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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

Unpublished Opinion No. 2023-UP-011 (S.C. Ct.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

Therese Hood, Petitioner,

v.

United Services Automobile Association, Respondent.

FINAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

QUESTIONS PRESENTED

I. Does South Carolina law permit a standalone claim for negligence in a first-party insurance action, in addition to a claim for breach of the duty of good faith and fair dealing?

II. Did the Court of Appeals err when it affirmed the trial court's decision on the ground that Respondent did not act in bad faith?

STATEMENT OF THE CASE

Before Trial

This case stems from a three-vehicle accident that occurred on November 7, 2014 and severely injured Petitioner Therese Hood. (R. p. 1105, lines 19-22, p. 1779). Petitioner sued Antoine Johnson, one of the other drivers. (R. pp. 23, 103). The Kucks, who were in the final car, sued Petitioner, alleging that she contributed to the accident by failing to properly use her headlights. (R. pp. 1789, 1793).

USAA ("Respondent"), Petitioner's liability insurer, hired attorney Chris Nickels to defend Petitioner in the Kuck suit. (R. p. 1438, lines 8-14). It also hired expert Woodrow Poplin (R. p. 2431), who performed a lamp filament test and reported to Nickels that Petitioner did have headlights on at the time of the collision (R. pp. 1778-82).[1] After Johnson's liability insurer paid $25,000 to settle Petitioner's case against him (R. p. 1424, lines 8-10), Respondent appeared as Petitioner's UIM carrier to defend in Johnson's name (R. pp. 23, 103). But in defending that suit, Petitioner denied that Petitioner's headlights were on. (R. p. 1448, lines 14-20). Ultimately, Petitioner won the Johnson suit. (R. p. 1108, lines 8-10).

[1] Respondent's consultant, Tyler Black, later validated Poplin's report. (R. p. 786, line 15-p. 789, line 7).

Because Respondent took disparate positions regarding the headlights in the two cases that it defended, even though the tortfeasor had admitted liability, and because in defending the Johnson suit, Respondent browbeat and belittled Petitioner and lied about its settlement authority, ultimately blocking mediation, Petitioner sued. Her first-party action alleged negligence/gross negligence, bad faith, and breach of contract, among other claims. (R. pp. 20-33).

In deposition testimony about Respondent's misconduct, Petitioner testified that Respondent's attorney and agent "accosted" her, "treating [her] like less of a person, like a liar" and accused her of telling "untruth[s]" even though Respondent's experts had already "cleared" her. (*See, e.g.*, R. p. 2475, lines 3-17; R. p. 2570, lines 9-12). Due to the attorney's conduct, Petitioner (as the attorney himself admitted) was "not fit for [the] deposition" he was conducting. (R. p. 2494, lines 16-21). Respondent's conduct in protecting its profits caused Petitioner "mental anguish . . . severe enough that" she required "treatment from a psychiatrist." (R. p. 2492, line 3-p. 2493, line 18; see R. p. 2494, lines 12-15 ("I continued to go see [a doctor] because I was questioning my own being . . . whether I was a liar). At trial, Petitioner, her husband, and her attorney in the Johnson suit testified to her emotional distress. For example, Petitioner's husband testified that USAA's behavior was "devastating" to his wife and had "been tearing her up since day one," (R. p. 1163, line 22-p. 1164, line 21), and her attorney testified that Respondent's attorney characterized her as "crazy" and "a liar," (R. p. 1459, lines 2-12).

Furthermore, at mediation, Respondent's attorney lied about his settlement authority. He told Petitioner's attorney, "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." (R. p. 1465, lines 17-20). After speaking with Petitioner, who would have compromised for $250,000, Petitioner's attorney 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, the attorney was authorized to offer up to $250,000—Respondent's reserve in the case. (R. p. 1288, lines 9-12; p. 1777). That reserve (according to Respondent's field adjuster and corporate representative (R. p. 958, line 22-p. 959, line 12; R. p. 1232, lines 18-19)) was Respondent's "reasonable evaluation of the value of the claim." (R. p. 1260, lines 5-15).

Respondent perpetrated this misconduct although its own core values include "honest[y], integrity, loyalty," and "standing by our insured" (R. p. 595, lines 3-17), and Respondent's internal policy is to have "the person handling the claim" "[p]rotect[] the insured to make sure that . . . we're paying the insured what we owe them." According to one of Respondent's adjusters (R. p. 493, lines 20-25), "if an adjuster . . . participated in keeping facts hidden in order to not pay an insured what they are owed, that individual would be violating [Respondent's] policies and ethics." (R. p. 537, lines 1-5; p. 538, lines 15-19). Yet this is exactly what Respondent did.

