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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Clifton B. Newman, Circuit Court Judge

Case No.: 2019-CP-40-04650

Appellate Case No.: 2023-001289

Tasha Jones; and Shaniqua Thompson.....Respondents,

v.

Lyndon Southern Insurance Company,.....Appellant.

INITIAL BRIEF OF RESPONDENTS

s/Dietrich A. Lake

Dietrich A. Lake (S.C Bar No.: 69649)

1004 Calhoun Street

Columbia, SC 29201

803-750-8311 *office*

803/750-8312 *fax*

dietrich@thelakelawfirm.org

Attorney for Respondents

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STATEMENT OF THE CASE

This is an appeal that arises as a result of the trial court denying the Appellant's post-trial motions. The Respondents filed a civil action against Lyndon Southern, Safe Choice Insurance LLC (hereinafter referred to as Safe Choice), in Richland County, Columbia, South Carolina on August 22, 2019; an amended Summons and amended Complaint was filed on August 23, 2019. (Complaints). Lyndon Southern filed its' Answer to the amended Complaint on October 1, 2019.

On March 19, 2021, the Summons and Complaint was amended again upon consent of the parties to add the Defendant Jupiter Managing General Agency, Inc. (hereinafter referred to as Jupiter) to this action. (Amended Complaint of March 19, 2021). Lyndon Southern filed its' Answer to the Amended Complaint on August 26, 2021. The Respondents and Lyndon Southern engaged in discovery over an extended period of time during this litigation and Lyndon Southern was the subject of two Orders compelling it to comply with providing discovery responses and/or documents during the pendency of this litigation. (Order of January 6, 2021, and May 19, 2022).

A jury trial was held before this Court on the week of June 19, 2023. Safe Choice settled all claims against it before trial and did not participate as a party at the call trial in this case; the Defendant Jupiter is currently in default with a damage hearing currently pending in this matter. Lyndon Southern made a pretrial motion for summary judgment alleging that as a matter of law that Respondent Shaniqua Thompson could not bring a breach of contract and bad faith claim against Lyndon Southern; furthermore, Lyndon Southern alleged that as a matter of law that the Respondent Tasha Jones could not

bring a bad faith and breach of contract action because Lyndon Southern had not acted in bad faith because it did not have an opportunity to settle the case within the policy limits. (Transcript, p. 6, l. 22 - p. 24, l. 16). The trial court denied the Lyndon Southern's summary judgment motion. (Transcript, p. 38, l. 23 – p. 39, l. 16).

At the conclusion of the trial on June 23, 2023, the Respondents received a jury verdict as follows: Respondent Tasha Jones, fifty thousand, three hundred dollars (\$50,300.00) in consequential damages for Breach of Contract; seventy-five thousand dollars (\$75,000.00) for the bad faith refusal to pay the claim; and three hundred and fifty thousand (\$350,000.00) in punitive damages. Respondent Shaniqua Thompson, fifty thousand dollars (\$50,000.00) in consequential damages for Breach of Contract; seventy-five thousand dollars (\$75,000.00) for the bad faith refusal to pay the claim; and three hundred and fifty thousand (\$350,000.00) in punitive damages. (Verdict Form; Form 4).

Lyndon Southern verbally and voluntarily declined to poll the jurors about their verdict, Lyndon Southern verbally and voluntarily declined to make any post-trial motions before jury was discharged, and Lyndon Southern did not request (by way of motion) that the trial court grant the Appellant any additional time to make any post-trial motions it had at the conclusion of the trial. (Transcript, p. 375, l. 14 – p. 377, l. 21). Lyndon Southern filed its' motion for new trials on July 3, 2023. (Appellant's Post-Trial Motion Pursuant to Rule 50(b) and/or Rule 59(a) and/or Rule 59(e) and for other Relief); however, Lyndon Southern did not notify the trial judge of its' post-trial motions until July 8, 2023. The Appellant prematurely filed and served its' Notice of Appeal on August 11, 2023; the trial court had not issued a ruling on Lyndon Southern's post-trial motions at

the time the notice of appeals was filed. Lyndon Southern appealed the jury verdict awards to the Respondents. (Notice of Appeal). The Respondents file a Motion with the appellate court to remand the Appellant's appeal back to the lower court on August 21, 2023. (Respondent's Motion to Remand of August 21, 2023). The Appellant conceded that its' appeal was premature and concurred with the Respondent's request for a remand with its' filing to the appellate court on October 9, 2024. (Appellant's Return to Motion to Remand). This appellate court remanded the matter back to the lower court on January 2, 2024, for a final order on Lyndon Southern's post-trial motions. (Order of January 2, 2024). The trial court heard oral arguments on Lyndon Southern's post-trial motions on January 30, 2024; the trial court denied the Appellant's post-trial motions pursuant to its' Form 4 Order an Order dated March 27, 2024. (Order of March 27, 2024). Lyndon Southern did not file any other post-trial motions after the trial court's Order of March 27, 2024, nor did Lyndon Southern move to reconsider any parts of the Order of March 27, 2024.

STATEMENT OF FACTS

The Order of Judgment of June 19, 2019, arose from an automobile accident that occurred on June 15, 2017. (Transcript, p. 73, l. 13 – p. 74, l. 7). Tasha Jones and Shaniqua Thompson were operating a vehicle owned by Ms. Jones and insured by Lyndon Southern. The insurance on that vehicle provided uninsured coverage for \$25,000.00 in bodily injury coverage per person, \$50,000.00 per accident, and \$25,000.00 in property damage coverage. (Transcript, p. 75, l. 21 – p. 76, l. 4).

As a result of this accident, Ms. Jones was injured and incurred medical expenses of \$9,586.95 and Ms. Thompson was injured and incurred medical expenses of \$9,780.71. (Order of Judgment June 19, 2019). In addition, Ms. Jones incurred total loss property damages in the amount of \$3,322.15. (Respondent's Exhibit 6). Ms. Jones had a \$200.00 deductible for her uninsured motorist property damage coverage; however, Lyndon Southern charged Ms. Jones a \$500.00 deductible and kept \$300.00 of her money. (Transcript, p. 76, l. 10 – p. 77, l. 6). A third party who was in Ms. Jones' vehicle, Ernest Mack, was injured and incurred medical expenses of \$11,439.25. Mr. Mack settled his uninsured motorist bodily injury claim for \$9865.00, which was \$1,574.25 less than his medicals. Mr. Mack was advised by Lyndon Southern that the medical payment coverage of \$1,000.00 was paid directly to a medical provider. (Transcript, p. 147, l. 12 – P. 148, l. 23). There is no record or any evidence that a \$1,000.00 medical payment coverage check was issued to a medical provider on Mr. Mack's behalf by Lyndon Southern.

Lyndon Southern offered Ms. Jones \$7,500.00 to settle her case and offered Ms. Thompson \$8,660.00 to settle her case. (Offer Letter of October 31, 2017). Ms. Jones'

offer was over \$2,000.00 below her incurred medical expenses while Ms. Thompson's offer was over a \$1,000.00 below her incurred medical expenses. Both Ms. Jones and Ms. Thompson rejected Lyndon Southern's offers that were determined by an insurance expert to be unreasonable offers due to the offers being below each party's medical expenses. (Transcript, p. 174, l. 20 – p. 177, l. 1).

Ms. Jones and Ms. Thompson brought suit against John Doe on January 18, 2018, for injuries and damages arising out of an automobile accident that occurred on June 15, 2017, with John Doe. (Complaint of June 18, 2018). Lyndon Southern was properly served on June 29, 2018, through the South Carolina Department of Insurance. (Affidavit of Service). Lyndon Southern did not file an Answer on behalf of John Doe although it had notice of the pending litigation. The lawsuit was in the claim's adjuster possession without any action on the claim adjuster's part. (Transcript, p. 149, l. 17 – p. 150, l. 15). Lyndon Southern sent the lawsuit to Randy Helmly, Esq.; however, the claim's file indicated that nothing was done on the file for approximately five (5) months up until the day of the damages hearing on January 30, 2019, when Mr. Helmly appeared at the damages hearing on the default judgment that was granted on September 28, 2018. (Transcript, p. 150, l. 16 – p. 151, l. 15). The lower court continued the damages hearing and ordered Mr. Helmly to formally file a Notice of Appearance with the court and to formally file a motion for continuance in the matter; Mr. Helmly did neither as required by the lower court. (Transcript, p. 152, l. 21-23; Transcript January 30, 2019, hearing, p. 4, l. 17 – p. 5, l. 7). Mr. Helmly represented to the lower court at a hearing on January 30, 2019, that he had just received the file the week before January 30, 2019; however, the claim file admitted into evidence showed

that Mr. Helmly possessed the lawsuit and claim file for months without doing anything on the file. (Transcript January 30, 2019, hearing, p. 3., l. 8 – 23; Exhibit 14).

