edition states in its summary of the law:

> 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.[4] For example, in the vast majority of cases where liability has been found, the common

[4] Todd v. South Carolina Farm Bureau Mutual Insurance Co., 283 S.C. 155, 321 S.E.2d 602, 610-611 (Ct.App.1984), rev'd on other ground, 287 S.C. 190, 336 S.E.2d 471 (1985).

> thread has been the existence of three factors.[5] First, a pre-existing relationship between the parties has existed, typically a debtor-creditor, **insured-insurer**[6]…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[7]…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.[8]

In Todd, the Court of Appeals specifically adopted guidance from Restatement §46, comment f including:

> (2) abusive conduct by a defendant in actual or apparent authority over a plaintiff, or with power to affect the plaintiff's interest, may give rise to a characterization of the conduct as outrageous, and (3) conduct may be adjudged outrageous because a defendant acts with knowledge that a plaintiff is peculiarly susceptible to emotional distress.

Here, the special relationship between insurer and insured, in fact exists and clearly USAA had power to affect plaintiff's interest in this case. Mrs. Hood testified about the uniqueness and strength of USAA's relationship with its insureds at trial:

> Q. Okay. As a member of USAA, how do they tell you that you will be treated?
> A. USAA prides itself on saying that they're always there and that they will always take care of you in any incident. As many of you or some of you may have seen, they have it in their commercials how a satisfied customer says, oh, I'm a member for life.
> And technically I'm a member for life, as well. But unfortunately in my incident USAA was not there to help me. They betrayed me. And so every time I see that commercial I am reminded that they were not supportive to me in my claim.

Trial Transcript 249: 18 – 250: 4. (R. p. 1101, line 18 – 1102, line 4).

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[5] Id.
[6] Id. See also Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981)(where the court held that conduct growing out of a business relationship may be so outrageous and shocking as to be actionable)(emphasis added).
[7] Id. See also Williams v. Grimes Aero. Co., 988 F.Supp.925 (D.S.C. 1997)(employer's conduct 'so extreme and outrageous as to exceed all possible bounds of decency").
[8] Id.

Moreover, because many of the acts complained of occurred after Mrs. Hood's deposition in the underlying case, USAA and its agents were aware that she was peculiarly susceptible to emotional distress. Nevertheless, they continued to insist she was lying, despite clear evidence to the contrary from expert witnesses they hired. Specifically, in her deposition Mrs. Hood complained of the conduct of repeatedly being called a liar about the headlight issue despite USAA knowing all along she was telling the truth. In her deposition in this case testifying about the treatment from USAA's counsel she stated:

> …I wasn't sure what this deposition as for, and I was thinking it was about Mr. Daniels (sic), to be honest with you, because of how he had mistreated me during my deposition. And how every time I saw him in the room, he like accosted me, he treated me like less of a person, like a liar. And for two and a half years, waiting for this case to be resolved, when apparently you guys already knew I was innocent, I've had to deal with that.

Deposition of Therese Hood 12:3-17. (R. p. 2475, lines 3-17).

> Everyday, questioning myself, why would people think I'm a liar? You know, that's not me. And it' just – it's been – that part of it has been really hard. And so I was hoping he wasn't here today…
>
> He was the one that my doctor volunteered to do the test – the deposition for on my behalf and wrote the letter to my attorney, Kevin Smith, about what that had caused and continued to cause, because I continued to go see her because I was questioning my own being, being whether I was a liar or whether I had made this up.
>
> I questioned myself about everything. Because he got me so turned around about, I didn't make sense, I wasn't fit to sit through the deposition – at one point, he said Do you want me to stop? Because you're just not fit for this deposition.

Deposition of Therese Hood 31:8-21. (R. p. 2494, lines 8-21).

> And everybody that – you know, friends or relatives couldn't believe that this would have to go to trial because it was cut and dry, and it was just lights on, lights off. But I have had to deal with people calling me a liar or, you know, ask – questioning my own sanity at some point about what

> this was about. And when Mr. Smith told me about the Kuck lawsuit, that I was – I was surprised at. But it just – it just would not have happened.

She later reiterated that it was them looking at her like a liar based on their actions and words in handling the case:

> Q. But you felt that people were looking at you at your deposition like you were?
> A. Yes…

Deposition of Therese Hood 155: 20-23, 156: 6-8. (R. p. 2618, lines 20-23, p. 2617, lines 6-8).

All of this, she testified, despite the experts hired by USAA indicating her lights were on:

> "And the fact that I was cleared by your experts about having my high beams on during the accident; and about USAA having taken two sides to the complaint to sue their behalf for not paying me, which led to all the mental anguish and loss of money that I could have had from two years of having a million dollars versus getting it three years later.

Deposition of Therese Hood 30: 6-13. (R. p. 2493, lines 6-13).

As a result of this conduct, Mrs. Hood testified that she suffered harm so severe that she had to get treatment from a psychiatrist:

> And the mental anguish was severe enough that I had to go get treatment from a psychiatrist, which volunteered to do a deposition, and provided a letter to my attorney about what had caused all my mental anguish.

Deposition of Therese Hood 30: 14-18. (R. p. 2493, lines 14-18).

She then explicitly testified that several of her other doctors knew as well:

> Q. Let me ask you this, other than that time, have you ever consulted a physician or a medical professional specifically about Mr. Daniel's conduct or USAA's conduct?
>
> A. Um, well, I don't know if I told them or if they knew. But besides Dr. Scott, who is the psychiatrist, DR. Ann Hanlon is my family doctor, and she saw me and she did a deposition. And – who was the other doctor? Dr.

> Jaskwhich. And he did a video deposition that was admitted at trial. And, um, I hate to say it, but they were all disgusted by the behavior that –
>
> Q: By how they were treated?
>
> A. Well, by Mr. Daniels, but that was allowed to happen to me. And that USAA hadn't done anything about it.

Deposition of Therese Hood 133:21 – 134:12. (R. p. 2596, line 21 – p. 2597, line 12).

