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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Supreme Court Case No. 2023-000423

Therese Hood,..... Petitioner,

v.

United Services Automobile Association,..... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court and Court of Appeals correctly determine that the facts of this case did not give rise to a "step down" duty, beyond and in addition to the duty of good faith and fair dealing, running from Respondent to Petitioner?

2. Were Petitioner's remaining arguments preserved for appellate review, and if so, are they meritorious?

COUNTER-STATEMENT OF THE CASE

This action arises from an automobile accident involving Petitioner Therese Hood ("Hood") and two other vehicles, one driven by Antoine Johnson ("Johnson") and one occupied by Mary and William Kuck. (R. pp. 3121-22.) United Services Automobile Association ("USAA") provided Hood with both liability coverage under which USAA was bound to defend her from claims by other parties to the wreck, and underinsured motorist ("UIM") coverage, under which USAA had the statutory right to defend the liability of any underinsured driver for claims made by Hood. The accident spawned three lawsuits concerning whether Hood's lights were on or off at the time of the collision. The responding police officer and four witnesses provided evidence that Hood's headlights were off. (R. pp. 2797-98, 2805, 2813, 2819-20.) In contrast, Hood *initially* maintained that that her automatic headlights (low beams) were on. (R. p. 1138, lines 3-20, p. 1140, line 24 – p. 142, ln 7; p. 1145, lines 14-22.)

In March 2015, Hood sued Johnson, who had minimum limits liability insurance through GEICO, contending he was at fault for the accident. (R. p. 1125, lines 19-25; p. 1433, lines 8-12.) However, Johnson (represented by counsel hired by GEICO) counterclaimed and asserted that Hood was really at fault because her headlights were off. (R. p. 1125, lines 19-25; p. 1364, lines 3-22; p. 1372, lines 19-24; p. 1553, lines 11-24.) Hood disputed this through defense counsel retained by USAA under her liability coverage. Her defense counsel retained an accident reconstructionist who opined, after examining Hood's totaled car, that her high beam headlights

were on. (R. p. 1562, lines 1-9.) After defending Hood's lawsuit against Johnson for over a year, sometime after March 29, 2016, GEICO tendered its liability limits and USAA took over Johnson's defense. (R. p. 1372, lines 9-24); S.C. Code. § 38-77-160 (a UIM insurer may appear and defend in the name of the underinsured motorist and contest liability "for its own benefit").

While USAA was defending in Johnson's name, Hood filed this bad faith suit, alleging that because USAA, as her liability carrier, was paying for Hood's defense of Johnson's counterclaim and separate lawsuits brought the Kucks, USAA, as her UIM carrier, could not contest Johnson's liability. In other words, Hood alleged USAA was liable for bad faith because Hood's defense counsel (paid for by USAA) presented evidence that Hood's lights were on, while counsel for USAA, as UIM carrier standing in Johnson's shoes, presented evidence of four eyewitnesses and a police officer that her lights were off.

Ironically, Hood admitted in the underlying trial that her headlights may have been off, chose not to present her expert witness at trial, and offered to stipulate through counsel in open court that her headlights were off. (R. p. 2872; p. 2882, lines 11-13.) In other words, the position Hood claims was bad faith for USAA to take during its statutorily prescribed defense of Johnson is the same position she took in the underlying trial against Johnson.[1]

Hood filed this bad faith suit against USAA while the underlying liability action was pending, asserting causes of action for bad faith, negligence, breach of contract, outrage, barratry, and negligence per se. (R. pp. 20-33.) The underlying liability suit went to trial in September 2017,

[1] According to Hood's counsel and underlying counsel, a "strategic decision" was made to not contest that Hood's lights were off at the underlying trial, after conducting several focus groups in the weeks before trial. (R. p. 876, lines 6-8; p. 878, lines 2-6; p. 1515, lines 8-18.) In the bad faith trial, the trial court granted Hood's motion to exclude evidence of these admissions. (R. p. 1009, lines 24-25.)

and Hood was awarded $2.5 million in actual damages, reduced by a finding of 49% comparative negligence (R. p. 1469.) After the verdict, and the denial of its post-trial motions on December 12, 2017, USAA paid Hood $1,023,993. (R. p. 1649, lines 6-10; p. 3120.) This amount represented her $1 million UIM policy limits plus interest that accrued during the post-trial motions practice.

This suit was tried thereafter. First, the trial judge granted USAA summary judgment as to all causes of action except for bad faith and negligence. During closing, Hood's counsel, after arguing USAA was liable for bad faith, argued as to Hood's negligence claim that a separate, "step down" duty was owed and breached by USAA: "And then you're going to hear about the second cause of action, which is negligence. Kind of the way **I describe it, as a step down.**" (R. p. 1640, lines 7-9.) He repeated this instruction later in his address when going over the verdict form: "Number two, do you find by a preponderance of the evidence the Defendant USAA individually or through its agents was negligent. In other words, did they have a duty and breach; and **that is a step down from the bad faith.** Of course the answer is yes." (R. p. 1649, lines 6-10.)

Hood also took issue with USAA's conduct at mediation in the underlying case. After learning in discovery in this bad faith case that USAA would have paid $250,000 to resolve the underlying case at mediation, Hood alleged she would also have settled that case for $250,000. (R. p. 1391, lines 1-5.) Hood therefore alleged USAA's last mediation offer of $200,000 was in bad faith because it was $50,000 less than its settlement authority. In another instance of irony, Hood's final settlement offer at the underlying mediation was $650,000—$400,000 more than what she claims, in this suit, she would have settled for—and her counsel indicated he thought the case could possibly settle for some amount between $300,000 and $400,000. (R. p. 1279, lines 1-11.) In a final irony, the failure of the case to settle for $250,000, as she now claims she desired, resulted in Hood collecting over four times that amount from USAA—$1,023,993. (R. p. 1121, lines 5-8.)

