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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.

RESPONDENT'S BRIEF

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Introduction

This suit concerns a he-said/she-said liability dispute in the underlying wreck case of *Hood v. Antoine Johnson*. This suit’s fulcrum is USAA’s retention of two separate law firms—one under Hood’s liability coverage and one under UIM coverage—as the law firms were necessarily on each side of the he-said/she-said liability dispute.

Counterstatement of the Case¹

1. The underlying lawsuit (the “wreck case”) and its defense, in a nutshell.

The underlying dispute centered on whether Hood’s headlights were on when Hood’s car collided with one car occupied by Antoine Johnson and then another car occupied by William and Mary Kuck, on November 7, 2014.² Hood initially maintained her low-beam headlights were on, and her attorney agents—Clawson and Staubes (retained by USAA as Hood’s liability insurer) and the Hoffman and Anastopoulo law firms (both retained by Hood personally)—advocated for her position.³

On the other hand, Johnson, Mary Kuck, William Kuck, two other eyewitnesses, and the responding police officer agreed Hood’s headlights were off.⁴ The first suit filed was Hood’s wreck case against Johnson; Johnson’s defense counsel (hired by GEICO) maintained Hood’s lights were off in Johnson’s answer and counterclaim.⁵ After defending Hood’s lawsuit against Johnson for over a year, sometime after March 29, 2016, GEICO tendered its liability limits to resolve Hood’s

¹ Petitioner’s “statement of the case” includes argument concerning issues beyond those for which this Court has granted certiorari. If the Court considers argument on issues beyond issues II and IV in Petitioner’s Questions Presented for Review, USAA requests notice and the opportunity to brief any additional issues.

² A more robust statement of the underlying accident and resulting lawsuits is contained in USAA’s Return to Hood’s Petition for Certiorari.

³ R. p. 1138, ln. 3-20, p. 1140, ln. 24 – p. 142, ln. 7; p. 1145, ln. 14-22.

⁴ R. p. 1555-57 ; 2797-98, 2805, 2813, 2819-20.

⁵ R. p. 1125, ln. 19-25; p. 1364, ln. 3-22; p. 1553, ln. 11-24.

claims against Johnson, and so USAA's underinsured motorist (UIM) counsel, the Carlock Copeland law firm, took over Johnson's defense of Hood's suit for USAA's benefit.⁶

2. *Hood's "disparate positions" theory of bad faith.*

While the wreck case was pending, Hood brought this suit (the "bad faith" suit) against USAA. The crux of it was Hood's contention that it was bad faith for USAA to (a) retain defense counsel for Hood, who defended Hood's position that her lights were on, in three separate liability suits brought against Hood by Antoine Johnson, William Kuck, and Mary Kuck and (b) retain UIM counsel to stand in Johnson's shoes to present evidence of five eyewitnesses that Hood's headlights were off in Hood's suit against Johnson.⁷

Throughout the trial of the bad faith case and up through the present appeal, Hood accused USAA of "lying" in the wreck case because there could only be one set of true facts and her lights could not be both on and off.⁸ This served as her theme in the bad faith trial, from opening ("This is a case about an insurance company telling a lie") to closing ("What they don't have the right to do is lie. That's what this case is about....They hired all these lawyers, like they were prosecuting a criminal, instead of just paying what she was owed. An insurance company is not allowed to call its insured a liar when they know it's true and are taking the opposition position in another case. That's what your verdict for Terry in this case will say.")⁹ And it is still her position today.¹⁰ The Court of Appeals found USAA did not take disparate positions, recognizing its retention of counsel

⁶ *Id.*; R. p. 1372, ln. 19-24 R. p. 1497, ln. 11-12; S.C. Code § 38-77-160.

⁷ R. p. 1125-26, ln. 19-25; p. 1135, ln. 9-25.

⁸ *See, e.g.*, R. p. 1135, ln. 9-24.

⁹ R. p. 1048, ln. 17-18; R. p. 1642-43, ln. 16 -3.

