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
Civil Action No. 2018-CP-10-666

Therese Hood, Appellant,

v.

United Services Automobile Association, Respondent.

PETITION FOR REHEARING

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The Appellant, Therese Hood, respectfully submits this Petition for Rehearing under Rule 221, SCACR.

POINTS OVERLOOKED OR MISAPPREHENDED BY THE COURT

I. The Court erred in failing to address the jury verdict; it should have held either that the verdict was consistent or that, if the verdict was inconsistent, the trial court applied the wrong remedy.

II. The Court erred in concluding that Appellant waived her right to appeal certain pretrial and mid-trial rulings.

III. In affirming the trial court's decision on the ground that Respondent acted reasonably, this Court erred by relying on two incorrect assumptions.

STATEMENT OF FACTS

I. Overview

This case stems from a three-vehicle accident that occurred on November 7, 2014 and severely injured Appellant Therese Hood. (R. p. 1105, lines 19-22, p. 1779). Appellant sued Antoine Johnson, one of the other drivers. (R. pp. 23, 103). Johnson's liability insurer settled; afterwards, Appellant's UIM carrier, USAA ("Respondent"), appeared to defend against the underlying action in Johnson's name. (R. pp. 23, 103). Ultimately, Appellant won. (R. p. 1108, lines 8-10).

Unfortunately, Respondent's conduct in defending against the underlying action forced Appellant to institute this case: a first-party suit against Respondent alleging negligence/gross negligence, bad faith, and breach of contract, among other claims. (R. pp. 20-33).

On June 25, 2019, the first day of trial, the trial court restricted Appellant's case by granting Respondent's summary-judgment motion on all causes of action except bad faith and negligence/gross negligence. (R. p. 1008, lines 2-24). Throughout the trial, the court continued to circumscribe Appellant's case. Most significantly, in granting Respondent's directed-verdict

motions, the court ruled that the jury could not consider mediation conduct—that is, Respondent's failure to offer its internal valuation and Respondent's attorney's conduct in affirmatively misrepresented his settlement authority—and that the jury could not consider emotional-distress damages. (R. p. 1517, lines 17-22; p. 1545, lines 22-24; p. 1546, lines 6-22). The court also ruled that the jury could not consider the underlying case's excess verdict as an element of consequential damages. (R. p. 1534, lines 10-14).

Eventually, the jury returned a verdict for Appellant, awarding her actual and punitive damages. (R. p. 15). The jury awarded $250,000 in punitive damages, the amount Respondent had set as its reserve in the case. (R. p. 15, p. 1777). Respondent did not object to the verdict before the court discharged the jury. (R. p. 853, line 13-p. 855, line 3).

Both parties filed multiple post-trial motions. (R. p. 1711, lines 8-11; p. 1734, line 31). On October 30, 2019, the trial court granted Respondent's motion for JNOV and denied the parties' other motions as moot, and on November 20, it denied Appellant's subsequent motion to alter or amend the judgment. (R. pp. 6-13). Two days later, Appellant appealed the JNOV and various other orders and rulings, including the orders granting Respondent's summary-judgment and directed-verdict motions.

This Court heard oral argument in November 2022, and it affirmed the trial court's decision on January 11, 2023. This Petition for Rehearing follows.

II. Close-up

Beyond this general background, three sets of facts bear on the points this Court overlooked or misapprehended. They appear below, accompanied by the relevant holdings from this Court's January 11 decision.

1. The Verdict

a. The Court's Holding

This Court did not discuss the jury verdict in its decision. Instead, it implied that the jury found Respondent liable only for negligence, not for bad faith. It ruled that "[t]he decision to grant JNOV was . . . correct" because "[i]n this context, there is no tort against an insurance company for negligence that does not also cross the threshold of breaching the duty of good faith and fair dealing."

b. The Facts

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

On the verdict form itself, the first-listed questions were question 1, "Do you find by a preponderance of the evidence that the Defendant USAA breached its duty of good faith and fair dealing to Therese Hood?", and question 2, "Do you find by a preponderance of the evidence that the USAA individually or through its agents was negligent?" (R. p. 15). Next, the form instructed, "IF YES TO EITHER 1 or 2 or BOTH GO TO QUESTION 3" (regarding actual damages), an instruction the judge repeated when she first went over the form. (R. p. 15, p. 1688, lines 8-13). Then came Question 4: "Did the Plaintiff prove by clear and convincing evidence that USAA's bad faith was intentional, reckless, willful, wanton, or malicious?" (R. p. 15). Finally, the form instructed, "If you answer yes, GO TO QUESTION 5" (regarding punitive damages). (R. p. 15 (emphasis omitted)).