It is proper to bring an action for emotional distress where the sole damage alleged is that of mental anguish. Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981). And the Courts have indicated that seeking medical treatment for the mental anguish raises it above the level of legally sufficient. Hansson v. Scalise Builders of S.C., 374 S.C. 352, 650 S.E.2d 68 (S.C. 2007)(where alleged emotional damages were loss of sleep and grinding of teeth in sleep requiring fillings, but no other medical treatment or medication from any physician or counselor, was not legally sufficient indicating had the plaintiff had other treatment for the mental anguish it would have been); Talamantes v. Berkeley County Sch. Dist., 340 F.Supp.2d 684 (D.S.C. 2004).

Where reasonable persons might differ on the extreme nature or outrageousness of Defendant's conduct, the same should be submitted to the jury. Here, the deposition testimony was raised to the Court in the argument on the Motion for Summary Judgment, but despite squaring with existing law, the Trial Court erred in granting the Motion on the basis that the conduct did not rise to the level outlined in the case law. Trial Transcript 153. (R. p. 1005).

II. The Trial Court erred in granting certain motions for directed verdict.

A. The Trial Court erred in refusing to allow the submission of claims based on mediation conduct in the underlying case and the failure of Defendant to offer its reasonable evaluation of the amount owed to Mrs. Hood.

In Myers v. State Farm Mutual Automobile Insurance Company, 950 F.Supp. 148 (D.S.C. 1997) the late Judge Sol Blatt held, "in cases of liability where it is clear that damages have been suffered by the insured that are greatly in excess of the tortfeasors' policy limits, the underinsured carrier may have a duty to make a settlement offer prior to its insured obtaining a judgment against, or exhausting the policy limits of, the tortfeasor." Myers v. State Farm Mut. Auto. Ins. Co., 950 F. Supp. 148, 151 (D.S.C. 1997) citing Handley v. Farm Bureau Mut. Ins. Co., 467 N.W.2d 247 at 249 (Iowa 1991); Ramirez v. USAA Casualty Ins. Co., 234 Cal.App.3d 391, 285 Cal.Rptr. 757 at 759 (1991); and Buzzard v. Farmers Ins. Co., 824 P.2d 1105 at 1112 (Okla.1991).

Likewise, Courts across the country have held the same: "The duty of good faith and fair dealing imposes on an insurance company an obligation to tender to its insured the amount which it concedes it owes under first party coverage. See, e.g., Newport v. USAA, 11 P.3d 190 (Okla. 2000); see also Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 450 S.E.2d 66, 72-73 (Ct. App. 1994)("The [trial] court held there was clear and convincing evidence that Cincinnati acted recklessly or in conscious disregard of OSCO's rights by: [among other things] refusing to pay, without explanation, even the undisputed portions of OSCO's claims for eight months, despite repeated requests for payment…After carefully reviewing the record, we agree with the trial court's analysis.").

There is no reasonable basis or good faith reason for an insurance company, like USAA, to retain insurance proceeds which it acknowledges are due to its insured and to earn interest on those sums while forcing its insured to pursue legal action to recover the full amount due to her. See Richardson v. Kentucky Nat. Ins. Co., 216 W.Va. 464, 607 S.E.2d 793 (2004)("[T]he [insurer] knew it had an obligation to pay the insured's claim, yet is essentially held the proceeds

of the insurance policy …"); PHC, Inc. v. North Carolina Farm Bureau Mut. Ins. Co., 129 N.C. App. 801, 501 S.E.2d 701 (1998)("Under the circumstances of this case, we hold that defendant's refusal to pay at least the undisputed amount of loss to plaintiff was unwarranted, and the trial court properly awarded attorneys' fees…").

In the present case, the testimony developed first with it being undisputed that USAA never offered, much less paid, what it had determined to be the reasonable value of the claim ($250,000.00) to its insured, Therese Hood:

> Q. Okay. Let's talk a little bit about what reserves are. So reserve, that is USAA's reasonable evaluation of the value of the claim; right?
> …
> Q. Correct?
> A. It is our value of a claim at any given time based on the information we have in the file at that time, yes.

Trial Transcript – Adjuster/Corporate Representative Moats[9] Direct 408: 5-15. (R. p. 1260, lines 5-15).

> A. I - - took it into account. Obviously, I took everything into account or we wouldn't have raised the reserve to $250,000.
> Q. Okay. So that - - the $250,000 was based on everything that you took into account.
> A. Everything that I looked at. Every piece of evidence that I looked at.
> …
> Q. And after taking everything into account and trying to determine what would happen at the trial of the case, determining that $250,000 was the reasonable amount, USAA never offered it?
> A. No, we did not offer it.

Trial Transcript – Adjuster/Corporate Representative Moats Direct 452: 24, 453: 23. (R. p. 1302, line 24 – 1303, line 23).

We know that the full authority of USAA at mediation, would have settled the case:

> Q. Ms. Hood, at the mediation ---
> A. Uh-huh.
> Q. --- what amount did you tell your attorney at that

[9] In addition to being the adjuster on the file, Ms. Moats was USAA's corporate representative at trial. Trial Transcript 106: 22 – 107: 12. (R. p. 958, line 22 – p. 959, line 12).

> point that you would take to be done with the case at that point?
> A. Near 250,000.

Trial Transcript – Claimant Therese Hood Direct 264: 5-10. (R. p. 1116, lines 5-10).

We also know, that while the full authority of USAA would have settled the case at the underlying mediation that it was never offered. In addition to her attorney's testimony, Mrs. Hood testified at trial as follows:

> Q – Ms. Hood, at that mediation you were never offered that amount [$250,000]; correct?
> A. No.

Trial Transcript – Therese Hood Direct 265: 3-5. (R. p. 1117, lines 3-5).