¹⁰ *See, e.g.*, Petitioner's Brief, p. 12 (Accusing USAA of "using [un]fair legal tactics and taking contradictory factual positions in court [because] Petitioner's lights were either on, or they were not.")

to perform two different roles was in keeping with the contract of insurance and the construction of South Carolina law concerning liability insurance and UIM insurance.¹¹

3. *Hood's change of story for the trial of the wreck case.*

Both before and after the trial of the wreck case trial, Hood's sworn testimony has always been that her lights were on.¹² Ironically given her professed indignation over USAA's allegedly taking two different positions, after conducting numerous focus groups in the weeks before the wreck case trial, Hood made a "strategic decision" not to contest that her lights were off during the wreck trial.

Prior to the wreck trial, Hood's counsel conducted five or six "focus groups."¹³ These "focus groups went really bad for Ms. Hood" and she "kept losing."¹⁴ However, on "the eve of trial" of the wreck case, Hood's counsel "figured out how best to present the evidence."¹⁵ Apparently, a plaintiff's verdict and higher damages seemed more likely if Hood—instead of maintaining that her lights were on as she had done in her deposition—agreed that her lights may have been off.¹⁶ "At trial we made a strategic decision, because we were in Jasper County and because the defendant was from Jasper County, not to contest every issue."¹⁷ This decision was also described as a "trial tactic" to increase Hood's credibility in the wreck trial: "That was a

¹¹ The Court of Appeals held the "UIM statute entitled USAA to defend the UIM case 'for its own benefit.' S.C. Code Ann. 38-77-160. USAA did precisely that."

¹² R. p. 1571-72, ln. 9-17; R. p. 1135-36, ln. 25-2.

¹³ R. p. 1461, ln. 18-25; 1512-13.

¹⁴ R. p. 1512, ln. 6-24.

¹⁵ R. p. 1512-13 ln. 25-2.

¹⁶ R. p. 1571-72, ln. 9-6.

¹⁷ R. p. 876, ln. 6-8.

stipulation at trial about the headlights, because the headlights had to be taken off the table in order for her credibility not to be wrecked, which was a trial tactic.”¹⁸

Accordingly, Hood *admitted* in the wreck trial that her headlights may have been off, chose not to present her expert witness, and offered to *stipulate* through counsel that her headlights were off.¹⁹ In other words, the position Hood claims was bad faith for USAA to take during its defense of Johnson is the same position Hood strategically took in her trial against Johnson. As predicted by her pre-trial focus groups, Hood’s tactical admission that her lights may have been off resulted in a substantial recovery in the wreck trial against Johnson.²⁰

In the bad faith trial, Hood moved to exclude evidence of the position she took in the wreck trial; this motion was granted over USAA’s objection.²¹ Regardless, in the bad faith trial and in this appeal, Hood accused USAA of an “abrupt and shameless shift of positions [that] would give prominence (and substance) to the image that lawyers [and parties] will take any position, depending on where the money lies, and that litigation is a mere game and not a search for the truth.”²²

4. Hood’s mediation-conduct theory of bad faith.

Hood’s second theory of bad faith focused on the pre-trial mediation of the wreck case. Mediation of the wreck case broke apart when Hood’s last demand was \$650,000 and USAA’s last

¹⁸ Appellant’s Nov. 17, 2022 oral argument before Court of Appeals, at 0:00, in response to question by Judge Hewitt about admitting her lights were off in the wreck trial: https://media.sccourts.org/COA_Videos/2019-001943.mp4

¹⁹ R. p. 2872; p. 2882, ln. 11-13.

²⁰ The wreck trial was in September 2017. 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, ln. 6-10; p. 3120.) This amount represented her \$1 million UIM policy limits plus interest that accrued during the post-trial motions practice.

²¹ R. p. 1009, ln. 24-25.

²² Pet. Br., p. 12.

offer was \$200,000. Hood’s counsel testified that although \$650,000 was her lowest demand, at the end of the mediation he told USAA’s counsel the case could possibly settle for some amount between \$300,000 and \$400,000, and USAA’s counsel told Hood’s counsel \$200,000 was the full amount of his authority.²³ In the bad faith case, after learning USAA’s reserves in the wreck case were \$250,000, Hood took the position that had the \$250,000 been offered at mediation, she would have accepted it and the case would have settled.²⁴ Although she claims it was bad faith for USAA to stop its formal offers fifty thousand dollars from the amount it would have accepted in settlement, Hood stopped her formal demands at \$650,000, four hundred thousand dollars away from what she now claims was her number at mediation.²⁵

USAA’s alleged “bad faith” in not paying Hood \$250,000 at the wreck case mediation resulted in Hood recovering \$1,023,983 from USAA after the wreck case trial. In other words, her recovery due to what she calls USAA’s “bad faith” was \$773,983 more than she would have recovered if USAA had acted in “good faith.”

