THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Appellate Case No.: 2019-001943
Case No.: 2018-CP-10-00666

Therese Hood .....Appellant,

v.

United Services Automobile Association .....Respondent.

FINAL REPLY BRIEF OF APPELLANT

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The old sailing aphorism 'if you can't tie a good knot, tie lots' bears striking veracity taken in the context of USAA's brief. USAA actually contends that if this Court enforces our state's long-standing precedent requiring an insurance company to act reasonably towards its own insured – by being honest – that it "would likely result in the lowering" of their own internal evaluation of claims, such that USAA would internally lie to its own attorneys and adjusters to compensate for no longer being permitted to tell external lies to its insureds about its reasonable valuation of its insureds' claims. [Respondent's Brief at 29]. The Supreme Court discussed a similar scenario in addressing the assignability of legal malpractice claims, stating: "[f]or the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for 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)). Here, USAA argues that if it was forced to be honest with its insured, it would simply cook the books internally, and lie to itself instead to protect its money. It is a remarkable position for a company that prides itself on "integrity" and "honesty" and markets itself to our military veterans and their families. Trial Trans. 367. (R. p. 1219).

Nevertheless, even this argument, is without merit. That is so because the insurance company also has a fiduciary responsibility to its shareholders – in USAA's case, its members like Hood – not to lie about its actual financial risks or it could be subject to liability. So, despite what USAA claims it "would likely" do if forced to follow first party insurance law in this case, it would be prohibited from lying to its shareholders about the reasonable valuation of its risk due to well established shareholder liability law. In any event, USAA's internal search through its brief for

an alternate way of conducting its business, is a search to find a solution without a problem.

So, like untying any series of knots, Appellant begins at the end and works backward. Accordingly, in further support of her opening brief (which in Appellant's view is itself sufficient to withstand USAA's rebuttal) Hood now makes these points on reply:

1.) The facts of the case as stated by USAA are not facts of the case at all, and the Court should be wary of USAA's application of invented facts to inapplicable law.

2.) USAA's argument regarding "no independent duty that could support a negligence claim" totally disregards the jury's finding of bad faith by clear and convincing evidence.

3.) USAA has a fundamentally flawed view of damages and uses bad law to support it.
   a. Excess verdict is a recoverable element of damage in a case against an insurer.
   b. Emotional damages are a recoverable element of damages in an insured's case against its insurer, and there was sufficient evidence presented for Appellant's claim to be submitted to the jury.

4.) USAA's reliance on a Rule 56 'resurrection' provision fails because no such provision exists, and even if it did breach of contract was not argued in the previously filed memorandum in support of summary judgment, further exhibiting a lack of support for Respondent's argument.

I. The facts of the case as stated by USAA are not facts of the case at all, and the Court should be wary of USAA's application of invented facts to inapplicable law.

Appellant encourages the Court to review in detail and look skeptically upon the recitation of facts and law laid out in USAA's brief.

First, Respondent's "Introduction," which cites to nothing in the record or otherwise, is not particularly helpful in understanding the facts or circumstances of the underlying case as they occurred. Instead, it attempts to recast those facts (and lack thereof) into a narrative that fits USAA's yarn. These facts as outlined are certainly better for USAA's case on appeal than the actual facts, but this court should not accept them at face value. USAA's brief is replete with this type of obfuscation.

Of course, it is axiomatic that "[a]rguments made by counsel are not evidence." S.C. Dep't

of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) citing McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); see also Sessions v. Withers, 327 S.C. 409, 488 S.E.2d 888 (Ct. App. 1997); Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986).

Nevertheless, in its "Background of the underlying accident and UIM case" subsection, USAA cites to pre-trial motions and arguments of counsel during those motions as establishing the "facts" and even in doing so, misstates them. For example, on page five of its Brief, USAA states "Appellant denied liability in those cases and maintained that her lowbeam headlights would have been on in in the automatic setting," and cites to two sections from motions arguments – one of Appellant's counsel and one of Respondent's. The problem? Appellant's counsel never used the word "lowbeam" and it only appears in Respondent's counsel's argument to the Court. There is no other citation to the record for this "fact."