The trial court granted USAA directed verdict on this claim because "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." (R. p. 1545, line 22 – p. 1546, line 2.)

However, the trial court allowed the jury to consider whether USAA's defense of Johnson (presenting evidence that Hood's lights were off) was negligent or breached the duty of good faith and fair dealing, because Hood's defense counsel retained by USAA presented evidence that her lights were on. (R. p. 1545, line 18 – p. 1546, line 5.) While the jury found USAA did not breach the duty of good faith and fair dealing, it found USAA liable for negligence and reckless, willful, or wanton conduct. (R. p. 15.)[2] Neither Hood nor USAA asserted that the verdict was inconsistent, and the jury was then discharged. (R. pp. 1706-1707.) The trial court subsequently granted USAA's motion for JNOV on the basis that Hood had not established any independent duty running between her and USAA apart from the duty of good faith and fair dealing. This was affirmed, unanimously, by the Court of Appeals.

ARGUMENT

The Court should deny the Petition for Writ of Certiorari because there is no novel question of law, no dissent by the Court of Appeals, no conflict between the Court of Appeals' decision and a prior decision of this Court, no constitutional issues, no federal questions, nor any other special reasons justifying certiorari. S.C. App. Ct. Rules 242(b). Instead, Hood raises mere disagreement with the Court of Appeals. The trial court and the Court of Appeals correctly determined the dispositive issues and Hood's disagreement with those determinations does not warrant certiorari.

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[2] Question 3 of the verdict form asked whether USAA's "bad faith" was intentional, reckless, willful, wanton or malicious? After a question from the jury, at the request of Hood's counsel, the trial court clarified this question to refer to both negligence and bad faith. (R. p. 1699, line 10 – p. 1701, line 5.) Hood did not object to the verdict form or to the trial court's instruction.

I. The trial court correctly granted USAA's motion for JNOV where neither the law nor the facts supported a "step down" duty in negligence distinct from the duty of good faith and fair dealing, which USAA did not breach.

At trial, Hood argued that if USAA did not breach the implied duty of good faith and fair dealing with respect to the handling of her claim under the contract of insurance, it could nevertheless be liable for a nebulous "step down" duty in negligence for the same conduct. (R. p. 1640, lines 7-9; p. 1649, lines 6-10.) However, this argument lacks any support under South Carolina law given the facts presented at trial, and it was correctly rejected by the trial court and affirmed by the Court of Appeals.

A. South Carolina law recognizes the implied duty of good faith and fair dealing owed between the parties to an insurance contract, but it does not recognize a separate "step down" or lesser duty owed between those parties.

In South Carolina, parties to a contract generally have no duty in tort to one another; an exception to this rule exists where there is a "special relationship" between them. *Tommy Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995). One such special relationship exists in the insurance contract, as the duty of good faith and fair dealing implied in the contract can support a tort claim for bad faith claim handling. *See, e.g.*, *Tadlock Painting Co. v. Md. Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996).

The seminal case of *Nichols v. State Farm Mut. Auto Ins. Co.* examined "whether this State should recognize an action for bad faith in an insurer's handling of a claim for first party benefits," premised on the "implied covenant of good faith and fair dealing that neither party will do anything to impair the other's rights to receive benefits under the contract." 279 S.C. 336, 339, 306 S.E.2d 616, 618 (1983). The *Nichols* court elected to "recogniz[e] this cause of action." It cited *Tyger River Pine Co. v. Maryland Casualty Co.* 170 S.C. 286, 170 S.E. 346 (1933)—relied upon by Hood here—and, though *Tyger River* collected cases from other jurisdictions and mentioned both bad

faith and negligence, *Nichols* made clear that there was a single applicable duty: the duty of good faith and fair dealing. *Nichols* at 339-40, 306 S.E.2d at 620. ("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**.") (emphasis added). It is also clear from *Nichols* that, contrary to Hood's argument that a common law negligence action against an insurer has long existed, the state had not previously recognized a separate negligence cause of action for first-party benefits. *Id.* ("**Heretofore,** the only compensation a successful insured could expect through litigation was the belated payment of his claim and the possibility of recovering attorney fees up to two thousand five hundred dollars [under a Title 38 attorneys' fee statute]") (emphasis added). Finally, this Court in *Nichols* recognized that a carrier's negligence could be considered with respect to the bad faith cause of action, not a separate and distinct tort. *Id*. at 342, 306 S.E.2d at 620 ("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.") (emphasis added).

Courts applying *Nichols* have recognized that the standard through which breach of the duty of good faith and fair dealing can be proved is similar to that of negligence. *See, Cock-N-Bull Steak House v. Generali Ins.*, 321 S.C. 1, 466 S.E.2d 727 (1996) (stating the elements of a claim for "bad faith refusal to pay benefits," and explaining an insured can succeed by showing a refusal "resulting from the insurer's ***bad faith or unreasonable action*** in breach of an implied covenant of good faith and fair dealing arising on the contract") (emphasis added) (quoting *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 359-60, 415 S.E.2d 393, 396-97 (1992)); *but see, Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 557 S.E.2d 670, 674 (2001) ("An insurer acts in bad faith where there is no reasonable basis to support the insurer's decision.") (emphasis added). Thus, while bad faith can be established through evidence of negligence and

unreasonable action, that fact does not create a duty separate and apart from the duty of good faith and fair dealing.