The lower court rescheduled the damages hearing to June 6, 2019; Lyndon Southern was properly served with a notice of this damages hearing. Mr. Helmly did not appear on behalf of Lyndon Southern at the damages hearing; however, other counsel did appear on his behalf. The lower court did not allow counsel to appear on behalf of Lyndon Southern since counsel did not follow the lower court's order to timely file a notice of appearance and file a motion for continuance. (Transcript, p. 127, l. 9 – 23). The lower court, upon its' finding of facts and record in this case, ordered Judgment in favor of Tasha Jones, against the Defendant John Doe in the amount of \$50,000.00; and the lower Court upon its' finding of facts and record in this case, ordered Judgment in favor of Shaniqua Thompson, against the Defendant John Doe in the amount of \$50,000.00. (Order of Judgment). The judgments awarded to both Ms. Jones and Ms. Thompson were close to their initial demand made to Lyndon Southern. Lyndon Southern had \$62,812.85 (\$41,135.00 in uninsured bodily injury coverage and \$21,677.85 in uninsured property damage coverage) available to settle its' claims with Ms. Jones and Ms. Thompson before the damage award; therefore, Lyndon Southern could have settled both cases for Ms. Jones and Ms. Thompson's demand before the hearing for \$30,000.00 each and Lyndon Southern still would have had \$2,812.85 in overall available coverage left under the policy. There is no evidence that either Ms. Jones or Ms. Thompson signed any property damage release that would have prevented them from recovering additional damages through the property damage coverage where punitive damages was a requested judgment based upon the willful

and wanton conduct of John Doe arising out of an automobile accident that occurred on June 15, 2017.

Ms. Jones and Ms. Thompson sent their demand for payment of the June 19, 2019, judgment on and by letter dated June 20, 2019. (Demand Letter of June 20, 2019). There is no evidence in the record that either Lyndon Southern or Mr. Helmly ever responded to the timed demand letter; therefore, Ms. Jones and Ms. Thompson brought a breach of contract and bad faith action against Lyndon Southern and Safe Choice on August 22, 2019. (Amended Summons and Complaint of August 23, 2019). Mr. Helmly's first and only attempt to address the June 19, 2019, Order of Judgment was when he filed a Rule 60(b)(1) motion on June 18, 2020, which was one year to the date of the Order of Judgment. (Motion to Set Aside Judgment of June 19, 2020). The Rule 60(b)(1) motion was denied by the lower court on August 4, 2020, and Lyndon Southern did not file any post-trial motions or seek to appeal the final judgment of the lower court. The June 19, 2019, Order of Judgment was final. (Order of Court August 4, 2020). Lyndon Southern had many post-trial options to address the amount of the judgment if it thought the amount was unreasonable; however, Lyndon Southern never exercised any of its' rights. (Transcript, p. 155, l. 20 – p. 157, l. 10).

Lyndon Southern had approximately one thousand, four hundred and sixty-five (1,465) days or approximately four (4) years to settle this case with Ms. Jones and Ms. Thompson. There is no credible evidence in the trial record from any witness that Lyndon Southern did not have enough time or the opportunity to settle this case within policy limits before trial. Lyndon Southern never made another offer or counteroffer to settle either Ms. Jones' or Ms. Thompson's case after October 31, 2017; neither Ms.

Jones or Ms. Thompson were afforded the opportunity to reject any offers since there is no evidence in the trial record of any other settlement offers of policy limits or offers of less than the policy limits. (Transcript, p. 156, l. 21-24).

The Respondents' expert, Stanley L. Lipshultz testified that Lyndon Southern's conduct of auditing the medical bills, conduct of making an offer below the medicals, and the conduct of not having proper claim's handling and/or policies and/or procedures was unreasonable; the testimony was to a reasonable degree of professional certainty. (Transcript, p. 134, l. 2 – p. 180, l. 6). Mr. Lipshultz further testified that the lack of activity on the file was not reasonable because it indicated to him, in his expert opinion, that Lyndon Southern made no additional attempts to settle the case within the policy limits though it had a lot time to do so. (Transcript, p. 152, l. 8-20).

Professor Constance Anastopoulo, and insurance expert, testified about the insurance contract and what evidence constituted breach of that contract by Lyndon Southern; furthermore, Professor Anastopoulo testified about why the Respondents were entitled to recover the entire amount of the June 19, 2019 judgment and she testified about why both Respondents were eligible to bring a breach of contract and bad faith suit against Lyndon Southern. Professor Anastopoulo's testimony was to a reasonable degree of professional certainty. (Transcript, p. 267, l. 18 – p. 319, l. 24).

Finally, the Respondents presented testimony from Howard Fishbein who was Lyndon Southern's vice president of claims. Mr. Fishbein provided very limited testimony concerning how the claim was handled by the adjuster; furthermore Mr. Fishbein was unable to testify at all about Lyndon Southern's standards, policies, and procedures regarding claims handling to ensure claims are promptly handled and

settled; furthermore, Mr. Fishbein could not provide actual documentation that either additional authority was provided to the adjuster to settle the case or provide any documentation that another offer had been made to the Respondents either before the judgment was entered on June 19, 2019 up to the date of the trial which is the subject of this appeal. (Transcript, p. 192, l. 19 – p. 262). Mr. Helmly did not cross-examine Mr. Fishbein. (Transcript, p. 263, ll. 4-7). Lyndon Southern rested its case without calling any witnesses who could testify about Lyndon Southern's claims handling manuals or testify about Lyndon Southern's claim's handling policy and procedures or testify about industry standards that Lyndon Southern utilized for the prompt handling and settlement of this claim or testify about why the Respondents were offered a settlement amount less than the medicals with no documentation of any additional offers made to the Respondents before the judgement against John Doe was obtained or the jury verdict award in this case. (Transcript, p. 323, l. 7-8). Lyndon Southern offered no expert testimony or lay witness testimony to rebut the expert testimony of the expert witnesses' testimony on behalf of Ms. Jones and Ms. Thompson.

Lyndon Southern failed to rebut any of the evidence in the Respondent's case by way of any testimony; the jury found in favor of Ms. Jones and Ms. Thompson and awarded a reasonable damage amount and a reasonable punitive damage amount which both comported with South Carolina case law. (Order of March 27, 2024).

Lyndon Southern was presented with the opportunity to file any post-trial motion that it wanted to before the jury was discharged; however, Lyndon Southern clearly and verbally rejected its' right to make any post-trial motions before the discharge of the jury. (Transcript, p. 375, l. 19-21). Lyndon Southern filed its' post-trial motions ten (10) days

after rejecting the opportunity to make its' motions and ten (10) days after the jury had been discharged in the case. (Lyndon Southern Motion of July 3, 2023). Lyndon Southern did not notify the trial judge about its' post-trial motions until fifteen (15) days after discharge of the jury. (Letter to Trial Judge dated July 8, 2024).

The trial court heard oral arguments on the post-trial matters on January 30, 2024, and provided both sides with the opportunity to further brief the issue of whether Lyndon Southern timely filed its' post-trial motions. Counsel on behalf of Ms. Jones and Ms. Thompson submitted a brief on the issue of whether Lyndon Southern timely filed its post-trial motions; Lyndon Southern did not file a brief on the issue of whether Lyndon Southern timely filed its post-trial motions. (Memorandum in Support of Denying Lyndon Southern's Post-Trial Motions).

The trial court exercised its' discretion and denied Lyndon Southern's post-trial motions stating that the motions were not timely filed according to the rules. (Order of March 27, 2024). The record clearly reflects that Lyndon Southern did not request that the trial court reconsider any of the court's decisions contained in the court's order dated March 27, 2024.

ARGUMENT

- I. **LYNDON SOUTHERN DID NOT TIMELY FILE ITS' POST-TRIAL MOTIONS; THEREFORE, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WITH ITS' DECISION THAT LYNDON SOUTHERN DID NOT COMPLY WITH THE PROCEDURAL REQUIREMENTS OF BOTH RULE 50 AND RULE 59, SCRCP FOR FILING A POST-TRIAL MOTION.**

Lyndon Southern's failure to file its' post-trial motion at the discharge of the jury and/or Lyndon Southern's failure to request additional time to file any post-trial motions left it within the discretion of the trial court as to whether Lyndon Southern had timely

filed its' post-trial motions; absent an abuse of discretion, there was no error of law by the trial court since its' decision was supported by the evidence.