But this is not a one-off mistake by Respondent. Respondent bolsters its arguments by citing portions of the record that it believes support its erroneous position in its "Counter-Statement of the Case and Facts." The problem? That section does not really cite facts at all, and where it does cite to the trial record, it primarily cites to arguments made by counsel. In USAA's "Relevant evidence and testimony presented at trial and the court's related rulings" sub-section, ten of its first eleven "factual" citations are actually citations to counsels' opening statements. See generally Resp. Brief, pp. 8-10. In fact, the entire three-and-a-half-page section includes only one citation to actual testimony in the case. Id. at 9, (Tr. 415:6-9; 418:24-419:2; 436:9-12). (R. p. 1267, lines 6-9; p. 1270, line 24 – p. 1271, line 2; p. 1288, lines 9-12). Cases in South Carolina are not decided by opening statements, or argument of counsel generally.

This was common in the trial as well, at one-point leading Hood's trial counsel to offer USAA's counsel to testify due to the repeated use of speaking objections to make "factual" points to the jury. See Trial Trans. 257: 4-6. (R. p. 1109, lines 4-6). ("Because we need legal objections, not speaking objections. If he wants to testify, I'll be glad to call him as a witness."). USAA's counsel declined, but the speaking objections continued, as USAA's counsel wanted to assert its own version of "facts" throughout. See Trial Trans. 250: 18-23, 386: 10-16, 794: 4-13. (R. p. 1102, lines 18-23; p. 1238, lines 10-16; p. 1646, lines 4-13).

In its transition from stating the "facts" to citing the "law," Respondent's prevarication turns to casuistry. Here, USAA strings together a bevy of non-binding federal court decisions, out of state opinions based on different law, and even one decision that is no longer good law, to further twist and knot its way to the barely plausible argument that an insurance company can treat its insured however it wants in South Carolina without consequence. Admittedly, because insurance disputes often involve diversity jurisdiction and are litigated in federal court, there are more decisions in that forum surmising as to how the South Carolina Appellate Courts might rule on a particular issue, than there are decisions from this Court actually establishing the law in any given situation. But lack of a case directly on point does not detract from the fact that our Appellate Court has recognized causes of action by an insured against its insurer for breach of contract, negligence, and bad faith in the first party context, and in the same case:

> Orangeburg Sausage Company (OSCO) sued Cincinnati Insurance Company (Cincinnati) for breach of contract, negligence, and bad faith failure to pay insurance benefits following a claim for damages to OSCO's business resulting from Hurricane Hugo. OSCO also sued the insurance agent, R.L. Bryant & Son, Inc. (Bryant), for negligence in connection with the policy and claim. A jury awarded OSCO $800,000 actual damages on the negligence claim against both defendants, $254,029.73 against Cincinnati on the breach of contract claim, and $250,000 against Cincinnati on the bad faith claim. The jury responded to a special interrogatory and found the defendants acted recklessly, willfully, wantonly, or in conscious disregard for OSCO's rights.

> The trial court required OSCO to elect its remedy, and OSCO chose to recover under its negligence theory. By agreement the court then held a separate hearing on punitive damages. The jury returned a verdict for OSCO for $1,630,000 in punitive damages.

Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 334, 450 S.E.2d 66, 68 (Ct. App. 1994), cert. denied.

While Orangeburg Sausage Co. did not address the issue of whether an insurer can lie and maintain two different positions in separate proceedings regarding the same facts, it did address whether or not an insurer can hold hostage the undisputed amount at which it reasonably values an insured's claim, holding:

> 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.

Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 450 S.E.2d 66, 72-73 (Ct. App. 1994).

It also reaffirmed the holding in Nichols v. State Farm Mut. Auto. Ins. Co. that "actual damages may include damages from an insurer's unreasonable action in processing a claim." (actual damages may include damages from an insurer's unreasonable action in processing a claim). Id. at fn. 5.

Those, in brief, are the fundamental issues concerning this Appeal.

II. USAA's argument regarding "no independent duty that could support a negligence claim" totally disregards the jury's finding of bad faith by clear and convincing evidence.