The trial court appropriately charged the jury on the bad faith standard, and Hood's counsel reminded the jury of it in closings. (R. p. 1636, lines 12-14 (arguing bad faith concerns "the insurer's bad faith or unreasonable action").) However, Hood's allegation of a separate duty in tort that was a "step down" from the duty of good faith and fair dealing, unsupported by South Carolina law, was fictional. Because the trial court did not initially grant a directed verdict on the negligence cause of action, Hood was given a "free shot" with the jury on this cause of action; however, the trial court appropriately granted JNOV as to the legally unsupported "step down" duty.

B. Recognizing a step-down duty apart from the duty of good faith and fair dealing would render the state's well-developed body of bad faith law superfluous; Hood's reliance on *Orangeburg Sausage* lends no support for such a duty.

Nichols is the settled law of this state and has been cited by no less than one-hundred and fifty-eight subsequent judicial opinions according to Westlaw's database. The cause of action has been well developed and its boundaries explained. *See, Carolina Bank & Trust Co. v. St. Paul Fire and Marine Co.*279 S.C. 576, 580, 310 S.E.2d 163, 165 (Ct. App. 1983) ("Implicit in the holding is the extension of a duty of good faith and fair dealing in the performance of all obligations undertaken by the insurer for the insured."); *Brown v. South Carolina Ins. Co.*, 284 S.C. 47, 57, 324 S.E.2d 641, 647–48 (Ct. App. 1984) (insured allowed to recover for insurer's bad faith refusal to pay a third party claim), *overruled on other grounds by Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 7, 437 S.E.2d 6, 9 (1993); *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 501, 473 S.E.2d 52, 53 (1996) (insured can recover for bad faith where there is no breach of contract). However, not one case has held that *Nichols* or any other decision of this Court authorizes a separate negligence tort that is a "step down" from bad faith. In fact, if

insurers are and have been subject to general duty separate and apart from the duty of good faith and fair dealing with respect to claim handling, this body of law on bad faith in South Carolina would be superfluous.

To support the existence of a negligence claim entirely independent of the duty of good faith and fair dealing, Hood leans heavily on the Court of Appeals decision in *Orangeburg Sausage Company v. Cincinnati Insurance Company,* because the underlying trial included a negligence cause of action in addition to causes of action for bad faith and breach of contract. 316 S.C. 331, 334, 450 S.E.2d 66, 68 (Ct. App. 1994). However, a close read of the decision reveals the negligence claim was for *negligent procurement* of insurance, a narrow cause of action applicable to the sale or attempted sale of an insurance policy—facts not at issue here.

Though the negligence claim against Cincinnati was not extensively discussed in the opinion, footnote one made a point to demonstrate it was a negligent procurement claim. *Id.* at 334 n. 1, 450 S.E.2d at 68 n.1. (citing *Sullivan Co. Inc. v. New Swirl, Inc.*, 313 S.C. 34, 437 S.E.2d 30 (1993) with respect to negligent procurement). Cincinnati and the insurance agent were sued for negligent procurement jointly, as the negligence award of $800,000 was rendered "against both defendants." *Id.* at 334, 450 S.E.2d at 68. The breach of contract and bad faith causes of action—which arose out of the insurance contract to which the agent was not a party—were solely against Cincinnati. *Id.* Thus, it is clear that the negligence cause of action at issue in *Orangeburg Sausage* was for negligent procurement. *See id.* at 348, 450 S.E.2d at 76 ("Cincinnati argues the trial court erred in failing to instruct the jury that it could consider [Cincinnati's reckless conduct] only as it related to alleged negligent procurement conduct by Bryant when determining punitive damages"); *see also id.* at 349 ("Cincinnati never challenged the propriety of the award of lost profits under OSCO's negligent procurement claim.").

Negligent procurement has no application to the claims made by Hood. Negligent procurement involves actions taken outside of the insurance policy and typically by persons (brokers or agents) not party to the policy. It necessarily involves duties—to procure insurance—separate from the duty of good faith and fair dealing to handle claims within the policy. *See, e.g.*, *Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 420, 171 S.E.2d 486, 490 (1969) ("We have long recognized the general rule that insurance agents and brokers 'are required to exercise due care in placing insurance and would be personally liable for the neglect of that duty.'") (quoting *La Tourette v. McMaster*, 104 S.C. 501, 89 S.E. 398 (S.C. 1916)). Thus, *Orangeburg Sausage* is distinguishable and inapplicable to the negligent claim handling allegations in this matter.

C. The trial court appropriately determined there was no step-down duty in this case based on the facts alone.

The question before the lower courts was simply whether the facts of *this case* gave rise to a separate duty beyond the duty of good faith and fair dealing. "The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict." *Steinke v. S.C. Dept. of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999). Here, Hood never articulated what duty, other than the duty of good faith and fair dealing, she contended was violated or from where it derives. At the JNOV hearing, the trial court pinned Hood down on this question, asking: "So my first question was what duty did they breach to support the negligence cause of action, which I think you have just answered by saying it's either bad faith or unreasonable action. Is that your response?" (R. p. 1727, lines 20-25.) Hood responded in the affirmative. (*Id.*) Thus, Hood's attempts to explain the source of the independent duty in tort she claims USAA owes always revert back to the bad faith standard. Accordingly, the lower courts correctly held that the facts presented no additional duty beyond the duty of good faith and fair dealing, and certiorari should be denied.