Lyndon Southern did not comply with the time requirements enumerated in both Rule 50 and Rule 59, SCRCP. Lyndon Southern failed to make any post-trial motions at the discharge of the jury after the jury had reached its' verdict; furthermore, Lyndon Southern failed to request additional time upon motion to file any post-trials at the discharge of the jury after the jury reached its' verdict. Lyndon Southern's arguments outlined in the Appellant's brief fail to recognize that the rule must be considered in its entirety.

Both Rule 50 and Rule 59, SCRCP address the methods for obtaining relief from a judgment and/or jury verdict. Rule 50(e) mandates the time frame for filing a Motion for Judgment Notwithstanding the verdict; it clearly states that "the motion for judgment n.o.v. shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter..." The Note to the 1996 Amendment states that "post-trial motions are made promptly at the end of the trial, or at that time the court, upon motion, may grant an additional ten days to make them."

Rule 59, SCRCP, states similar language as it addresses the request for new trials and sets the time for setting such motions. Rule 59 states that "the motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter..." In Rule 59's Note to the 1986 Amendment, the comments state "in jury trials, post-trial motions are made promptly at the end of the trial, or at that time the court, upon motion, may grant an additional ten days to make them..."

The ten (10) day requirement of Rule 50 and Rule 59 are rules of limitation and not one of jurisdiction. *In re Beard*, 359 S.C. 351, 597 S.E.2d 835 (S.C.App. 2004). Lyndon Southern's argument fails to consider that both rules placed additional limitations on timely filing of a post-trial motion in this case; both Rule 50(e) and Rule 59(b) add the additional limitations that the post-trial motions pursuant to those rules must be "made promptly after the jury is discharged, **or** in the **discretion of the court** ...;" this discretion by the trial court would consider whether Lyndon Southern made a motion to the trial court requesting additional time to submit its' post-trial motions. Counsel for Ms. Jones and Ms. Thompson agrees that the general time limit for filing a post-trial motion pursuant to Rule 50 and Rule 59 is ten (10) days; however, Respondent's counsel also recognizes that limit does not apply if the other limiting conditions laid out in the rules are not met. *Earle v. Owings*, 72 S.C. 362, 365, 51 S.E. 980, 982 (1905). The plain and unambiguous language of Rule 50 and Rule 59 clearly established that Lyndon Southern was required to file its' post-trial motion either promptly after the discharge of the jury or after the trial court exercised the trial court's discretion (pursuant to motion) to allow Lyndon Southern additional time to file its' post-trial motions within ten (10) days. Our Supreme Court has understood that "Post-trial motions such as a JNOV or new trial motion 'shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter.' Rules 50(e) and 59(b), SCRCP." *Elam v. SOUTH CAROLINA DEPT. OF TRANSP.*, 361 S.C. 9, 602 S.E.2d 772 (S.C. 2004). The language contemplated in *Elam* indicates that the motion must be made after discharge of the jury **or** at the **discretion** of the trial court not later than ten (10) days. Lyndon Southern's appellate brief wrongly asserts that the trial

court did not have any discretion in determining if Lyndon Southern's post-trial motions were timely filed and Lydon Southern wrongly focuses its's argument only on the fact that Lyndon Southern filed its' post-trial motions within ten (10) days from discharge of the jury. Lyndon Southern ignores the rest of both rules that place additional limitations on timely filing a post-trial motion for new trial. The trial court exercised its' discretion and rightly decided that Lyndon Southern's post-trial motions were not timely filed and were, therefore, denied.

The trial court asked both Counsel for the parties if either party wanted to conduct individual polling of each jury member to determine, "if that was their verdict and whether it was still their verdict." Counsel for Ms. Jones and Ms. Thompson declined to poll the jury; counsel for Lyndon Southern clearly stated to the court "**None from the Defense, Your Honor.**" (Transcript, p. 375, l. 14-18). The Respondents contend that the jury completed and fulfilled its' jury duties at the very moment both counsel declined to poll the jury regarding their verdict; therefore, the jury was thereby considered discharged even though the Court did not use that specific verbiage in the Court's communications with the jury after their verdict. The Court would later "excuse" the jury after the trial court stated that there were "**no post-trial motions**", and this was a "**final verdict.**" (Transcript, p. 375, lines 22 – p.377, line 21.)

Lyndon Southern failed to utilize two (2) opportunities to comply with the mandatory requirement of both Rule 50 and Rule 59, SCRPC after declining to poll the jury. First, the trial inquired as to whether any of the parties had any post-trial motions; both counsels declined to make any post-trial motions. Mr. Helmly, when asked by the trial court if he had any post-trial motions on behalf of Lyndon Southern, stated, "**None**

from the Plaintiff, Your Honor.” (Transcript, p. 375, l. 19-21). Lyndon Southern clearly, explicitly, and verbally stated that it did not have any post-trial motions; furthermore, Lyndon Southern did not make any motion to the Court requesting any additional time to make any post-trial motions. The Respondent, in its’ brief, does not deny or address the fact that it told the court “none” when asked about whether it had any post-trial motion.

The second opportunity that Lyndon Southern had to comply with the timing requirements of Rule 50 and Rule 59, SCRPC was when the trial court asked both parties, “are there any other matters we need to attend to on this case?” (Transcript, p. 377, l. 24 – p. 383, l. 2). Lyndon Southern did not clearly or explicitly state that it wanted to make a motion for new trial based upon any reasons. The *only* statement that Mr. Helmly made after the jury had been discharged was that “I just want to renew my directed verdict motion.” Mr. Helmly never uses any of the following words or phrases related to filing a post-trial motion in this case, such as: 1) “motion for additional time to file any post-trial motions;” or “new trial;” or “JNOV;” or “new trial *nisi remittitur*,” or “Thirteenth Juror Doctrine;” or “de novo review of punitive damages award;” or “new trial absolute;” or any other terminology that would have notified this trial court that Lyndon Southern wanted to be heard on any other post-trial motions. The trial court’s response to Mr. Helmly’s statement that Lyndon Southern wanted to “renew” its’ motion for directed verdict was met with this response from the court, “We’ll indicate that it was properly made, directed verdict motion, but no post-trial motions were made.” (Transcript, p. 382, l. 24 - p. 383, l. 1). Lyndon Southern made no further clarifying statements to the trial court after Lyndon Southern knew or should have known that the

trial court believed (based upon Mr. Helmly's clear statement) that the Lyndon Southern did not have any other post-trial motions.

Lyndon Southern cannot contend that it made a sufficiently clear statement to the trial court framing a request for a new trial; a directed verdict motion is not the same as a motion for a new trial. A direct verdict motion is made at the close of evidence when a party asks the court to direct a verdict in its favor as a matter of law based upon there being no legal sufficient evidentiary bases for a jury to reach a different conclusion; a judgment notwithstanding the verdict motion seeks a new trial based upon the evidence not supporting the verdict. *McEntire, Jr. v. Mooregard Ext. Services*, 3534 S.C. 629, 578 S.E.2d 746 (S.C.App. 2003). Furthermore, Mr. Helmly's statement indicated that Lyndon Southern was not making a new motion, but Lyndon Southern was renewing its' pre-jury verdict directed verdict motion. (Transcript p. 382, l. 22-23). Lyndon Southern cannot reasonably contend that a motion for new trial is the same as a motion for directed verdict; Lyndon Southern's brief clearly does argue as such as well. The trial court did not interpret Lyndon Southern's post-trial directed motion as a motion for judgment notwithstanding the verdict as Lyndon Southern did not state the specific grounds for its' post-trial motion.

Rule 6, SCRCP prescribes the amount of time allowed to file motions. As it relates to motions filed pursuant to Rule 50 and Rule 59 SCRCP, Rule 6(b) states that "the time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them." Rule 6 prohibits this appellate court from enlarging the time frame for Lyndon Southern to file post-trial motions when Lyndon Southern did not comply with the conditions as stated in

both rules. In other words, Rule 50(b) and Rule 59 motions for new trials required Lyndon Southern to either argue its' motion(s) for any new trial motions at the discharge of the jury or Lyndon Southern was required to file a motion with the Court requesting additional time to file its' post-trial motions to preserve Lyndon Southern's right to be heard by this trial court on Lyndon Southern' motions for a new trial; Lyndon Southern did neither. Lyndon Southern's failed to adhere to the timing limitations for filing post-trial motions for new trials as promulgated in both Rule 50 and Rule 59.