USAA attempts to tie a knot in the jury's verdict in this case by misconstruing it as only a finding on the basis of negligence, but that knot is easily untied. In fact, as written, verdict form

question four states, "Did the Plaintiff prove by clear and convincing evidence that USAA's **bad faith** was intentional, reckless, willful, wanton, or malicious?" Verdict Form at ¶ 4. (R. p. 15). The jury marked "Yes." Id. After the jury came to a decision, the court read verdict form question four in open court stating: "Did the plaintiff prove by clear and convincing evidence that USAA's bad faith was intentional, reckless, willful, wanton, or malicious," to which the jury responded in the affirmative. Trial Trans. 854: 4-7. (R. p. 1706, lines 4-7). So, the argument that somehow the jury only found USAA liable for negligence is just wrong.

The jury found Respondent liable for bad faith, by clear and convincing evidence, and intended to punish Respondent, yet the trial judge's order granting Respondent's JNOV incorrectly states the opposite. To rectify this, two options are available to this Court: (1) Uphold the jury verdict by reconciling its various features, carry into effect the jury's clear intentions and reverse the lower court's order granting Respondent's JNOV, or (2) If the Court finds that the verdict was inconsistent, it should reverse the lower court's order granting Respondent's JNOV and remand the case ordering a new trial absolute and addressing the other issues that are the subject of this appeal to provide the trial court guidance in handling the remanded matter.

Because the jury found Respondent liable for bad faith and intended to punish Respondent, this Court should uphold the jury verdict by reconciling its various features, carry into effect the jury's clear intentions, and reverse the lower court's order granting Respondent's JNOV. "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)). The

jury's determination of damages is entitled to substantial deference. Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999).

During deliberations, the jury posed several questions to the court. One question asked "Can verdict one and four be mutually exclusive?" Trial Trans. 842: 24. (R. p. 1694, line 24). Question one on the verdict form asked if the jury found that USAA breached their duty of good faith and fair dealing by a ***preponderance*** of the evidence. Question four asked: "Did the Plaintiff prove by ***clear and convincing evidence*** that USAA's bad faith was intentional, reckless, willful, wanton, or malicious?" Verdict Form at ¶ 4. (R. p. 15). In response, Respondent stated to the court, "Okay, well, for the record I would like [verdict form question four] to be read as it is written. Trial Trans. 849: 24-25. (R. p. 1701, lines 24-25). The jury answered "No" to question one and "Yes" to question four. By answering yes, the jury found that Appellant met the high burden of clear and convincing evidence regarding USAA's bad faith liability. Further, on verdict form question number five, when asked "...state the amount of punitive damages to be awarded against USAA," the jury answered $250,000.[1] Verdict Form at ¶ 5. (R. p. 15). The jury found it appropriate to punish Respondent for its bad faith conduct and its damages award is entitled to substantial deference. The jury found that USAA was liable by a preponderance of the evidence

[1] This number of $250,000 is not random. It is the exact amount Appellant claimed that Respondent should have offered under Appellants underinsured policy, equal to the amount of Respondent's full reserve. As Respondent confirmed during trial, "[a]nd I believe that the issues that he identified that this case is about is, one, failing to offer the $250,000. (WHEREUPON, pause to confer with co-counsel.) Mr. Whelan: Right, the $250,000, and which was the full reserve." Trial Trans. 667:12-16.

Furthermore, Appellant's lawyer in the underlying mediation, Kevin Smith, testified at trial on Direct as follows: "A[nswer]….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." Trial Trans. 613: 17-20. In Respondent's brief, it states, 'Finally, contrary to Appellant's characterization, USAA did not "concede" that it owed Appellant $250,000 solely by setting its reserves and authorizing settlement authority at this amount." Respondent's Final Brief at 32-33. However, Jack Daniel's statement make clear that "put[ting his] full authority on the table" was appropriate. So, either his actual full authority of $250,000 was appropriate and he made a mistake by saying $200,000 or he intentionally misrepresented his authority in violation of SC Rule of Professional Conduct 4.1 & 8.4.

to Hood in negligence, and by clear and convincing evidence in bad faith, justifying their punitive damage award. Because the jury found Respondent liable for negligence and bad faith and intended to punish Respondent, this Court should uphold the jury verdict by reconciling its various features, carry into effect the jury's clear intentions and reverse the lower court's order granting Respondent's JNOV motion.