At Trial

A. Summary Judgment

On June 19, six days before trial, Respondent filed a motion for summary judgment in which it purported to renew its earlier motion for summary judgment. (R. pp. 114-16).

On the first day of trial, Petitioner vigorously argued that the court could not hear the motion: "Rule 56(C) is quite clear in when a motion for summary judgment must be served. And it says the motion shall be. Not may be. Shall be served at least ten days before the time fixed for the hearing." (R. p. 862, lines 14-19). She argued that she would be prejudiced if the trial court heard and granted the motion, because due to the short notice, she had not had enough time to prepare. (R. p. 865, line 21-p. 867, line 15). Her arguments at the first hearing had been drawn from preliminary discovery and did not reference all the pertinent bases; the short notice before the second hearing prevented her from gathering evidence and preparing memoranda specific to that hearing. (R. p. 865, line 21-p. 867, line 15; R. p. 966, lines 15-22). For example, she was

unable to prepare a memorandum regarding breach of contract, a cause of action Respondent did not argue in its prior memorandum supporting summary judgment. (R. p. 966, lines 15-22; R. pp. 114-24). Ultimately, though, the court heard the motion. (R. p. 871, lines 1-3).

After doing so, the court restricted Petitioner's case, granting Respondent's summary-judgment motion on all causes of action except bad faith and negligence/gross negligence. (R. p. 1008, lines 2-24). It granted summary judgment on the breach of contract claim because "there's been an award now that has been paid, the insurance now has been tendered"—in other words, because Respondent was no longer breaching the contract. (R. p. 1008, lines 17-19). And it granted summary judgment on the outrage claim because "the conduct has to be so extreme that it shocks the conscience, that no reasonable person can be expected to endure it I don't find that the conduct rises to the level of outrage " (R. p. 1008, lines 10-16).

B. Directed Verdict

Throughout the trial, the court continued to circumscribe Petitioner's case. At the directed-verdict stage, the court decided not to allow the jury to consider the unpaid portion of the verdict below ($250,000, the difference between the policy limits and the ultimate verdict) as an element of damages. (R. p. 1531, line 24-p. 1534, lines 9-14). The court also granted Respondent's directed-verdict motions on the negligence and bad-faith claims "to the extent that" those claims "rel[y] on conduct regarding mediation"—that is, on Respondent's failure to offer its internal valuation and Respondent's attorney's affirmative misrepresentation of his settlement authority—holding that 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). It also decided that the jury could not consider emotional-distress damages, ruling (1) that there was no evidence of emotional-distress damages in the bad-faith claim because not enough evidence tied

such damages to Respondent's bad-faith acts and (2) that the negligence claim could not contain emotional-distress damages because, in a negligence action, "emotional distress damages are not recoverable . . . where there is no accompanying physical injury." (R. p. 1517, lines 17-22; p. 1546, lines 6-22-p. 1547, line 2).

C. Jury Instructions

While charging the jury, the judge provided separate instructions for each remaining 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 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 firm 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 on question 3, responded "Yes" to question 4, and awarded $250,000 (the amount of Respondent's reserve) in punitive damages on question 5. (R. p. 15) When the judge sought to verify the answer to 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 46). 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).

And Beyond

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 on the grounds that no standalone claim of negligence exists in first-party insurance cases under South Carolina and that "the jury found in [Respondent's] favor on the only remaining cause of action"—that is, bad faith. (R. pp. 6-9). The court denied the parties' other motions as moot. (R. pp. 6–9). On November 20, the court denied Petitioner's subsequent motion to alter or amend the judgment. (R. pp. 11-13). Two days later, Petitioner appealed the JNOV and various other orders and rulings, including the orders granting Respondent's summary-judgment and directed-verdict motions.

The Court of Appeals heard oral argument in November 2022, and it affirmed the trial court's decision on January 11, 2023. It did not address the jury verdict, but simply held that JNOV was proper because South Carolina does not recognize a standalone negligence cause of action

in first-party insurance cases. Regarding the summary-judgment and directed-verdict motions, it held that Petitioner waived her arguments; as an additional sustaining ground, it held that there was "no way a reasonable jury could find USAA acted in bad faith." It supported this additional sustaining ground with two holdings: (1) an insurer does not act in bad faith by not offering to settle the case for the full amount of its reserve, and (2) in taking disparate positions in the two underlying cases, Respondent did not go beyond "defend[ing] its own interest as allowed by statute."

Petitioner filed a Petition for Rehearing on January 26, 2023, which the Court of Appeals denied on February 26. Petitioner filed a Petition for Writ of Certiorari on March 30, 2023, which this Court granted on March 5, 2024.