During deliberations, the jury asked, "Can verdict one and four be mutually exclusive?" (R. p. 1694, lines 23-24). The judge clarified, "If you find actual damages then you will continue

to question number four, did the plaintiff prove by clear and convincing evidence that USAA's bad faith on either of the bad faith cause of action or the negligence cause of action was intentional, reckless, willful, wanton, or malicious." (R. p. 1703, lines 18-22).

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

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

2. Waiver

a. The Court's Holding

In its January 11 decision, this Court held that because Appellant allegedly failed to address certain rulings "in her posttrial motions or in her motion for the court to reconsider its JNOV ruling," she waived her arguments regarding those rulings.

b. The Facts

In her post-trial motions, Appellant referenced the trial court's ruling that the jury could not consider emotional-distress damages, moving for a "New Trial *Nisi Additur* because the jury failed to account for Plaintiff's emotional distress damages." (R. p. 132; *see* R. pp. 133–34).

Then, in her motion to reconsider, Appellant referenced the trial court's rulings on her breach of contract claim and several other causes of action. She argued that based on the trial court's ruling that the insurer's only duty was that of good faith and fair dealing, "the breach of contract cause of action should have been submitted to the jury," and she went on to argue that cause of action in some detail. (R. pp. 158-62). She also stated that the trial court failed to consider "the full basis of [her] claims as laid out in her complaint and in argument before the Court." (R. p. 152). Without waiving any additional claims, she went on to remind the court that she had claimed that Respondent was liable for bad faith, negligence, and breach of contract; "for not offering its full valuation of what she was owed"; "for not following its own policies and procedures"; "for negligently evaluating, investigating and/or adjusting the claim"; and "for intentional infliction of emotional distress." (R. pp. 152-53).

In addition, Appellant raised the breach of contract issue prior to her motion to reconsider; in an email memorandum opposing the court's proposed order, she stated, "[t]he appeal then will focus on whether where bad faith is submitted there should also be a submission of contract breach – which is clearly the law if the only tort duty is the duty arising from the contract itself of good faith and fair dealing." (R. p. 163).

3. The Vanishing $50,000

a. The Court's Holding

Finally, in its January 11 decision, this Court held that no reasonable jury could find Respondent liable for bad faith. Among other arguments supporting this holding, the Court held that an insurance company does not "act[] in bad faith by not offering to settle the case for the full amount of its authority or reserve" and added that "[i]t may be that USAA had a duty to answer truthfully if asked whether it was offering the maximum amount of its authority, but that question was not asked here and is not before us."

b. The Facts

At mediation, Respondent's highest offer was $200,000. 1465 line 5. In fact, Respondent's attorney told Appellant's attorney, "I want to put my full authority on the table and it is $200,000, that's all I I have got and I just want to put it on the table." (R. p. 1465, lines 17-20). After speaking with Appellant, who was willing to compromise for $250,000, Appellant's attorney went back to Respondent's attorney and asked, "[I]s 200 all you have got?" (R. p. 1465, line 22-p. 1466, line 17). Respondent's attorney told him, "It is all I have got; it will never be more; I can't get anymore; I'm putting it all on the table." (R. p. 1466, lines 17-18).

However, Respondent's attorney actually had authority to offer up to $250,000—the amount of Respondent's reserve for the case. (R. p. 1288, lines 9-12; p. 1777).

STANDARD OF REVIEW

"When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court": it must "view[] the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Garrison v. Target Corp.*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022) (quoting *RFT Mgmt. Co. v. Tinsley & Adams*

L.L.P., 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012)). The lower court's decision to grant JNOV should be reversed if "the evidence yields more than one inference or its inference is in doubt." *See Garrison v. Target Corp.*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022) (quoting *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 176, 648 S.E.2d 585, 588 (2007)) ("The motions should be denied when either the evidence yields more than one inference or its inference is in doubt."). Also, this Court "must uphold a jury verdict if it is possible to reconcile its various features." *Sapp v. Wheeler*, 402 S.C. 502, 512, 741 S.E.2d 565, 571 (Ct. App. 2013) (quoting *Camden v. Hilton*, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct. App. 2004)).

ARGUMENT

I. The Court erred in failing to address the jury verdict; it should have held either that the verdict was consistent or that, if the verdict was inconsistent, the trial court applied the wrong remedy.