USAA also misstates that "[Appellant] has never been able to explain what that duty is or from where the non-bad-faith duty derives." Respondent's Brief at 43. Appellant maintains her argument that the jury also found USAA liable to her for negligence, and so stated repeatedly, including explaining one such duty that could arise – from USAA's own policies and procedures. See e.g. Appellant's Final Brief 34-37.

Because the evidence and inferences favor Appellant, the trial court's order should be reversed. "When reviewing a motion for JNOV, an appellate court must employ the same standards as the trial court by viewing the evidence and the inferences in the light most favorable to the nonmoving party." Harbin v. Williams, 429 S.C. 1, 9, 837 S.E.2d 491, 491 (Ct. App. 2019) (quoting Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mut. Auto. Inc. Co., 307 S.C. 354, 415 S.E.2d 393 (1992); *Gastineau v. Murphy*, 331 S.C. 565, 503 S.E.2d 712 (1998). If more than one inference can be drawn from the evidence, the grant of a JNOV is improper and the case must be left to the jury's determination. *Gastineau*, 331 S.C. at 568, 503 S.E.2d at 713. Burns v. Universal Health Servs., Inc., 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004).

The trial judge, reading the jury's verdict, stated, "Did the plaintiff prove by clear and convincing evidence that USAA's bad faith was intentional, reckless, willful, wanton, or

malicious," to which the jury answered yes. Trial Trans. 854: 4-7. (R. p. 1706, lines 4-7). The trial judge continued, "As to question number five: If the answer to question four is yes state the amount of punitive damages to be awarded against USAA. And the answer is $250,000." Trial Trans. 854: 8-10. (R. p. 1706, lines 8-10). Viewing the evidence and the inferences in the light most favorable to Appellant, the jury's clear intent was to find Respondent liable for negligence by a preponderance of the evidence and bad faith by clear and convincing evidence and to punish them for their conduct. The evidence yields only this inference, because that's what the jury's verdict reads. However, three months after the verdict, the court in its order stated, "[b]ecause the jury found in USAA's favor on [bad faith], the Court **GRANTS** USAA's Motion for JNOV and directs that judgment for USAA should be entered." Order Granting USAA's Motion for JNOV and Denying Both Parties' Other Post-Trial Motions at 4. (R. pp. 6-10).

The trial judge's Order unreasonably, erroneously, arbitrarily, and improperly overrides the jury's clear intentions. To rectify this matter, Appellant respectfully requests that this Court uphold the jury verdict by reconciling its various features, carry into effect the jury's clear intentions and reverse the lower court's order granting Respondent's JNOV motion.

Alternatively, if the Court finds that the verdict is inconsistent, it should reverse the lower court's order granting Respondent's JNOV motion and remand the case ordering a new trial absolute. "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). "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). Town of Hollywood v. Floyd, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013). The jury's determination of damages is entitled to substantial deference. Stevens v. Allen, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999).

Therefore, if the jury verdict was inconsistent, the only remedies available to the trial court were to resubmit the case to the jury to cure any inconsistency or grant a new trial absolute. Because Respondent waited until after the jury was released to raise issues about post-trial motions, and a possible inconsistent verdict, the only remedy available to the trial judge was to grant a new trial absolute. Instead, however, the trial court provided Respondent ten days to make post-trial motions and subsequently granted Respondent's JNOV. In the trial court's order, it incorrectly stated, "[b]ecause the jury found in USAA's favor on [bad faith], the Court **GRANTS** USAA's Motion for JNOV and directs that judgment for USAA should be entered." Order Granting USAA's Motion for JNOV and Denying Both Parties' Other Post-Trial Motions at 4. (R. pp. 6-10). Both the jury's answer to question four and five makes clear who the jury intended to render a verdict for. It is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found, i.e. the jury's finding of liability for bad faith and its intent to punish Respondent. Therefore, this Court must uphold the jury's verdict. Otherwise, if this Court finds that the verdict was inconsistent, Appellant respectfully requests that this Court reverse the lower court's order granting Respondent's JNOV and remand the case ordering a new trial absolute.

III. USAA has a fundamentally flawed view of damages and uses bad law to support it.

a.) Excess verdict is a recoverable element of damage in a case against an insurer.