5. The bad faith suit and trial.

Shortly after the wreck case mediation, Hood filed the subject bad faith case against USAA, asserting causes of action for bad faith, negligence, breach of contract, outrage, barratry, and negligence per se.²⁶ The bad faith case continued even after Hood’s recovery of over a million dollars following the September 2017 trial of the wreck case. The bad faith case was tried on short notice during the week of June 25, 2019, following a “strategic decision” by Hood’s counsel to

²³ R. p. 1468, ln. 9-25.

²⁴ R. p. 1391, ln. 1-5.

²⁵ R. p. 1463, ln. 13-14.

²⁶ R. pp. 20-33. USAA was granted summary judgment as to all causes of action except bad faith and negligence.

abort attempts to depose USAA's UIM counsel from the wreck case.²⁷ USAA's bad faith counsel argued Hood's bad faith case was an attack on "how the legislature has set up UIM coverage," that Hood was "trying to [] take advantage of the way the legislature has set up this insurance to work," and "I don't see how a jury is going to be able to process all of these issues concerning underinsured motorist coverage."²⁸ However, the trial court allowed the jury to consider whether USAA's taking "disparate positions" was negligent or breached the duty of good faith and fair dealing.²⁹ 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.³⁰ Neither Hood nor USAA asserted that the verdict was inconsistent, and the jury was then discharged.³¹

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

I. The Lower Courts Correctly Rejected Hood's Proposed "Step-Down" Duty Under These Facts.

²⁷ R. p. 867, ln. 10-13.

²⁸ R. p. 861, ln. 16-22; 1015, ln. 23-25. After the verdict, USAA noted the jury's dissatisfaction with this scheme (in which an insured's own insurer is her adversary in UIM litigation) explained how the jury found negligence and recklessness, without finding breach of the duty of good faith and fair dealing. R., pp. 1714-15, ln 23-4. This is supported by Hood's counsel's continued arguments based upon an insurer being the litigation adversary of its own insured. *See, e.g.*, R. p. 1643, ln. 4-8 ("If you award Terry a verdict for what's happened in this case you will be telling them and every other insurance company that they are not allowed to call their insured a liar when they know it's not true, and take the opposite position in another case.")

²⁹ R. pp. 1545-56, ln. 18-5.

³⁰ 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. pp. 1699-1701, ln. 10-5. Hood did not object to the verdict form or to the trial court's instruction.

³¹ R. pp. 1706-1707.

Question II of Hood’s Petition was: “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?”³² However, the relevant question is whether the acts complained of *in this case* violated a duty separate from the duty of good faith and fair dealing.³³

A. Hood’s Step-Down Negligence Claim was Duplicative of Her Bad Faith Claim: it Concerned the Same Duty, the Same Alleged Breaches, and the Same Damages.

To this day, Hood has never articulated how her negligence claim differed from her bad faith claim, and it is too late to do so now. *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (“An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant’s brief.”) 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?”³⁴ Hood responded in the affirmative.³⁵ 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.

Hood does not contend certain of USAA’s actions violated the duty of good faith and fair dealing while others violated her “step-down” duty. Nor does she claim bad faith gives rise to different damages than does her step-down tort. Rather she claims the insurance relationship gave rise to the same duty, the same breach, and the same damages, but a different standard of care.

³² Pet. p. 1.

³³ Hood inaccurately claims 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.’” But its ruling was not so broad—it was necessarily limited to the facts and context of this case, and its holding was correct.

³⁴ R. p. 1727, ln. 20-25.

³⁵ *Id.*

This is manifest in Hood’s trial summation, where 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.**”³⁶ He repeated this instruction when explaining 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.”³⁷

B. 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 Duplicative of the Duty of Good Faith.

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).

³⁶ R. p. 1640, ln. 7-9.

³⁷ R. p. 1649, ln. 6-10.

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 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 such a tort. *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]”). 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.”).