1. The Verdict is Consistent

A court must "sustain a verdict when a logical reason for reconciling the verdict can be found." *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 344–45, 450 S.E.2d 66, 74 (Ct. App. 1994) (citing *Rhodes v. Winn–Dixie Greenville, Inc.*, 249 S.C. 526, 155 S.E.2d 308 (1967) and *Haskins v. Fairfield Elec. Co-op.*, 283 S.C. 229, 321 S.E.2d 185 (Ct. App.1984), *overruled in part on other grounds, O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993)). This is especially so if it is "possible to ascertain and give effect to the jury's intent," *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 312, 529 S.E.2d 45, 59 (Ct. App. 2000) (citing *Vinson v. Jackson*, 327 S.C. 290, 491 S.E.2d 249 (1997), because "the guidepost for the court is enforcing the jury's intent," *Encore Tech. Grp., LLC v. Trask*, 436 S.C. 289, 302–03, 871 S.E.2d 608, 616 (Ct. App. 2021), *reh'g denied* (Jan. 11, 2022) (citing *Vinson v. Jackson*, 327 S.C. 290, 293, 491 S.E.2d 249, 250 (1997)).

Here, viewing the evidence and all reasonable inferences in the light most favorable to Appellant, an individual can easily find at least one logical reason for reconciling the verdict. Specifically, the apparent discrepancies between answers 1 and 3 could mean that rather than finding Respondent liable for bad faith by a mere preponderance of the evidence, the jury found by clear and convincing evidence that Respondent acted in bad faith—and that Respondent's bad faith was intentional, reckless, willful, wanton, or malicious.[1] The amount of punitive damages lends credence to this logical explanation. The jury awarded $250,000 dollars, equal to Respondent's reserve in the case—the amount Respondent would have offered had not its attorney (who was also its agent) lied when Appellant's attorney asked him about his authority. This award suggests that the jury found Respondent liable for bad faith and intended to punish Respondent for mistreating its insured.

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

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

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

2. Even if the Verdict is Inconsistent, Respondent Forfeited Its Remedy by Failing to Object

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

Where verdicts "are facially inconsistent under South Carolina law . . . the proper remedy, ***when an objection is raised***, is to resubmit the matter to the jury," *Stevens v. Allen*, 342 S.C. 47, 52, 536 S.E.2d 663, 665 (2000) (emphasis added), or perhaps to immediately "grant a new trial absolute," *Campbell v. Robinson*, 398 S.C. 12, 26, 726 S.E.2d 221, 229 (Ct. App. 2012) (citing *Stevens v. Allen*, 342 S.C. 47, 52–53, 536 S.E.2d 663, 665–66 (2000) and *Camden v. Hilton*, 360 S.C. 164, 173–74, 600 S.E.2d 88, 92–93 (Ct. App. 2004)). If "the jury cannot reach a consistent verdict" on its second try, "the trial court may then order a new trial nisi or a new trial absolute." *Stevens v. Allen*, 342 S.C. 47, 53, 536 S.E.2d 663, 666 (2000).

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

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

Even if (1) Respondent preserved the alleged error despite its failure to object, and (2) the verdict was actually inconsistent, the appropriate remedy would be a new trial, not an order granting JNOV. If a verdict is "internally inconsistent and unexplainable," "the appropriate remedy on appeal is to grant a new trial," *Vinson v. Jackson*, 327 S.C. 290, 293, 491 S.E.2d 249, 250 (1997). A motion for JNOV is not an appropriate vehicle for correcting an inconsistent verdict; the court cannot decide on its own "whether the jury intended to render a verdict for the plaintiff or defendant." *Campbell v. Robinson*, 398 S.C. 12, 25–26, 726 S.E.2d 221, 228–29 (Ct. App. 2012); *see Jolly v. Gen. Elec. Co.*, 435 S.C. 607, 657, 869 S.E.2d 819, 846 (Ct. App. 2021), *reh'g denied* (Feb. 25, 2022) ("[N]o factual or legal determination may be based on speculation."). Thus, if this Court believes that the verdict is so inconsistent that it cannot have a logical explanation, the Court should reverse and remand for a new trial.

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

II. The Court erred in concluding that Appellant waived her right to appeal certain pretrial and mid-trial rulings.

Appellant did not waive her right to appeal the trial court's rulings that granted Respondent summary judgment on numerous causes of action. Nor did she waive her right to appeal the court's rulings that the jury could not consider mediation conduct or emotional-distress damages.

