

RECEIVED

May 31 2024

S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2023-000423
Circuit Court Case No. 2018-CP-10-00666

Therese Hood,

Petitioner,

v.

United Services Automobile Association,

Respondent.

FINAL REPLY BRIEF OF PETITIONER

/s/ Roy T. Willey, IV

Roy T. Willey, IV

S.C. Bar No.: 101010

roy@akimlawfirm.com

Eric M. Poulin

S.C. Bar No.: 100209

eric@akimlawfirm.com

32 Ann Street

Charleston, SC 29403

T: (803) 222-2222

F: (843) 494-5536

ATTORNEYS FOR THE PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....3

ARGUMENT.....3-9

I. The Major Disconnect – Can an Insurance Company be Held Liable for Negligence in South Carolina?4

CONCLUSION.....9

TABLE OF AUTHORITIES

CASES

Nichols v. State Farm Mut. Auto. Ins. Co.,
279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983)7, 8

Orangeburg Sausage Co. v. Cincinnati Ins. Co.,
316 S.C. 331, 342- 43, 450 S.E.2d 66, 72-73 (Ct. App. 1994).....8, 9

Hinds v. United Ins. Co. of Am.,
248 S.C. 285, 289– 91, 149 S.E.2d 771, 774–75 (1966).....8, 9

ARGUMENT

Petitioner would urge the Court to take a close look at any portion of Respondent’s brief it finds compelling and to carefully examine the portion of the record cited – if any – for accuracy. There are several points in Respondent’s brief that would be intriguing, *if they were true*, but once explored fall apart on either their own logic or lack of support in the record. For efficiency’s sake, I will only explore one – an important one – below.

But before I do that, I want to remind the Court that even in Respondent’s Brief, it acknowledges: “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. 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. Neither Hood nor USAA asserted that the verdict was inconsistent, and the jury was then discharged.” [Resp. Br., p. 6]. Emphasis added. At its base, that is correct. And it is important, because to “achieve finality in decisions arrived at by a collective jury, courts are, and should be, reluctant to intrude upon the sacrosanct purview of the jury room and to overturn a verdict deliberated therein.” *Lenrich Associates, LLC, Plaintiff, V. Littlefield Corporation, and American Bingo & Gaming, Defendants.*, No. 03-CP-10-910, 2003 WL 25459558 (S.C.Com.Pl. Aug. 08, 2003) (Judge Roger Young).

Accordingly, even if USAA were correct about the verdict now being inconsistent, and the trial court agreed, then the remedy is to order a new trial absolute – not to invade the sacrosanct purview of the Jury by issuing a judgment contrary to the verdict that the Jury spent an entire week of hard work unanimously arriving at.

The Court told the jury they could find either / or, and they found or. Yes, as to negligence, no as to breach of the duty of good faith and fair dealing. Respondent’s entire argument on this point distills down to whether the insurance company has any other duties to its insured besides the general duty under a bad faith cause of action of “good faith and fair dealing.” And the answer is of course they do, they have the duty to not take unreasonable action under the case law of this state.

I. The Major Disconnect – Can an Insurance Company be Held Liable for Negligence in South Carolina?

In its Brief USAA states “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.” [Resp. Br., p. 7]. That is incorrect.

From the initial Complaint, where Hood laid out her Bad Faith and Negligence/Gross Negligence causes of action separately she clearly delineated the difference between the two. [App. pp. 26-31]. Specifically, she delineated that USAA was negligent or grossly negligent in “violating Defendant USAA’s own policies and procedures, and/or guidelines regarding the investigation and handling of similar claims...” and in other manners. [App. pp. 30-31].

These are exactly the bases that were argued to the court in motions practice, and to the jury. Taking just the violation of their own internal policies and procedures, which was first alleged in the Complaint and developed through the case and at trial, here is how it was addressed in Petitioner’s closing argument:

“Negligence also says that when a defendant adopts internal policies or self-imposed rules and thereafter violates those policies or rules, a jury may consider such violations as evidence of negligence if they are a proximate cause of the plaintiff’s damages.

So what did we hear? We heard -- we heard from Ms. Moats and Ms. Howard, stand by our insured; we should pay what we believe a reasonable evaluation is; never comingle BI and UIM files. They did all of it in this case.

Loyalty, honestly, integrity and service. Is it loyal when you have two experts saying her lights were on and you’re taking the opposite position in another case to try to throw her under the bus and have a good day in court where she gets zero when she was obviously injured, and paid premiums all those years so she could be compensated if, God forbid, something like that ever happened to her? Is that loyal? Is it honest? Is that the kind of integrity that we expect in our community? I don’t think so. And it’s certainly not good service.

And they knew it was wrong. They knew it was wrong. And they didn’t care because they thought the judge would let them keep rolling the dice.” [App. p. 1645, n. 4-25].

“You have the dice, and you’re going to have the opportunity to decide what happens to them.” [App. p. 1646, n. 1-2].