Courts applying *Nichols* have recognized that while subtle differences may exist, 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.³⁸ 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.³⁹

C. These Facts Present No Cause to Upset the Apple Cart.

It is apparently Hood’s position that *Nichols* and its progeny were wholly superfluous. Since at least 1933, she argues, a step-down duty has controlled the same conduct, breaches, and damages, as exist under a bad faith cause of action—the only difference being a lower standard of care. If her theory were correct, South Carolina bad faith law could be thrown out with the bath water, and thousands of briefs, decisions, articles, books, CLE’s, and entire law school classes on the tort of bad faith in South Carolina over the past forty years were similarly unnecessary.

To the contrary, for decades, parties, attorneys, courts, and commentators have understood claims such as Hood’s tort claims arise from the implied duty of good faith and fair dealing implied in the contract of insurance. An established body of law has grown around this duty of good faith

³⁸ R. p. 1636, ln. 12-14 (arguing bad faith concerns “the insurer’s bad faith or unreasonable action”).

³⁹ Hood did not object or appeal with respect to the jury charges on bad faith, the verdict form concerning bad faith, or the jury’s finding that USAA did not act in bad faith. Thus, USAA’s compliance with the duty of good faith and fair dealing, as determined by the jury, is the law of the case.

with its boundaries explored and 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).

Additionally, that the duties alleged by Hood arise from the duty of good faith and fair dealing appears to be well understood by the judiciary, as reflected by the trial court’s ruling, the unanimous ruling of the court of appeals, and by numerous federal decisions dismissing negligence causes of action for conduct alleged to violate the duty of good faith. *See, Skinner v. Horace Mann Ins. Co.*, 369 F. Supp. 3d 649 (D.S.C. 2019); *Kraemer v. Mass. Mut. Life Ins. Co.*, 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); *Krug v. Travelers Home and Marine Ins. Co.*, No. 8:22-2245-HMH-KFM, 2022 WL 18106574 (D.S.C. 2022); *Givens v. Erie Ins. Co.*, No 6:22-00842-HMH (D.S.C. 2022); *American Modern Select Ins. Co. v. Mcanulty*, No. 8:21-cv-00295-JD (D.S.C. 2022); *Maranto v. State Farm Mut. Auto. Ins. Co.*, No. 2:98-3131-23-PMD, at 3-4 (D.S.C. Aug. 11, 1999), ECF No. 19.

D. Hood’s Continued Reliance Upon the Tort of Negligent Procurement is Unavailing.

Since *Nichols* and its progeny do not support Hood’s step-down duty, she relies primarily upon the completely distinct doctrine of negligent procurement. This is a narrow doctrine

pertaining to the sale or attempted sale of an insurance policy. It is completely inapplicable here, as Hood has never alleged any issues with her policy's procurement.

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. 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, the negligence claim 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."). Hood's citation to *Hinds v. United Ins. Co of Am.*, is similar. 248 S.C. 285, 149 S.E.2d 771 (1966). *Hinds*, was an early South Carolina negligent procurement case that concerned a "duty to accept [an insurance application] or reject it within a reasonable time." *Id.*

Negligent procurement has no application to the claims made by Hood. 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 (1916)). Thus, *Orangeburg Sausage* and *Hinds* are distinguishable and inapplicable to the claim handling allegations in this matter.⁴⁰

II. The Court of Appeals’ Additional Sustaining Ground that No Reasonable Jury Could Find USAA’s Conduct in Bad Faith was Correct.

Question IV of Hood’s petition, accepted for review by this Court was: “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?” The Court of Appeals found there was no bad faith as a matter of law under both of Hood’s theories: her mediation conduct theory and her disparate position theory. These are addressed below.

A. Hood’s Disparate Position Theory Fails as a Matter of Law.

The main thrust behind this suit has always been Hood’s position that USAA is “using [un]fair legal tactics and taking contradictory positions in court” because “Petitioner’s lights were either on, or they were not.”⁴¹ Essentially, she claims it was bad faith for USAA to contest her UIM claim and present objective evidence concerning her liability. The jury and the Court of Appeals correctly found there was no bad faith liability for contesting a claim where: (1) Hood’s testimony

⁴⁰ Hood claims that South Carolina law is “upside-down” in that applicants have more rights than insureds. This is not so, as all insureds had similar rights, with respect to *procurement*, when they applied for their insurance policies; when the policies went into force, they acquired additional rights through the duty of good faith and fair dealing inherent in the policies.