ARGUMENT

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 *Id.* (quoting *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 176, 48 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.").

Regarding summary judgment, it "is a drastic remedy" which "should be cautiously invoked" lest a litigant be "improperly deprived of a trial on disputed factual issues." *Lord v. D &*

J Enterprises, Inc., 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) (citing *Madison ex rel. Bryant v. Babcock Ctr.*, Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006)). Therefore, "[i]n determining whether any triable issues of fact exist," this Court must view "the evidence and all inferences which can be reasonably drawn therefrom . . . in the light most favorable to the nonmoving party." *Ray v. City of Rock Hill*, 434 S.C. 39, 44–45, 862 S.E.2d 259, 262 (2021) (quoting *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002)). If the non-moving party presents so much as a "scintilla of evidence" of dispute as to evidentiary facts or conclusions to be drawn from those facts, this Court must deny summary judgment. *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011) (citing *Hancock v. Mid–South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)).

Finally, 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)).

I. Does South Carolina law permit a standalone claim for negligence in a first party insurance action, in addition to a claim for breach of the duty of good faith and fair dealing?

This Court should reverse the Court of Appeals and uphold the jury's verdict because South Carolina law permits a standalone claim for negligence in a first-party insurance action which is distinct from a claim for breach of the duty of good faith and fair dealing.

In its January 11 decision, the Court of Appeals held that in the first-party insurance 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." The Court of Appeals interpreted *Nichols* as recognizing "a single tort encompassing bad faith and negligence, not separately viable claims for bad faith and negligence." *See Nichols v. State Farm Mut. Auto. Ins. Co.* ("[I]f

an insured can demonstrate bad faith or unreasonable action by the insurer in processing a claim . . . he can recover consequential damages in a tort action."), 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983) (*superseded on other grounds by statute*, Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C. § 1144(a), (b)(2)(A)).

The Court of Appeals also held that "unreasonable action" is part of an "element[] of a cause of action for bad faith refusal to pay first party benefits." *See Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 396 (1992).

Beyond this indirect support, the Court of Appeals sought support primarily from non-binding authority. In *Skinner v. Horace Mann Ins. Co.*, the District Court held that where "[t]he negligence/gross negligence claim is duplicative of the bad faith claim," "a freestanding claim of negligence is improper." 369 F. Supp. 3d 649, 654 (D.S.C. 2019). Similarly, in *Kraemer v. Massachusetts Mut. Life Ins. Co.*, the District Court held that where "the crux of [the plaintiff's] negligence claim is that [the insurance company] breached the policies in bad faith when it refused to pay benefits," the plaintiff's "negligence claim is better suited as a bad faith claim." No. CV 2:15-04571-CWH, 2017 WL 5635469, at *6 (D.S.C. Apr. 28, 2017), *aff'd*, 701 F. App'x 268 (4th Cir. 2017). However, the two South Carolina cases on point, *Tyger River Pine Co. v. Maryland Cas. Co.* and *Orangeburg Sausage Co.*, contradict this argument.

In *Tyger River*, this Court rejected the defendant's "contention . . . that plaintiff [was] not entitled to recover for negligence unaccompanied by fraud or bad faith on the part of defendant in the negotiations relating to compromise and settlement." 170 S.C. 286, 170 S.E. 346, 348 (1933). And in *Orangeburg*, handed down after *Nichols* and *Crossley*, the Court of Appeals found the verdict consistent where "the jury found for [the plaintiff] on its negligence, breach of contract, and bad faith claims," and "awarded different amounts under each theory," 316 S.C. at

345, 450 S.E.2d at 74; "[d]ifferent damages [were] recoverable under each claim." *Id.* Thus, the decision in this case conflicts with two prior decisions, including a Supreme Court decision.

Based on *Tyger River* and *Orangeburg Sausage Co.*, it would appear that this Court has already recognized that an independent tort of negligence in this context stands separate and apart from the breach of the duty of good faith and fair dealing. If this Court concludes that this proposition has not already been recognized by *Tyger River* and *Orangeburg Sausage Co.*, it should take this opportunity to recognize it now.