Our Supreme Court has consistently held that "if a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary, and the stated meaning should be enforced. *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (S.C. 2003). The court further stated in *Genez* that our courts should apply "the same rules of construction used to interpret statutes." Our courts have held that a South Carolina statute should be interpreted according to its' "clear meaning." *Nucor Steel, a Div. of Nucor Corp. v. South Carolina Public Service Com'n*, 426 S.E.2d 319, 310 S.C. 539 (S.C. 1992). The *Nucor* case limits the authority of this trial court to enlarge the time frame for the Defendant Lyndon Southern to file any post-trial motions pursuant to Rule 50 and/or Rule 59 SCRPC, since the language of both rules is clear in its requirement that a party has to argue its' post-trial motions at the discharge of the jury or request additional time to file any post-trial motions pursuant to a motion to the court for additional time to file post-trial motions. *Nucor* goes on to hold that "The well settled rule in South Carolina is that, where possible, all provision of a statute must be given full force and effect." Also citing, *Bradford v. Byrnes*, 221 S.C. 255, 70 S.E.2d 228 (1952).

Our courts have determined that abuse of discretion occurs only when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. *State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019). Lyndon Southern's appellate brief does not address whether Lyndon Southern believes that both Rule 50 and Rule 59 does not impose additional time limitations for filing post-trial motions along with the ten (10) day rule to file a post-trial motion.

Lyndon Southern had multiple opportunities to timely file its' post-trial motions but failed to do so. Lyndon Southern verbally waived its' rights before the trial court to file post-trial motions pursuant to both Rule 50 and Rule 59, SCRCP; furthermore, Lyndon Southern argued not post-trial motions for new trial at the time of discharge nor did Lyndon Southern pursuant to motion request that the court grant it additional time to file any post-trial motions. Our Courts have defined "**waiver**" as a "voluntary and intentional abandonment ore relinquishment of a known right." *Eason v. Eason*, 384 S.C. 473, 682 S.E.2d 804 (S.C. 2009). Lyndon Southern knew it had the right to file post-trial motions after the jury returned its' verdict and should have known of the rules of limitations contained within both Rule 50 and Rule 59 requiring that any post-trial motions be made promptly after the discharge or the jury or made pursuant to a motion for additional time to file its' post-trial motion with the court within ten (10) days after the discharge of the jury. Lyndon Southern waived and abandoned that right to any post-trial considerations, so Lyndon Southern cannot now claim that it did not have time to file and/or notify the trial court of its' to file post-trial motions in this case.

The trial court did not abuse its' discretion nor was the trial court's decision controlled by an error of law when the trial court determined that Lyndon Southern was

not entitled to a new trial because Lyndon Southern did not timely file its' post-trial motions pursuant to the mandatory time limitations of Rule 50 and Rule 59 SCRPC. Lyndon Southern did knowingly and voluntarily waive its' right to consideration of any post-trial motions (to include the de novo review of the punitive damage award); this abandonment of that right by Lyndon Southern was done intentionally and knowingly.

This Court should affirm the trial court's denial of Lyndon Southern's request for a new trial based upon the trial court's determination that Lyndon Southern failed to timely its' post-trial motions pursuant to Rule 50 and Rule 59, SCRPC.

ARGUMENT

II. LYNDON SOUTHERN DID NOT PRESERVE ITS' ISSUES FOR APPELLATE REVIEW AND CANNOT CHALLENGE THE TRIAL COURT'S DECISIONS FOR THE FIRST TIME ON APPEAL.

Lyndon Southern did not seek reconsideration of any issue by the trial court in the trial Court's Order of March 27, 2024; therefore, Lyndon Southern's failure to address the findings of the final order is fatal to Lyndon Southern's appeal. It should be noted that rules regarding preserving issues are designed to "give the trial court a fair opportunity to rule on the issues." *Queen's Grant v. Greenwood Development*, 368 S.C.342, 628 S.E.2d. 902 (S.C.App. 2006). Lyndon Southern failed to provide the trial court the opportunity to rule upon and/or reconsider the issues laid out in its' appeal; therefore, the issues presented by Lyndon Southern in its' appeal cannot be considered by this appellate court as the issues were not preserved for review.

A. Issues Must Be Both Raised and Ruled Upon By The Trial Court To Be Preserved For Appellate Review.

Our courts have consistently and clearly held that for an issue to be properly preserved for an appeal, the issue must have been both raised and ruled upon by the

trial court. See, *Elam*. Furthermore, our courts have held that arguments cannot be presented on appeal unless the arguments have been “fairly and properly raised at the trial court and ruled upon by that trial court. *State v. Oxner*, 391 S.C.132, 705 S.E.2d 51 (2011). South Carolina law requires the losing party to try and convince the trial court that it ruled in error; if unsuccessful, then move to convince the appellate court that the trial court erred in a ruling of law. *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). Our courts have determined that our issue preservation rules are “meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *Id.* Furthermore, constitutional issues are not exempt from the preservation rule requirements. *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2012).

B. Lyndon Southern Was Required To Seek Reconsideration Of The Final Court Order of March 27, 2024 In The Trial Court Before Filing Its’ Appeal

Lyndon Southern had an opportunity to present its’ untimely filed arguments to the trial court regarding preventing a double recovery for Ms. Jones and Ms. Thompson at the discharge of the jury; furthermore, Lyndon Southern had an opportunity to present its’ untimely filed arguments to the trial court regarding allegations of improper attacks on their counsel, Ransome H. Helmly, Esquire, at the discharge of the jury. Lyndon Southern failed to secure a ruling on either of these two issues at the discharge of the jury or any other time thereafter. Our Courts have determined that Rule 59(e) provides the mechanism by which the losing party can preserve its’ argument for appellate review by requesting that the trial court reconsider the trial court’s final decision. *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C 56, 427 S.E.2d 673 (1993). The

losing party is required to file a motion to alter or amend the judgment to preserve an issue for appellate review when the losing party has raised an issue in the lower court, but the lower court failed to rule upon the issue. *Id.*; *See also, l'On*.

Lyndon Southern had ten (10) full days from March 27, 2024, to file its' motion to reconsider the trial court's order that did not rule upon either the issue regarding double recovery or the issue regarding allegations of improper attacks on Lyndon Southern's counsel during the trial. Although the trial court typically maintains jurisdiction only to reconsider motions "timely" filed by Lyndon Southern regarding double recovery or the issue regarding allegations of improper attacks on Lyndon Southern's counsel during the trial, Lyndon Southern was still required to file a Rule 59 motion to preserve these issues for appellate review and consideration. Our Supreme Court has held that even the filing of an appeal does not deprive the trial court of jurisdiction to hear a timely filed Rule 59 motion. *Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d, 341 (1986). Lyndon Southern has no excuses for not filing a Rule 59(e) motion to ask the trial court to issue a ruling regarding double recovery and/ or issue a ruling regarding allegations of improper attacks on Lyndon Southern's counsel during the trial to preserve these issues for appellate review. Lyndon Southern is the losing party in this case and Lyndon Southern raised issues in its' post-trial motions (and in this appeal) regarding double recovery and improper attacks on its' counsel to the trial court; however, there is no record that the trial court ever ruled upon either of the two (2) above-stated issues. Lyndon Southern was required to act to preserve its' arguments on these two issues by filing a motion to reconsider to allow the court to issue a ruling on the matters regarding double recovery and improper attack on its' counsel. Lyndon Southern's failed to act by

filing a Rule 59(e) motion regarding the March 27, 2024, Order which has resulted in these two issues not being preserved for appellate review.

Lyndon Southern's brief does not address whether it believes those two issues were preserved for appellate review. Lyndon Southern's brief also does not address whether the trial court maintained jurisdiction to hear its' post-trial motions in light of the trial court's ruling that Lyndon's Southern's post-trial motions were untimely filed with the trial court. Lyndon Southern clearly knows for a fact that the trial court's Order of March 27, 2024, contains no ruling about nor does it make any reference to Lyndon Southern's arguments regarding double recovery or the issue regarding allegations of improper attacks on Lyndon Southern's counsel during the trial for appellate review. South Carolina courts have held "until the trial court considers the matter and makes a ruling", that an appellate court is unable to find error. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct.App.2004). This appellate court must not find error on these two arguments by Lyndon Southern because there is no ruling in the record or in the trial court's order regarding Lyndon Southern's argument regarding double recovery to the Respondents or Lyndon Southern's argument regarding allegations of improper attacks on Lyndon Southern's counsel. Issues and/or arguments must be presented to and ruled upon by the trial court to be appealable. *Caldwell v. Wiquist*, 406 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013).