II. Hood's remaining arguments are not preserved for appellate review and are not meritorious.

A. Hood's claims are not preserved for appeal.

1. Hood's claim of an allegedly inconsistent verdict was not preserved for review.

Hood's principal argument to the Court of Appeals was that the jury's verdict was inconsistent. Presumably because she did not assert it below and failed to preserve it for appeal, Hood advances her inconsistent verdict argument in disguise. For example, through projection and displacement, Hood claims it is USAA that is asserting an inconsistent verdict or, alternatively, that the trial court determined the verdict was inconsistent. Neither claim is true. USAA did not contend the verdict was inconsistent or that JNOV was appropriate for that reason, and the trial court did not so rule. Instead, USAA consistently argued—in support of summary judgment, directed verdict (twice), and JNOV—that the step-down negligence cause of action was not legally cognizable and that no duty beyond the duty of good faith and fair dealing fit the facts of this case. The trial court's JNOV ruling agreed with this argument by USAA and was in no way premised on a supposed inconsistency in the verdict. (R. pp. 6-10.) Hood also argues that the verdict should be "reconciled" or "upheld," but is actually asking that the jury's answer of "no" be changed to a "yes" on the question of bad faith. (Petition, p. 8-9.)

Prior to JNOV being granted, when asked whether she contended that the verdict was inconsistent at the post-trial hearing, Hood affirmed that the verdicts were not inconsistent. (R. p. 1728-29) ("…when you read the jury charges, I do not think that's an inconsistent verdict.") Yet *after* JNOV was granted, Hood began asserting disguised inconsistency arguments, starting with her Motion to Reconsider, and continuing through her first question presented in the pending

Petition.[3] (R. p. 149) (where Hood's Motion to Reconsider argued that JNOV was granted due to "an inconsistency [on the verdict form]").

If Hood believed the verdict form was inadequate or that the verdict was inconsistent, she had an obligation to raise it at trial, when it could still be cured. *See, e.g., Bensch v. Davidson,* 354 S.C. 173, 179, 580 S.E.2d 128, 131 (2003) (holding complaints about jury verdict and verdict form were not preserved where "Appellants did not object to the verdict at the time it was rendered, failed to request that the verdict be resubmitted for clarification, and allowed the jury to be discharged before voicing their objection to the verdict" and collecting cases). The Court of Appeals correctly refused to address Hood's inconsistent-verdict arguments when they were never raised to or ruled upon by the trial court. *Id.* Hood's Petition put succinctly the problem with her present complaints with the verdict and verdict form: "*Trial is the time to address an irreconcilably inconsistent verdict.*" (Petition, p. 10-11, collecting cases).[4]

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[3] Hood's supplemental citation to *Glenn v. 3M Co*. Op. No. 5875 (S.C. Ct. App, filed April 5,2023 (Davis Adv. Sh. No. 13 at 102) continues to implicitly argue for reconciliation of an "apparently inconsistent verdict." Essentially, she argues that the jury's finding of no bad faith should be reformed to reach the opposite conclusion. However, the fact remains that the argument was not made below and is not preserved. In *Glenn*, the appellant argued the verdicts were inconsistent and appealed the circuit court's failure "to correct the inconsistency." The appellant in *Glenn* preserved the argument by raising the issue, filing a motion for JNOV on the subject, obtaining a ruling, and appealing that ruling. Hood did none of those things.

[4] Additionally, the verdict was not inconsistent. Hood's counsel twice told the jury that negligence was "a step down from the bad faith," or in other words that if USAA's conduct did not breach the duty of good faith and fair dealing, it could still be liable for negligence. (R. p. 1642; 1649.) This was supported by the jury charges, which applied the standard negligence charges, but placed higher hurdles for bad faith. (R. p. 1680) (noting for example that "[a]n insurance company acts in bad faith only when there is no reasonable basis to support its decision," that it is not bad faith to investigate or gather facts, and that liability for bad faith must be judged at the time of the denial or the filing of suit).) As discussed at the JNOV hearing, the fact that Hood put the legislature's system of defending UIM insurance cases on trial and a lay jury found that system to be unreasonable explains the verdict. (R. p. 1714, line 23 – p. 1715, line 4.)

2. Hood failed to preserve her claim of error as to the trial court's grant of summary judgment on her breach of contract claim.

Hood's claim that USAA breached the contract was also not preserved below. At the summary judgment hearing, USAA's counsel noted that Hood initially brought a breach of contract claim asserting that USAA breached the terms of the policy. However, after this suit was filed, the UIM case concluded with the verdict in Hood's favor and USAA paid the $1 million policy limits after the denial of its post-trial motions. Thus, as USAA's counsel noted, "I don't think there's a breach of contract claim anymore." (R. p. 1001, lines 12-14.) Hood did not respond to this contention and made no argument in support of this claim at the hearing. The court found that because there had been an award and USAA tendered its limits, summary judgment was appropriate as to the breach of contract claim. (R. p. 1008, lines 17-19.) Hood did not move to reconsider or otherwise attempt to provide any supporting arguments or evidence for this cause of action and cannot now present those arguments. *See, Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

3. Hood's newest mediation argument is not preserved.

Additionally, Hood now claims that directed verdict should not have been granted with respect to USAA's mediation conduct because USAA "lied" about its authority during mediation negotiations. However, this argument was not raised to and ruled upon by the trial court. The basis for directed verdict was simply, "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." (R. p. 1545, line 22 – p. 1546, line 2.) If Hood sought to hold USAA liable for "lying" about the amount of its

authority during settlement negotiations, she had an obligation to assert and obtain a ruling on that claim, neither of which she did.[5]

B. Hood's remaining arguments are not meritorious.

1. Summary judgment was appropriate.

Hood contends the trial court should not have considered USAA's motion for summary judgment because it was not served ten days before the hearing. This is without merit.