Not only did USAA not offer its full evaluation to its insured, which would have settled the case, USAA also misrepresented its evaluation at the mediation in the underlying case, only ever offering $200,000 and indicating that it was "full authority," when it was not. Mrs. Hood's lawyer at the underlying mediation, Kevin Smith, testified at the trial of this action as follows:

> A. …So Jack Daniel walks in the room right before we are going to leave and just says I want to put my full authority on the table and it is $200,000, that's all I have got and I just want to put it on the table. And I knew Terry and I were. And I -- give us a moment to talk.
> So I discussed that with Terry. And, you know, when I say -- when a lawyer says three to four hundred thousand a lot of times that means three fifty. But three to four hundred thousand you don't really float those things unless you are willing to get into the bottom range and the top range, you know what I mean, of that kind of range there.
> So I discussed it with Terry. And I thought it -- I thought it was low. I thought her case was worth more than that. But Terry wasn't necessarily about money. She wanted to get this done. And, frankly, she was tired of just this -- this beat down. All of these accusations and all of this kind of stuff…
> …
> Terry indicated to me that she would compromise to $250,000 if they would offer it. Now this was less than

> the authority she discussed in my office. But I am going to respect her wishes. And I went back to Jack, is 200 all you have got? It is all I have got; it will never be more; I can't get anymore; I'm putting it all on the table.
>
> You know, you may get the sense through this conversation there is a language that lawyer speak to each other, right. Something in the neighborhood of, something north of, something south of. We have a language that we speak to each other that kind of passes hints.
>
> Because we each have to work on our client, right. The defense has to work on the insurance company to kind of get the money and get the authority to say settle. I've got to talk to my client and tell her what I think and what is reasonable. So we have got -- we both have kind of got work to do. So we are sending messages to each other.
>
> But when a lawyer is very deliberate we mean to be deliberate and we mean to pass a specific message. So the message I got was 200 is all I have got, I won't get any more, take it or leave it. So we left.

Trial Transcript – Attorney Kevin Smith Direct 613: 17 - 615: 8. (R. p. 1465, line 17 – p. 1467, line 8).

The law requires that an insurer act reasonably with respect to its insured, which includes paying undisputed sums, and offering a fair evaluation of the insured's claim. Where the insurer has valued the claim itself, that valuation is prima facie a "reasonable" evaluation from the insurer's perspective. Nevertheless, after the cited testimony – and more – and argument from counsel regarding Defendant's directed verdict motion on the issue, the Court ruled:

> I am granting the directed verdict motion to the extent that relies on – that the bad faith or negligence claims relies on conduct regarding mediation. Again, I do not believe they have a duty to offer the full amount of their evaluation or their reserve where the parties are that far apart in their negotiations.

Trial Transcript 693: 22 – 694: 2. (R. p. 1545, line 22 – p. 1546, line 2).

Accordingly, the Court committed reversible error.

B. The Trial Court erred in limiting Appellant's presentation of damages to the jury to mere direct litigation costs.

1. Appellant was entitled to submit consequential damages to the jury.

"We hold today that if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action. Actual damages are not limited by the contract. Further, if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages." Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). Consequential damages are those which any "reasonable person in the insurer's position with its knowledge could have reasonably foreseen the additional damages resulting from the refusal to pay a claim under the contract, those damages are recoverable." Brown v. S.C. Ins. Co., 284 S.C. 47, 56, 324 S.E.2d 641, 646–47 (Ct. App. 1984), overruled on other grounds by Charleston Cty. Sch. Dist. v. State Budget & Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993) citing Sitton v. McDonald, 25 S.C. 68, 60 Am.Rep. 484 (1885).

2. Appellant was entitled to submit damages regarding the reduction in verdict in the underlying case and excess verdict as an element of damages.

One of those "reasonably foreseen" damages resulting from Appellant's refusal to pay Mrs. Hood's claim is the reduction in verdict in the underlying case and excess verdict as the same has been a recoverable element of damages in the underinsured motorist context since Nichols:

> While we have never ruled on this precise question, we held in Tyger River Pine Co. v. Maryland Casualty Co., 170 S.C. 286, 170 S.E. 346 (1933) that an insurer's unreasonable refusal to settle within policy limits subjects the insurer to tort liability. We have held also that unreasonable refusal on the insurer's part to accept an offer of compromise settlement will render it liable in tort to the insured for the amount of the judgment against the insured in excess of policy limits. Miles v. State Farm Mutual Ins. Co., 238 S.C. 374, 120 S.E.2d 217 (1961). The cause of action we consider today and that which is commonly known as the "Tyger River Doctrine", are merely two different aspects of the same duty.

Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 339–40, 306 S.E.2d 616, 618–19 (1983).

In Tyger River Pine Co. v. Maryland Cas. Co., the case relied on in Nichols, the Supreme Court held as follows:

> The following was quoted from the case of Attleboro Mfg. Co. v. Frankfort, etc., Co. (C. C. Mass.) 171 F. 495: "Where an insurer under an employers' liability policy on being notified of an action for injuries to insured's servant assumed the defense thereof, and was negligent in conducting the suit, to the loss of the employer, the latter was entitled to sue the insurance company for breach of its implied contract to exercise reasonable care in conducting the suit or in tort for negligence."
>
> We said in our opinion in connection with this question: "The same principle is announced in the rehearing of the same case reported in [Attleboro Mfg. Co. v. Frankfort, etc., Co.] (C. C. A.) 240 F. 573. And such we find to be the prevailing opinion."
>
> We adhere to that conclusion.

Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346, 348 (1933).

In so holding the Court determined that if the insurer had an opportunity to settle within the policy limits and failing to do so resulted in an excess verdict that the excess amount of the verdict would be a damage its insured is entitled to collect from the insurer. That can be no truer that in the first party context where it is the insured who is suffering the damage, while the insurer gambles with the money that the insured has paid premiums to have available to her in her time of need.

Here, the Court allowed the testimony about the excess amount – but refused to submit it as an element of damage for the jury to consider. The testimony regarding the amounts at issue went as follows:

> Q. Okay. In that case what did the twelve people on that jury determine your damages from the car wreck to be?
> A. Two-point-five million dollars.