Lyndon Southern utilized its' untimely Rule 50 and Rule 59 motions as a vehicle to request new trials pursuant to either a judgment notwithstanding the verdict or new trial absolute or new trial *nis remittitur* or as a mechanism for altering or amending the judgment; however, Lyndon Southern's only Rule 59 motion did not seek a ruling on the

issue of double recovery or the issue regarding allegations of improper attacks on Lyndon Southern's counsel during the trial. Lyndon Southern clearly had time to seek a ruling on those issues but failed to do so. Our courts have long held that Rule 59(e) motions have been viewed as a "motion for consideration." See, *Elam*. A motion for consideration allows the losing party to request that the trial court "reconsider" a decision that the losing party believes that the trial court misunderstood or failed to fully consider or where the trial court failed to rule on a matter. *Id.*

Lyndon Southern was required to seek reconsideration of the March 27, 2024, Order because the trial court had not ruled upon all of the issues raised in Lyndon Southern's untimely filed motions. Rule 59(e) states that, "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Lyndon Southern arguments in its' brief ignores the fact that Lyndon Southern's post-trial motion to alter or amend the judge was filed on July 3, 2023, while the while the written notice of the entry of the final Order by the court was not entered until March 27, 2024. Lyndon Southern does not argue that the trial court's written notice of the entry of the order was done before July 3, 2023; therefore, Lyndon Southern would have had ten (10) days from March 27, 2024, to file its' Rule 59(e) motion. Lyndon Southern failed to file a Rule 59(e) motion after March 27, 2024. Lyndon Southern cannot excuse its' failure to seek a Rule 59(e) motion for reconsideration nor can Lyndon Southern excuse its' failure to file a motion to alter or amend the judgment because it lacked time and/or opportunity to do so after the final order on March 27, 2024. Although there is an issue as to whether the trial court maintained jurisdiction over the Rule 59(e) motion since the trial court determined that

the initial post-trial motions were untimely filed, Lyndon Southern still had an obligation to file a subsequent Rule 59(e) motion after the Order of March 27, 2024, to have the trial court rule on the issue regarding double recovery or the issue regarding allegations of improper attacks on Lyndon Southern's counsel during the trial. See, *Oxner*.

This appellate court has stressed that the losing party must seek a Rule 59(e) reconsideration from the trial court to preserve its' issues for appellate review. See *Caldwell*. This appellate court in *Caldwell* held that the appellant did not preserve her issues and arguments for appellate review; therefore, the appellant was barred from making such arguments because she had failed to seek reconsideration under Rule 59(e). Likewise, Lyndon Southern cannot ignore the fact that Rule 59(e) after the March 27, 2024, order would have provided Lyndon Southern with the method and path to challenge the trial court's lack of ruling on the issue of double recovery and/or improper attack on Lyndon Southern's counsel at trial. Lyndon Southern failed to file a motion to reconsider; therefore, Lyndon Southern's arguments concerning double recovery and/or Lyndon Southern's argument regarding allegations of improper attacks on Lyndon Southern's counsel are not preserved for this appellate court's review. This appellate should determine that there was no error by the trial on the issue regarding double recovery and improper attack on its' counsel because these issues were not preserved for appellate review.

ARGUMENT

- III. THE TRIAL COURT STILL PROPERLY DENIED ALL OF LYNDON SOUTHERN'S POST-TRIAL MOTIONS AND THOSE DECISIONS WERE NOT AN ABUSE OF DISCRETION AMOUNTING TO AN ERROR OF LAW.**

Direct Verdict

The trial court may issue a direct verdict when the case presents only questions of law. Rule 50(a), SCRPC. Our courts have held that when deciding on a directed verdict motion, the court must consider all evidence and reasonable inferences in the light most favorable to the non-moving party. If only one reasonable inference can be drawn from the evidence at trial, the motion must be granted.” *Brady Dev. Co, Inc. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993); *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 466 S.E.2d 727, 321 S.C. 1 (S.C. 1995). In this case, both parties filed motions for a directed verdict after the conclusion of Ms. Jones’ and Ms. Thompson’s case. The trial court ruled in favor of both Ms. Jones and Ms. Thompson and determined that Lyndon Southern had breached its’ contract to pay uninsured motorist benefits under the insurance contract. (Transcript, p. 322, l. 18 – p. 23, l. 1). The trial court exercised its’ discretion and determined that that there was no genuine issue as to any fact and determined that both Ms. Jones and Ms. Thompson proved the existence of an insurance contract with Lyndon Southern, each (along with both experts) showed the breach of the contract by Lyndon Southern, and each (along with both experts) showed the damages caused by the breach of the contract by Lyndon Southern. The Respondents agree with the quote Lyndon Southern utilizes in its’ brief citing, *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989), “the Court must consider the testimony and reasonable inference to be drawn therefrom in the light most favorable to the nonmoving party.” In the trial of this case, Lyndon Southern did not offer any evidence or any inferences to rebut any testimony or any other evidence offered by the Respondents at trial.

Lyndon Southern's appellate brief clearly does not allege that there was no binding insurance contract or that Ms. Jones or Ms. Thompson were not entitled to uninsured motorist benefits under the policy; furthermore, Lyndon Southern does not allege in its' brief that Lyndon Southern paid either of the Respondents any uninsured motorist bodily injury benefits pursuant to the June 19, 2019, Order of Judgment. Lyndon Southern main argument is whether the Respondents were entitled to recover damages in excess of the policy limits, which was a question of law which the trial court decided in favor of the Respondents. An abuse of discretion standard applies to the granting or denying of a directed verdict motion and a trial court's decision will not be disturbed or reversed on appeal absent an abuse of that discretion; our courts have determined that as long as "no more than one inference is created from the evidence presented, a jury issue is not created, and the trial court is proper in directing a verdict." *Henson v. Int'l Paper Co.*, 358 S.C. 133, 147, 594 S.E.2d 499, 506 (Ct. App. 2004).

The trial court properly denied Lyndon Southern's motion for directed verdict on the issue of whether Lyndon Southern breached its' insurance agreement with the Respondents; therefore, this case was properly submitted to the jury on the issues of damages from the breach as it was the role of the jury to determine the damages amount, if any, from the evidence concerning the breach of contract. There was no error of law made by this court in submitting the damages case to the jury and Lyndon Southern has not met its' burden in the Appellant's brief of showing how the trial court abused the trial court's discretion in ruling that there was ample evidence to support the

jury's verdict; furthermore, the Appellant has not met its' burden in showing that the trial court's legal conclusions were controlled by errors of law.

Judgment Notwithstanding the Verdict (JNOV)

Judgment as a matter of law is only warranted where there is no evidence to support the verdict or where the trial court's legal conclusions were controlled by errors of law. *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 512-13, 698 S.E.2d 822, 826-27 (Ct. App. 2010). The court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party in ruling a JNOV motion. *Bishop Logging Co. v. John Deere Industrial Equipment Co.*, 317 S.C. 520, 450 S.E.2d 183 (Ct. App. 1995). Furthermore, the court in *Bishop Logging* stated that the case must be submitted to the jury if more than one inference can be drawn from the evidence. An appellate court will only reverse the trial court's ruling on a JNOV motion whether there is no evidence to support the ruling or where it is controlled by an error of law. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 629 S.E.2d 642 (2006).

The trial court did not abuse its' discretion, and this case was properly submitted to the jury as there was substantial evidence to warrant submitting this case to the jury; furthermore, there was no error of law made by the court in submitting the case to the jury. The trial court heard testimonial evidence from the Ms. Jones and Ms. Thompson about the binding insurance agreement with Lyndon Southern, the trial court heard testimonial evidence about a demand for payment of benefits from a judgment obtained under the insurance agreement, the trial court heard testimonial evidence Lyndon Southern paid no benefits to either Ms. Jones or Ms. Thompson under the uninsured motorist bodily injury coverage of the mutually binding insurance contract, and the trial

court heard testimonial evidence about the damages which arose out of Lyndon Southern's failure to pay any benefits under the uninsured motorist bodily injury coverage of the insurance contract. (Transcript, p. 70, l. 10-24; p. 75, l. 11-15; p. 77, l. 12-25; p. 78, l. 12 – p. 79, l. 12; p. 80, l. 4 – p. 84, l. 6; p. 90, l. 2-4; p. 112, p. 18 – p. 114, l. 16; p. 118, l. 9 – 122, l. 3). In addition, Ms. Jones testified that she would have settled within the policy limits but that Lyndon Southern had made her wait so long to resolve the case. (Transcript, p. 108, l. 9 – 110, l. 18).