⁴¹ Pet. Br., p. 12.

concerning her low beams being on conflicts with her expert's findings that her high beams were on; (2) five eye-witnesses testify her headlights were off; (3) the responding police officer testifies her headlights were off; (4) Hood offers to stipulate her lights were off in the wreck trial; and (5) the jury in the wreck case finds Hood 49% at fault.

In fact, the conduct underlying Hood's theory was created and controlled by Hood alone. Hood is the one who initially took the position that her lights were on, and her defense counsel were bound to follow her wishes and instructions in asserting that theory when defending the suits of Antoine Johnson, William Kuck, and Mary Kuck. *Day v. Kilgore*, 311 S.C. 73, 76, 427 S.E.2d 683, 684 (Ct. App. 1992) ("The presentation of a case and documentary evidence must be reserved to the lawyers who advocate the positions taken by their clients."); *see also, Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, 426 S.C. 154, 157, 826 S.E.2d 270, 271 (2019).

It is Hood's position that through simply informing her defense counsel that her lights were on, she could defeat USAA's statutory right to defend liability in Johnson's name, because by doing so USAA would be "lying" and taking disparate positions. However, South Carolina's UIM laws, which have been in place for decades, give UIM insurers the express right to defend in the tortfeasor's name. *See*, S.C. Code § 38-77-160; *Williams v. Selective Ins. Co. of Se.*, 315 S.C. 532, 534, 446 S.E.2d 402, 404 (1994) ("We note that the intent of § 38-77-160 is to protect an insurance carrier's right to contest its liability for underinsured benefits."). As recognized by the Court of Appeals, Hood's theory does not reflect the law of this state.

Ironically, Hood argues USAA orchestrated an "abrupt and shameless shift of positions ... depending upon where the money lies," and claims this conduct was a "revenue source for" USAA. Not remotely. It was Hood who abruptly shifted her position at the wreck case trial, admitting for the first time her lights were off, as the result of focus groups done before trial, as a "trial tactic"

resulting from a “strategic decision” because that was where the money was. It was Hood who profited as a result of this conduct in the underlying litigation, and she continues to try and further profit from that conduct through this lawsuit.

In fact, USAA paid over \$1,000,000 to Hood alone, and had significant additional exposure through the claims against Hood by Antoine Johnson, Mary Kuck, and William Kuck. If USAA’s “bad faith” conduct was part of some design to be a “revenue source” for USAA, as Hood alleges, the result was precisely the opposite.

B. Hood’s Mediation Theories Fail as a Matter of Law.

Hood has now advanced two theories concerning USAA’s mediation conduct. At trial she alleged USAA had a duty to offer the full extent of its authority at mediation. This was rejected by the trial judge, who granted directed verdict 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.”⁴² On appeal, Hood shifted tacks, alleging USAA’s counsel’s statement during mediation negotiations that he would never get more than \$200,000 in authority was a “lie” that was in bad faith.

1. Hood’s mediation-lie theory was not argued below, is not preserved for appeal, and in any event would have failed on its merits.

Hood has shifted her theory during this appeal and now argues she could show bad faith because USAA “lied” about its authority during the mediation. At trial, Hood consistently complained of the amount of USAA’s offer at mediation being less than its full reserves. She never

⁴² R. 1545-46, ln. 22-2.

alleged that counsel's statement during negotiations were "lies" that justified her bad faith claim.⁴³ Thus, Hood's mediation-lie theory was never advanced at the trial court, it was not ruled upon by the trial court, and it was therefore not preserved for appellate review. The Court of Appeals correctly held that Hood never argued USAA had a duty to answer truthfully if asked whether its offer constituted its maximum authority, and accordingly, that question was not properly before the court, and is also not properly before this Court. *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.").