USAA filed its summary judgment motion on March 12, 2018. Hood responded with a 17-page memorandum in opposition with roughly 300 pages of exhibits attached. (R. pp. 166-478). At the June 20, 2018 hearing, Hood's counsel argued that Hood needed to conduct discovery to respond to the motion. (R. p. 1754, line 10 – p. 1756, line 9.) Accordingly, the court entered an order denying USAA's motion "without prejudice, with leave to renew at a later time." (R. p. 5.) While discovery was pending, with both parties requesting information from one another, USAA's motion to assert an additional affirmative defense was scheduled for a hearing on June 18, 2019, when, on June 17, the case moved from number 180 on the Charleston master jury docket to number 23 on the next week's jury trial roster. (R. p. 860, lines 7-21.) Accordingly, at the hearing on June 18, Hood's counsel "made a strategic decision" to announce he no longer needed discovery and was prepared to try the case. (R. p. 863, lines 2-13; p. 867, lines 10-15; p. 869, lines 8-18.) Therefore, the very next day, USAA filed a one sentence pleading stating that "USAA ***renews*** its motion for summary judgment filed on March 12, 2018" and that it "refers to and incorporates by

[5] Hood attempts to distinguish *Gordon v. Rothberg*, 213 S.C. 492, 50 S.E.2d 202 (1948) by arguing there was no need for Hood to move for a new trial since she was the "prevailing party." Petition at p. 14. However, Hood "request[ed] this Court order a New Trial *Nisi*, or in the alternative, *additur*" based upon the trial court's exclusion of emotional distress damages. (R. p. 134.) She has cited no law creating an exception to the rule that matters must be raised to and ruled upon by the trial court.

reference the arguments made in that motion." (R. p. 114 (emphasis added).) No new arguments were contained in the renewal.

The trial court's consideration of USAA's renewed motion for summary judgment was appropriate. Rule 6(d) says a motion must be served at least 10 days prior to the hearing unless a different period is fixed by court order. Rule 6(d), SCRCP. Furthermore, as this Court has explained, "[t]he decision whether to reconsider a motion for summary judgment is within the trial judge's discretion." *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997). In *Brown*, the appellants contended that the respondent's motion did not give them any notice that a certain issue would be re-argued. *Id.* The court gave them four days to submit any cases in support of their argument, and this Court found that the appellant failed to show they were prejudiced by this ruling. *See id.*

The ten-day requirement contemplated by Rule 56(c) ensures that a party has adequate notice of the arguments that the moving party intends to raise and to submit any opposing evidence if it so chooses. Here, the motion for summary judgment ***was*** served more than 10 days before the hearing. In fact, it was served over a year before the hearing. Hood had time to file a 17-page brief and 300 pages of exhibits before the first hearing. At her request, she was afforded many months to perform discovery. And USAA renewed the motion, as it was permitted by Order to do, the day after she made the "strategic decision" that she needed no more discovery and was prepared to try the case, which can only mean she was prepared to submit any evidence opposing USAA's grounds for summary judgment. Hood's reading of Rule 56 would enable a party to insulate herself from summary judgment through similar one-sided "strategic decisions" and was properly rejected.

2. The trial court correctly found there was no duty to offer the full extent of USAA's $250,000 reserve when Hood's last demand was $650,000 and she indicated the case might settle between $300,000 and $400,000.

By arguing for a duty upon insurers to offer their full reserves, evaluation, or authority, either *sua sponte*, or in response to certain settlement demands, Hood seeks to have courts and juries review and second guess mediation decisions and negotiation strategy of parties and their counsel. Such a duty is not recognized by South Carolina law, nor should it be.

a. The trial court correctly found there was no duty to offer USAA's full evaluation and/or reserves to Hood.

As discussed above, the existence and scope of a duty are matters for the court. South Carolina courts have repeatedly held that the concept of a legal duty of care should not be extended beyond reasonable limits, and that it is the function of the court to set those limits. *McCullough v. Goodrich & Pennington Mort. Fund, Inc*., 373 S.C. 43, 48, 644 S.E.2d 43, 46 (2007).

Hood sought to expand the scope of the duty of good faith to require insurers to *sua sponte* offer their highest evaluation of a claim and/or offer their reserves, even where liability is unclear and the damages are uncertain. The trial court properly refused to expand the scope of the duty of good faith and fair dealing. Such an expansion would fundamentally change how negotiations and mediations are conducted, affect the evaluation of claims and setting of reserves, and likely result in other unforeseen consequences.

As an initial matter, the duty Hood sought to impose would require courts and juries to delve into confidential mediation settlement offers, demands, and negotiations. The Court need look no further than the testimony of Hood's personal counsel, Kevin Smith, quoted in Hood's brief, where he discusses the conduct and discussions within mediation and the meaning and interpretation of communications therein. (Final Brief of Appellant at Court of Appeals, p. 20-21.) Mediation is a process that is having great success in this state. *See* Supreme Court Admin. Order

No. 2015-11-12-04 (noting the success of pilot mediation program and extending mandatory mediation to all counties). This is, in part, due to the ability of parties to speak freely and confidentially to one another. *See* Rule 8, SCADR.

