

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY S.C. SUPREME COURT
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Unpublished Opinion No. 2023-UP-011 (S.C. Ct.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

Therese Hood,

Petitioner,

v.

United Services Automobile Association,

Respondent.

REPLY BRIEF OF PETITIONER

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The Petitioner, Therese Hood, respectfully submits this Reply to clarify several points related to her Petition for Writ of Certiorari.

ARGUMENT

I. Respondent repeatedly mischaracterizes relevant facts.

Respondent's recitation of facts tends to mischaracterize events and motives. Petitioner particularly wishes to draw this Court's attention to the following matters:

First, Respondent alleges that Petitioner took the position that "because USAA [Respondent], as her liability carrier, was paying for Hood's defense of Johnson's counterclaim and separate lawsuits brought [by] the Kucks, USAA, as her UIM carrier, could not contest Johnson's liability."¹ (Return p. 2.) However, this was not, and is not, Petitioner's position. In Petitioner's Complaint, she criticized Respondent not for contesting Johnson's liability, but for taking contradictory positions on a specific factual issue. (R. pp. 20-33). "A UIM carrier may indeed defend a case 'for its own benefit' . . . but there is a difference between using fair legal tactics and taking contradictory positions in court." (Petition p. 23-24.)

Second, Respondent attempts to discredit Petitioner's motives by claiming that she only "alleged she would have . . . settled [the] case for \$250,000" "[a]fter learning in discovery in this bad faith case that USAA would have paid \$250,000 to resolve the underlying case at mediation." This is false. Petitioner testified that at mediation, she told her attorney that she would be willing to settle for "[n]ear 250,000," (R. p. 1115, line 25-p. 1116, line 10); similarly, Petitioner's attorney testified that Petitioner was frustrated, discouraged, and just "wanted to get" the case over with,

¹ Johnson and the Kucks were the other parties involved in the underlying wreck. (Petition p. 1).

and that she was willing to “compromise to \$250,000 if they would offer it.” (R. p. 1466, lines 3-16).

Third, Respondent alleges that Petitioner “did not present evidence from which a jury could determine that Attorney Daniel’s” behavior “caused her any different distress than any of the witness testimony, arguments of counsel, other lawsuits, or findings of the underlying jury.”² (Return p. 22). However, Petitioner presented the jury with evidence of specific bad acts, not merely with evidence of litigation stress. According to Petitioner, at deposition, Daniel “ridiculed” her and “question[ed] [her] sanity.” (R. p. 1133, lines 5-19). In fact, he ultimately had to stop the deposition because “he didn’t think [she] could handle anymore.” (R. p. 1134, line 25-p. 1135, line 2). But despite his awareness of Petitioner’s emotional vulnerability, Daniel proceeded to mistreat her at mediation. According to Petitioner’s attorney in the underlying case—an attorney with considerable experience in the field, (R. p. 1434, line 24-p. 1435, line 5)—Daniel’s opening statement at mediation, in which he characterized Petitioner as “a liar” and “crazy,” lacked the “usual[] . . . decorum.” (R. p. 1459, lines 2-23). Furthermore, Daniel eventually ended the mediation—and dragged the case on—by callously misrepresenting his settlement authority. (R. p. 1288, lines 9-12; p. 1777; p. 1465, line 17-p. 1466, line 18).

Fourth, Respondent misstates the verdict. According to Respondent, “the jury found USAA did not breach the duty of good faith and fair dealing,” but “it found USAA liable for negligence and reckless, willful, or wanton conduct.” (Return p. 4). However, this interpretation ignores the standards present on the verdict form. According to the form, the jury found that Respondent did

² Respondent sugarcoats Attorney Daniel’s behavior by portraying it as mere “presentation of evidence showing that [Petitioner’s] lights were off,” (Return p. 22), in order to bolster its argument that Petitioner’s distress was due solely to litigation, not to specific bad acts. (Return pp. 22-23).

not “breach[] its duty of good faith and fair dealing” merely “by a preponderance of the evidence,” but was liable for “intentional, reckless, willful, wanton, or malicious” “bad faith” “*by clear and convincing evidence.*” (R. p. 15).