Regardless, even if Hood had advanced and preserved this theory, no reasonable jury could have found USAA's conduct was in bad faith. Hood's new mediation-lie theory is based entirely on the trial testimony of Kevin Smith, Hood's personal counsel in the wreck case and in the bad faith case. He was an interested witness who testified he was earning one-half of the attorneys' fees in the bad faith case.⁴⁴ His testimony concerned a mediation that occurred approximately three years earlier, and though he professed to quote USAA's statements within the mediation, he was unable to remember his own opening demands.⁴⁵

Smith testified that when the parties were four hundred and fifty thousand dollars apart, he announced to the mediator and USAA that Hood was going to walk out of the mediation, and at

⁴³ During argument on directed verdict, the trial judge provided Hood with an opportunity to elaborate on her mediation conduct theory. "So let me tell you kind of where I am. MR. WILLEY: Okay. THE COURT: Because then I need to hear from you. I do not think that there is any question for the jury regarding the conduct at mediation. I don't think that there is a duty to offer the full amount of their evaluation or the full amount of their reserve where the parties are \$450,000 apart...." R. p. 1534, ln. 15-22. Hood never argued or even suggested statements about the amount of authority during mediation supported her bad faith claim.

⁴⁴ R. p. 1476, ln. 13-18 (explaining he was earning half of any contingency fee in the bad faith case).

⁴⁵ R. p. 1460, ln. 10-12. ("I believe our first offer was around maybe 850 or 800. Maybe 750.")

that point USAA's counsel "walks in the room right before we are going to leave and just says I want to put my full authority on the table and it is \$200,000, that's all I have got and I just want to put it on the table."⁴⁶ Smith offered different versions of this conversation, with various degrees of firmness ascribed to USAA's counsel, all of which were to show the \$200,000 offer made by counsel was less than the \$250,000 USAA was prepared to settle for.

However, Smith acknowledged "there is a language that lawyers speak to each other, right. Something in the neighborhood of, something north of, something south of. We have a language that we speak to each other that kind of passes hints. ... So we are sending messages to each other. But when a lawyer is very deliberate we mean to be deliberate and we mean to pass a specific message. **So the message I got** was 200 is all I have got, I won't get any more, take it or leave it. So we left."⁴⁷

Thus, Hood's counsel acknowledged the "bad faith" conversation consisted of "lawyer language" within the context of a mediation in which the lawyers were "sending messages to each other." And he and his co-counsel are now trying to impose bad faith liability based on "the message I got" during that conversation. Even if "lawyer language" within a mediation were actionable, statements concerning how much a client will or will not offer during settlement negotiations is generally puffery and insufficient to give rise to a bad faith claim. *Williams v. Texaco Ref. & Mktg. Inc.*, 53 F.3d 330 (4th Cir. 1995) ("Texaco's alleged statement that it would pay no more than \$143,000 for settlement was mere puffery made by opposing counsel during the course of settlement negotiations. As such, the statement simply was not a misrepresentation of material fact.") The Court should reject Hood's invitation for courts and/or juries to parse the

⁴⁶ R. p. 1464, ln. 14-20.

⁴⁷ R. p. 1465-66, ln 19-8 (emphasis added).

meaning of lawyer language concerning settlement negotiations, particularly in the confines of mediation.⁴⁸

2. USAA’s not offering its full reserve to Hood, when her lowest settlement demand exceeded that reserve by \$450,000, did not violate the duty of good faith and fair dealing.

The trial court and the Court of Appeals wisely rejected Hood’s attempt to have a twelve-person jury play Monday morning quarterback with respect to mediation settlement negotiations. The trial court held: “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.”⁴⁹ The Court of Appeals found Hood’s position that USAA had an obligation “to offer to settle the case for the full amount of its authority or reserve” without any support. Both rulings were correct.

Through imposing 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. The deleterious effects of doing so would be significant and include, at a minimum: altering the way that negotiations and mediations are conducted; eliminating the incentive for at least one party to negotiate; and discouraging the full evaluation of claims, the setting of reserves, and the provision of settlement authority.

This duty would require courts and juries to delve into confidential mediation settlement offers, demands, and negotiations. Mediation is a process that is having great success in this state.

⁴⁸ Indeed, if the duty of good faith inherent in the insurance contract applies to both sides, does Hood’s counsel’s statement that the case could settle between \$300,000 and \$400,000, when she would actually settle below those numbers (\$250,000), violate that duty? Does her demand of \$850,000 or more when she would settle for \$250,000 violate that duty? Or does she contend she is free to negotiate in the normal course, and only her adversary is subject to litigation over its settlement offers?

⁴⁹ R. p. 1545-46, ln. 22-2.

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. 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.⁵⁰ Second, the knowledge that a court or jury could one day examine and second-guess the offers, demands, and negotiations within the mediation would have a chilling effect on the free-flow of information and offers upon which mediation relies. To recognize a duty that would hinder free negotiations between the parties and remove incentives for one side to negotiate 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).