The trial court heard testimony from Mr. Lipshultz, an insurance adjuster expert, who provided his opinion that Lyndon Southern offer below the medicals was not reasonable; furthermore Mr. Lipshutz testified that Lyndon Southern's claims handling of this case and lack of claims handling policy and/or procedures was not reasonable. (Transcript, p. 134, l. 2 – p. 180, l. 6). Professor Anastopoulo testified that Lyndon Southern's failure to pay the benefits under the insurance contract was not reasonable and that both Ms. Jones and Ms. Thompson were eligible to bring a bad faith and breach of contract claim against Lyndon Southern; furthermore, Professor Anastopoulo testified that both Ms. Jones and Ms. Thompson were entitled to recover the original judgment amount of June 19, 2019, and further testified that both Ms. Jones and Ms. Thompson were entitled to recover benefits outside of the insurance contract for the breach of contract. (Transcript, p. 267, l. 18 – p. 319, l. 24).

Our Court of Appeals in *Maro v. Lewis*, 389 S.C. 216, 697 S.E.2d 684 (S.C.App. 2010) held that the Plaintiff has the burden of proving the existence of a contract, proving the breach of the contract, and proving damages as a result of that breach. In this case, the Defendant Lyndon Southern admitted to the following:

1. That both Respondents are considered insureds under an enforceable insurance agreement and that both Plaintiffs were entitled to first-party benefits; (Insurance Policy).
2. That the Respondents obtained a monetary judgment award related to uninsured motorist benefits under the Defendant Lyndon Southern's insurance agreement; (June 19, 2019, Order of Judgment).
3. That Lyndon Southern did not pay any uninsured motorist bodily benefits to either Respondent despite the judgment and despite the Respondent's request for payment of benefits under the binding insurance agreement; (Demand Letter).
4. That Lyndon Southern charged Ms. Jones a higher uninsured motorist deductible than was allowed under the contract; Lyndon Southern overcharged Ms. Jones by \$300.00 and never reimbursed her for the overcharge; (Insurance Policy; Transcript, p. 76, l. 13 – p. 77, l. 2).
5. That the Respondents were injured as a result of Lyndon Southern's failure to pay any benefits under the uninsured motorist coverage. (Transcript, p. 77, l. 12-13; p. 121, l. 15-17).

Lyndon Southern focuses more on seeking to exclude Ms. Thompson from bringing a bad faith action against it for failing to pay any parts of the judgment owed to her under the Order of Judgment of June 19, 2019. Lyndon Southern agrees that Ms. Thompson was entitled to first-party uninsured motorist benefits as an insured under the insurance agreement, yet Lyndon Southern argues that Ms. Thompson is not entitled damages for Lyndon Southern's breach of contract for failing to pay said first party

benefits to her. This argument goes against our case law as it relates to breach of contract, bad faith, and for bad faith refusal to pay first-party benefits under the insurance policy. Lyndon Southern's brief never addresses whether Lyndon Southern believes that bad faith does not extend to first party claims and/or claimants such as Ms. Thompson who have experienced for willful or wanton or reckless claims handling and/or for willful or wanton or reckless refusal to pay by an insurer.

Our Supreme Court has addressed the issue of what a first party insured is entitled to recover under a breach of contract and bad faith action for failure of an insurer to pay first party benefits under an enforceable insurance agreement. *Nichols v. State Farm Mut. Auto Ins. Co.*, 306 S.E.2d. 616, 279 S.C. 336 (S.C. 1983) clearly holds "that 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. Actual damages are not limited by the contract. Further, if he can demonstrate the insurer's actions were willful or in reckless disregard of the insured's rights, he can recover punitive damages."

The only inference that could be drawn from the evidence is that there was an enforceable insurance agreement at the time of this accident between both Ms. Jones and Ms. Thompson and Lyndon Southern; both Ms. Jones and Ms. Thompson were defined as insureds under the enforceable insurance agreement. The only inference that could be drawn from the evidence is that Lyndon Southern intentionally and willfully failed to pay any first-party benefits to either Ms. Jones and Ms. Thompson under the enforceable and mutually binding insurance agreement. The only inference that could be drawn from the evidence is that Lyndon Southern breached its' contract with the

Respondents to pay first-party benefits and that the refusal to pay said benefits was in bad faith; the refusal to pay said first-party benefits caused the Respondents to suffer damages as a result of the breach of contract by Lyndon Southern. The trial court was correct in granting the Respondents' motion for a directed verdict since no other inferences could be drawn from the evidence presented to the jury. The Respondents presented evidence of the mutually binding insurance agreement, they presented evidence of the judgment, they presented evidence that Lyndon Southern failed to pay any benefits after written request by the Respondents, and they presented evidence that they sustained damages as a result of Lyndon Southern's failure to pay any benefits under the agreement.

The Respondents also presented testimony from their expert, Stanley L. Lipshultz, who testified that Lyndon Southern failed to implement reasonable standards and/or procedures for the prompt handling and prompt settlement of this claim; furthermore, Mr. Lipshultz testified that it was not reasonable to have a lack of policies and procedures for claims handling, testified that it was not reasonable to have a lack of record keeping, testified that it was not reasonable to offer to settle the claims for an amount less than otherwise reasonably due, and he testified that it was not reasonable to charge the Plaintiff a higher deductible than what was required under the insurance agreement. (Transcript, p. 134, l. 2 – p. 180, l. 6).

Professor Constance Anastopoulo, an insurance expert, provided her expert opinion about breach of contract and bad faith; she further provided her legal opinion about the acts and/or omissions of Lyndon Southern which was evidence of breach of contract and bad faith. Professor Anastopoulo provided her expert opinion that Lyndon

Southern's failure to respond to the Respondents' demand for payment of the judgment, and she testified that Lyndon Southern's requiring the Plaintiffs to file suit to recover under policy was evidence of breach of contract with bad faith. Professor Anastopoulo further testified that after reviewing the case that she did not find any reasonable basis to support Lyndon Southern's decision not to pay any first-party benefits under the insurance agreement. Both experts provided testimony that assisted the jury in understanding the facts of the case. (Transcript, p. 267, l. 18 – p. 319, l. 24).

Lyndon Southern did not offer any evidence in the record as to why it failed to pay any first-party benefits to the Respondents under the mutually binding insurance agreement. The failure on Lyndon Southern's part to pay any amounts on the judgment had the effect of being a denial of the Respondents' claim for benefits under their uninsured motorist bodily injury claim under the insurance policy. Lyndon Southern offered no evidence that there was a reasonable ground for its' offer of less than the medicals to the Respondents, Lyndon Southern offered no evidence as to why it lacked policies and procedures for claims handling, Lyndon Southern offered no evidence as to why it required the Respondents to file suit to recover the uninsured motorist benefits under the policy, Lyndon Southern offered no evidence as to why it failed to adopt or implement reasonable standards for the settlement of these claims, and Lyndon Southern offered no evidence as to why no uninsured motorist bodily injury benefits had been paid to the Respondents in six (6) years. In fact, all of the evidence presented at trial indicated that there was no adjuster assigned to this case for the majority of time during this litigation; there is no record of an adjuster and/or any notes from any adjuster handling the case since January 21, 2019. Lyndon Southern argues that it never had

an opportunity to settle the case within the policy limits, but it appears that is because there was no claims adjuster available and/or authorized to settle the case. Lyndon Southern's brief does not address this fact.

Both experts testified that it was not reasonable for Lyndon Southern to not have an assigned adjuster to the case who could handle and settle the matter and pay the first-party benefits to the Respondents under the contract. Both experts responded to the Lyndon Southern's false claim that it acted reasonably since Lyndon Southern did not have an opportunity to settle the case; both experts testified that Lyndon Southern arguments lacked merit. Also, both experts testified that Lyndon's Southern's argument was not in line with South Carolina law. Both experts testified that Lyndon Southern requiring the Plaintiffs to file suit to recover benefits under the policy, that Lyndon Southern's failure to have claim's handling policies, procedures and records was evidence of the breach of contract and bad faith.