Lastly, Respondent alleges that “[t]he trial court . . . 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.” (Return p. 4). Although this is true as far as it goes, Respondent fails to mention the trial court’s controversial factual finding: “[T]he jury found in USAA’s favor on the only remaining cause of action.” (R. pp. 8-9).

II. In addition to mischaracterizing salient facts, Respondent ignores the appropriate standards of review.

In its Return, Respondent essentially shrugs off the fact that the relevant standards of review favor Petitioner. But the standards of appellate review for directed-verdict, JNOV, and summary judgment rulings all favor Petitioner. (Petition pp. 7-8). So does the standard by which this Court determines whether a jury verdict is consistent. (Petition pp. 8-9). Petitioner asks this Court to give these standards their due weight.

III. Respondent’s analysis of issue preservation is incorrect.

For an issue to be preserved, it must “be raised to and ruled upon by the trial judge,” in order to give the trial court the opportunity “to rule properly after it has considered all relevant facts, law, and arguments.” *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (first citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998), and then citing *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). This doctrine is a “practical” one, which should not be used “in a rigid, hyper-technical manner” “as if this is some sort of a game of ‘gotcha’ elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue.” *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690,

705, 869 S.E.2d 859, 867 (Ct. App. 2022), *reh'g denied* (Feb. 25, 2022) (quoting *Herron*, 395 S.C. at 470, 719 S.E.2d at 644); *State v. Morales*, Op. No. 28154 (S.C. Sup. Ct. filed May 31, 2023) (Davis Adv. Sh. No. 21 at 17). In fact, if issue preservation is in doubt, “any doubt should be resolved in favor of preservation.” *Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019) (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result in part and dissenting in part)).

Here, Petitioner’s verdict argument does not even raise even a shadow of a preservation issue. In its efforts to frame Petitioner’s argument as a new theory, Respondent states that Petitioner’s “principal argument to the Court of Appeals was that the jury’s verdict was inconsistent.” (Return p. 10). But Respondent is wrong. The mere fact that Petitioner asks that the verdict be “reconciled” does not imply that Petitioner believes the verdict was initially inconsistent. *See Camden v. Hilton*, 360 S.C. 164, 174, 600 S.E.2d 88, 93 (Ct. App. 2004) (enunciating an appellate court’s duty to “uphold” and “reconcile” jury verdicts as part of its holding that the jury verdicts *were* consistent).

In fact, Petitioner argues that the jury’s verdict was consistent—and would have remained so, had not the trial court granted JNOV on the negligence claim. The trial court’s decision to grant JNOV injected an ambiguity into the verdict, which the court then exploited to rescue Respondent from the jury’s decision. (R. pp. 6-9). Faced with a newly created “inconsistency,” Petitioner appropriately raised the issue at the first opportunity (that is, in her Rule 59 motion, (R. pp. 147-52)), as well as in her appellate briefings.

Regarding the breach-of-contract cause of action, Petitioner raised the matter at some length in her Rule 59(e) motion. (R. pp. 158-62). Although a party generally “cannot raise an issue

by way of a Rule 59(e) motion³ which could have been raised at trial,” *see Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (citing with approval *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995)), the plenitude of authorities discussing whether an issue was raised at a hearing *or* on a post-trial motion suggests a very permissive view of when an “issue . . . could have been raised at trial.” *See, e.g., SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 499, 392 S.E.2d 789, 793 (1990) (citation omitted) (“Although this issue was raised in Cox’s answer to SSI’s complaint, it was never ruled on by the trial judge or raised in an appropriate post-trial motion. Therefore, this issue is not properly before this Court.”); *Jennings v. Dargan*, 308 S.C. 317, 322, 417 S.E.2d 646, 648 (Ct. App. 1992), *amended* (June 4, 1992) (“Moreover, Dargan did not make this argument to the trial judge and the court did not rule on the issue. No Rule 59(e) motion was filed and therefore the issue is not preserved for appellate review.”); *Browder v. Browder*, 382 S.C. 512, 523, 675 S.E.2d 820, 826 (Ct. App. 2009) (“This issue was not ruled upon by the trial court nor was it raised in Wife’s Rule 59(e) motion to alter or amend; thus, it is not preserved for our review.”). Given this permissive view, this Court should resolve any doubts about the preservation of the contract issue in favor of preservation.