Additionally, Hood's proposed duty to tender one's reserves 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 both sides' guesswork was off. As a result, USAA paid over a million dollars to Hood, and Hood

⁵⁰ The duty of good faith and fair dealing runs to both parties of a contract. See, *Tadlock Painting Co. v. Md. Cas. Co.*, 322 S.C. 498, 500, 473 S.E.2d 52, 53 (1996). 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 \$650,000, she would have been within USAA's authority.

recovered substantially more than she wanted at mediation. This precise situation was discussed in *Snyder v. State Farm Mut. Auto. Ins. Co.*, 586 F. Supp. 2d 453, 459 (D.S.C. 2008). As that court explained, if the insurer 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*, *Stewart v. State Farm Fire & Cas. Co.*, No. 2:11-CV-03020-DCN, 2013 WL 3206553, at *4 (D.S.C. June 24, 2013); *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”).⁵¹ The same findings are equally applicable to USAA in this case.

⁵¹ In addition to being supported by *Stewart*, *Snyder*, and *Collins*, the lower court’s ruling is also supported by the law of other jurisdictions. *See, e.g.*, *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.”); *Greil v. Geico*, 184 F. Supp. 2d 541, 545-46 (N.D. Tex. 2002) (explaining settlement authority does not equate to a valuation of the claim since “numerous factors other than the actual value of the claim, including the desire to avoid a trial, go into calculating a settlement amount,” and finding the insurer did not act in bad faith by offering \$40,000 where a maximum of \$60,000 was authorized). In *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 592 (E.D. Pa. 1999), *aff’d*, 234 F.3d 1265 (3d Cir. 2000) (noting the court “rejects the idea that negotiation—*i.e.*, offering the bottom of an estimated settlement range—qualifies as bad faith in this case for similar reasons. Such an argument fails to consider the nature of the UIM policy purchased by plaintiff.”)

It is undisputed that Hood’s lowest official demand was \$650,000.⁵² After the exchange of formal offers, Smith approached USAA’s counsel and informally suggested that the case could possibly settle for between \$300,000 and \$400,000.⁵³ As he testified, this was “lawyer language” meaning that he would “settle the case for \$350,000.”⁵⁴ USAA’s representative, Ms. Moats, acknowledged that in “mediation world” she understood this to mean \$350,000.⁵⁵

During the UIM case, Hood *never* indicated to USAA that she would settle for \$250,000.⁵⁶ In fact, Ms. Moats testified she was surprised to hear Hood later contend she would have settled for this amount.⁵⁷ 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.⁵⁸ Yet she never demanded this amount, and never represented that she would have settled for it until the trial of the present case.⁵⁹

Thus, the fact that USAA set its reserves at \$250,000 and gave its counsel that amount of authority is irrelevant. Likewise, counsel’s supposed representation during mediation that the extent of his authority was \$200,000 instead of \$250,000 was equally irrelevant. The lowest amount USAA ever heard that Hood *might* accept was “between \$300,000 and \$400,000,” which both USAA and Hood’s counsel understood to mean \$350,000. USAA cannot be said to have acted unreasonably by offering \$200,000 instead of \$250,000 where there is no evidence it would have impacted the outcome in any way. This situation is a classic example where the overarching

⁵² R. p. 1279, ln.1-6, 1390, ln.19-25, 1478, ln 23-24.

⁵³ R. p. 1289-90, ln 20-22; R. p. 1478-79, ln 25-6.

⁵⁴ R. p. 1479, ln. 20-24.

⁵⁵ R. p. 1290, ln. 5-22.

⁵⁶ R. p. 1391, ln. 1-5.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ R. p. 1116, ln. 5-10.

appellate maxim applies: “whatever doesn’t make any difference, doesn’t matter.” *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

The trial court correctly found that there was no question for the jury “regarding the conduct at mediation,” as USAA did not have a duty to offer the full amount of its evaluation or reserves where the official offers were \$450,000 apart.⁶⁰ This Court should affirm.

Conclusion

The lower courts’ rulings should be affirmed.

Respectfully Submitted,

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May 6, 2024

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⁶⁰ R. p. 1534, ln. 18-22.