Our Supreme Court, in *Cock-N-Bull*, affirmed the decision by the trial court to direct verdict to the Plaintiff in a breach of contract and bad faith action. As in this case, the Supreme Court in *Cock-N-Bull* determined that the language of the insurance contract set forth the scope of coverage under a mutually enforceable agreement. The Supreme Court in *Cock-N-Bull* further determined that the Defendant's refusal to pay benefits under the mutually enforceable agreement "constituted breach of contract," and that the Defendant acted in "bad faith." The actions of Lyndon Southern are similar to the actions of the Defendant in *Cock-N-Bull*; therefore, a directed verdict in the Respondents' favor was proper as the evidence, when viewed in the light most favorable to Lyndon Southern, yields only one inference ... that inference is that Lyndon

Southern breached its' mutually enforceable agreement with the Respondents and acted in bad faith as there was no reasonable basis for not paying the judgment. This decision by the trial court warranted the issue of damages to go to the jury.

Lyndon Southern incorrectly argues that the Respondents were not entitled to recover damages outside of the insurance agreement and that argument again is inconsistent with our case law in *Nichols*. *Nichols* specifically states that damages are not limited by contract when there is a breach of contract and bad for failing to pay first-party benefits. In the underlying case, Lyndon Southern exercised its' right not to appear and to defend the Defendant John Doe at the damages hearing in the uninsured motorist action; the Court awarded each Plaintiff \$50,000.00 in damages after hearing their testimony. Lyndon Southern's argument runs counter to public policy as Lyndon Southern chose not to defend but attempts to argue that the Respondents' damages should be reduced to the limits of the insurance agreement. Lyndon Southern was bound to the judgment amount once it knowingly and voluntarily chose not to appear and not to defend at the damages hearing. Lyndon Southern must live with the consequences of not participating in the underlying uninsured motorist litigation when it had ample opportunity to do so.

This trial court's granting of the Respondents' motion for directed verdict was proper as the evidence did not yield more than one inference. Lyndon Southern's failure to make any payment to either Ms. Jones or Ms. Thompson was a breach of contract; Lyndon Southern acted in bad faith. The trial court's denial of Lyndon Southern's motion for a direct verdict was proper. There was significant evidence to support the matter going to the jury and significant evidence to support the jury verdict

and awards. Lyndon Southern breached the insurance contract and acted in bad faith; therefore, this Court should affirm the decision of the trial court and deny Lyndon Souther's request for a judgment as a matter of law. The trial court's legal conclusion that the case should go to the jury was not controlled by any errors of law.

Thirteenth Juror Doctrine

Lyndon Southern did not address the Thirteenth Juror Doctrine in its' appellant brief though Lyndon Southern does reference the Thirteenth Juror Doctrine in its' untimely filed post-trial motion. Our court rules state that all issues and arguments must be presented in Lyndon Southern's initial brief; therefore, no issue or argument which is not set for in the statement of the issues on appeal will be considered. Rule 208(b)(1(B), SCACR.

The Thirteenth Juror Doctrine entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely on the facts. *Lane v. Gilbert Const. Co., Ltd.*, 383 S.C. 590, 681 S.E.2d 879 (2009).

Although the Lyndon Southern does not clearly mention the Thirteenth Juror Doctrine in its' brief, this appellate court's review of the record shows that there was substantial evidence in the record to support the submission of the cause of action to the jury and would refer this trial court to the testimony of the witnesses as to the existence of a binding contract, testimony as to the failure to pay uninsured motorist bodily injury benefits under the contract, testimony as to the damages that the Plaintiffs incurred as a result of said brief, and testimony as to the unreasonableness of the

Defendant Lyndon Southern's conduct in failing to pay the benefits and in its' unreasonable handling of the Plaintiffs' uninsured motorist bodily injury claims.

There was ample evidence in the record to support the submission of the cause of action to the jury as this trial court originally found. There was evidence of the contract, evidence of the breach of contract, evidence of damages sustained by the Plaintiffs as a result of the breach of contract and bad faith conduct by Lyndon Southern. This court should deny Lyndon Southern's request for a new trial under the Thirteenth Juror Doctrine.

The issue of the Thirteen Doctrine was not set for in the statement of the issues on appeal; therefore, this issue should not be considered by this appellate court although there was also ample evidence that Lyndon Southern engaged in willful, wanton, or reckless conduct to warrant punitive damages. This court should affirm the trial court's denial of Lyndon Southern's request for a new trial under the Thirteenth Juror Doctrine.

New Trial Absolute

A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993). The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly excessive as to shock the conscience of the court and clearly indicates the verdict amount reached was the result of passion, caprice, partiality, corruption or some other improper motives. *Id.*

The trial court had discretion to deny the Lyndon Southern's motion for a new trial. A trial court's decision to either deny or grant a new trial motion will not be

disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Swicegood v. Lott*, 379 S.C 346, 355, 665 S.E.2d 211, 216-216 (Ct. App. 2008). The appellate court must consider the testimony and reasonable inferences to be drawn there from in the light most favorable to the nonmoving party when determining whether the trial court's ruling was controlled by an error of law. *Id.*

There was sufficient evidence in the record to indicate that the jury's verdict was not excessive. The Respondents testified about their outstanding medical expenses and about their overall economic losses from the failure of Lyndon Southern to pay any uninsured motorist bodily injury benefits under the policy. The Respondents also testified about the collateral consequences and/or damages that arose from Lyndon Southern's failure to pay benefits under the uninsured motorist's claim under a valid and mutually binding insurance agreement. The Respondent's medical expenses are still outstanding, and these outstanding debts negatively impacted the Respondent's lives and credit score. This type of testimony is evidence of damages to warrant the verdicts in this case. This trial court exercised its' discretion in finding that the awards were neither excessive as to shock the conscience nor were the awards the result of passion, caprice, partiality, corruption or some other improper motives. The trial court still properly denied Lyndon Southern's request for a new trial absolute as there was sufficient evidence in the record to indicate that the awards were not excessive.

New Trial Remittitur

A trial court may grant a new trial *nisi remittitur* whenever it finds the amount of the verdict excessive; however, substantial deference must be afforded to the jury's

determination of damages and the trial court must offer compelling reasons for invading the jury's province. *Todd v. Joyner*, 385 S.C. 509, 685 S.E.2d 613 (Ct. App. 2008).

There was sufficient evidence in the record for the trial court to determine that the awards were neither excessive as to shock the conscience nor were the awards the result of passion, caprice, partiality, corruption or some other improper motives. The Respondents both testified that they both had a valid judgment for \$50,000.00 under the uninsured motorist bodily injury coverage benefits under a mutually binding insurance agreement with Lyndon Southern. The Respondents presented testimony regarding out of pocket and outstanding expenses for medical treatment and for prescription medication. The Respondents presented testimony regarding the negative impact to their financial stability with the outstanding medical expenses for which they were still responsible for paying some six (6) years after the accident which is the underlying subject of the judgment.

There is sufficient evidence in the record to indicate that Lyndon Southern acted wantonly, willfully, and with reckless disregard for the financial well-being of Ms. Jones and Ms. Thompson when Lyndon Southern breached its' contract with them. See, *Cock-N-Bull*. Our Supreme Court has held that "a conscious failure to exercise due care constitutes willfulness." *Taylor v. Medenica*, 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). The Respondents presented clear and convincing evidence that Lyndon Southern had no reasonable basis to not pay any uninsured motorist bodily injury benefits under the insurance contract; furthermore, Lyndon Southern has not disputed that the Respondents were not entitled to recover uninsured motorist bodily injury benefits under the insurance contract.

Lyndon Southern has presented no evidence that the jury's awards were excessive so as to be the result of passion, caprice, prejudice, or some other influence outside of the evidence. There was sufficient evidence in the record to indicate that Lyndon Southern acted wantonly, willfully, and recklessly in the breach of the insurance contract. The trial court properly denied Lyndon Southern's request for new trial *nisi remittitur* as there was sufficient evidence in the record for the awards to Ms. Jones and Ms. Thompson and there was also sufficient evidence in the record to indicate that the awards were not excessive. The jury's determination of damages is entitled to substantial deference. See, *Rush*.

Punitive Damages

As this appellate court is already aware, a de novo review must be conducted when evaluating the constitutionality of a punitive damage award. The purpose of punitive damages is to serve as a deterrent for offenders and to prevent others from committing certain or similar wrongs in the future. Our South Carolina Supreme Court in *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (S.C. 2009), outlined the following test to be conducted in the de novo review of punitive damages: 1) Reprehensibility; 2) Ratio; and 3) Comparative Penalty Awards.