Hood preserved that issue during post-trial motions. For example, on page 152 of the Appendix,

Hood states in her memorandum to the trial court:

“Specifically, but not all inclusively, Hood also alleged:

- USAA was liable to her for not offering its full valuation of what she was owed under her insurance policy;
- USAA was liable to her for not following its own policies and procedures;
- USAA was liable to her for negligently evaluating, investigating and/or adjusting the claim; and
- USAA was liable to her for intentional infliction of emotional distress.”

[App. p. 152].

Again, Hood argued:

“There are many duties that the jury could have found USAA violated that were owed to Hood without finding they breached a duty owed specifically under the contract. For example:

- Duty to offer or pay the internal valuation amount (which there was evidence was never done in this case)
- Duty to not be negligent in adjustment of the claim (which there was evidence was never done in this case)

- Duty to not violate own internal policies and procedures at expense of Plaintiff (which there was evidence was done in this case)
 - Duty not to delay payment or protract litigation to delay payment (which there was evidence was done in this case)
- Of course, they could also find USAA breached the contract without finding a tort breach of the duty of good faith and fair dealing.”

[App. p. 161].

Hood also argued these points extensively in her briefing to the Court of Appeals:

“Next, the Court instructed the jury on negligence as a separate cause of action, stating: “[t]he plaintiff has also alleged a cause of action for negligence. The plaintiff claims that the defendant was negligent and should compensate the plaintiff for the damages the plaintiff suffered as a result of defendant’s negligence.” [App. p. 1685, n. 20-24]. The court instructed the jury on the duty owed to the Plaintiff as “done something that a reasonable person would not have done or has failed to do something that a reasonable person would have done in this same situation.” [App. p. 1686, n. 9-12].

Notably, this charge mirrors the language in Nichols of “unreasonable action.”

“Following the proximate cause charge that accompanies the negligence cause of action the Court then instructed the jury that “[w]hen a defendant adopts internal policies or self-imposed rules, and thereafter violates those policies or rules, the jury may consider such violations as evidence of negligence.” [App. p. 1687, n. 16-19].

So, for Respondent to state “[t]o this day, Hood has never articulated how her negligence claim differed from her bad faith claim” is simply false. Either Respondent does not have a recollection of the case or has not read the record, and that entire argument should be stricken.

Respondent acknowledges that it is the “seminal case of *Nichols v. State Farm Mut. Auto Ins. Co.*” that established the rights of insured against its insurance company in the first party context stating “...though *Tyger River* collected cases from 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.” [Resp. Br., p. 9]. That is incorrect.

Instead, *Nichols* plainly states: “We hold today and if an insured can demonstrate bad faith **or** unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action.” *Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983). Emphasis added. While the tort of bad faith is concerned with the duty of “good faith and fair dealing” it is the unreasonable action that gives rise to negligence and *Nichols* – along with every other insurance case in our state’s jurisprudence addressing the issue – so hold. Respondent has not pointed to any authority to the contrary because it does not exist.

Moreover, to adopt Respondent’s argument would put insurance companies – an industry long recognized to be strongly affected with a public interest – in a protected corporate class all their own to act as unreasonably as they ever please as long as they do not commit “bad faith.” That is not and should not be the law for the protection of the public.

Respondent dismissed out-of-hand the cases that have used this logic to find an insurance company can be negligent and held liable therefore without any analysis, stating simply that they are fact specific and that an insurance company can only be held liable for its negligence before an insurance contract is actually procured by a paying customer. *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 342- 43, 450 S.E.2d 66, 72-73 (Ct. App. 1994) and *Hinds v. United Ins. Co. of Am.*, 248 S.C. 285, 289– 91, 149 S.E.2d 771, 774–75 (1966).

Respondent, apparently recognizes the frailty of its argument taken to its logical conclusion, with respect to *Orangeburg Sausage* and *Hinds* because it then relegates its analysis therein to a footnote, which reads:

“Hood claims that South Carolina law is “upside down” in that applicant 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.” [Resp. Br., p. 13, footnote 40].

This footnote is dispositive to Respondent’s argument and includes a key omission which is required if you analyze South Carolina jurisprudence fairly. That is that once an insurance policy goes into effect the insured “acquire[s] **additional rights** through the duty of good faith and fair dealing inherent in the policies.” But they do not lose the more basic rights they had before entering those contracts, including to not be treated negligently by their insurance company. The bad faith standard and duty of good faith and fair dealing is an “additional right” or a “step-up,” if you will, from what a South Carolinian can expect from every other company with which it might interact even by Respondent’s own admission, albeit in a footnote.

CONCLUSION

Therefore, 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 as inconsistent, it should remand the case for a new trial absolute, which is the appropriate remedy for an inconsistent verdict.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

/s/ Roy T. Willey, IV

Roy T. Willey, IV

S.C. Bar No.: 101010

roy@akimlawfirm.com

Eric M. Poulin

S.C. Bar No.: 100209

eric@akimlawfirm.com

32 Ann Street

Charleston, SC 29403

T: (803) 222-2222

F: (843) 494-5536

ATTORNEYS FOR THE PETITIONER

Charleston, South Carolina
May 31, 2024