Imposing a duty on an insurer to offer its full settlement authority and/or to offer the full extent of its reserves will affect mediation in at least two ways. First, by requiring one side to offer the full amount of its evaluation, it would operate as a disincentive to the other side to negotiate in good faith while unfairly forcing the other to negotiate against itself. A plaintiff would never drop her demand if she knew that her opponent was duty bound to pay the highest amount it thought it would ever have to pay.[6] Second, the knowledge that a court or jury could one day examine and weigh in upon the offers, demands, and negotiations within the mediation would make its confidential protections largely meaningless.

To recognize a duty that would hinder free negotiations between the parties, remove incentives for one side to negotiate, and impede the free and frank evaluation of disputed claims and setting of reserves would reduce judicial economy, stymie the prompt settlement of claims, and run counter to the public policy of South Carolina. *See Fowler v. Hunter*, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010). Indeed, public policy underlies the concept of duty, and this state would not recognize an extension of a duty averse to its public policy. *See Araujo v. S. Bell Tel. &*

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[6] Additionally, the duty of good faith and fair dealing runs to both parties of a contract. *Tadlock Painting Co. v. Md. Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996) (there is an implied covenant of good faith and fair dealing in every insurance contract "that neither party will do anything to impair the other's rights to receive benefits under the contract" (quoting *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983))). Therefore, if an insurer has an obligation to offer its highest number *sua sponte*, presumably the insured likewise has an obligation to *sua sponte* offer her lowest number. How that would work in practice is anyone's guess. Ironically, had Hood followed what she now proposes as a duty of good faith by offering her lowest number (which she now claims was $250,000) instead of $600,000, she would have been within USAA's authority.

Tel. Co., 291 S.C. 54, 57-58, 351 S.E.2d 908, 910 (Ct. App. 1986) ("[A] duty is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.").

Finally, the duty Hood seeks to impose is a solution in search of a problem. This case illustrates why. Although assessment of jury verdicts is necessarily guesswork, it is to the parties' benefit to guess as accurately as possible. If an offeror miscalculates a jury verdict and fails to settle, it is the offeror who faces the consequences. Here, the verdict showed that both sides' guesswork was off. As a result, USAA had to pay over a million dollars to Hood, and Hood recovered many hundreds of thousands of dollars more than she was willing to accept. This precise situation was discussed by the court in *Snyder v. State Farm Mut. Auto. Ins. Co.*, 586 F. Supp. 2d 453, 459 (D.S.C. 2008). As that court explained, if State Farm had known the jury would find significantly in excess of its offer to settle, the "last course of action it would have wanted" would have been to insist on taking the case to trial. *Id.* at 461. The evidence revealed that "State Farm simply made an erroneous (and costly) miscalculation as to how much money a jury was likely to award Snyder for his injuries," but this was not a basis for determining that its conduct was unreasonable or in bad faith. *Id.* It also noted that "[e]stimating likely jury verdicts is by its very nature an unpredictable pursuit, and from time to time juries are bound to return verdicts that are either substantially more or substantially less than the insurer's estimates." *Id.* at 462. *See also, Collins v. Auto Owners Ins. Co.*, 759 F. Supp. 2d 728 (D.S.C. 2010) (stating there is no bad faith where the value of the plaintiff's UIM claim "could reasonably be debated"); *Stewart v. State Farm*

Fire & Cas. Co., No. 2:11-CV-03020-DCN, 2013 WL 3206553 (D.S.C. June 24, 2013).[7] The same findings are equally applicable to USAA in this case.

b. USAA's reserves were not a concession that it "owed" Hood anything.

Finally, contrary to Hood's characterization, USAA did not concede it "owed" Hood $250,000 by setting its reserves and authorizing settlement authority at this amount. An insurer's reserves are "merely estimates of the insurer's total exposure." *Messer v. Universal Underwriters Ins. Co.*, No. 2017-CA-000293-MR, 2019 WL 2557330, at *8 (Ky. Ct. App. June 21, 2019). As a result, "the majority rule holds that reserves do not evidence an admission of coverage, fault, or liability by the insurer." *Id.* at 768; *see also, e.g., First Horizon Nat'l Corp. v. Houston Cas. Co.*, No. 2:15-CV-2235-SHL-dkv, 2016 WL 5869580, at *15 (W.D. Tenn. Oct. 5, 2016) (explaining that reserves are a "business judgment and do not reflect a legal determination of the validity of the Plaintiffs' claim against [the insurer]").

Hood's citation to *Orangeburg Sausage Co.* misses the mark. That case concerned first party property damage (frozen foods damaged by a power outage) and the insurer's delay in paying the "undisputed amount" of the property damage. 316 S.C. at 337, 450 S.E.2d at 70. Hood improperly equates the valuation of property damage coverage to valuation of liability coverage. Property damage is inherently different from an adversarial personal injury suit where the amount of "damage" is to be determined by a jury and can only be guessed at in advance. *See, Snyder v.*

[7] In addition to being supported by *Stewart*, *Snyder*, and *Collins*, the lower courts' rulings are also supported by the law of other jurisdictions. *See, e.g., Greil v. Geico*, 184 F. Supp. 2d 541, 545-46 (N.D. Tex. 2002); *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 592 (E.D. Pa. 1999), *aff'd*, 234 F.3d 1265 (3d Cir. 2000); *Stewart v. GEICO Ins.*, No. 2:18-CV-00791-MJH, 2020 WL 822053, at *4 (W.D. Pa. Feb. 19, 2020) ("Pennsylvania law requires an insurance company to set reserves aside when they are placed on notice of a possible loss arising under its policy. However, the failure of a carrier to offer its full settlement authority does not constitute bad faith.").