Q. All right. And even after that -- that was reduced, correct, 49 percent?
A. Right.
Q. All right. After that reduction, that was 1.275 million?
A. That's correct.
Q. Has USAA ever paid you that money, the 1.275 million?
MR. WHELAN: Your Honor, objection; ---
A. No.
Q. Okay.
MR. WHELAN: --- USAA doesn't owe her the 1.275 million.
MR. WILLEY: Well, that's a question for the jury that we'll get to.
MR. WHELAN: I object to that. It's not an element of ---
MR. WILLEY: Your Honor, may we approach?
MR. WHELAN: USAA ---
MR. WILLEY: Because we need legal objections, not speaking objections. If he wants to testify, I'll be glad to call him as a witness.
THE COURT: Okay. Thank you.
[Whereupon, an off-the-record bench conference is held]
THE COURT: I'm going to allow it. Thank you.
Q. Ms. Hood, the verdict, after it was reduced, was 1.275 million; correct?
A. Yes.
Q. Has USAA ever paid that verdict in full?
A. No.

Trial Transcript – Claimant Therese Hood Direct 256: 8 – 257: 15. (R. p. 1008, line 8 – p. 1009, line 15).

The Court prohibited the actual submission of the element of damages after argument, as follows:

> I am not going to allow that to be an element of damages, the excess – the difference between the policy limits and what the verdict was I am going to have to disagree with you there. I don' [sic] think that that is a proper element of damages…I think that her economic damages are basically limited to her litigation costs in the underlying action.

Trial Transcript 682: 10-14, 683: 2-3. (R. p. 1534, lines 10-14; p. 1535, lines 2-3).

The Court underscored that in the jury's charge on the law, stating: "…actual damages would be the actual losses and expenses which the plaintiff has suffered…" Trial Transcript 832: 1-3. (R. p. 1684, lines 1-3).

This ruling was in error and the jury should have been able to consider the full extent of Mrs. Hood's damages as evidenced by the testimony and evidence in the case, not just her actual expenses.

3. Appellant was entitled to submit emotional distress damages to the jury.

A negligence cause of action and a bad faith cause of action both support damages that proximately flow therefrom – including emotional damages. In fact, our Federal Courts have explicitly recognized that emotional distress damages are recoverable in this context. See University Medical Associates of the Medical University of South Carolina v. UnumProvident Corp., 335 F. Supp. 2d 702 (D.S.C. 2004). As the Court in that case recognized, the Fourth Circuit has implicitly held that emotional distress damages related to a bad faith action in South Carolina are recoverable when the distress was related to the refusal to pay benefits. State Farm Fire and Cas. Co. v. Barton, 897 F. 2d 729 (4th Cir. 1990).

Numerous cases from other jurisdictions recognize that emotional damages are recoverable as an element of actual damages in a negligence or bad faith case, without proof of injury, illness, or severe distress. See, e.g., Ace v. Aetna Life Insurance Company, 139 F. 3 d 1241 (9th Cir. 1998); Goodson v. American Standard Insurance Company of Wisconsin, 89 P. 3 d 409 (Col. 2004); Ingalls v. Paul Revere Life Insurance Group, 561 N.W. 2d 273 (N.D. 1997); Hangarter v. Paul Revere Life Insurance Company, 236 F. Supp. 2d 1069 (Cal. 2002); State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513 (2003); Washington v. Group Hospitalization, Inc., 585 F. Supp. 517 (U.S. D. C. 1984); Bibault v. Hanover Insurance

Company, 417 A. 2d 313 (R.I. 1980); Tran v. State Farm Mut. Auto Ins. Co., 999 F. Supp. 1369 (D.Ha. 1998); and Patel v. United Fire and Cas. Co., 80 F. Supp. 2d 948 (N. D. Ind. 2004).

As described *infra* there was ample testimony and evidence to support an outrage cause of action and damages therefrom in this matter. However, policy considerations for requiring severity of emotional distress to be shown in the "outrage" context do not support applying that requirement in the negligence or bad faith context. The basic assumption underlying limits to the tort of outrage is that emotional distress without physical injury or illness may be relatively trivial and too easily asserted. In contrast, when an insurance company wrongfully refuses to honor its obligations, emotional distress is a natural and believable response. Insureds bargained and paid for the security and peace of mind of knowing that reimbursement and financial support will be provided in the event that a misfortune occurs. Ace v. Aetna Life Insurance Company, supra, 139 F.3d at 1250.

Given that insureds purchase insurance policies to obtain financial security and peace of mind, emotional distress is a likely and foreseeable result of [ ] bad faith . . . . The action of the insurer causing anxiety, stress, inconvenience, and financial risk to the insured by delaying payment owed under the policy contravenes a fundamental benefit of obtaining the insurance. Goodson v. American Standard Insurance Company of Wisconsin, supra, 89 P.3d at 417.

"[A]n unreasonable denial of insurance benefits--a necessary element of every bad faith breach of insurance contract-- can cause anxiety, fear, stress, and uncertainty, even when the benefits are eventually paid." Id. An insured purchases insurance in the first place so as not to suffer such anxiety, fear, stress, and uncertainty. The fact that an insurer finally pays in full does not erase the distress caused by the bad faith conduct. Damages for emotional distress the insured

proves are therefore available in actions for bad faith breach of insurance contract upon the showing of the insurer's liability. Id.

"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." Jarchow v. TransAmerica Title Ins. Co., 48 Cal. App. 3d 917, 122 Cal. Rptr. 470, 486 (1975); Ingalls v. Paul Revere Life Insurance Group, supra, 561 N.W. 2d at 283.

The testimony regarding Mrs. Hood's emotional distress damages caused by the actions of USAA and its agents in the underlying matter was extensive. This is just a sampling:

> A. Okay. I had a -- after three months I had a phone interview deposition with USAA, which five months later was preceded by a deposition with Mr. Daniels and my other USAA attorney, Mr. Nickels.
>
> And which at -- at the depositions, and I've had several, I felt that it was always insinuated that I lied in my depositions to the point in one of my depositions Mr. Daniels was questioning my sanity.
>
> And so throughout this whole process for five years I've had to look at myself in the mirror every day and see myself as a liar. And I am -- I am not a liar. I'm a very honest and kind person. I'm an open book.
>
> And so as this time goes on, and even today, they are still insinuating that I lied.
>
> My depositions went from first beginning in 2015 until today. That is a five-year lapse between the depositions. Your memory -- I don't think anybody can remember exactly what they said five years ago.

Trial Transcript 254:19 – 255: 11. (R. p. 1106, line 19 – p. 1107, line 11).