The trial court erred in granting directed verdict limiting damages because a verdict amount in excess of the policy limits is recoverable by an insured as a consequential damage. In its brief, Respondent unwittingly supports Appellants entitlement to 'recover the "excess verdict" amount as consequential damages' by citing to a Supreme Court of Florida case that was overturned and misstating its holding. Respondent's Brief at 35. Respondent states that "the Florida Supreme Court rejected an attempt to recover the amount of excess judgment in the UIM context." Respondent's brief at 36. McLeod v. Con't Ins. Co., 591 So. 2d 621, 624 (Fla. 1992). First, McLeod was not "in the UIM context." It was a UM (uninsured motorist) insurance case. That matters, because the finding that so allowing "recover of the excess judgment in first-party cases would be in direct conflict with the fundamental principle that one is not liable for damages that or she did not cause" is not applicable in a UIM (underinsured motorist) insurance case where the actual coverage is meant to cover damages caused by another in excess of what the tortfeasor's coverage provides. Respondent's Brief at 36. That is wholly different from a UM case where the coverage is primary to the loss. To support its misrepresentation of the law, Respondent cites to a proposition in the Supreme Court of Florida case of McLeod v. Con't Ins. Co. that suggests that an insured is not allowed to recover "the excess judgement in first-party cases." 591 So. 2d 621, 624 (Fla. 1992). The court in McLeod, in excluding the excess judgment, states that "damages recoverable in a first-party suit…are those amounts which are the natural, proximate, probable, or direct consequence of the insurer's bad faith." Id. That is exactly what Appellant argues for here and fits squarely within UIM first-party law of this state.

Moreover, Respondent's reliance on McLeod even in the UM context would be misplaced because, it is bad law. The controlling law in Florida as set forth in a subsequent opinion of the Florida Supreme Court is "that the damages in bad faith actions shall include any amount in excess of the policy limits." Fridman v. Safeco Ins. Co. of Illinois, 185 So. 3d 1214, 1221 (Fla. 2016). The Court continues in that case by stating, "[i]mportantly, in both first- and third-party bad faith actions, an element of damages includes any amount in excess of the policy limits." Id. If it was not, there would be no consequence to the insurer. Accordingly, a verdict amount in excess of the policy limits is recoverable by an insured as consequential damage.

Here, Appellant sought the excess verdict amount beyond her policy limits as consequential damage. Respondent's support of McLeod subtly and inadvertently supports Appellant's entitlement to such award. However, Respondent's statements that "[Tyger River's application does not apply in a UIM case]," "[Appellant] received a windfall," and "Appellant suffered no harm" are attempts to gain sympathy, not justice, and are opinions, not statements of law. Respondent's Brief at 35-36. As Respondent's brief encourages, Appellant is entitled to the excess verdict amount beyond her policy limits as consequential damage under McLeod and its progeny. Thus, the trial court erred in limiting damages to actual litigation costs.

Further, Respondent mistakenly equates the lack of South Carolina authority applying the excess verdict concept with the idea that South Carolina will not ever apply the excess verdict concept. Respondent's Brief at 35-36. One reason for lack of authority may be that, unlike Respondent, insurance companies confronted with an excess verdict may not challenge the excess. However, as the excess verdict concept is properly before this court, Respondent may receive the clarification it seeks.

b.) Emotional damages are a recoverable element of damages in an insured's case against its insurer, and there was sufficient evidence presented for Appellant's claim to be submitted to the jury.

The modern trend recognizes that emotional tranquility is an interest worthy of protection. Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 581, 336 S.E.2d 465, 466 (1985); See also Mack v. South-Bound R. Co., 52 S.C. 323, 29 S.E. 905 (1898) (Affirming liability of a railroad company for injuries sustained in consequence of fright caused by its negligence); Spaugh v. Atl. Coast Line R. Co., 158 S.C. 25, 155 S.E. 145, 147 (1930) (Affirming liability of a railroad company for injuries to plaintiff's nervous system caused by its negligence, equating a nervous breakdown with physical injury); Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958) (Affirming liability for injuries of shock from the negligent colliding of a panel truck with plaintiff's home); Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979) (Implicitly recognizing that a verbal assault or hostile, abusive encounter with respondent's agents may constitute outrageous conduct); State Farm Mut. Auto. Ins. Co. v. Ramsey, 295 S.C. 349, 368 S.E.2d 477 (Ct. App.), aff'd, 297 S.C. 71, 374 S.E.2d 896 (1988) (Establishing that under an insurance policy covering bodily injury, damages may be recovered for negligent infliction of emotional trauma); and Bray v. Marathon Corp., 356 S.C. 111, 118, 588 S.E.2d 93, 96 (2003) (citing the Mack, Spaugh, and Padgett line of cases, the court stated that "[b]ecause Padgett allows recovery for injuries sustained as a consequence of shock, fright, and emotional upset, Bray may be able to recover for her alleged injuries that arose from the sudden fright she felt when the machine she was operating crushed her coworker").