State Farm Mut. Auto Ins. Co. , 586 F. Supp. 2d 453, 462 (D.S.C. 2008) ("Estimating likely jury verdicts is by its very nature an unpredictable pursuit."). The underlying case is illustrative: though Hood received a large damages award, the jury's finding of comparative fault was just 2 percentage points away from her receiving nothing. In short, USAA's internal pre-trial valuation of $250,000 was a mere estimate of an inherently unpredictable result at one point in time and did not constitute an amount "owed" to the insured.

Therefore, USAA was under no obligation to offer the full amount of its reserves or authorized authority, and neither of these actions operated as a concession that USAA owed Hood that amount of money for the UIM claim.

c. Even if USAA owed a duty, no reasonable jury could find in Hood's favor.

Even if the Court were to recognize a duty allowing jurors to second guess mediation conduct, no reasonable jury could find it was unreasonable for USAA to not offer its entire authority when the parties were hundreds of thousands of dollars apart. It is undisputed that Hood's lowest official demand was $650,000. (Tr. 427:1-6, 538:19-25, 626:23-24; R. pp. 1279, 1390, 1478.) After the exchange of formal offers, Hood's personal counsel approached Attorney Daniel and informally suggested that the case could possibly settle for between $300,000 and $400,000. (R. p. 1289, line 20 – p. 1290, line 22; p. 1478, line 25 – p. 1479, line 6.) As he testified, this was "lawyer language" meaning that he would "settle the case for $350,000." (R. p. 1479, lines 20-24.) USAA's representative, Ms. Moats, acknowledged that in "mediation world" she understood this to mean $350,000. (R. p. 1290, lines 5-22.)

During the UIM case, Hood ***never*** indicated to USAA that she would settle for $250,000. (R. p. 1391, lines 1-5.) In fact, Ms. Moats testified she was surprised to hear Hood contend she would have settled for this amount. (*Id.*) Hood first indicated she would have accepted $250,000

during the present litigation after she learned in discovery that USAA had set its reserves at $250,000 prior to the mediation. (*Id.*) Additionally, Hood has never indicated why, if she would have settled for $250,000, her lowest demand was $650,000.

3. The trial court properly granted directed verdict on Hood's alleged consequential damages.

Hood's arguments concerning consequential damages are moot, as the jury determined that USAA did *not* violate the duty of good faith and fair dealing. Therefore, alleged consequential damages flowing from that duty are irrelevant and need not be considered. In any event, Hood's arguments concerning consequential damage are off base.

a. Hood's brief erroneously attempts to shoe-horn Tyger River's standard into the UIM context.

In support of her argument regarding consequential damages, Hood cites to *Tyger River* to support that she should have been permitted to recover the "excess verdict" amount as consequential damages. This is not supported by South Carolina law.

The *Tyger River* doctrine recognizes that an insured may recover damages in a bad faith suit where an excess verdict was entered ***against the insured as a result of the insurer's failure to settle a case***. *See Miles v. State Farm Mut. Auto. Ins. Co.*, 238 S.C. 374, 380-81, 120 S.E.2d 217, 220 (1961) (citing *Tyger River Pine Co. v. Md. Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933)). *Tyger River* and its progeny give an insured recourse against her insurer where the insured suffers exposure to an excess judgment because of the insurer's bad faith conduct. *See id.* In that situation, the insured has suffered harm and a direct loss due to her insurer refusing to settle when it had the chance since she is personally liable for the resulting verdict. This is a fundamentally different scenario than in a UIM case, where the insured is the plaintiff, rather than the defendant. The

insured cannot suffer any "loss" or "harm" by pursuing the UIM claim and obtaining a verdict **in excess of** what she would have settled for.

Hood ignores the plain fact that, at common law, consequential damages still require showing causation of an actual loss. *See* Black's Law Dictionary 174 (3rd pocket ed. 2006) (explaining that consequential damages are "[l]osses that do not flow directly and immediately from an injurious act, but that result indirectly from the act"). Here, Hood asserted that she would have settled for $250,000. By proceeding to trial, she received a windfall in excess of $750,000. Hood suffered no harm as a result of the "excess verdict" since she actually obtained far more money than she alleges she would have settled for in this case. The trial court accurately noted that the "excess" verdict was not a proper element of damages due to the posture and mechanics of UIM coverage and the facts of this case.

b. The trial court correctly granted directed verdict on Hood's claim for emotional distress.

Hood's Petition relies upon unsupported allegations absent from the record stating that USAA's attorney "bullied and gaslit" her at her deposition and that her "distress caused her to visit a doctor." (Petition, p. 21.)[8] However, these allegations were not raised to or ruled upon by the trial judge and are not supported by the record or preserved. Instead, below Hood attempted to connect her emotional distress to questions concerning whether her headlights were on or off and whether her initial testimony that her lights were on was accurate. Hood's husband testified:

> I know 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.

[8] Petitioner's statement of the case also contains allegations on this subject that were never before the trial court, as they cite, if at all, to Hood's discovery deposition. (Petition, p. 2.)

(R. p. 1164, lines 15-21.)