> Q. Now, USAA, you said -- you said earlier that USAA lied to you and that caused you a lot of emotional stress you said; right?
> A - Yes.
> Q. What was the lie?
> A. They knew for a long period of time that I was innocent, based on their findings; and they continued the case accusing me of the same thing, of not telling the truth about my life.

Trial Transcript 279: 17-25. (R. p. 1131, lines 17-25).

> Q. So I am trying to get down to the lie that you say USAA told. And what you just told us is the lie was they knew you were innocent but, what, Jack Daniel defended the suit; is that the lie?
> A. I cannot say it was solely Mr. Daniels. Because he was an attorney for USAA, and it was a -- he had made USAA aware of the circumstances.
> And I don't know if I can say this or not. But at my first deposition with Mr. Daniels, in several different ways he ridiculed me, make -- questioning my sanity, do you realize this, do you realize that, did you say this, did you say that, why did you say this, why did you say that.
> I had -- first of all, I had never had an attorney before. Had no idea what to expect. And then here comes this man, you know, just making me feel stupid in front of everybody.
> And on the other encounters with this man, he did the same thing.
> Q. Jack Daniel?
> A. Jack Daniels ---
> Q. Okay.
> A. --- did the same thing.

Trial Transcript 280: 23 – 281: 19. (R. p. 1132, line 23 – p. 1133, line 19).

> Q. All right. And so let me get back to the what you call the lie. You said that USAA knew you were innocent so USAA -- what you are saying is USAA knew that your headlights were on; right?
> A. Right.
> Q. And you were then caused emotional damages because you feel that they knew they were on and they lied about it and said they were off; right?
> A. That is one thing. The most severe thing is the fact that they kept insinuating and trying me and saying that I lied.
> Q. By saying that your lights were ---
> A. Because in one case you chose to say my lights were on, to protect your money, and in the second case you chose to say my lights were off, to protect your money, so you wouldn't have to pay the people involved.
> Q. Okay. Which is the truth? Were your lights on or were they off?

A. They were on.

Trial Transcript 283: 9 – 284: 2. (R. p. 1135, line 9 – p. 1136, line 2).

Mrs. Hood's testimony was supported by her attorney in the underlying case, Kevin Smith's testimony during trial as well, where he testified regarding the conduct of USAA's agent Mr. Daniel during the mediation:

> Q. Okay. And what was the sort of the crux of the statement that he gave?
> …
> A. Terry is a liar. She is crazy. It was tough to -- it was tough to sit there and hear. I prepare people -- I prepare my clients to hear the bad side. And, you know, actually I want them to hear it. You know, because I don't want them to hear it for the first time in trial. I don't want them to sit here in trial for the first time and hear all of the defense opening and that. And so I want them to hear it. But usually there's a little bit more decorum. But anyway, it was -- it was the usual. It very -- very -- very if not overly confident in his case.
> Q. And so while he is giving that opening statement everyone is in the room including Terry?
> A. Yes.

Trial Transcript 607: 11-23. (R. p. 1459, lines 11-23).

Mrs. Hood's testimony was further supported by the person who knows her best. When asked, her husband David Hood responded as follows:

> Q. Have you noticed an impact on her from what USAA has Done?
> A. It's been devastating to her.
> …
> Q. Mr. Hood, tell the jury based on USAA's actions how they treated you and your wife, what you've noticed about how it's affected her.
> A. We've been married 44 years. I know Terry better than anybody else on this planet. I know that this has been tearing her up since day one, since they first started this whole thing about were her lights on, were her lights off and where they're going back and forth with, you know, is she telling the truth, is she not telling the truth. And

her credibility is more important to her than anything else.

And to be honest with you, this whole thing is getting to a point where it's bothering me as well. I can't protect her from this. I can't protect her from the company that I've been paying premiums to for 20 years, a company that I thought was on our side, that we expected to represent us.

They have taken a police report and have turned it in different directions, depending on who they're talking to and when they're talking to them about it.

They did the same thing with the whole lights thing. I heard Mr. Whelan yesterday say ---

MR. WHELAN: I ---

Trial Transcript 311: 22-24, 312: 14 – 313: 8. (R. p. 1163, lines 22-24, p. 1164, line 14 – p. 1165, line 8).

With respect to the emotional distress damages stemming from negligence or bad faith, the Court ruled as follows:

MR. WILLEY: Thank you. And just so I am clear, the emotional distress damages are granted as to the extent of the bad faith action; but of course we can still recover compensable elements under negligence?

THE COURT: My previous ruling was that they're -- they are still -- the only -- the only cause of action that carried an emotional distress element was bad faith.

MR. WILLEY: Right.

THE COURT: That the negligence action emotional distress damages are not recoverable in the negligence action where there is no accompanying physical injury. That was my ruling pretrial. And that is still my ruling.

Trial Transcript 694: 16 – 695: 2. (R. p. 1546, line 16 – p. 1547, line 2).

The Court then underscored this during the charge on damages stating: "Emotional damages are not an element of damages in this action." Trial Transcript 832: 5-6. (R. p. 1684, lines 5-6).

Here, there was more than adequate testimony of the emotional distress that Mrs. Hood endured at the hands of USAA. As a result, the damages should have been submitted for the jury's consideration.

III. The Trial Court erred in granting Respondent's Motion for Judgment Notwithstanding the Verdict.

A. The jury's verdict was not inconsistent.

In South Carolina an insurer is subject to liability if it is negligent in the processing of an insurance claim and/or if it commits bad faith in the handling of an insurance claim. Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983)("We hold today that if an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action."). Of course, an insurance company's liability to its insured in tort is even older jurisprudence in South Carolina dating to the 1933 case of Tyger River Pine Co. v. Maryland Casualty Co., where the Supreme Court held:

> Running all through the case, as appears from an inspection of the grounds of the motion for a directed verdict and the requests to charge preferred by defendant, is the contention by defendant that plaintiff is 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 and defendant's actions and conduct thereabout.
>
> We think this question was decided by this court by the opinion on the appeal from the order overruling the demurrer. The opinion thus states the issue: "Does the complaint state a cause of action either in contract or in tort for breach of contract, or of bad faith or negligence [emphasis added] in the performance of contract?"
>
> The following was quoted from the case of Attleboro Mfg. Co. v. Frankfort, etc., Co. (C. C. Mass.) 171 F. 495: "Where an insurer under an employers' liability policy on being notified of an action for injuries to insured's servant assumed the defense thereof, and was negligent in conducting the suit, to the loss of the employer, the latter was entitled to sue the insurance company for breach of its

> implied contract to exercise reasonable care in conducting the suit or in tort for negligence."
>
> We said in our opinion in connection with this question: "The same principle is announced in the rehearing of the same case reported in [Attleboro Mfg. Co. v. Frankfort, etc., Co.] (C. C. A.) 240 F. 573. And such we find to be the prevailing opinion."
>
> We adhere to that conclusion.