Of the allegedly waived arguments, Appellant raised only the emotional-distress damages in her post-trial motions. But she had no reason to do otherwise. At trial, she won on a tort cause of action; thus, she could not claim a remedy for breach of contract, or any other alternative remedy, for the same wrong. *See Brown v. Felkel*, 320 S.C. 292, 294–95, 465 S.E.2d 93, 95 (Ct. App. 1995) (citing *Save Charleston Foundation v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985)) ("When one set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both."). Only after the trial court granted JNOV did Appellant have reason to raise other issues.

And raise them she did. In her motion to reconsider, she argued that based on the trial court's ruling that Respondent owed her only the duty of good faith and fair dealing, "the breach of contract cause of action should have been submitted to the jury." Indeed, her motion to reconsider argued the breach of contract claim in some detail. Appellant had also raised the issue in her earlier email memorandum opposing the trial court's proposed order.

In that same motion, Appellant complained that the trial court failed to consider "the full basis of [her] claims as laid out in her complaint and in argument before the Court." These, as she reminded the court, included claims that Respondent was liable for bad faith, negligence, and breach of contract; "for not offering its full valuation of what she was owed"; "for not following its own policies and procedures"; "for negligently evaluating, investigating and/or adjusting the claim"; and "for intentional infliction of emotional distress."

Because Appellant raised these issues, giving the trial court an opportunity to consider them, she did not waive them. *See Gordon v. Rothberg*, 213 S.C. 492, 505, 50 S.E.2d 202, 208 (1948) (refusing to consider "matters complained of [that] were not included in the appellants'

ground on motion for new trial" because the circuit court "ha[d] not been given an opportunity of passing on same"). This Court should reverse its ruling on waiver on this ground.

III. In affirming the trial court's decision on the ground that Respondent acted reasonably, this Court erred by relying on two incorrect assumptions.

This Court affirmed the trial court's decision on the additional ground that no reasonable jury could find Respondent liable for bad faith where Respondent failed to offer its full reserve—where Appellant did not ask Respondent if it was offering the maximum amount of its authority. In doing so, the Court necessarily assumed that Appellant did not ask Respondent this key question.

However, this assumption is in error. Appellant *did* ask Respondent's attorney and agent whether $200,000 was the maximum amount of his authority. In response, the attorney said that $200,000 was the full amount of his authority. However, he was lying. Testimony at trial established that his authority was $250,000, a twenty-five percent increase.

In addition, in affirming on this ground, this Court presupposes that the trial court correctly granted summary judgment on the breach of contract action. If that claim had reached the jury, as was proper, the jury would have evaluated it not for reasonableness (as the jury did at trial and as this Court did on appeal), but for simple breach. *See S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491–92, 732 S.E.2d 205, 209 (Ct. App. 2012).

Because these underlying errors render the Court's additional affirming ground inapplicable, the Court should disregard this portion of its analysis on reconsideration.

CONCLUSION

Because the jury's verdict was internally consistent or, if it was inconsistent, because Respondent failed to preserve the issue, this Court must reverse the trial court's order granting JNOV; reinstate the original verdict; and remand the case for further findings on Appellant's post-

trial motions regarding her Offer of Judgment, Attorneys' Fees, New Trial *Nisi Additur*, and costs and interest.

If the Court finds that the jury's verdict cannot stand, it should remand the case for a new trial absolute. That trial should proceed consistent with findings that the trial court erred in granting summary judgment as to claims other than negligence and bad faith; in granting directed verdicts limiting submission of claims based on mediation conduct; and in limiting damages to actual litigation costs.

Respectfully submitted,

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Therese Hood, Appellant,

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United Services Automobile Association, Respondent.

PROOF OF SERVICE

Pursuant to Rule 262(c), SCACR, I certify that I have served Appellant's Petition for Rehearing on Respondent by Electronic Mail and U.S. Mail on January 26, 2023, addressed to Respondent's attorney of record, Robert William Whelan of Whelan Mellen & Norris, LLC, 89 Broad Street, Charleston, SC 29401.

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January 26, 2023

VIA U.S. MAIL and E-MAIL ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O Box 11629
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RE: *Therese Hood v. United Services Automobile Association*
Case No.: 2019-001943

Dear Ms. Kitchings,

Attached for filing, please find Appellant's Petition for Rehearing, a check in the amount of fifty (50) dollars for the filing fee, and Proof of Service. Please let us know if you need any additional information.

Sincerely,

s/Angeline Larrivee

Cc: Robert William Whelan (via email and mail)
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