Based on the evidence presented, it is the duty of the fact finder to determine to what extent a person is injured. The Court in Kinard, establishing the NIED cause of action, recognized that emotional distress requires physical symptoms, not judicially cognizable physical injury. 286 S.C.

at 583 ("[T]he emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony."). The Court in Padgett held, after analyzing both Mack and Spaugh, that "the trial Judge was correct in submitting the question of whether or not respondent had sustained physical or bodily injury as a consequence of the shock, fright and emotional upset experienced by him." 232 S.C. at 607-08. The Fourth Circuit has implicitly recognized recovery of emotional distress damages related to a bad faith cause of action in South Carolina when the distress was related to the refusal to pay." University Medical Associates of the Medical University of South Carolina v. UnumProvident Corp., 335 F. Supp. 2d 702 (D.S.C. 2004) (citing State Farm Fire and Cas. Ins. Co. v. Barton, 898 F.2d 729, 732-33 (4th Cir. 1990)). It seems proper that a case involving MUSC recognizes the Fourth Circuit's understanding that a claim for emotional distress damages may be suitable for recovery because witness testimony can aid courts with understanding how emotional distress affects the physical body. But this is not a NIED action, it is an action where one of the actual damages suffered due to the negligence and bad faith of USAA was emotional damage.

Therefore, the trial judge erred when granting a partial directed verdict in favor of Respondent, removing Appellant's claim of emotional distress damages from the jury's consideration. "When reviewing a motion for JNOV, an appellate court must employ the same standards as the trial court by viewing the evidence and the inferences in the light most favorable to the nonmoving party." Harbin v. Williams, 429 S.C. 1, 9, 837 S.E.2d 491, 491 (Ct. App. 2019) (quoting Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004). A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mut. Auto. Inc. Co., 307 S.C. 354, 415 S.E.2d 393 (1992); *Gastineau v. Murphy*, 331 S.C. 565, 503 S.E.2d 712 (1998). If more than one inference can be

drawn from the evidence, the grant of a JNOV is improper and the case must be left to the jury's determination. *Gastineau*, 331 S.C. at 568, 503 S.E.2d at 713. Burns v. Universal Health Servs., Inc., 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004).

In granting the directed verdict as to the emotional damages claim, the trial judge stated, "…I don't think we can say, well, she was - - her emotional distress was not because of what other people were saying; it was only what USAA was saying." Trial Trans. 691: 2-5 (R. p. 1543, lines 2-5). This supports Appellant's claim. Despite that, the trial judge continued "I do not feel that there is sufficient evidence of emotional damages for that to go to the jury." Trial Trans. 694: 7-9 (R. p. 1546, lines 7-9). However, as previously acknowledged by the trial judge, Appellant and her husband both testified to her emotional distress. See Trial Trans. 254: 23-25 (R. p. 1106, lines 23-25), 255: 1-7 (R. p.1107, lines 1-7), 280: 23-25 (R. p. 1132, lines 23-25), 281:1-19 (R. p. 1133, lines, 1-19), 283, 9-25 (R. p. 1135, lines 9-25), 284: 1-2 (R. p. 1136, lines 1-2), 310: 22-24 (R. p. 1162, lines 22-24), 312: 11-25 (R. p. 1164, lines 11-25), 313: 1-7 (R. p. 1165, lines 1-7). Additionally, Appellant sought medical treatment for such distress. Looking at the evidence and inferences in the light most favorable to Appellant. The trial judge should have denied Respondent's motion for directed verdict, permitting the fact finder to determine to what extent Appellant was damaged by USAA's conduct.