Tyger River Pine Co. v. Maryland Cas. Co., 170 S.C. 286, 170 S.E. 346, 348 (1933).

The Nichols Court went on to iterate that the negligence should absolutely be considered on the issue of an unreasonable refusal to pay benefits due under an insurance contract:

> Insurer next argues the trial judge erred in instructing the jury that an insured can recover in a "bad faith" cause of action for negligence of the insurer in handling the claim. Under our view of the bad faith cause of action, above stated, the jury is entitled to consider negligence on the issue of unreasonable refusal to pay benefits. See generally, Tyger River Pine Co., supra; and Robertsen, supra.

Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 342, 306 S.E.2d 616, 620 (1983).

In the present case the jury was given the decision between finding bad faith in response to question to 1 on the verdict form or negligence in response to question 2 on the verdict form. In the charge on the law the trial judge instructed the jury that the "plaintiff has alleged a cause of action for violation of the implied duty of good faith and fair dealing. So I'm going to talk about that cause of action first." (bad faith) Trial Transcript 827: 22-25. (R. p. 1679, lines 22-25). In that same charge, the Court instructed the jury that "[a]n insurance company acts in bad faith only when there is no reasonable basis to support its decision…[and] [w]hether an insurance company is liable for bad faith must be judged by the evidence…" Trial Transcript 829: 1-2, 9-10. (R. p. 1681, lines 1-2, lines 9-10). The Court further indicated that "[b]reach of this duty by an insurer's bad faith refusal to settle the claims of its insured's renders the insurance company

liable in tort for all actual and consequential damages that occur as a natural and probable result of the breach." Trial Transcript 829: 14-18. (R. p. 1681, lines 14-18).

Next, the Court instructed the jury on negligence as a separate cause of action, stating: "[t]he plaintiff has also alleged a cause of action for negligence. The plaintiff claims that the defendant was negligent and should compensate the plaintiff for the damages the plaintiff suffered as a result of defendant's negligence." Trial Transcript 829: 20-24. (R. p. 1681, lines 20-24). The court instructed the jury on the duty owed to the Plaintiff as "done something that a reasonable person would not have done or has failed to do something that a reasonable person would have done in this same situation." Trial Transcript 830: 9-12. (R. p. 1682, lines 9-12). Notably, this charge mirrors the language in Nichols of "unreasonable action." Following the proximate cause charge that accompanies the negligence cause of action the Court then instructed the jury that "[w]hen a defendant adopts internal policies or self-imposed rules, and thereafter violates those policies or rules, the jury may consider such violations as evidence of negligence." Trial Transcript 831: 16-19. (R. p. 1683, lines 16-19).

Likewise, the verdict form was outlined to allow the jury to find for the Plaintiff on two separate causes of action – bad faith or negligence. Verdict Form. (R. p. 15). Under South Carolina law, those two causes of action have different elements. Based upon the Court's pre-charge conference, and understanding the verdict form and the charge that the Court would give the jury, Plaintiff's counsel structured his closing argument to align the facts within the two separate and distinct causes of action that the Court intended to charge – bad faith and negligence.

Later, the jury had a question during deliberations which was "Can verdict one and four be mutually exclusive?" Trial Transcript 842: 23-24. (R. p. 1694, lines 23-24). Question 1 on the

verdict form was: "Do you find by a preponderance of the evidence that Defendant USAA breached its duty of good faith and fair dealing to Therese Hood?" Question 4 was: "Did the Plaintiff prove by clear and convincing evidence that USAA's bad faith was intentional, reckless, willful, wanton, or malicious?" Verdict Form. (R. p. 15). After discussion with counsel, the Court decided to bring the jury back "to walk through the verdict form with them again and just I am going to give them that caveat that if you can answer yes to either one or two then go to number three. If you find that an award of actual damages proper under either cause of action, then you will go to question number four…Basically going to tell them that these questions apply to either cause of action [bad faith or negligence]." Trial Transcript 849: 11-22. (R. p. 1701, lines 11-22). And the Court did just that:

> Okay. Ladies and gentlemen, I am just going to go over the verdict form with you one more time. I hope this will answer your question.
>
> Number one on the verdict form is asking you do you find by a preponderance of the evidence that the defendant breached its duty of good faith and fair dealing to Therese Hood. And of course you are going to answer that either yes or no.
>
> Number two pertains to the second cause of action for negligence. And it states do you find by a preponderance of the evidence that the defendant USAA individually or through its agent was negligent. To which you will answer yes or no.
>
> If you answered yes to either of these things, either number one or two, then you will proceed to number three which is the question about actual damages. So if the answer to number one or two is yes, the amount of actual damages, if any, caused by the defendant's conduct.
>
> 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.
>
> If the answer is yes you will continue to question five. If the answer is no you will stop and deliberate no further.

Trial Transcript 850: 25 – 851: 25. (R. p. 1702, line 25 – p. 1703, line 25).

Then, following the Court's instruction, that is exactly what the jury did in rendering a verdict against USAA to hold it accountable for its actions towards Mrs. Hood – they found negligence, that was intentional, reckless, willful, wanton, or malicious, and awarded Mrs. Hood actual damages in the maximum amount allowed by the Court along with punitive damages. The jury answered in the negative with respect to the bad faith cause of action.