In analyzing the first prong of reprehensibility, the trial court is concerned with a Defendant's conduct and what type of harm was done to the Plaintiff(s), whether that conduct was reflective of indifference or reckless disregard for the safety of others, whether the Plaintiff(s) was financially vulnerable, whether the conduct involved repeated actions or was isolated in nature; and whether the harm was the result of intentional malice, deceit, etc. or was a mere accident.

This case involved reprehensible conduct on the part of Lyndon Southern. The trial court determined that the harm to the Ms. Jones and Ms. Thompson was economic in this action and physical in the underlying uninsured motorist bodily injury claim. As a result of Lyndon Southern's failure to pay the benefits under the uninsured motorist bodily injury coverage, Ms. Jones and Ms. Thompson were left with outstanding medical expenses and other costs. Furthermore, Ms. Jones and Ms. Thompson testified about their lack of financial well-being after the underlying accident which was the subject of the judgment. The trial court determined that the conduct of Lyndon Southern reflected indifference and a reckless disregard for the safety and financial well-being of both Ms. Jones and Ms. Thompson when Lyndon Southern did not pay benefits under a mutually binding insurance contract. The trial court determined that Ms. Jones and Ms. Thompson were financially vulnerable because of their age and/or lack of work history; furthermore, they were financially vulnerable because the amount of outstanding expenses was almost \$10,000.00 for each Respondent. The outstanding medical expenses resulted in bad credit and would limit both Ms. Jones' and Ms. Thompson's ability to obtain credit to get loans and/or would limit their ability to obtain other goods and/or limit their ability to obtain stable housing. The trial court determined that Lyndon Southern's actions were repetitive and intentionally malicious and deceitful in the following ways: 1) Lyndon Southern had the intent to harm the Respondents by not paying any uninsured motorist benefits and this failure to pay resulted in harm to each Respondent by damaging each Respondent's credit due to outstanding medical expenses; 2) Lyndon Southern failed to have any policies and/or procedures for claim's handling and/or record keeping to resolve its' insurance claims; 3) Lyndon Southern

required the Plaintiffs to file suit to recover benefits under the insurance agreement; and 4) Lyndon Southern failed to adopt and/or implement reasonable standards for the prompt investigation, handling, and settlement of the Respondents' uninsured bodily injury claims. Also, a negative inference could be drawn from Lyndon Southern failing to produce any evidence that any of its' actions were reasonable.

The ratio prong of the test considers the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award. The United States Supreme Court, though not adhering to any bright line rules, has stated that few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. *State Farm v. Campbell*, 538 U.S. 408, 124 S.Ct. 1513, 155 L.Ed.2d 585 (2003). This case involved a single-digit ratio between punitive and compensatory damages. Our Supreme Court has held that a punitive damage award will not violate due process so long as the degree of punishment is both reasonable and proportionate to the amount of harm to the Plaintiff and the general damages recovered. See, *Mitchell*. The trial court should consider the following in determining the reasonableness of a ratio: 1) the likelihood that the award will deter the defendant from similar conduct; 2) whether the damage award is reasonably related to the harm likely to result from such conduct; and 3) the defendant's ability to pay. *Id.*

In the Respondent' case, the ratio between actual damages and punitive damages is not excessive as it involves single digit ratios; the ration satisfies the requirement of due process. The ratio is a single-digit ratio approaching approximately 7 to 1 on the breach of contract cause of action and 4.6 to 1 on the bad faith cause of

action. The trial court determined that there was evidence to support the \$350,000.00 punitive damage awards, that the awards are not excessive or in violation of any due process based upon the low ratio amount. The jury determined that Lyndon Southern's conduct was wanton, willful, and with a reckless disregard for the rights of Ms. Jones and Ms. Thompson. The single digit ratio is evidence that the award is not excessive and is consistent with the requirements of due process.

The comparative penalty award prong allows the trial court to consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. The trial court considered the type of harm sustained by Ms. Jones and Ms. Thompson, the reprehensibility of Lyndon Southern's conduct, the ratio of harm to punitive damages, the size of the award, and any other factors the court may deem relevant.

A review of case law reflects a case which presents similar issues present in the Respondents' case. See *James v. Horrace Mann Ins. Co.*, 638 S.E.2d 667, 371 S.C. 187 (S.C.2006). In that *James* insurance negligence and bad faith case, the jury returned a verdict for the Plaintiff for \$146,600.00 actual damages for bad faith and \$1,000,000.00 in punitive damages. The ratio in the *James* bad faith action was 6.82 to 1 in a trial where the Defendant acted in bad faith for failing to advise the Plaintiff of the correct available coverage.

In the case at hand, the trial court was presented with a reasonable single-digit ratio from actual to punitive damages. Furthermore, the trial court determined that the award was not excessive so as to be the result of passion, caprice, prejudice, or some other influence outside of the evidence. The trial court determined that the punitive

damage award in this case was consistent with penalties awarded in a comparable case. See, *James*. Furthermore, the trial court determined that the awards were reasonably related to the breach of contract and bad faith conduct of Lyndon Southern and was a reasonable deterrent to Lyndon Southern to refrain from similar conduct. In addition, the trial court found by its' ruling there was evidence that Lyndon Southern was financially capable of paying the judgment since it is owned by a large holding company, Fortegra Financial.

Lyndon Southern contends in its' untimely filed motion that S.C. Ann. §15-32-30 (A) serves as a statutory cap to the punitive damage award in this case; subsection (A) states that "an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars;" however, Lyndon Southern failed to state in its' brief that subsection (C) provides an exception to the statutory cap. The exception to the statute laid out in subsection (C) states that "when the trial court determines one of the following apply, there shall be no cap on punitive damages if:

- (1) at the time of injury the defendant had an intent to harm and determines that the defendant's conduct did in fact harm the claimant;

In this case, the trial court exercised its' discretion and determined that Lyndon Southern had the intent to harm Ms. Jones and Ms. Thompson when Lyndon Southern intentionally failed to pay Ms. Jones or Ms. Thompson any benefits without a reasonable basis for doing so. The trial court further determined that Lyndon Southern did in fact harm Ms. Jones and Ms. Thompson as neither of them was made whole after

being involved in an accident with a John Doe vehicle. The trial court found that Ms. Jones and Ms. Thompson were required to retain counsel, they were required to file a civil suit to recover benefits under the policy, and they incurred additional costs and expenses in the litigation of the breach of contract and bad faith action against the Defendant. The trial court determined that Ms. Jones and Ms. Thompson meet the exception requirements of S.C. Ann. §15-32-30 (A); therefore, the punitive damage award to the Respondents should not be capped at all pursuant to statute.

The punitive damage award is proper and complies with S.C. Ann. §15-32-30 (A). The trial court's determination regarding the award of punitive damages should not be disturbed absent a clear abuse of discretion; furthermore, an abuse of discretion can only be found when the conclusions and/or determinations of the trial court were not based upon reasonable factual support. *Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996). The record in this case contains substantial factual evidence to support the trial court's decision. Lyndon Southern has not stated in its' brief that the trial court did not have discretion to determine that the Respondents met the exception as laid out clearly in S.C. Ann. §15-32-30(C). Our Supreme Court has held that " the court of appeals has no power to review circuit court's ruling unless it rests on basis of fact wholly unsupported by evidence or is controlled by error of law..." *Brinkley v. S.C. Dept. of Corrections*, 687 S.E.2d 54, 386 S.C. 182 (S.C. App. 2009). There is significant evidence in the record to support the court's determination that the exception applies in this case and Lyndon Southern has offered no evidence of what the error of law is regarding the trial court's legal determination.

The trial court heard all of the testimony and received all of the evidence in this case and was in the best position to evaluate Lyndon Southern's motions and was well within its discretion to deny all of the Lyndon Southern's post-trial motions; the trial court's decision to deny all of Lyndon Southern's motions was not an abuse of discretion amounting to an error of law, this appellate court must affirm all of the decisions of the trial court.

ARGUMENT

IV. THIS COURT SHOULD AFFIRM THE TRIAL COURTS RULINGS ON ANY GROUNDS APPEARING IN THE RECORD

Pursuant to Rule 220(c), SCACR, the Respondents request that this appellate court affirm the trial court's decisions based upon any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.

CONCLUSION

For the reasons stated above, this Court should affirm all of the judgments of the trial court.

Respectfully submitted,

October 1, 2024.

s/ Dietrich A. Lake

Dietrich A. Lake (S.C. Bar No.: 69649)

The Lake Law Firm

1004 Calhoun Street

Columbia, SC 29201

803-750-8311 *office*

803-750-8312 *fax*

dietch@thelakelawfirm.org

Attorney for Respondents