Indeed, Respondent doesn't deny Appellant's allegations. Instead, it dismisses Appellant's suffering of emotional distress, the consequence of attorney misconduct, as "mere litigation stress." Respondent's Brief 39. Where is the line between actionable emotional distress and litigation conduct? In a self-serving, one-sided point of view, Respondent argues that litigation stress is not actionable. Respondent's Brief 37-39. In this vein, Respondent suggests that attorneys can never be held responsible for causing litigants emotional distress because Courts

refuse to address their bad behavior. Respondent essentially argues that, in all instances, attorneys are free to conduct themselves as they please without legal repercussions, because they are entitled to vast protection of the Court and litigants are not. Contrary to its contentions, by virtue of their status as an attorney, Respondent and its agents are not immune from the basic principle of damages, i.e. injured parties should be compensated.

IV. USAA's reliance on a Rule 56 'resurrection' provision fails because no such provision exists, and even if it did breach of contract was not argued in the previously filed memorandum in support of summary judgment, further exhibiting a lack of support for Respondent's argument.

The final knot for purposes of this brief is USAA's contention that its pre-trial summary judgment motion was not a motion for summary judgment at all, but a motion to recommence arguments raised in a prior motion (filed some year and a quarter prior) that was denied (by a different judge) a year prior. Unfortunately for USAA, no such procedure for resurrection of a previously denied motion exists in Rule 56, or the South Carolina Rules of Civil Procedure more generally. Even if it did, USAA's argument fails because USAA did not argue summary judgment as to breach of contract in that fore filed motion or the memorandum supporting it.

In its brief, USAA first raises Rule 6, which does not apply to summary judgment motions, to argue the trial judge has discretion to shorten the time. Presumably Rule 6 does not apply to summary judgment motions because they are dispositive of a party's claims, and parties deserve a full and fair opportunity after the filing of such a motion to research, brief, and otherwise address it prior to a hearing. In any event, since Rule 56 specifically applies to summary judgment motions and uses non-discretionary language with respect to the 10-day requirement, controls. USAA, seemingly recognizing this, eventually abandons that argument in favor of claiming the "renewed" motion was the same motion filed prior that was denied.

In so doing, USAA admits that it did not comply with Rule 56, which requires that a motion

for summary judgment be served 10 days prior to any hearing filing its "renewed" motion less than a week before the first day of trial when it was heard. See Respondent Brief at 15 ("which gave Appellant six days to prepare"). However, there was no motion pending and so the motion to which Hood was expected to respond was a new motion for summary judgment under Rule 56, which specifically requires that motions for summary judgment "***shall*** be served at least 10 days before the time fixed for the hearing." SCRCP 56. There is no discretionary element in Rule 56, as there are for other motions listed in Rule 6, which USAA uses to make its initial argument that somehow it was not bound by Rule 56.

Nevertheless, even if there were some "resurrection provision" in Rule 56, which there is not, the earlier filed memorandum in support of its form motion, does not make a summary judgment argument as to the breach of contract claim. Memorandum in Support of Motion for Summary Judgment filed June 15, 2018. (R. pp. 117-124). So, saying Appellant did not argue it, is exactly the point. There was nothing to argue prior on the breach of contract cause of action, certainly not the "no continuing breach theory" eventually advanced, and no required notice under Rule 56 provided to Appellant that it would even be raised. In its Memorandum filed in Support of its 2018 motion, which was denied, Section C is the only section purporting to address the breach of contract cause of action. The title of that section is "These facts do not support a claim for bad faith, barratry, breach of contract, or outrage. Memo. In Support of Mot. For Summ. Judg. Filed June 15, 2018, at 3. (R. pp. 119-121). Yet, the first paragraph makes its arguments as to bad faith ("With respect to her claim for bad faith"), the second "[w]ith respect to barratry," and "[f]inally outrage." The Memorandum then goes into Section D, which addresses negligence per se. Other than this fleeting mention of "breach of contract" no argument is actually ever advanced as to that cause of action., which is subject of this appeal.

Therefore, USAA's last-ditch effort to argue the non-existent "resurrection provision" fails, and with that the final knot is unwound.

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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