There was good logical reason for the jury's verdict. The trial contained extensive testimony from USAA's agents regarding its policies and procedures with respect to how to handle a claim for UIM benefits with an insured, evidence that went directly to the court's charge on negligence, but not necessarily to its charge on bad faith. Specifically, USAA's agents testified that loyalty, honesty, integrity and standing by its insured were its internal policies and ethos. *infra.* USAA's agents and corporate representative also testified that USAA has a responsibility to pay its insured what it determines is owed under a particular claim, as demonstrated by the below testimony from one of the adjusters on the claim offered via deposition at the trial:

> Q. Well let's just talk about it generally. So we talked earlier about USAA's ethics of honesty, integrity, loyalty, and it's kind of stand by the insured idea, right?
> A. Certainly.
> Q. Right. And you said earlier that USAA's purpose of handling UIM coverage is to determine how much the insured should be compensated from that coverage, right?
> A. If there's a claim owed and paying what we owe, yes, right.
> Q. All right. So in this case at this particular point in time where this injury evaluation is printed, the reserves were set at two hundred and fifty thousand, right?
> A. Yes.
> Q. That's the internal evaluation of the case, right, the reserve?
> A. I don't know why it was set at that.
> Q. Right. But it is set at that?
> A. It is set at that, correct.

Deposition of Missy Howard 117:3-7, 22-25; 120:7-25. (R. p. 595, lines 3-7, lines 22-25; p. 598, lines 7-25). Trial Transcript 577: 23 - 578: 1. (R. p. 1429, line 23 – p. 1430, line 1). Court Exhibit 10. (R. p. 2915). [See also: Howard Depo 33: 4-12, 34: 1-2]. (R. p. 511, lines 4-12; p. 512, lines 1-2).

Importantly, that is also the law in South Carolina – that an insurer must pay its insured what is reasonably owed on the claim in the first party context. And there can be no more dispositive, uncontradictable evidence of reasonable value than the insurer's own internal valuation. In fact, according to Adjuster Howard, USAA recognizes that internally in their policies and procedures:

> Q. All right. And the person handling the UIM claim, what are they protecting?
> A. Protecting the insured to make sure that we, that we're paying the insured what we owe them, if something is owed to them.
> Q. So it's not that individual's job to try to keep the UIM money from the insured; is that fair?
> A. Correct.
> Q. And it wouldn't be that person's job to try to hide a fact that is known to them in order to keep the UIM money from the insured, correct?
> A. Correct.
> Q. And if that person did take part in keeping facts hidden from the insured which helped the insured's claim, that person would not be doing their job, would they?
> A. If they had hidden facts, no.

Deposition of Missy Howard 59: 4-19. Id. (R. p. 537, lines 4-19).

> A. I mean, our goal is to pay what we owe, investigate a claim and pay, you know, what we owe.
> Q. Okay. And what is owed would be determined by the true set of facts and circumstances relative to that particular wreck, correct?
> A. Yes.
> Q. Okay. And if an adjuster at USAA participated in keeping facts hidden in order to not pay an insured what they were owed, that individual would be violating USAA's policies and ethics, correct?
> A. Yes. If that happened.

Deposition of Missy Howard 59:1-2, 4-19; 60:2-5, 7-12, 14-19, 21. Id. (R. p. 537, lines 1-2, 4-19; p. 538, lines 2-5, 7-12, 14-19, 21).

In this case it was undisputed that USAA never offered, much less paid, what it had determined to be the value of the claim ($250,000.00) to its insured, Therese Hood:

> Q. Okay. Let's talk a little bit about what reserves are. So reserve, that is USAA's reasonable evaluation of the value of the claim; right?
> …
> Q. Correct?
> A. It is our value of a claim at any given time based on the information we have in the file at that time, yes.

Trial Transcript – Adjuster Kathy Moats Direct 408: 5-15. (R. p. 1260, lines 5-15).

> A. I - - took it into account. Obviously, I took everything into account or we wouldn't have raised the reserve to $250,000.
> Q. Okay. So that - - the $250,000 was based on everything that you took into account.
> A. Everything that I looked at. Every piece of evidence that I looked at.
> …
> Q. And after taking everything into account and trying to determine what would happen at the trial of the case, determining that $250,000 was the reasonable amount, USAA never offered it?
> A. No, we did not offer it.

Trial Transcript – Adjuster Kathy Moats Direct 452: 24 – 453: 23. (R. p. 1304, line 24 – p. 1305, line 23).

And we know that after the adjuster set the reserve to $250,000, which was before the mediation where it was never offered, the reserve was also never changed. In fact, it had only been changed to $250,000 time following the receipt of the expert report USAA obtained in the other case indicating that Mrs. Hood's lights were on:

> Q. Okay. So Woody generates his report August 12th, 2016 and then on August 24th, 2016, the -- your boss, Ron, who's also handling maybe the BI claim, increases the reserve from 100,000 to $250,000. Is that the accurate timeline?
> A. That's a timeline, yeah.

Trial Transcript – Adjuster Kathy Moats Direct 416: 16-20. (R. p. 1268, lines 16-20).

Therefore, on this testimony alone there was evidence of negligence, as instructed by the Court, on the record for the jury to find under that cause of action.

The alleged inconsistency (if there is one) on the first cause of action is not that hard to explain logically either. It was admitted, see above, that USAA owed Mrs. Hood a duty to act reasonably towards her. But a specific element of the bad faith cause of action is the "mutually binding contract of insurance." And this testimony also exists in the record on that point:

> Q. Mr. Hood, you -- how long have you been a USAA member?
> A. Over 20 years. But -- and I did -- I guess I should point out that this insurance policy that we're involved with is actually my policy. My wife ---
> Q. Right.
> A. --- is on my policy. This is my member account.
> Q. Right. We got that.

Trial Transcript – Husband David Hood Direct 304: 11-17. (R. p. 1156, lines 11-17).

Therefore, it is entirely possible that while the jury found negligence – a duty, breach thereof, and damages – it simply had questions about the "mutually binding contract of insurance" and so elected to not find for Plaintiff on the bad faith cause of action, where it did on the negligence cause of action. There are other examples too, but this is the exact reason why an inconsistent verdict cannot be cured by a judgment notwithstanding, because any party can string together a theory based on competing evidence. That is the exact purpose of a jury verdict in our civil justice system – to arrive at the truth based on the competing evidence – and that is precisely what this jury did.