However, from "day one" (the day of the accident) it was the police officer who put in her accident report that Hood was at fault and that Hood's lights were off upon her arrival. (R. pp. 3121-22.) As detailed above, four other witnesses gave statements that her lights were off. Johnson and the Kucks all sued Hood contending her lights were off and she was at fault. In fact, her own lawyer offered to stipulate in open court that her lights were off, and a jury found that she was 49% at fault. (R. p. 1469, lines 17-24.)

Hood did not present evidence from which a jury could determine that Attorney Daniel's presentation of evidence showing that her lights were off caused her any different distress than any of the witness testimony, arguments of counsel, other lawsuits, or findings of the underlying jury. As the trial court astutely observed: "[W]hat I am struggling with is when you say they called her a liar, I mean there were several other people that were saying that the headlights were not on. . .. But to the extent that USAA's counsel could be faulted for suggesting that her lights were off, he was one of many."). (R. p. 1542, line 22 – p. 1543, line 5.)

The trial court's ruling was correct. For example, the Fourth Circuit, applying South Carolina law, reversed a jury's verdict for consequential damages in a bad faith action where the plaintiff could not separate bad faith damages from those inherent in litigation as "[n]either the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *State Farm Fire & Cas. Co. v. Barton*, 897 F.2d 729, 733 (4th Cir. 1990) (quoting *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438, 444 (1971)).

Moreover, as a general rule, "litigation-induced emotional distress is ***never*** a compensable element of damages." *Knussman v. Maryland*, 272 F.3d 625, 642 (4th Cir. 2001) (collecting cases) (emphasis added). "[A]ny anxiety, stress or other unpleasantness" that the plaintiff experiences as

a by-product of litigation is not caused by the supposed bad act itself. *Id.* at 641. "Such mental distress is 'inherent in most litigation'" and though one could argue the plaintiff should not have had to assert her rights, "the same can be said of the successful plaintiff in any case." *Id.* (quoting *School Dist. No. 1, Multnomah Cnty. v. Nilsen*, 534 P.2d 1135, 1146 (Or. 1975)); *see also Stoleson v. United States*, 708 F.2d 1217, 1223 (7th Cir. 1983) ("An alleged tortfeasor should have the right to defend himself in court without thereby multiplying his damages.").

Various courts have found that litigation stress is not recoverable in the insurance bad faith context. *See, e.g.*, *Seehafer v. Depositors Ins. Co.*, No. 19-CV-01461-REB-KMT, 2020 WL 1627092, at *2 (D. Colo. Feb. 28, 2020) ("Plaintiffs generally cannot recover for the stress occasioned by the filing and prosecution of a lawsuit to vindicate their rights."); *Allen v. State Farm Mut. Auto. Ins. Co.*, No. 3:15-CV-0019-HRH, 2018 WL 1474526, at *7 (D. Alaska Mar. 26, 2018) (predicting "that the Alaska Supreme Court would hold that litigation-induced stress is not recoverable, primarily because 'the heavy weight of authority holds that litigation-induced stress is not ordinarily recoverable as an element of damages'" (quoting *Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70, 79 (1st Cir. 2001))); *Leporace v. N.Y. Life & Annunity Corp.*, No. 11-2000, 2014 WL 1806788, at *3 (E.D. Pa. May 7, 2014) (precluding expert's opinions on litigation stress "because there is no question that filing a lawsuit . . . is the plaintiff's decision, and imposing additional damages on the defendant for defending against the plaintiff's claims would impair the defendant's right to defend himself").

Thus, even if Hood had been able to distinguish between emotional distress caused by Attorney Daniel suggesting that her lights were off and the various other people suggesting the same, credibility concerns are inherent in most litigation. As these authorities establish, mere litigation stress is not actionable "emotional distress" for purposes of a bad faith claim. Therefore,

the trial court properly granted directed verdict on Hood's claim for emotional distress damages, and this Court should not grant certiorari to review the Court of Appeals' affirmance.

CONCLUSION

Hood's Petition concludes by arguing the law should not "countenance an abrupt and shameless shift of positions…depending on where the money lies." (Petition, p. 24.) Her statement is ironic for three reasons, given that both parties have a duty of good faith and fair dealing under the insurance policy. First, Hood argues it was bad faith for USAA to present evidence that her headlights were off—yet, Hood could, in good faith, make a "strategic decision" to admit they *were* off on the way to the underlying verdict. Second, Hood claims USAA acted in bad faith by officially offering to settle for $200,000 when it was prepared to settle for $250,000 ($50,000 from its top dollar)—yet, Hood, who now claims she would have settled the case for $250,000, acted in good faith when she would not officially go below $650,000 ($400,000 from her bottom dollar). Finally, Hood claims she was damaged by USAA's conduct, but, in reality she recovered over $1,000,000 as a result of USAA allegedly preventing her from settling for $250,000.

The jury correctly found that USAA did not breach its duty of good faith and fair dealing. However, Hood's manufactured claims should not have reached the jury, and the duties she sought to impose would change how law is practiced in this state. If a UIM insurer cannot contest liability where four eyewitnesses and a police officer call it in question, it cannot safely exercise its right to defend under S.C. Code § 38-77-160. If courts and juries can play Monday morning quarterback with respect to settlement negotiations in a mediation when the carrier has 80% of its authority on the table and the plaintiff has 38% of its authority on the table, it cannot safely negotiate.

The Court of Appeals' decision is on solid footing. Hood's Petition should be denied.

Respectfully Submitted,

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