"In this jurisdiction it has long been recognized that insurance is a business affected with a public interest." *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 169, 829 S.E.2d 707, 713 (2019) (quoting *Hinds v. United Ins. Co. of Am.*, 248 S.C. 285, 291, 149 S.E.2d 771, 774-75 (1966)). Specifically, as to UIM and UM policies, that interest is "for the benefit of injured persons." *See State Farm Mut. Auto. Ins. Co. v. Windham*, 432 S.C. 134, 144, 850 S.E.2d 633, 638 (Ct. App. 2020). As a result, even ***mere applicants*** for insurance may bring a cause of action solely in negligence (without alleging a breach of the duty of good faith and fair dealing) against an insurer which negligently mishandles his or her application, as this Court specifically recognized in *Hinds v. United Ins. Co. of Am.*, 248 S.C. 285, 289– 91, 149 S.E.2d 771, 774–75 (1966). The *Hinds* court observed that "The jurisdictions which deny recovery for negligence with respect to an application would appear to either not recognize, or else not give effect to, the principle that the insurance business is affected with a public interest." *Id*. However, as noted above, in South Carolina "it has long been recognized that insurance is a business affected with a public interest." *Id*.

In contrast, the Court of Appeals' decision in this case sets forth an upside-down regime in which a mere applicant has more rights than an insured. This contradicts South Carolina's

insurance regime, which is constructed for the benefit of the insured, not the insurer. *See State Farm Mut. Auto. Ins. Co. v. Windham*, 432 S.C. 134, 144, 850 S.E.2d 633, 638 (Ct. App. 2020) (cleaned up) ("The UIM and uninsured motorist statutes are remedial in nature and enacted for the benefit of injured persons and should be construed liberally to effect the purpose intended by the Legislature."), *aff'd as modified,* 438 S.C. 1 56, 882 S.E.2d 754 (2022).

This "Court has often observed that the relationship between an insurer and its insured is "special," more so than parties in a mere contractual relationship." *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 170, 829 S.E.2d 707, 714 (2019). Surely someone who is actually insured (such as petitioner) and thus enjoys a "special" relationship with the insurance company, has at least as much of a right to be treated non-negligently as a mere ***applicant*** for insurance. Accordingly, this Court should reverse the Court of Appeals' decision, acknowledge a standalone negligence claim in first-party cases, and uphold the jury's verdict.

II. Did the Court of Appeals err when it affirmed the trial court's decision on the alternative ground that Respondent did not act in bad faith?

Finally, the Court of Appeals erred when it affirmed the trial court's decision on the alternative ground that Respondent did not act in bad faith.

The Court supported this ground by holding that (1) an insurer does not act in bad faith by not offering to settle the case for the full amount of its reserve and (2) in taking disparate positions in the two underlying cases, Respondent did not go beyond "defend[ing] its own interest as allowed by statute."[1]

[1] Both of these holdings rely on the erroneous assumption that South Carolina law does not allow a standalone negligence claim in the first-party insurance context. *See* Section I, *supra*.

First of all, sub-holding (1) relies on the proposition that Respondent was never asked whether it was offering its entire authority, and thus, any duty to respond truthfully to such a question is inapplicable. However, Petitioner did ask. Respondent, in turn, lied. Based on this factual error alone, sub-holding (1) cannot stand. And, as discussed above, Respondent's failure to offer its full reserve—not to mention its lie in so doing—was bad faith, as a reasonable jury could well conclude. At the very least, such behavior was unreasonable, in direct contravention of Respondent's own policies and of the South Carolina's Legislature's intent to protect insureds. As a result, a jury could reasonably conclude that Respondent acted in bad faith.

As to sub-holding (2), a reasonable jury could find that Respondent acted in bad faith (or at least unreasonably) in taking disparate positions regarding Petitioner's lights. In this case, the trial court knew "that there was a liability issue . . . that [Petitioner] could be found comparatively negligent." (R. p. 999 lines 10-12). Yet it also found a jury question as to whether Respondent's choice to take disparate positions was bad faith. (R. p. 1545 lines 18-21). Given that the judge found that there was a jury question, a reasonable jury could certainly have taken Petitioner's side of that question. A UIM carrier may indeed defend a case "for its own benefit," S.C. Code Ann. § 38-77-160, but there is a difference between using fair legal tactics and taking contradictory factual positions in court. Petitioner's lights were either on, or they were not. Respondent cannot have it both ways according to what suits its pocketbook at the time. "For the law to countenance [an] abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers [and parties] will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for the 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)). Insurance law is intended to protect the insured, not to be a

revenue source for insurance companies. In doubt, the legal system—and a reasonable insurance company—should act in the insured's favor.

CONCLUSION

This Court should hold that South Carolina recognizes the tort of negligence in this first-party insurance context, separate and apart from a breach of the duty of good faith and fair dealing. In addition, this Court should hold that a jury could reasonably conclude that Respondent acted in bad faith, in particular by lying to its insured. As a result of either or both of these holdings, This Court should reverse the Court of Appeals and allow Petitioner's jury verdict to stand. But if this Court finds that the jury's verdict cannot stand, it should remand the case for a new trial absolute.

[SIGNATURE ON FOLLOWING PAGE]

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