Finally, in regard to Petitioner’s mediation argument, the issue was raised and ruled on below. Specifically, the trial court’s decision to grant Respondent’s directed-verdict motions as to “conduct regarding mediation,” because Respondent had no “duty to offer the full amount of their evaluation or their reserve where the parties [were] that far apart in their negotiations,” (R. p. 1545, line 22-p. 1546, line 2), necessarily included a finding that the parties were “that far apart” *in good*

³ Or, for example, by way of a motion for new trial. *See McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 347, 468 S.E.2d 633, 637 (1996) (citation omitted).

faith. The issue was in question because Petitioner had presented compelling evidence that Daniel, Respondent’s representative, significantly misrepresented his settlement authority at mediation. (See R. p. 1288, lines 9-12; p. 1777; p. 1465, line 17-p. 1466, line 18).

Assuming *arguendo* that the issue is otherwise unpreserved, to the extent that the Court of Appeals relied on a factual misapprehension in affirming the trial court’s ruling, (Petition p. 23), the Petitioner has a right to bring that mistake to this Court’s attention. See *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (“An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record.”)⁴

IV. Recognizing a stand-alone tort of negligence in first-party insurance action would not “render the state’s well-developed body of bad faith law superfluous.”

To avoid the possibility of a stand-alone tort of negligence in first-party insurance actions, Respondent exaggerates the effect of *Nichols v. State Farm Mut. Auto. Ins. Co.* on the issue at hand. Respondent correctly notes that *Nichols* “has been cited by no less than one-hundred and fifty-eight subsequent judicial opinions according to Westlaw’s database,” (Return p. 7); however, only forty of those judicial opinions are reported decisions of our courts, and only twenty of that forty even reference negligence. None of those cases explicitly declare a freestanding claim of negligence to be improper.⁵ Meanwhile, several published South Carolina cases—*Tyger River Pine Co. v. Maryland Cas. Co.*, *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*,⁶ and *Winburn v. Ins. Co. of N. Am*—suggest that such a claim is possible.

⁴ Rule 220(c), SCACR, provides: “The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”

⁵ Unlike two federal district-court cases, *Skinner v. Horace Mann Ins. Co.* and *Kraemer v. Massachusetts Mut. Life Ins. Co.* (See Petition p. 13).

⁶ It is worth noting that, even if the “negligence” claim at issue in *Orangeburg Sausage* related to “negligent procurement,” it involved an insurer who was already in a long-term relationship with

Petitioner has already discussed the impact of *Tyger River* and *Orangeburg Sausage*. (Petition p. 13). As for *Winburn*, the Court of Appeals held that Winburn had no viable negligence claim against his insurer for “negligently adjust[ing] his claim”—but not because a negligence claim against an insurer is impossible in a first-party case. 287 S.C. 435, 443, 339 S.E.2d 142, 147 (Ct. App. 1985). Rather, the Court held merely that Winburn presented insufficient evidence “prescribing the manner in which [the insurer was] to adjust his claim.” *Ibid*.

V. An insurer’s duty to offer its reserves is relatively narrow.

Finally, contrary to Respondent’s contention, Petitioner does not “[seek] 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.” Rather, Petitioner seeks clarification regarding two narrower points of an insurer’s duty.

First, Petitioner argues that an insurer has a duty to offer the *undisputed* amount owed to its insured—an amount which may or may not include so-called “reserves,” depending on how an insurer defines that term. (Petition pp. 19-20). And second, Petitioner argues that insurer has a duty not to lie when asked whether it has offered the full amount of its settlement authority. (Petition p. 20).

CONCLUSION

For the reasons stated here and in the original Petition for Writ of Certiorari, this Court should grant Therese Hood’s Petition and review all grounds presented.

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the insured (i.e., the request in question was a request for *additional* coverage). 316 S.C. 331, 334–37, 450 S.E.2d 66, 68–70 (Ct. App. 1994). Thus, the facts are not as easily distinguishable as Respondent supposes.

Respectfully submitted,

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