In any event, the jury did exactly what the Court instructed it that it could do in order to find against USAA – answer answered in the affirmative to number two on the verdict form (negligence) proceeded and found actual damages in number three and then found USAA's

conduct to be "intentional, reckless, willful, wanton, or malicious" in finding punitive damages under number four.

B. If the jury's verdict was inconsistent, Respondent should have objected, and the jury should have been so instructed and the case resubmitted prior to the jury being dismissed.

If the verdict was inconsistent as the Court questioned during the hearings on Post-Trial motions, then the remedy for that has been prescribed by this Court. ("[D]o you see this as an inconsistent verdict…?") Post-Trial Motions Hearing Transcript 20: 14. (R. p. 1728, line 14).

"Judges and parties should not be required to guess as to what a jury sought to render." Rhodes v. Winn-Dixie Greenville, Inc., 249 S.C. 526, 155 S.E.2d 308, 310 (1967) (quoting Lorick & Lowrance, Inc. v. Julius H. Walker & Co., 153 S.C. 309, 150 S.E. 789, 793 (1929)). "Where two verdicts are irreconcilably inconsistent, a new trial should be granted in both cases. If the judge decided which verdict to let stand and which to try over, he would be appraising the evidence which is for the jury." Prego v. Hobart, 287 S.C. 116, 118, 336 S.E.2d 725, 726 (Ct. App. 1985) citing Rhodes v. Winn-Dixie Greenville, Inc., 155 S.E.2d at 309.

More recently in Stevens v. Allen, the Supreme Court reaffirmed that when verdicts are "facially inconsistent under South Carolina law, and that the proper remedy, when an objection is raised, is to **resubmit the matter to the jury**. See Rhodes v. Winn–Dixie Greenville, Inc., 249 S.C. 526, 155 S.E.2d 308 (1967) (holding it is appropriate for trial judge to refuse to receive inconsistent verdicts; judge should recommit matter to jury with additional instructions) (emphasis added). Upon resubmission, the trial court should instruct the jury, if requested, that it must either find in the defendant's favor or award the plaintiff at least some nominal amount of damages. After the jury returns a revised verdict, it is within the province of the trial court to order a new trial *nisi* or a new trial absolute. McCourt by and Through McCourt v.

Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995); Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993). Stevens v. Allen, 342 S.C. 47, 52–53, 536 S.E.2d 663, 665–66 (2000). In Stevens, the jury found against the Defendant on a claim of negligence but awarded zero in damages. The Supreme Court held that because the tort of negligence has as an element "damages proximately caused by the breach" that the verdict was facially inconsistent and must be resubmitted to the jury. Only then, if the "jury cannot reach a consistent verdict, the trial court may then order a new trial *nisi* or a new trial absolute." Id. at 53.

Here, if the Court accepts the argument that the jury found no breach of the duty of good faith and fair dealing, instead of no bad faith as they were charged (and then reinstructed) and that creates an inconsistent verdict, the remedy would have been for USAA to raise that exception prior to the discharge of the jury and to take advantage of the resubmission provided for by law. USAA did not do so and so the verdict should stand.

C. If the jury's verdict was inconsistent, and because USAA allowed the jury to be dismissed, the proper remedy is to allow the verdict to stand or a new trial, not a Judgment Notwithstanding the Verdict.

In any event, the remedy is never for the court to act as a substitute for the jury and reach its own conclusion about their intent. When faced with the need "to cure a facially inconsistent and ambiguous verdict. The court cannot construe the verdict of the jury, nor can it 'correct' the verdict." Stevens v. Allen, 336 S.C. 439, 451, 520 S.E.2d 625, 631 (Ct. App. 1999), aff'd, 342 S.C. 47, 536 S.E.2d 663 (2000) citing Johnson v. Phillips, *315* S.C. 407, 433 S.E.2d 895 (Ct.App.1993) (rev'd in part on other grounds), 318 S.C. 453, 458 S.E.2d 427 (1995). As stated in footnote 7 to Johnson:

> Under our law, where the case is tried to a jury, the judge cannot perform the jury's function for it. If the jury renders an ambiguous verdict, the court must resubmit the case to the jury, not act as a substitute for the jury.

Johnson, 315 S.C. at 417, n. 7, 433 S.E.2d at 902, n. 7.

Therefore, since USAA failed to raise the alleged inconsistent prior to dismissal of the jury the verdict should stand. A losing party, like USAA, is not permitted to ignore the inconsistency and then raise it later to void the verdict reached by the jury. If it were, every party who was found against in an allegedly inconsistent manner would simply wait to raise the issue until the jury was discharged not wanting their cause to be resubmitted to the same twelve that had just found against them. The same would result in the waste of precious resources of both the parties and the judiciary by forcing the retrial of cases where the jury simply made a mistake – and did not intend to make a fatal error giving the losing party a second bite at the same apple with a different twelve. Therefore, the verdict on those grounds should stand. However, at the very most USAA would have only ever been entitled to a new trial absolute and never a judgment notwithstanding. Therefore, the Trial Court's ordering of a JNOV was in error and must be reversed.

CONCLUSION

Wherefore, based on the aforementioned the Trial Court's Order Granting Judgment Notwithstanding should be reversed, the jury's true verdict reinstated, and the case remanded for further findings on Plaintiff's Post-Trial Motions regarding her Offer of Judgment costs and interest, and Attorneys' Fees.

If the Court finds the jury's verdict cannot stand the case should be remanded for a new trial absolute. That trial should proceed consistent with findings that the Trial Court's prior granting of summary judgment as to the breach of contract claim and outrage claim were in error. The trial should further proceed consistent with findings that the Trial Court's prior granting of directed verdicts limiting submission of claims based on mediation conduct in the

underlying case, the failure of Defendant to offer its reasonable evaluation of the amount owed to Mrs. Hood, and limiting damages to actual litigation costs were all in error.

Respectfully submitted,

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